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LAWYERS REPORTS

ANNOTATED

NEW SERIES.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK
EX REL. KINGS COUNTY LIGHTING
COMPANY, Respts.,
v.

WILLIAM R. WILLCOX et al., Composing
the Public Service Commission for the
First District, Appts.

(210 N. Y. 479, 104 N. E. 911.)

Public service corporation — fixing rates — “going value.”

1. “Going value” is to be considered as a distinct item in fixing the rates to be charged by a gas company.

Same — elimination of item of going value.

2. The item of going value is eliminated in fixing rates for a gas company if it has already received a fair return on its investment, either by charging rates which give it a fair return from the start, or which give it more than a fair return after the business has been developed.

Same — when allowed.

3. Where a gas company paid no dividends for a number of years after it began to do business, going value is to be allowed in fixing its rates where it was not due to bad management, the accumulation of surplus, or to betterments which have been allowed for in the structural valuation.

Definition — going value.

4. Going value, for the purpose of fixing the rates of a gas company, is an amount equal to the deficiency of net earnings below a fair return on the actual investment, due solely to the time and expenditures reasonably necessary and proper to the development of the business and property to its present stage, and not comprised in the valuation of the physical property.

Public service corporation — valuation of property — cost of replacing pavement.

5. In ascertaining the value of the prop-

erty of a gas company or the amount of capital actually expended for the purpose of fixing rates, the cost of replacing pavement now in the streets, but not there at the time the mains were laid, is not to be taken into consideration.

Same — appreciation in land.

6. In ascertaining the gross receipts of a gas company for the purpose of fixing its rates, the annual appreciation of the value of its land should not be considered.

(March 24, 1914.)

APPEAL by defendants from an order of the Appellate Division of the Supreme Court, First Department, reversing on certiorari a determination of the public service commission fixing a maximum rate for gas to be charged by the relator in a certain ward of the borough of Brooklyn, city of New York. Reversed in part.

Statement by Miller, J.:

The relator was organized in 1904, and merged with the Kings County Gas & Illuminating Company, which was organized in 1889, and began supplying gas in October, 1891. The appellate division held that the determination of the commission was wrong in three respects, which are presented by four questions certified for review, viz.: (1) Was the relator entitled, upon the facts shown in the record, to have the commission make an allowance for going value in determining the value of the relator's property used in the public service? (2) Was the relator entitled, upon the facts shown in the record, to have the cost of reproduction of paving now in the streets, but not in place at the time the mains were laid, allowed for in ascertaining the value of its property used in the public service? (3) Was the relator entitled, upon the facts shown in the record, to have the cost of reproduction of paving now in the streets,

but not in place at the time the mains were laid, allowed for in ascertaining the capital actually expended? (4) Was the commission entitled, upon the facts shown in the record, in ascertaining the amount which should constitute a proper return, to consider, as part of what accrues to the relator as gross receipts of its yearly operations, the annual appreciation in the value of its land?

Messrs. George S. Coleman and Oliver C. Semple, for appellants:

It is not necessary that the item of going value should be estimated as a separate and several item in the calculation of value.

Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Iowa, 426, 48 L.R.A.(N.S.) 1025, 138 Am. St. Rep. 299, 120 N. W. 966; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 669, 56 L. ed. 594, 604, 32 Sup. Ct. Rep. 389; Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081; Spring Valley Waterworks v. San Francisco, 192 Fed. 137; Cumberland Teleph. & Teleg. Co. v. Louisville, 187 Fed. 637; Contra Costa Water Co. v. Oakland, 159 Cal. 323, 113 Pac. 668; Knoxville v. Knoxville Water Co. 212 U. S. 1, 9, 53 L. ed. 371, 378, 29 Sup. Ct. Rep. 148.

The profit the plants have earned should be considered, and excess of profit may have offset the early losses and in this way wholly or partly wiped them out.

Hill v. Antigo Water Co. 3 Wis. R. C. R. 623; Racine v. Racine Gaslight Co. 6 Wis. R. C. R. 228.

In the various cases in which the Wisconsin Commission has found that early losses have already been recouped out of earnings, there has been no allowance for going concern or the cost of establishing a business.

Payne v. Wisconsin Teleph. Co. 4 Wis. R. C. R. 1, 1909; Racine v. Racine Gaslight Co. 6 Wis. R. C. R. 60, 1911; Meyer v. Sheboygan Gaslight Co. 9 Wis. R. C. R. 439, 1912.

Relator was not entitled to have the cost of reproduction of paving now in the streets, but not in place at the time the mains were laid, allowed for in ascertaining the value of its property used in the public service, or in ascertaining the capital actually expended.

People ex rel. Buffalo & L. E. Traction Co. v. State Tax Comrs. 209 N. Y. 496, 103 N. E. 776; Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Iowa, 426, 48 L.R.A.(N.S.) 1025, 138 Am. St. Rep. 299, 120 N. W. 966; Des Moines Gas Co. v. Des Moines, 199 Fed. 204; State Journal Printing Co. v. Madison Co. 4 Wis. R. C. R. 501; Ripon v. Ripon Co. 5 Wis. R. C. R. 1; 61 L.R.A.(N.S.)

Buffalo Gas Co. v. Buffalo, 3 P. S. C. R. (2d D. N. Y.) 553 (1913); Gately & Hurley v. Delaware & A. Teleg. & Teleph. Co. opinion by Board of Public Utility Comrs. of New Jersey, Jan. 7, 1913, p. 38; Milwaukee v. Milwaukee Electric R. & Light Co. 11 Wis. R. C. R. 1, 116.

The commission was entitled, in ascertaining the amount which should constitute a proper return, to consider as part of what accrues to the relator as gross receipts of its yearly operations, the annual appreciation in the value of its land.

Re Advances in Rates, Western Case, 20 Inters. Com. Rep. 339; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Spokane v. Northern P. R. Co. 15 Inters. Com. Rep. 376; People ex rel. Manhattan R. Co. v. Woodbury, 203 N. Y. 231, 96 N. E. 420.

Messrs. Morgan J. O'Brien, James F. Meagher, and Swinburne Hale, for respondents:

Relator was entitled to have the commission make an allowance for going value in determining the value of the relator's property used in the public service.

Omaha v. Omaha Water Co. 218 U. S. 180, 54 L. ed. 991, 48 L.R.A.(N.S.) 1084, 30 Sup. Ct. Rep. 615; National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; Appleton Waterworks Co. v. Railroad Commission, 154 Wis. 121, 47 L.R.A.(N.S.) 770, 142 N. W. 476; Missouri, K. & T. R. Co. v. Love, 177 Fed. 493; Des Moines Water Co. v. Des Moines, 192 Fed. 193; Pioneer Teleph. & Teleg. Co. v. Westenhaver, 29 Okla. 429, 38 L.R.A.(N.S.) 1209, 118 Pac. 354; Hill v. Antigo Water Co. 3 Wis. R. C. R. 623; State Journal Printing Co. v. Madison Gas & Electric Co. 4 Wis. R. C. R. 501; Racine v. Racine Gaslight Co. 6 Wis. R. C. R. 228; Re Public Service Corp. Passaic Dist. 3 N. J. P. U. C. R. 246.

Relator was entitled to have the cost of reproduction of paving now in the streets, but not in place at the time the mains were laid, allowed for in ascertaining the value of its property used in the public service.

Consolidated Gas Co. v. New York, 157 Fed. 849; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

Relator was entitled to have the cost of reproduction of paving now in the streets, but not in place at the time the mains were laid, allowed for in ascertaining the capital actually expended.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 43 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

The commission was not entitled, in ascertaining the amount which should constitute a proper return, to consider as part of what accrues to the relator as gross receipts of its yearly operations, the annual appreciation in the value of its land.

Willcox v. Consolidated Gas Co. 212 U. S. 52, 53 L. ed. 399, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

Miller, J., delivered the opinion of the court:

It is now generally recognized that "going value," as distinct from "good will," is to be considered in valuing the property of a public service corporation, either for the purpose of condemnation or rate making, but there is a wide divergence of view as to how it is to be considered. The commission in this case says it was taken into account in valuing the plant as a "going," and not as a "defunct or static," concern, and that it was also considered in fixing the fair rate of return. The appellate division says that there is no proof of the latter fact in the record. Thus, the first question certified requires us to decide whether going value is to be appraised as a distinct item, or whether it is sufficient to regard it as something vague and indefinable to be given some consideration, but not enough to be estimated. The valuation of the physical property was determined by ascertaining the cost of reproduction less accrued depreciation. Preliminary and development expenses prior to operation were included, but no allowance was made for the cost of developing the business. By that method the plant was valued in a sense as a "going concern." In other words "scrap" values were not taken; but to say that that sufficiently allows for going value is the same as to say that going value is not to be taken into account. The problem is to determine what is fair to the public and the company. The public is entitled to be served at reasonable rates, and the company is entitled to a fair return on its investment on the value of the property used by it in the public service. *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729. It would have been entitled to a return on the valuation adopted by the commission, if it had no customers, but was just ready to begin business, whereas it had a plant in operation with an established

business, which every one knows takes time, labor, and money to build up.

If going value is capable of ascertainment, it will not do for the commission vaguely to consider it in fixing the fair rate of return. That no appreciable allowance was made in this case is shown both by the rate fixed and by the following statement in the opinion of the commission: "It should be noted that the plant has been in operation for nearly twenty years, and it might be argued with considerable force that two decades should be sufficient for the company to recoup its early deficiencies below a fair rate of return, if any such deficiencies ever existed. If the company has not recouped itself by this time, under such circumstances it is doubtful whether the present consumers ought to be burdened for this reason."

The first question certified then resolves itself into two heads: (1) Is going value a distinct item to be appraised and included in the base upon which the fair return is computed? (2) Was the evidence in this case sufficient to justify an allowance for it?

The opinion of Mr. Justice Clarke below saves me the necessity of citing and analyzing the cases bearing on the first branch of the question. We concur fully in what he has said on the subject, and in his conclusion that there is no "logical difference between allowing 'going valuation' in the valuation of a plant when it is to be taken entirely by the public, and allowing the same element when valuing the same plant for rate-making purposes." A case since decided should be added to the rate cases cited by him, in which going value has been allowed, i. e., *Public Service Gas Co. v. Public Utility Comrs.* 84 N. J. L. 463, 87 Atl. 651.

It is no answer to say that in condemnation cases the exchange value is taken, and that that depends on the rates charged, the thing to be determined in rate cases. Of course, a rule of valuation might be adopted in a condemnation case which would not work in a rate case; but if the cost of reproduction, less depreciation, rule be adopted, as appears to have been done in *National Waterworks Co. v. Kansas City*, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853, and *Omaha v. Omaha Water Co.* 218 U. S. 180, 54 L. ed. 991, 48 L.R.A.(N.S.) 1084, 30 Sup. Ct. Rep. 615,—the leading condemnation cases in the Federal courts in which going value was considered,—it is impossible to see why the going value could not be determined in both classes of cases in precisely the same way.

The difficulty of determining the going value will not justify the disregarding of

it. Rate making is difficult. But that will not justify confiscation. The difficulty, however, will lessen, as it does in most cases, when we cease to think about the subject vaguely. What, then, is going value, and how is it to be appraised?

It takes time to put a new enterprise of any magnitude on its feet, after the construction work has been finished. Mistakes of construction have to be corrected. Substitutions have to be made. Economies have to be studied. Experiments have to be made, which sometimes turn out to be useless. An organization has to be perfected. Business has to be solicited and advertised for. In the case of a gas company, gratuitous work has to be done, such as selling appliances at less than a fair profit, and demonstrating new devices, to induce consumption of gas and to educate the public up to the maximum point of consumption. None of those things is reflected in the value of the physical property, unless, of course, exchange value be taken, which is not admissible in a rate case. The company starts out with the "bare bones" of the plant, to borrow Mr. Justice Lurton's phrase in *Omaha Waterworks Case*, *supra*. By the expenditure of time, labor, and money, it co-ordinates those bones into an efficient working organism, and acquires a paying business. The proper and reasonable cost of doing that, whether included in operating expenses or not, is as much a part of the investment of the company as the cost of the physical property.

The investors in a new enterprise have to be satisfied as a rule with meager or no returns while the business is being built up. In a business subject only to the natural laws of trade, they expect to make up for the early lean years by large profits later. In a business classified among public callings, the rate-making power must allow for the losses during the lean years, or their rate will be confiscatory, and, of course, will drive investors from the field. In the former class, the value of the established business is a part of the good will, and may be determined by taking a given number of years' purchase of the profits, or exchange value may be considered. In the latter case, a different rule must be adopted.

Referring again to the *Ames Case*, *supra*, the public is entitled to be served at reasonable rates, and the corporation is entitled to a fair return on the property used by it in the public service, no more, no less, always assuming, of course, that the return is computed on a proper valuation. That was not made so by statute, but was the rule at common law, which justifies legislatures and commissions in fixing rates. If then a public service corporation has re-

ceived more or less than a fair return, it has received more or less, as the case may be, than was its due, irrespective of whether a rate had been fixed by public authority. If a deficiency in the fair return in the early years was due to losses or expenditures which were reasonably necessary and proper in developing efficiency and economy of operation, and in establishing a business, it should be made up by the returns in later years. If there was a fair return from the start, the corporation has received all it was entitled to, irrespective of how much of the earnings may have been diverted to the building up of the business.

To view the matter in another aspect, take the case of a public service corporation with a plant constructed just ready to serve the public. It is going to take time and cost money to develop the highest efficiency of the plant and to establish the business. Three courses seem to be open with respect to rate making, *viz.*: (1) To charge rates from the start sufficient to make a fair return to the investor, and to pay the development expenses from earnings,—a course likely to result in prohibitive rates, except under rare and favorable circumstances; (2) to treat the development expenses as a loss to be recouped out of earnings, but to be spread over a number of years, in other words, as a debt to be amortized,—that involves complications, but would seem to be fairer to the public, and certainly more practical than the first; (3) to treat the development expenses, whether paid from earnings or not, as a part of the capital account, for the purpose of fixing the charge to the public. The last course would seem to be fairest to both the public and the company, as well as the most practical.

It may be, as is urged, that a well-conducted enterprise will charge the cost of developing the business to operating expenses, and that it would open the door to an overissue of securities to permit the capitalization of early losses. In answer, it is sufficient to say that we are dealing, not with proper methods of bookkeeping, not with the proper capitalization upon which to issue securities, but solely with the fair return which the company is entitled to receive from the public. Treating a reasonably necessary and proper outlay in building up a business as an investment, for the purpose of determining the fair rate of return to be charged, is far from holding that it should be treated as capital against which securities might be issued.

We do not say, as matter of law, that the third course above outlined should be adopted as an original proposition. That may present a question of economics, depending

on the particular conditions involved. The commission in this case had to determine the rate to be charged, not by a new company with no business, but by an old company with an established business. The first question, therefore, to determine on this branch of the case, was whether the company had already received a fair return on its investment. If it had received such return from the start, or if in later years it had received more than a fair return, the public would already have borne the expense of establishing the business, in whole or in part, and to that extent the question of going value for the purpose of fixing a present rate would be eliminated; for it must constantly be kept in mind in dealing with this problem that the company is entitled to a fair return and no more. If it has already had it, that is the end of the matter. If it did not receive a fair return in the early years, owing to the establishment of the business, a subsequent rate must allow for that loss, or it will be confiscatory. Now, no dividends appear to have been paid by the original company, or by the relator, prior to 1907. Assuming a reasonable need of the service from the start, and that the failure to pay dividends was not due to bad management, an accumulation of a surplus, or undivided profits, the investment of earnings in permanent additions or betterments allowed for in the structural valuation, or to other causes besides those under consideration, none of which is asserted, it would seem plain that going value was an element in this case which the commission was required to determine in making an appraisal on which to compute the fair return to which the company is entitled.

It is urged that an unprofitable business will thus have a greater value for rate-making purposes than one profitable from the start. That again overlooks the fundamental consideration that a public service corporation is entitled to a fair rate of return from the beginning of its investment and no more. If the shareholders have been deprived of a fair return on their investment because of the time and expense reasonably and properly required to build up the business, they have, to the extent of that deprivation, added to their original investment, and are entitled to a return upon it. If, however, a fair return in addition to the expense of building up the business has been earned from the start, the public, not the shareholders, have paid the development expenses. We are dealing, not with exchange values, but with the value upon which the company is entitled to earn a return. In this connection it is to be observed that the statements in the opinions of the courts, in reference to computing the 51 L.R.A. (N.S.)

fair rate of return on present values, have for the most part been made in cases in which the precise question under consideration was not directly involved, and in which no attempt was made to limit the elements composing the problem. Manifestly a rate computed on the cost to-day of reproducing the bare plant would not be fair. Experience is proverbially expensive. With the advantage of that experience the same or an equally efficient plant could be constructed to-day at a cost much below the actual and necessary investment of the company in both plant and experience. Indeed, wholly apart from the intangible thing called the going business, the reproductive value to-day of the physical property would not necessarily include the actual and legitimate investment in tangible property which may have been entirely replaced, not because of depreciation, but to meet advances in mechanical science, new conditions, and increasing demands not reasonably to have been foreseen at the start. I am not now speaking of replacements made with fresh capital, about which there is no question in this case. The term "going value," though not exactly defined, has been used quite generally to comprise the elements not included in the structural value of the property in its present condition. The term is not important. The point is that in some manner and under some appropriate heading a due allowance must be made for the investment in those elements. No inflexible rule will in the long run be just both to the public and the corporation. The right to limit the corporation to a fair return fixed by public authority necessarily involves the correlative right in the corporation to be assured of that fair return during all the time that its capital is employed in the public service. The statute governing this case (public service commissions law [Consol. Laws, chap. 48] § 72) provides: "In determining the price to be charged for gas . . . the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question, although not set forth in the complaint, and not within the allegations contained therein, with due regard, among other things, to a reasonable average return upon capital actually expended, and to the necessity of making reservations out of income for surplus and contingencies."

Of course, a reasonable need for the service from the start and reasonably good management are assumed. While, within reasonable limits, service may be provided for anticipated needs, a company should not construct a plant in a wilderness and, after a city has been built around it, expect to recoup its losses while waiting; nor should

it expect to recoup losses from bad management. I do not include in the latter mere mistakes or errors in judgment which are almost inevitable in the early stages of any business. The fair return is to be computed on the actual investment, not on an over-issue of securities; and the failure to pay dividends to the investors must be due to the causes under consideration, not to an accumulation of a surplus or to expenditures for permanent additions or betterments which are included in the appraisal of the physical property; in other words, the actual net earnings are to be taken. Making proper allowance for the matters just considered, and perhaps for others which do not now occur to me, I define "going value" for rate purposes as involved in this case, to be the amount equal to the deficiency of net earnings below a fair return on the actual investment, due solely to the time and expenditures reasonably necessary and proper to the development of the business and property to its present stage, and not comprised in the valuation of the physical property.

It may be conceded that going value has no existence apart from tangible property, and that commercially there is but one value, that of the property as a whole, but as the rate cannot be made to depend upon the exchange value, which would in turn depend upon the rate, it would seem to be necessary to appraise the physical property and the going value separately, and of course that is the case if the cost of reproduction rule be adopted.

It remains to consider how going value is to be appraised. That presents a question of fact, the determination of which is primarily within the province of the rate-making body. It is proper for this court, however, to indicate a permissible method or methods, as in *People ex rel. Jamaica Water Supply Co. v. State Tax Comrs.* 196 N. Y. 39, 89 N. E. 581, it indicated a rule for valuing a special franchise for taxing purposes, which has generally been followed.

Obviously, the most satisfactory method is to show the actual experience of the company, the original investment, its earnings from the start, the time actually required and expenses incurred in building up the business, all expenditures not reflected by the present condition of the physical property, the extent to which bad management or other causes prevented or depleted earnings, and any other facts bearing on the question, keeping in mind that the ultimate fact to be determined is not the amount of the expenditures, but the deficiency in the fair return to the investors due to the causes under consideration. The business 51 L.R.A. (N.S.)

in this case was twenty years old, the books of the old company were not available, and it is of course problematical whether, if produced, they would have shown the necessary facts. The question, therefore, had to be determined, as all questions of fact have to be, by the best evidence available. Here, I may repeat that mere difficulty in the proof would not justify a confiscatory rate. The value of the physical property was shown by opinion evidence as to the cost of reproduction. The same kind of evidence was given by two witnesses for the relator as to the cost of building up the business to its present state. In the appellants' brief it is said that they were men "of mature age and much experience." One witness said that \$30 a meter was an arbitrary sum usually adopted by engineers as the cost of building up such a business, and he put the cost in this case at \$600,000. Another witness estimated the going value to be \$781,916. He explained at length how he arrived at that figure. He assumed the existence of two plants, situated exactly alike in the same community and with the same physical property: (1) The actual plant with its established business; (2) a suppositional plant with no business. He then estimated the length of time and expense required by the second plant to develop its business to the stage and revenue of the actual plant. There would appear to be as good ground for admitting the opinion of a qualified expert on such a subject as on the cost to reproduce the physical property. Of course, the commission was not bound by that evidence. It had in addition the experience of the relator and its predecessor as to payment of dividends, the amount of capitalization of both, and the value of the physical property in its present condition determined as above stated. With nothing opposed to those facts and the opinion evidence, it was not justified in ignoring the evidence of going value, or of merely attaching some inappreciable importance to it. See *Bonbright v. Geary* (D. C.) 210 Fed. 44, 54, 56. The first question certified must be answered in the affirmative.

Upon the next two questions we disagree with the learned appellate division.

In determining the cost of reproduction, the commission allowed \$12,717 as the cost of restoring the pavement as it existed when the mains and service pipes were laid in the streets. The relator claimed an allowance of at least \$200,000 for the cost of restoring pavements subsequently laid, on the theory that that cost would have to be incurred if the mains were to be laid to-day. But the new pavements in fact added nothing to the property of the relator. Its

mains were as serviceable and intrinsically as valuable before as after the new pavements were laid. The controlling considerations under the preceding point also determine this. The rights of the public are not to be ignored. The question has a double aspect. What will be fair to the public as well as to the relator? *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418. Should the public pay more for gas simply because improved pavements have been laid at public expense? It is no answer to say that the new expensive pavements suggest improved conditions, which, though adding to the value of the plant, will not, by reason of the greater consumption, add to the expense per thousand feet of the gas consumed. The public are entitled to the benefit of the improved conditions, if thereby the relator is enabled to supply gas at a less rate. The relator is entitled to a fair return on its investment, not on improvements made at public expense. It is said that the mains will have to be relaid. So will the new pavements, and much oftener. Both might possibly be relaid at the same time. The case is not at all parallel to the so-called unearned increment of land. That the company owns. It does not own the pavements, and the laying of them does not add to its investment or increase the cost to it of producing gas. The cost of reproduction, less accrued depreciation, rule seems to be the one generally employed in rate cases. But it is merely a rule of convenience, and must be applied with reason. On the one hand, it should not be so applied as to deprive the corporation of a fair return at all times on the reasonable, proper, and necessary invest-

ment made by it to serve the public, and on the other hand it should not be so applied as to give the corporation a return on improvements made at public expense which in no way increase the cost to it of performing that service.

The appellate division felt bound by the decision of the United States circuit court in the Consolidated Gas Case, 157 Fed. 849, and it is true that such an allowance was made in that case. But the United States Supreme Court held in that case (212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034) that the rate established was not confiscatory, and did not pass on the propriety of that allowance. What was said in the opinion on the subject of present value was merely a general statement having no necessary relation to the question now under consideration.

We agree with the appellate division that annual increase in the value of land is not income. Of course, under the rule of the *Ames Case*, *supra*, land might become so valuable as to require its use for other purposes, and as to make a rate based on it unfair to the public. The present is not such a case.

The first question should be answered in the affirmative, the second, third, and fourth in the negative, and the order of the Appellate Division, in so far as it remits the proceedings to the public service commission, should be affirmed, without costs.

Willard Bartlett, Ch. J., and Werner, Hiscock, Chase, Collin, and Cuddeback, JJ., concur.

Note. — Special problems in respect to the treatment of appreciation, in public service property valuations.

- I. Pavement over mains.
 - a. Introduction, 7.
 - b. Original cost or investment theory, 8.
 - c. Value theory, 9.
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- II. Adaptation and solidification.
 - a. Introduction, 13.
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I. Pavement over mains.

a. Introduction.

When an appraisal is to be made of the property of a public utility company for 51 L.R.A.(N.S.)

condemnation or rate-making purposes, it may be found that a considerable portion of it is under paved streets. Some of these underground lines may have been put in before the pavements were laid and some afterward. In the latter case an additional expense is imposed upon the company because of the fact that the pavement must be taken up and replaced. One of the interesting questions which has arisen with reference to public utility property valuation is how this item shall be treated. This matter has not received any extended consideration by the courts, but is being constantly presented to commissions. The right of the companies to have the actual expense entailed by taking up and putting back pavements, in process of laying their mains and conduits, recognized as a capital expenditure, has never been denied. The controversy has been over the propriety of permitting the companies, on the cost to reproduce theory, to add to their capital

account the cost of pavements paid for by taxpayers where the mains were laid before the pavements were spread. The commissions are unanimous in refusing to allow the companies anything for paving under such circumstances. The decision in *PEOPLE EX REL. KINGS COUNTY LIGHTING CO. v. WILLCOX* accords with the views of public service commissioners on this subject.¹

It is obvious that the correct rule as to paving in rate cases will depend in the first instance upon the theory of valuation adopted; that is to say, whether the company is held entitled to earn a return upon the original cost or investment theory, upon the value theory, or upon the cost of reproduction theory. If the investment theory is to control and the return based on the amount of the company's sacrifice, manifestly no allowance can be made for that which cost the company nothing. On the other hand, if the cost of reproduction theory is to be applied, the question of who paid for the pavement is immaterial. Assuming, however, that the company's property is to be inventoried at its present value, the question of what shall be done

with pavements becomes a trifle more difficult, and yet the principles applicable to this aspect of the problem seem reasonably clear. The various theories of valuation as applied to paving will now be discussed.

b. Original cost or investment theory.

If it is to be held that the company shall be allowed to earn a return only on the basis of its sacrifice, that is to say, on the amount of its actual investment, it is apparent, as stated, that nothing can be allowed for paving not laid at the cost of the company. The books of the corporation would show no expenditure for this item. On the other hand, if the mains were put down after the pavements were laid, the additional expense necessitated thereby would appear as part of the construction account, and would have to be recognized. As already pointed out, the commissions have always been ready to give the company credit for these expenditures, no matter what theory of valuation they may be proceeding on.²

¹ In the lower court, Clarke, J., gave the following reasons for an allowance for paving over mains: "The fact that these streets have been paved and the region generally improved has caused sales of land, the building of houses, and the increase in population, which has enabled the company within the last few years to make profits and declare dividends, which for many years it was unable to do. The argument that streets paved or unpaved make no difference in the earning power of a gas company is unsound. The earning power of a gas plant depends upon its constituency. If it has nobody to sell gas to, it can make no profits; and if there are no decent streets, there will be few people. The value of a plant of any kind is certainly affected by its location and the demand for its products. If a new company undertook to install a duplicate plant, the cost of repaving the present streets would properly be allowed for. Hence it is a necessary element of reproduction value. It is a valuable advantage which the present owner has which a prospective buyer would have to pay for. Like increased land values, a school of thought might condemn it as 'unearned increment', but the law does not yet refuse to include it in its definition of property capable of ownership and entitled to protection."

² The actual expense of cutting pavements for the purpose of laying mains must be allowed as part of the company's capitalization for rate-making purposes. *Buffalo Gas Co. v. Buffalo*, 3 P. S. C. R. (2d D. N. Y.) 553 (1913).

Nothing should be allowed for paving, in the value of a telephone company's property for rate-making purposes, where no 51 L.R.A. (N.S.)

pavements were in existence at the time conduits were put down. *San José v. Pacific Teleg. & Teleph. Co.* Cal. R. C. R. Dec. 1008 (1913).

Paving is not a proper element of value where the pavement was not paid for by the utility, nor any expense in connection with it directly incurred, in determining a value which shall serve as the basis for an adjustment in rates. *Ripon v. Ripon Light & Water Co.* 5 Wis. R. C. R. 1 (1910).

For the purpose of determining the value of a public utility taken over by a municipality, the cost of paving which was not paid for by the utility will not be included. *Re Fond du Lac Water Co.* 5 Wis. R. C. R. 482 (1910).

No allowance will be made for paving which the company was not compelled to remove when laying its mains and services. *Re Manitowoc Waterworks Co.* 7 Wis. R. C. R. 71 (1911).

In *Baltz v. Brooklyn Borough Gas Co.* 2 P. S. C. R. (1st D. N. Y.) 620 (1911), it is said: "We shall assume that the company is not entitled to collect from gas consumers a rate which will yield a fair return upon paving which the city has placed over its mains, and for which the company has not expended or paid directly or indirectly a single dollar."

A public service corporation may not present, as a basis for capitalization, the cost of street paving which the city has laid. *Re Metropolitan Street R. Co.* 3 P. S. C. R. (1st D. N. Y.) 113 (1912).

The cost of paving not laid by the utility company will not be included in the inventory of its property for rate-making purposes. *Milwaukee v. Milwaukee Electric R. & Light Co.* 10 Wis. R. C. R. 1 (1912).

c. Value theory.

It would probably be conceded that in a sale or condemnation case, the amount the company would be entitled to receive for its property would be measured by its present value. In considering the proper treatment for paving in a rate case, it will be here assumed that the Federal and state Constitutions require the returns to be based upon the value of the company's property used and useful in the public service, rather than upon its original cost. This supposition, if applied to land, would mean that appreciated values would have to be recognized. The question then is: If appreciation in land values would be allowed under such circumstances, is it necessary to include in the inventory of the company's property pavements laid at the expense of the taxpayers of the city, on the theory that the cost of reproduction represents their present enhanced value? In other words, is the situation here analogous to that of donations of land? It has been very strongly urged on behalf of the companies that the cost of such pavements does represent an appreciation which must be recognized, on the theory that the company is entitled to earn a return on the value of its property. Is there any difference in principle between the appreciation of land

by reason of the fact that a pavement is laid in the street in front of it, and the appreciation of the value of pipes due to new paving? It has been held that such an analogy does not exist.³ In a case before the New York Public Service Commission, First District, it is admitted that there is some similarity between the two situations, but it is pointed out that land is owned or leased or paid for by the company and selected by it, while this is not true of pavements.⁴

This, however, does not seem to be a fair answer to the contention, because the increment of value is supposed to be added to the mains or conduits, which are a part of the property of the company, as much as its land. Assume that two lots, A and B, on adjoining streets, each have, in 1900, a value of \$1,000 and that such value remains unchanged for ten years. In 1910 a pavement costing \$200 is laid in front of lot A. If lots A and B were now to be sold, undoubtedly the former would be more valuable and would probably sell for \$1,200, whereas lot B would retain its original value of \$1,000. In this case, however, the cost of the pavement would have been borne by the owner of lot A, and the reason the buyer would give more for it afterward would be that he would be relieved of the cost of the laying of the pavement. If, how-

A gas company is not entitled to earn a return on the cost of paving which the city has put down over its mains. In *Re Rates for Gas*, 31st Ward, 4 P. S. C. R. (1st D. N. Y.) 328 (1913), Maltbie, Commissioner, said: "The cost of such paving has been paid once by taxpayers or property owners, and it is not to be presumed that the gas consumers are to pay the company a return upon what the company does not own, what it has never paid for, and what has been paid for by other persons."

³The cost of more expensive improvements than the company paid for when it laid its conduits, where old pavements have since been replaced by more expensive ones, cannot be allowed in the valuation of a telephone plant, on the theory that it is analogous to the appreciated value of land. *Gately v. Delaware & A. Teleg. & Teleph. Co.* 1 N. J. P. U. C. R. 519 (1913).

⁴In *Mayhew v. Kings County Lighting Co.* 2 P. S. C. R. (1st D. N. Y.) 659 (1911), it was urged that if land should be taken at its present value, mains and services should likewise be appraised at the cost to reproduce; that the increase in the value of the land is a social increment; that improvement in paving is also a social increment; and that if one is to be recognized as belonging to the company, the other should be. To this the commission replied: "Doubtless there is some similarity, and so far as there is, there is equal injustice in allowing the company to make a profit upon 51 L.R.A. (N.S.)

that increase. Indeed, it is not yet clearly settled by the courts that in all cases land shall be taken at appreciated value and the company allowed to increase its rates because of such growth. But pavement that is not owned nor laid nor paid for by the company is very unlike land. In the first place, land is owned or leased by the company; the pavement in question is neither owned nor leased. The company may sell the land it has and buy other land; the company has no such right over pavement, and if it removes its pipes, the pavement remains. Secondly, the company pays for land; it does not, for new pavement. Land is a necessary factor in gas production and distribution; pavement is not. It matters not whether the streets are paved with the most expensive material, or allowed to remain in their natural state. Repairs may cost more in the former case, but such expenses are paid for out of income, and not from capital. Thirdly, the precise land used is selected by the company; the nature of the pavement is fixed by the public authorities. If the company finds its land not well adapted to its needs or too valuable for gas purposes, it may sell and purchase locations elsewhere. Thus, a company may secure the increase in value for itself. But there is no known way whereby a company may sell a pavement over its mains and substitute another kind. Pavement is wholly beyond the control of the company."

ever, it be assumed that for some reason the city, in that particular instance, laid the pavement at its own cost, it would not affect the value of the lot, for it would be worth just as much to the buyer. If it now appeared that a gas company had laid its mains in the same street before it was paved, would it also be said that the mains had appreciated in value the same as the lot? This question goes to the heart of the matter, and to assume that a perfect analogy exists between the enhancement in the value of an isolated lot of land in such a case, and the mains of a public service corporation, illustrates the great confusion of thought which exists as to values as applied to such properties.

It is always possible to place a value on a lot or parcel of land, because of the fact that similar parcels are sold from time to time. It is also an easy matter to determine the price or value of the pipe laid under a pavement, and to estimate the cost of setting it in place. Once the pipe is laid, however, it becomes a part of the entire system, and the value of the plant as a unit is measured by its earning capacity, present or prospective. The value of mains and conduits in streets, therefore, increases only when the earning power of the company increases, and is in nowise affected

by the cost of paving or the expense of putting the structures in position.

Land may be enhanced in value by the laying of paving in streets, or by the growth of the community. Mains and conduits can never be enhanced in value by the mere laying of a pavement. They depreciate rather than appreciate by the reason of this fact, because it would cost more to put them on the market. It would be like buying a piece of land encumbered with old buildings which would have to be removed before the land could be used. It should be remembered that the point here under discussion is not whether there should be an allowance for paving not paid for by the company, but merely whether there should be an allowance on the theory that the paving has appreciated the value of the mains lying beneath it, and on the further assumption that the Constitutions require all values to be recognized.

The confusion of thought which exists with reference to cost and value is adverted to in a late decision by the California Commission.⁵ And the Wisconsin Commission has said that the benefit resulting to a utility company by the laying of pavement over its mains does not constitute an element of value.⁶ The New York Commissions have refused to apply this theory to paving,⁷

⁵ In *San José v. Pacific Tele. & Teleph. Co.* Cal. R. C. R. Dec. 1008, October 9, 1913, on the question of the amount to be allowed for paving in the valuation of a telephone company's property for rate-making purposes, Commissioner Eshleman said: "The commission's engineer has disallowed the sum of \$4,639, which is represented by the laying of conduits under pavement, in the estimates of the engineers of the defendant, where the evidence shows that no pavements existed at the time the conduits were put in. The difference of opinion between the engineer of the commission and the telephone company illustrates very forcibly the confusion which apparently exists in the minds of both the courts and the engineers between cost and value. Counsel for the telephone company seriously contends that the putting of pavements above conduits after they are laid represents an appreciation in the value of the property. Of course, such is not the case, but when this condition exists it certainly is true that the cost to reproduce the property in its present condition would be more than the actual cost incurred in the original production of such property. If cost of reproduction is to be the basis upon which rates shall be computed, the engineer of the commission, in my opinion, in this regard, is wrong; while if value is to be considered, as the courts have suggested, the engineers of the telephone company are wrong. As I suggested in Application No. 118, value as ordinarily conceived cannot be used as a basis for fix- 51 L.R.A.(N.S.)

ing rates of a public utility, because the ordinary conception of value is that for which anything will sell, which, of course, is largely determined by the earning power of the agency in question. . . . Cost of reproduction of a property is to be considered merely because it serves as an indication of what has been invested in the property, and not what the property is worth, as worth is generally understood."

⁶ Where a pavement is constructed over the distribution mains and piping of the utility, but no portion of the pavement has been paid for by the utility, nor any expense in connection therewith directly incurred by it, the benefits resulting to the utility are remote and incidental, and do not constitute an element of value in determining a fair valuation which shall serve as a basis of adjustment in rates. *Ripon v. Ripon Light & Water Co.* 5 Wis. R. C. R. 1 (1910).

⁷ The fact that if a new and competing company were to enter the field, it would be obliged to pay for the existing pavement over its mains and services, does not justify the allowance of this item in the valuation of the property of the existing company. The commission said: "Even the maximum to be fixed by law would not of necessity be based upon the cost of the most expensive service. However, this argument is irrelevant, because it is the policy of this state that public regulation of rate shall take the place of competition, and that unnecessary duplication of plant shall be

and the Wisconsin Commission, while recognizing it as a proper item to be included in an inventory of the cost to reproduce a public service property, does not allow it as a basis for rate making. The commission, of course, holds that, in so far as any expense for this item has actually been incurred by this company, and not previously charged to other accounts, it may be included in the inventory.⁸

d. Cost of reproduction theory.

Some confusion with reference to the question of the proper treatment of pave-

ment may have arisen through a misconception of the purpose of an appraisal. When an engineer is directed to find the cost of reproducing the plant of a public utility company new, he must necessarily estimate the present cost of laying the mains; and the fact that they were laid before existing pavements were spread is immaterial. It is for the commissions to make such use of the fact reported by the engineers as they deem advisable.⁹ The cost of reproduction measures neither the actual cost nor the actual value. The protecting arm of the Constitution does not extend beyond actual

amount upon which investors are entitled to reasonable returns, but it does not furnish the only evidence of this amount, even in so far as the physical parts alone of the plants are concerned. To include something in the valuation of the physical property for the cost of paving is undoubtedly fair and just when such costs have actually been incurred. But when they have not been incurred, it is very difficult to find any just and reasonable ground upon which they can fairly be made a permanent charge against the consumers."

avoided. The state is to protect the consumer against unreasonable rates. But if the state must fix rates upon the basis of competitive supply, it is evident that the consumer has lost the advantages of competition, and not gained those of monopoly." *Mayhew v. Kings County Lighting Co.* 2 P. S. C. R. (1st D. N. Y.) 650 (1911).
In *Buffalo Gas Co. v. Buffalo*, 3 P. S. C. R. (2d D. N. Y.) 553 (1913), in considering the question whether the company should be allowed for the cost of paving over streets where it had actually incurred no expense for that purpose, it is said: "It should be stated at the outset that this item of repaving to the amount named would be a fair and legitimate item in reproducing the plant as it now exists at the present time. If reproduction cost, with or without depreciation, is the sole test of the present value of the property, then the item must be allowed. If it is not the sole test, then we are at liberty to consider whether or not this repaving affords a just and fair basis in adding to what would otherwise be the price of gas the sum of 11 cents per thousand cubic feet." The commission disallows the claim, saying that the clear weight of reason and equity was against it.

⁸In *Ashland v. Ashland Water Co.* 4 Wis. R. C. R. 273 (1909), it was held that no allowance should be made for the item of paving, which may be properly a part of the cost of reproduction new, but which is not a part of the company's property devoted to the public use, for the reason that the company did not actually cut through this paving in constructing its system. In so far as paving has actually been cut through in making repairs, extensions, or renewals, and the expense of this cutting has not been previously charged to other accounts, it may properly be included in a valuation of the property.

⁹Although it is proper to include the cost of paving in an estimate of the cost of reproducing a gas plant, if no expense has actually been incurred by the company for this purpose, it cannot be taken into consideration for rate-making purposes. In *State Journal Printing Co. v. Madison Gas & Electric Co.* 4 Wis. R. C. R. 501 (1910), the commission said: "The cost of reproduction constitutes valuable evidence of the 51 L.R.A. (N.S.)

The commission, with reference to the allowance that should be made for paving in *Re Appl. La Crosse Gas & E. Co.* 8 Wis. R. C. R. 138 (1911), said: "Such items as these are, without question, costs to be considered in determining the reproduction costs, and should properly be included in a valuation representing the cost of reproducing the plants to-day. That such sums should be retained in determining the physical value upon which returns should be allowed is not so clear; this is a matter which is governed largely by conditions that have been met in constructing the plants. If sums which have been arrived at as expenditures that would be necessary in order to cut through and replace pavement over the underground systems have actually been disbursed for these purposes by the company or the former owners, it is difficult to consider such expenditures in any other light than construction costs; for the additional expense due to paving, when actually met, constitutes necessary investments that the company must make in order to place its services at the disposal of the public, regardless of whether the usefulness of the various mains and conduits so laid beneath pavement does or does not exceed the usefulness of other similarly located, but in streets that are not paved. When, however, such sums as are said to represent the cost of paving have not actually been paid out by the utility for this purpose, but have been borne only by the community itself, to consider such values as investments upon which consumers must return to the company interest charges appears unreasonable, as such procedure, under these conditions, places a penalty upon civic improvements due to economic and social conditions."

value, and the commissions are therefore free to adopt the cost to reproduce theory, or to reject it, as the equities of the particular case may dictate. Courts and commissions have refused to apply this theory to paving.¹⁰

e. Conclusion.

It would seem that the rule adopted by the commissions that the cost of paving not paid for by the company should be disregarded in appraisal of utility property is sound; that an allowance therefor should be rejected in a sale or a condemnation case, because it is not an element of value; that it should not be allowed in a rate case on the theory that it measures an appreciated

value; that it should not be recognized in any case on the cost to reproduce new theory, since this would require the public to pay for the most expensive service, and permit the capitalization of monopoly privilege. In short, there appear to be no grounds, legal or equitable, for the inclusion of paving paid for by a municipality and owned by it, in the inventory of the property of a public service corporation. It is often fair and just to allow the companies for certain expenditures incurred, irrespective of the question of whether any actual value is created thereby, on the grounds that such expenditures were a necessary sacrifice in the interest of the public service, but no reason can be perceived for swelling the company's capitalization for

¹⁰ Increase in the value of gas mains because of the fact they are under pavements will not be recognized in a valuation for rate-making purposes. *Cedar Rapids Gas-light Co. v. Cedar Rapids*, 144 Iowa, 426, 48 L.R.A. (N.S.) 1025, 138 Am. St. Rep. 299, 120 N. W. 966. The court said: "The company had laid them before the paving was done, but it is argued that, as the value of the mains and pipes are to be estimated when in the ground, what it would now cost because of the pavement to put them there should be included in determining present value. If so, the contingency of having to remove them at the expiration of the franchise also should be taken into account. Moreover, the fact that most of the paved streets are paralleled by unpaved alleys or parkings in which pipes might be laid without removing the pavement, and possibly with less danger from electrolysis, is entitled to consideration. Nor is it to be forgotten that pavements yield to the ravages of time, and that with new pavements new pipe may be laid. Undoubtedly the values of the pipes are somewhat enhanced because of their location, but the entire immediate cost of opening and replacing the pavement is not the criterion for value which should be adopted. The contention illustrates how inequitable would be a rule arbitrarily fixing the value as that for which a system might be replaced. Aside from this being impractical, it may safely be said that there is hardly an enterprise of this character which, were it destroyed, would be restored as it was before. In ascertaining values in this way, the worth of a new plant of equal capacity, efficiency, and durability, with proper discounts for defects in the old and depreciation for use, should be the measure of value, rather than the cost of exact duplication."

In *Des Moines Gas Co. v. Des Moines*, 199 Fed. 204, McPherson, J., said: "The theory at first thought in all cases is plausible and attractive, but in the end often-times utterly illogical and unreliable, originally adopted as a mere timesaver by mere theorists, and sought to be enforced as against substantial and unbending facts. If 61 L.R.A. (N.S.)

the plant is to be reproduced, when is it to be done? If, when reproduced, will the streets then be paved, and, if paved, paved with what? Must it all be reproduced at once, or the same covered by a number of years? If but gradually reproduced, why should not such cost go into either the operating or maintenance accounts? No one can state when it must be reproduced, and a material question arises: What, then, as compared with the present, will be the price of labor, material, and freight? But finally, and to my mind the conclusive reason against the soundness of the reproduction under paved streets is that to allow that theory to prevail, and to increase the capitalization now to the extent of \$140,000, is to allow such gas rates as will pay a dividend on such sum from and after this date. But the sum of \$140,000 is not put in the capital or value account until the plant is reproduced. As, of course, streets paved or unpaved make no difference in the earning power of the gas plant, and but little, if anything, goes more directly and accurately to the question of value of any structure or plant than its rental, earnings, or as a dividend producer."

The company cannot be allowed to earn a dividend on the cost of paving which it was not allowed to construct. *Mayhew v. Kings County Lighting Co.* 2 P. S. C. R. (1st D. N. Y.) 659 (1911). In commenting on the theory that the company should be allowed a return on the cost of such paving, the commission said: "The practical effects of such a theory are interesting and important. Suppose a locality at the time a gas company was started and its pipes laid were content to have unpaved, or cheaply paved, streets,—cobblestone, macadam, or gravel being used. Suppose the people come to demand better paving, being dissatisfied with earlier conditions, and that asphalt, brick, or granite block with a concrete base is laid throughout the area. Naturally, the people appreciate that you must pay the cost of the repaving; but according to the theory of counsel for the company, the gas consumer must also pay more for gas. In other words, every time the streets are im-

something which adds no measurable value to its property, and which cost it nothing. Justice would appear to be fully satisfied when the company is allowed to capitalize any actual expense necessitated by the laying of the pavement, and this, as stated, is everywhere conceded to be a legitimate charge.

II. Adaptation and solidification.

a. Introduction.

When the builders turn a railroad over to the owners for operation, everything except the land is new and green. From the moment operation begins, the buildings, the rails, the ties, the switches, the rolling stock, in short, all parts of the physical plant except the roadbed, begin their march to the junk heap, as Mr. Hatfield, in his work on Modern Accounting, very picturesquely puts it. Depreciation sets in instantly. The repairs are comparatively few in the early stages of operation, but grow rapidly as the property ages, until the time arrives when patching will no longer answer, and the old parts must be replaced. With the roadbed, the physical law is different. Expenses connected with the maintenance of this part of the property are high in the initial stage of operation, but grow less and less as the bed settles and reaches its normal state. Adaptation has been defined by Mr. Dwight B. Morgan, an engineer connected with the Minnesota railroad appraisal, as the adjustment of the physical line to its environment and purposes; and solidification is defined by him as the set-

tlement of the roadbed to a stable condition. The same conditions exist in respect to the earthworks of canal and irrigation companies.

b. Conflicting views as to treatment of.

Opinions of appraisers and others engaged in the valuation of railroad properties are not in harmony in respect to the treatment this item should receive. Conflict, however, does not take on so wide a range as it does with reference to some other question connected with appraisals of public service company properties. It is conceded by everyone that the cost of bringing these earthworks up to their highest normal operating condition should be allowed. The difference in view is merely whether the expense belongs in the capital account or is an operating charge. Sometimes a specific allowance under this head is rejected, because of the fact that it has been taken care of elsewhere, as, for example, under the head of contingencies. Where this is the ground of its disallowance, it does not mean that it is not considered a proper capital expenditure. It has also been suggested that this expense should be charged to operation, and that the roadbed should not be depreciated, but always be appraised at 100 per cent of its cost new. Again, while it has been recognized that the change in the physical condition of the roadbed appreciates its value, a claim for allowance has been rejected on the ground of lack of evidence by which such value could be measured.¹¹

It will be seen from an examination of

proved, not only do taxes or assessments go up, but higher gas rates are justified, notwithstanding the fact that the company may not have paid \$1 in connection therewith. If this theory is correct, citizens must consider, in connection with every civic improvement, its effect upon rates for gas, electricity, telephone service, water transportation, and every other service which involves the use of the subsurface of the streets. If such improvement increases the cost of reproducing the undertaking supplying such service, higher rates will thereby be justified than would be reasonable before such improvement is made.

¹¹"In Kansas and Oklahoma no allowance is made for this item. Mr. [R. A.] Thompson, of Oklahoma, says allowance of this item would be capitalizing operating expenses.

"Michigan makes no specific allowance, although Prof. [Mortimer E.] Cooley says it has value, but is usually allowed for in operating expenses. Mr. [Henry E.] Riggs states that this item was partly allowed for in the 10 per cent item for contingencies. (Proceedings American Society of Civil Engineers, November, 1910.) He also 51 L.R.A. (N.S.)

says: 'There can be no reasonable objection to adding to the contract prices for grading, ballasting, etc., a reasonable amount to cover not so much the seasoning and settling of the new roadbed as the actual money disbursed in work on this new roadbed during the first three or four years of operation in order to bring it up to the proper operating condition. A very considerable part of the money spent on "maintenance of track" for the first few years after a new line is built is in reality deferred construction cost. (The Valuation of Public-Service Property, p. 147.)'

"Minnesota, through her engineer, Mr. [Dwight C.] Morgan, made a total allowance for this sum amounting to \$11,743,000, or over 3 per cent on the total 'present value' of the properties, which is about 20 per cent of the cost of grading. However, the commission refused to approve the item in its findings. Mr. [D. F.] Jurgenson says this item was computed as follows: 'Main line, one man. at \$1.40, 313 days for 4 years, \$1,752.80 per mile. Branch line, one-half man, at \$1.40, 313 days, for 4 years, \$876.40 per mile.'

"Nebraska allows for adaptation and so-

the last preceding note, that California makes no allowance for adaptation and solidification of roadbed in its estimate of reproduction value, but does recognize it in its estimate of present value. In other words, the commission endeavors to ascertain the cost of reproducing the property new at the date of the appraisal. In ascertaining the present value of other physical property, accrued depreciation is subtracted from the cost to reproduce new. It would therefore seem to be an entirely consistent policy to add to the cost new, the amount of appreciation due to the settlement and seasoning

lidification of roadbed. Mr. [E. C.] Hurd gives his reasons (which are stated in the report).

"South Dakota makes no allowance for this item, stating it is properly chargeable to maintenance, just as worn-out ties are cared for; suggesting that roadbed might be allowed for at 100 per cent.

"Washington allows for adaptation and solidification at 10 per cent of the cost of reproducing the grade."

"In California no allowance will be made for this item in the estimates of reproduction value. However, in the estimates of present value, this factor will appear as a percentage of reproduction value, or as an arbitrary allowance made to cover maintenance of roadbed for a short period. . . .

"Massachusetts, in the New York, New Haven, & Hartford Railroad appraisal, allowed \$500 per mile, being about 2.6 per cent on the cost of grading and about .4 of 1 per cent on the total cost of road and structures.

"The New York Public Service Commission for the first district has allowed this item with others in certain rate cases. . . .

"In New Jersey Mr. Hansel clearly recognized the item 'solidification and adaptation of roadbed,' as an element of cost, and that it must be provided for. He says, however: 'The railroad company is entitled to claim this cost as a part of their investment. We have no means of determining the amount of solidification or settlement, even approximately, and have not therefore attempted to fix any definite unit of values for same.

"No allowance is made for the cost of solidification and adaptation of roadbed, as such has been allowed by the Wisconsin Commission." Report of Committee on Railroad Taxes & Plans for Ascertaining Fair Valuation of Railroad Property, at the 24th Annual Convention of the National Association of Railway Commissioners, 1 Public Service Regulation, 757.

¹² In *Re Lake Tahoe R. & Transp. Co.* 2 Cal. R. R. C. 830 (1913), the commission's engineer appreciated the item of grading 10 per cent in excess of the estimated reproduction value, except as to clearing, grubbing, and rip-rap, which were estimated at 100 per cent. The additional 10 per cent 51 L.R.A. (N.S.)

of the roadbed. At the time the report of the committee on railroad taxes and plans for estimating the fair value of railroad property was submitted to the National Association of Railway Commissioners, the percentage of allowance had not been determined. Since that time, however, the question has arisen in actual cases before the commission.¹² In the *Minnesota Rate Case*, the lower court recognized the item of adaptation and solidification of roadbed as a proper capital charge. This point was not directly passed upon in the supreme court decision.¹³ Other courts and commissions have upheld the propriety of the

was for the solidification and adaptation of roadbed. The commission said: "With reference to solid rock, an appreciation of 10 per cent has been allowed, although the commission is making further investigations in appreciation of solid rock, and may not hereafter allow more than 5 per cent."

In *Re Tonopah & Tidewater R. Co.* Cal. Dec. 836, July 29th, 1913, an allowance of 8 per cent was made on the item of grading for appreciation.

¹³ In *Shepard v. Northern P. R. Co.* 184 Fed. 765, it is said: "There are exceptions because the master allowed to the Northern Pacific Company \$1,613,612.76, to the Great Northern Company \$3,219,642, and to the Minneapolis & St. Louis Railroad Company \$608,896.43, for the solidification and adaptation of their respective railroads, and deducted nothing from the cost of reproduction for depreciation. But these amounts are those allowed by the defendants' engineer and witness Morgan in his original estimates of the cost of reproduction which he reported to the commission, and there is much other evidence in the record to sustain them. It is clear that a new railroad may appreciate or depreciate as it grows older. It may be renewed, repaired, and improved day by day and year by year as it is operated, until its embankments become more solid, its culverts and bridges firmer and more reliable, its ties and rails more steadfast and secure, and its rolling stock more seasoned and better adapted to its service and to the railroad it traverses, and until the whole property becomes more valuable than it was when it was first constructed. On the other hand, its embankments and its roadbed may be neglected and permitted to deteriorate by the action of rain, snow, and frost, its ties may be allowed to become partially decayed, its bolts and rails loose, and its rolling stock worn, without adequate repairs, until the entire property suffers great depreciation. Whether, at a given time, a railroad property is more or less valuable than it would be if it had just been constructed, is a question of fact that, in a suit of this nature, must be answered by the evidence. That evidence in this case is that the railroads, rolling stock, and appurtenances which constitute the great transportation machines

charge for adaptation or solidification.¹⁴ Upon the question of adaptation of a railroad to its environment and purposes, it has been said: "An established railroad system may be worth more than its original cost and more than the mere cost of its physical reproduction. . . . The inevitable errors in its building which finite minds and hands cannot avoid have been measurably

corrected; time and effort have produced a commercial adjustment between it and the country it was intended to serve; relations have been established with patrons, and sources of traffic have been opened up and made tributary. In other words, the railroad, unlike one newly constructed, is fully equipped and is doing business as a going concern."¹⁵ But the New York

of these companies in Minnesota, are in better condition for use, more efficient, more steadfast, better adapted to each other, than if their construction was just completed; that all depreciation had been offset by appreciation, and that values to the amounts here allowed by the master have been added to the values of these properties new, by their age, their repairs, their renewals, their adaptation, and the assured efficiency that comes from constant careful maintenance and operation. There was no error in these allowances."

¹⁴ In *Mercantile Trust Co. v. Texas & P. R. Co.* 51 Fed. 529, McCormick, J., points out that seasoning is a proper cost of a railroad plant. He says: "In the race to occupy territory, or to avail of the state's donations of land, or to get a basis for the issuance and placing of their bonds, or to meet the crying want of communities along their projected lines, or for one or more or all of these considerations, the defendant railways hurried the construction of their lines, and opened them for business in a green and unfinished condition, with unseasoned roadbeds, ties, rails, culverts, and bridges, and rolling stock, not adequate to move or bear the weight of their present traffic, and with very little terminal and way station equipment. That in large sections of the state through which these railways pass, the most fertile, fully occupied and developed, and furnishing the bulk of their domestic freight and passenger traffic, the character of the soil is such as renders it extremely difficult and expensive to construct and to maintain a sound roadbed, and to keep the ties on top of it; time and use and constant large additions to the dump being required, and these not always efficient. That the cost of construction and equipment up to the time when these roads were respectively opened for business was far short of the proper cost of their plant as it exists to-day. That this proper cost of their plant as it exists to-day exceeds, in the case of each of these railways, the amount of its bonded indebtedness. That these roads could be duplicated only by going through a similar process of seasoning, and that even with the present reduced market value of much of the construction and equipment material, and the advantages of transportation of the same to interior points, which existing roads would furnish, such duplicates, with equal right of way, roadbed, track, rolling stock, terminal and way station facilities, could not be acquired and constructed now for less money than these roads have cost."

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In *Metropolitan Trust Co. v. Houston & T. C. R. Co.* 90 Fed. 683, McCormick, J., says that, in estimating the value of railroad property, an allowance should be made for the increase due to the settling, seasoning, and permanent establishment of the railways.

In *Re Report of the Physical Valuation of Nebraska Railways*, 4 Neb. S. R. C. R. 447 (1911), with reference to "Adaptation and Solidification of Roadway," this item was included as reasonable in representing the cost or value of labor and material over and above the normal maintenance cost of an established roadway. A period of three years was determined as proper in order to thoroughly adapt and solidify a newly constructed property, involving therein labor in the maintenance of the track structure and material providing against subsidence in the earthwork.

In the *Holyoke Water Power Co.'s Valuation*, the commission, in considering the market value of the property, said: "In this connection, as bearing upon the market value of the property, we have also taken into account, among other things introduced in evidence, the fitness, suitability, and adaptability of the plants for the service required; their ability to supply present needs, and to what extent they can be depended upon to produce gas or electricity for the future; how efficiently and economically they can be carried on; their location with reference to facility for producing supplies and to dispose of their product; and whether or not there are any faults or defects inherent in the plants, independent of the diminution factors contained in third clause, such as any faulty arrangement of the works or any part thereof, inadequate facilities for their extension or for any necessary changes, any lack of capacity to supply the output for present or for future requirements, any undue expense necessary for repairs and replacements, or other excessive cost of operation, or any other fault inherent in the systems not included in clause third, which increases the trouble and expense of making and distributing gas and electricity, and thereby affects the market value of the plants." *Holyoke Water Power Co.* 18 Mass. G. & E. L. C. R. 77 (1903). (Property taken over by municipality.)

¹⁵ *Missouri, K. & T. R. Co. v. Love*, 177 Fed. 493.

Hon. C. A. Prouty, of the Interstate Commerce Commission, has made the following striking presentation of this problem: "The first railroad which the commission is pro-

Commission, First Department, has refused to apply this principle to adaptation of a street railway to its purpose, holding that interest and operating expenses for several months after operation actually begins cannot be capitalized on the theory that operation up to that time is experimental.¹⁶

In the valuation of a water company's plant, a claim for a large sum was made for the appreciation of the earthworks of the company's canal due to the packing of the banks and silting. The claim was rejected, but on the ground that the evidence was insufficient for a basis of calculation.¹⁷

c. Treatment as capital or operating expenses.

The fundamental reasons for treating appreciation due to the adaptation or solidification of roadbeds and earthworks as a capital charge or an operating expense have not been very satisfactorily explained. What should be the rule? Let it be assumed, for the purpose of illustration, that ordinary natural laws are reversed, and that physical property, instead of depre-

ciating in spite of repairs, actually appreciates until it attains the point of its highest efficiency, from which time it neither appreciates nor depreciates. Assume that a new steam engine may be bought by the expenditure of \$1,000; that, by the further expenditure of \$100 a year for ten years, it will be brought to its highest standard of efficiency, and will so remain forever. At the end of ten years the engine has cost \$2,000. This cost will probably measure its value at the time. In other words, if the owner had bought a similar engine ten years old, it would have probably cost \$2,000. Instead, however, of buying it in that condition, a new engine is purchased, so that the yearly expenditure is necessary to bring it up to its greatest efficiency. Is the sum of \$1,000 spent for this purpose a capital charge or an operating expense? It is obviously a capital charge, and for precisely the same reason the original expenditure of \$1,000 for the engine should be deemed a capital charge, rather than an operating expense.

One reason for putting certain expenditures into the capital account is to dis-

ceeding to survey in what is known as the Pacific District is the San Pedro, Los Angeles, & Salt Lake, extending from San Pedro, California, to Salt Lake City, Utah, some 800 miles. Most of this road has been built in comparatively recent times, and the circumstances and cost of construction are fairly well known. The course of the road is for the most part through an arid desert. A certain section of it, when built, was located where no man thought it could ever be disturbed by floods, yet shortly after it was opened for operation, the floods came and carried out this portion. It was at once reconstructed upon a new location supposed to be beyond all possible danger from a recurrence of the previous disaster, nevertheless the waters again came and washed away this same section; whereupon it was rebuilt upon a third location, beyond all possible reach of future trouble from this source. Considering the nature of the road and the people who were interested in its construction, it seems probable that due caution was exercised in the original location; that is, that a reasonably prudent man building this railroad, as those men did, to be operated by them as a railroad, would have located it as it was located. It is undoubtedly true that the second location was made with great care, and was believed to be beyond possible danger. It has cost a large sum more to rebuild this road than it would have originally cost to construct it where it is to-day. Now, in determining the value of this property, what, if any, allowance is to be made for this experimental outlay? If the government itself had constructed this railroad, it probably would have had the same experience and would have expended the same amount 51 L.R.A.(N.S.)

of money which the owners actually did. This illustration puts the question in a very striking form, but the same idea enters more or less into the valuation of most of the railroads of this country. There has of necessity been a certain amount of experiment before hitting on the right and proper thing. Does this development expense constitute an element of value which may be recognized to-day, or must the owners of these public utilities stand the loss of their mistakes in the same way that the owner of a private enterprise would? Vast sums of money are involved in the answer to that very simple question." Address before the Second Annual Meeting of the Chamber of Commerce of the United States of America, in Washington, February 11, 1914, 3 Public Service Regulation, 61.

¹⁶ Re Bond Issue of New York & N. S. Traction Co. 3 P. S. C. R. (1st D. N. Y.) 63 (1912). To the same effect. Re 2d Reorganization Plan of 3d Ave. R. Co. 2 P. S. C. R. (1st D. N. Y.) 347 (1910), and Re Metropolitan Street R. Co. 3 P. S. C. R. (1st D. N. Y.) 113 (1912).

¹⁷ In San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County, 191 Fed. 875, an irrigation case, the company claimed the sum of \$129,365 for appreciation of the earthworks of its canal due to packing of the banks and silting, thus avoiding breaks and preventing the loss of water by seepage. After reviewing the testimony on this point, the master said: "After a careful examination of all the testimony on this question, I find I am unable to make either a calculation as to appreciation or depreciation of the earthworks of the canal, and shall assume that the one offsets the other." The court reached the same conclusion.

tribute the burden of the service equitably among the consumers who are benefited by it. If the yearly expenditures of \$100, made to bring the engine up to the highest state of efficiency, were charged to the operating account, the result would be that the consumers of the first ten years would bear one half of the whole expense of the engine, which, in justice, ought to be distributed over the entire period of its usefulness.

If it is assumed that a new public service company is organized, and is to be allowed to earn a return on the cost of its property new, including this engine, it would be of some advantage to the company to have the annual expenditure of \$100 charged to operating expenses. If so charged, the company would, of course, not be allowed to earn a return upon it, but neither would the stockholders have to advance this money out of their own pockets, and, having title to the engine, they would, if called upon to sell it, profit by its appreciated value.

If one railroad company desired to purchase the property of another, it would undoubtedly pay more for a seasoned than it would for a green roadbed. The value of such a roadbed has undoubtedly appreciated. If that part of the appreciation which is due to expenditures has been paid for by the patrons of the road, as would be the case if such outlays were charged to operating expenses, the company would profit by the process, upon the sale or condemnation of its property. For rate-making purposes, it would make little difference to the company which method was adopted.

It would be unjust, of course, to allow the company to include such charges in its operating expenses and then permit it to earn a return upon them as part of its investment, if this matter were wholly within the discretion of the courts. The great practical difficulty in applying the principle to the adaptation and solidification of roadbed is to determine what part of the early expenditures really belong to maintenance, and what part goes to make up the appreciated value. If all expenses after operation begins are charged to operation, it is a serious question, even in a rate case, whether the appreciated value of the roadbed would not have to be recognized as part of the property of the company upon which it is entitled to earn a return. Reverting to the steam engine illustration again, let it be supposed that the valuation is made in the eleventh year. It is found from an examination of the books of the company that the yearly expenditures of \$100 for the improvement of the engine have not been made out of the pockets of the stockholders, but from the earnings of the company. The mere fact the consumers

have paid for half of the present cost or value of engine does not change its nature as capital. The increment of value has been added to it, and the title is in the company. The problem of the treatment it shall receive is therefore the same as that in respect to the treatment of all appreciated values. If the rule is adopted that donations of land are to be recognized as part of the property of a public service corporation upon which it is entitled to earn a return,—and this appears to be the sound rule,—consistency would require the adoption of the same rule here. If the Constitutions require that the value basis shall be adopted in measuring the amount the company is to receive for its property, or the amount upon which it is entitled to earn a return, it would seem to follow that the company would here be entitled to have the engine valued at \$2,000 rather than at \$1,000. If the engine at the time of the valuation would actually sell for \$2,000, how would it be possible to allow the property to earn a return only on \$1,000, on the theory that the additional value had been contributed by consumers, without being guilty of taking the company's property without compensation?

The problem of the treatment of the item of adaptation and solidification of earthworks is no different from that of the treatment of the steam engine operating under the conditions named. It would appear, therefore, that the expenditures necessary to bring a roadbed up to its highest state of efficiency were theoretically a capital charge, rather than an operating expense. Treating such expenditures as operating costs is unjust to the patrons of the road, since it practically requires them to donate the appreciated value to the company.

H. C. S.

KENTUCKY COURT OF APPEALS.

J. S. GOTT, Appt.,
v.

BEREA COLLEGE et al.

(156 Ky. 376, 161 S. W. 204.)

College — rule restricting patronage of pupils — reasonableness.

1. A rule by a college which provides board and lodging for its pupils, forbidding

Note. — Right of third person to complain of regulations concerning conduct of students, employees, etc., by which he is injuriously affected.

The only case besides GOTT v. BEREA COLLEGE, falling within the scope of the note, in which there was no element of malice

them to patronize restaurants not controlled by it, is not unreasonable.

Case — forbidding patronage of restaurant — right of action.

2. The proprietor of a restaurant who is not a student in a college, and has no children as such students, has no right of action against the college for forbidding pupils to patronize his restaurant.

(December 11, 1913.)

APPPEAL by plaintiff from a judgment of the Circuit Court for Madison County in defendants' favor in a suit to enjoin them from boycotting plaintiff's business, and for damages occasioned by said boycott. Affirmed.

The facts are stated in the opinion.

Messrs. J. A. Sullivan and S. Mayner Wallace, for appellant:

Berea College had no authority, under its charter, to make or to enforce the by-law, and therefore the same is void.

Plant v. Woods, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011;

or purpose to injure any particular person, appears to be *Jones v. Cody*, 132 Mich. 13, 62 L.R.A. 160, 92 N. W. 495, holding that a tradesman has no right of action against the principal of a public school for enforcing a lawful order of the board of education requiring pupils to go directly home when dismissed from school, although the effect of such enforcement is to injure his trade with the pupils. The court stated that "no trader or merchant has the constitutional right to have children remain in his place of business in order that they may spend money there while they are on their way to and from school. The liberty of neither the child nor parent nor trader is at all unlawfully restrained by this rule and its reasonable enforcement. The rule does not interfere with the right of the parent to send his child upon an errand to a store or other reputable place, or to the home of a relative or friend to visit. Neither does it restrict the authority of parents over their children."

In *People ex rel. Pratt v. Wheaton College*, 40 Ill. 186, discussed in the opinion in *Gott v. Berea College*, the complaint of the rule in question was not made by the society affected thereby, but by the father of a student who had been suspended because of his violation of the rule; the father having applied for mandamus to compel the reinstatement of the son.

See *Payne v. Western & A. R. Co.* 13 Lea, 507, 49 Am. Rep. 666, holding that a trader had no cause of action against an employer for maliciously posting a notice forbidding his employees to trade with him; and *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373, holding that the owner of a house has no cause of action against an employer who maliciously refuses to employ anyone who may lease such house. 51 L.R.A.(N.S.)

Chase, Lead. Cas. on Torts, pp. 293, 300; *Pollock, Torts, Webb's ed.* pp. 406, 409; *Bigelow, Torts*, pp. 115 et seq.; 8 Cyc. 650 et seq.; 1 *Clark & M. Priv. Corp.* 365; *Sayre v. Louisville Union Benev. Asso.* 1 Duv. 143, 85 Am. Dec. 613.

The by-law is void because it is unreasonable and illegal.

10 Cyc. 1358; *Kinzer v. Independent School Dist. (Kinzer v. Toms)*, 129 Iowa, 441, 3 L.R.A.(N.S.) 496, 105 N. W. 686, 6 Ann. Cas. 996; *Cross v. Walton Graded Common School Dist.* 121 Ky. 469, 89 S. W. 506; *State ex rel. Bowe v. Board of Education*, 63 Wis. 234, 53 Am. Rep. 282, 23 N. W. 102; 31 Cyc. 1134, 1135; 29 Am. & Eng. Enc. Law, 327; 10 Cyc. 356, 359; *State ex rel. Clark v. Osborne*, 24 Mo. App. 309, 32 Mo. App. 536; *Hobbs v. Germany*, 94 Miss. 469, 22 L.R.A.(N.S.) 983, 49 So. 515; *Sayre v. Louisville Union Benev. Asso.* 1 Duv. 143, 85 Am. Dec. 613.

The by-law is void because in derogation of the students' civil rights, in violation of

So, in Guethler v. Altman, 26 Ind. App. 587, 84 Am. St. Rep. 313, 60 N. E. 355, an action by a dealer in confectionery and school supplies against the school board, wherein it was alleged that the teacher of the high school for several months made continual and increasing efforts, by means of persuasion and threats and intimidation, to prevent the pupils of the high school over whom he had particular charge and control from visiting and patronizing his place of business; that he talked to the pupils, advising them to stay away from the plaintiff's place of business and to purchase their school supplies elsewhere, and that in doing these things he was following instructions given him by the school board and superintendent, and all that was done was with the full knowledge of the board and superintendent. The court, in holding no cause of action existed, said that it was proper for the school authorities to make such reasonable rules and regulations as were necessary for the discipline, government, and management of the school, that it was not an unlawful act for the teacher to advise or persuade the pupils not to visit such store, and the fact that he acted maliciously did not change the rule. That an act which is lawful in itself and which violates no right cannot be made actionable because of the motive which induced it. (See, in this connection, note in 62 L.R.A. 674, on the general subject of the effect of bad motive to make actionable what would otherwise not be.)

As to validity of agreement at common law by which an employer seeks to direct the trade of his employees to the other party, see note to *Stewart v. Stearns & C. Lumber Co.* 24 L.R.A.(N.S.) 649.

J. H. B.

their personal liberty, and on other grounds of public policy.

Dittrich v. Gobey, 119 Cal. 599, 51 Pac. 962; Union Cent. L. Ins. Co. v. Champlin, 11 Okla. 184, 55 L.R.A. 109, 65 Pac. 836; Pollock, Contr. p. 316; Parsons v. Trask, 7 Gray, 473, 66 Am. Dec. 502; 1 Clark & M. Priv. Corp. 402; 9 Cyc. 468.

Defendants may be enjoined from interfering with plaintiff's business.

Tunstall v. Stearns Coal Co. 41 L.R.A. (N.S.) 453, 113 C. C. A. 132, 192 Fed. 808; Lewis v. Bloede, 120 C. C. A. 335, 202 Fed. 7; Underhill v. Murphy, 117 Ky. 640, 111 Am. St. Rep. 262, 78 S. W. 482, 4 Ann. Cas. 780; Quinn v. Leathem [1901] A. C. 495, 1 B. R. C. 197, 85 L. T. N. S. 289, 17 Times L. R. 749, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139; Berry v. Donovan, 188 Mass. 353, 5 L.R.A. (N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; South Wales Miners' Federation v. Glamorgan Coal Co. [1905] A. C. 239, 1 B. R. C. 1, 21 Times L. R. 441, 74 L. J. K. B. N. S. 525, 53 Week. Rep. 593, 92 L. T. N. S. 710, 2 Ann. Cas. 436; Read v. Friendly Soc. of Operative Stonemasons [1902] 2 K. B. 88, 18 Times L. R. 577, 71 L. J. K. B. N. S. 634, 50 Week. Rep. 619, 86 L. T. N. S. 593.

Mr. John Noland also for appellant.

Messrs. Burnam & Burnam for appellees.

Nunn, J., delivered the opinion of the court:

The appellant, J. S. Gott, about the 1st of September, 1911, purchased and was conducting a restaurant in Berea, Kentucky, across the street from the premises of Berea College. A restaurant had been conducted in this same place for quite a long while by the party from whom Gott purchased. For many years it has been the practice of the governing authorities of Berea College to distribute among the students at the beginning of each scholastic year a pamphlet entitled "Students' Manual," containing the rules and regulations of the college for the government of the student body. Subsection 3 of this manual, under the heading "Forbidden Places," enjoined the students from entering any "place of ill repute, liquor saloons, gambling houses," etc. During the 1911 summer vacation, the faculty, pursuant to their usual practice of revising the rules, added another clause to this rule as to forbidden places, and the rule was announced to the student body at chapel exercise on the first day of the fall term, which began September 11th. The new rule is as follows: "(b) Eating houses and places of amusement in Berea, not controlled by the college, must not be

entered by students on pain of immediate dismissal. The institution provides for the recreation of its students, and ample accommodation for meals and refreshment, and cannot permit outside parties to solicit student patronage for gain."

Appellant's restaurant was located and conducted mainly for the profits arising from student patronage. During the first few days after the publication of this rule, two or three students were expelled for its violation, so that the making of the rule and its enforcement had the effect of very materially injuring, if not absolutely ruining, appellant's business because the students were afraid to further patronize it.

On the 20th day of September appellant instituted this action in equity and procured a temporary restraining order and injunction against the enforcement of the rule above quoted, and charging that the college and its officers unlawfully and maliciously conspired to injure his business by adopting a rule forbidding students entering eating houses. For this he claimed damages in the sum of \$500. By amended petitions he alleged that, in pursuance of such conspiracy, the college officers had uttered slanderous remarks concerning him and his business, and increased his prayer for damages to \$2,000. The slanderous remarks were alleged to have been spoken at chapel and other public exercises to the student body as a reason for the rule, and were to the effect that appellant was a bootlegger, and upon more than one occasion had been charged and convicted of illegally selling whisky. Berea College answered and denied that any slanderous remarks had been made as to appellant, or that they had conspired maliciously or otherwise, or that the rule adopted was either unlawful or unreasonable. In the second paragraph the college affirmatively set forth that it is a private (incorporated) institution of learning, supported wholly by private donations and its endowment and such fees as it collects from students or parents of students who desire to become affiliated with said institution and abide by and conform to the rules and regulations provided by the governing authorities of the college for the conduct of the students; that every student upon entering said institution agrees, upon pain of dismissal, to conform to such rules and regulations as may be from time to time promulgated; that the institution aims to furnish an education to inexperienced country, mountain boys and girls of very little means at the lowest possible cost; that practically all of the students are from rural districts and unused to the ways of even a village the size of Berea; and that they are of very limited means.

It is further alleged that they have been compelled from time to time to pass rules tending to prevent students from wasting their time and money and to keep them wholly occupied in study; that some of the rules prohibit the doing of things not in themselves wrong or unlawful, but which the governing authorities have found and believe detrimental to the best interest of the college and the student body. For these reasons the rule in question was adopted; but they say at the time that they had no knowledge that the plaintiff owned or was about to acquire a restaurant, and that the rule was in no way directed at the plaintiff. Upon motion the restraining order was dissolved, but, on account of allegations charging slanderous remarks, the lower court overruled demurrer to the petition. After filing of the answer, proof was heard, the case submitted and tried by the court, with the result that the petition was dismissed, and Gott appeals to this court.

Passing the question as to whether an ordinary action can be joined with an equitable action for restraining order, there being no objection to it in the lower court, it is sufficient to say that, on the question of uttering the slanderous words, issue was joined, and the case submitted to the court without the intervention of a jury, and we are disposed to accept its finding against Gott since it is supported by sufficient evidence. The larger question, and the one we are called here to pass upon, is whether the rule forbidding students entering eating houses was a reasonable one and within the power of the college authorities to enact, and the further question whether, in that event, appellant Gott will be heard to complain. That the enforcement of the rule worked a great injury to Gott's restaurant business cannot well be denied; but, unless he can show that the college authorities have been guilty of a breach of some legal duty which they owe to him, he has no cause of action against them for the injury.

One has no right of action against a merchant for refusal to sell goods, nor will an action lie, unless such means are used as of themselves constitute a breach of legal duty, for inducing or causing persons not to trade, deal, or contract with another; and it is a well-established practice that, when a lawful act is performed in the proper manner, the party performing it is not liable for mere incidental consequences injuriously resulting from it to another. 38 Cyc. 418-423.

College authorities stand *in loco parentis* concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the

government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulation are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy. Section 881 of the Kentucky Statutes, applicable to corporations of this character, provides that they may "adopt such rules for their government and operation, not inconsistent with law, as the directors, trustees, or managers may deem proper." The corporate charter of Berea College empowers the board of trustees to "make such by-laws as it may deem necessary to promote the interest of the institution, not in violation of any laws of the state or the United States." This reference to the college powers shows that its authorities have a large discretion, and they are similar to the charter and corporate rights under which colleges and such institutions are generally conducted.

Having in mind such powers, the courts have without exception held to the rule which is well settled in 7 Cyc. 288: "A college or university may prescribe requirements for admission and rules for the conduct of its students, and one who enters as a student impliedly agrees to conform to such rules of government." The only limit upon this rule is as to institutions supported in whole or in part by appropriations from the public treasury. In such cases their rules are viewed somewhat more critically; but, since this is a private institution, it is unnecessary to notice further the distinction.

A further consideration of the power of school boards is found in Mechem on Public Officers, § 730, from which we quote: There is no question that the power of school authorities over pupils is not confined to schoolroom or grounds, but to extend to all acts of pupils which are detrimental to the good order and best interest of the school, whether committed in school hours, or while the pupil is on his way to or from school, or after he has returned home. Of course, this rule is not intended to, nor will it be permitted to, interfere with parental control of children in the home, unless the acts forbidden materially affect the conduct and discipline of the school.

There is nothing in the case to show that the college had any contract, business, or other direct relations with the appellant. They owed him no special duty; and, while he may have suffered an injury, yet he does not show that the college is a wrongdoer in a legal or any sense. Nor does he show

that, in enacting the rule, they did it unlawfully, or that they exceeded their power, or that there was any conspiracy to do anything unlawful. Their right to enact the rule comes within their charter provision, and that it was a reasonable rule cannot be very well disputed. Assuming that there were no other outside eating houses in Berea, and that there never had been a disorderly one, or one in which intoxicating liquors had been sold, still it would not be an unreasonable rule forbidding students entering or patronizing appellant's establishment. In the first place, the college offers an education to the poorest, and undertakes to offer them the means of a livelihood within the institution while they are pursuing their studies, and at the same time provides board and lodging for a nominal charge. Whatever profit was derived served to still further reduce expenses charged against the pupil. It stands to reason that when the plans of the institution are so prepared, and the support and maintenance of the students are so ordered, there must be the fullest co-operation on the part of all the students, otherwise there will be disappointment, if not failure, in the project. It is also a matter of common knowledge that one of the chief dreads of college authorities is the outbreak of an epidemic, and against which they should take the utmost precaution. These precautions, however, may wholly fail if students carelessly or indiscriminately visit or patronize public or unsanitary eating houses. Too often those operating such places are ignorant of, or indifferent to, even the simplest sanitary requirements. As a safeguard against disease infection from this source, there is sufficient reason for the promulgation of the rule complained of.

But, even if it might be conceded that the rule was an unreasonable one, still appellant Gott is in no position to complain. He was not a student, nor is it shown that he had any children as students in the college. The rule was directed to and intended to control only the student body. For the purposes of this case the school, its officers and students, are a legal entity,—as much so as any family, and, like a father may direct his children, those in charge of boarding schools are well within their rights and powers when they direct their students what to eat and where they may get it, where they may go, and what forms of amusement are forbidden. A case very similar and often quoted is that of *People ex rel. Pratt v. Wheaton College*, 40 Ill. 186. It illustrates the principles here announced so well that we quote with approval the following from it: "Wheaton College is an incorporated institution, resting upon private

endowments, and deriving no aid whatever from the state or from taxation. Its charter gives to the trustees and faculty the power 'to adopt and enforce such rules as may be deemed expedient for the government of the institution,'—a power which they would have possessed without such express grant, because incident to the very object of their incorporation, and indispensable to the successful management of the college. Among the rules they have deemed it expedient to adopt is one forbidding students to become members of secret societies. We perceive nothing unreasonable in the rule itself, since all persons familiar with college life know that the tendency of secret societies is to withdraw students from the control of the faculty and impair to some extent the discipline of the institution. Such may not always be their effect, but such is their general tendency. But, whether the rule be judicious or not, it violates neither good morals nor the law of the land, and is therefore clearly within the power of the college authorities to make and enforce. A discretionary power has been given them to regulate the discipline of their college in such manner as they deem proper; and, so long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father in his family. It is urged that the Good Templars are a society established for the promotion of temperance, and incorporated by the legislature, and that any citizen has a right to join it. We do not doubt the beneficent objects of the society, and we admit that any citizen has the right to join it if the society consents. But this right is not of so high and solemn a character that it cannot be surrendered, and the son of the relator did voluntarily surrender it when he became a student of Wheaton College, for he knew, or must be taken to have known, that by the rules of the institution which he was voluntarily entering he would be precluded from joining any secret society. When it is said that a person has a legal right to do certain things, all that the phrase means is that the law does not forbid these things to be done. It does not mean that the law guarantees the right to do them at all possible times and under all possible circumstances. A person in his capacity as a citizen may have the right to do many things which a student of Wheaton College cannot do without incurring the penalty of college laws. A person as a citizen has a legal right to marry, or to walk the streets at midnight, or to board at a public hotel, and yet it would be absurd to say that a college cannot forbid its students to do any of these things. So a

citizen, as such, can attend church on Sunday or not, as he may think proper, but it could hardly be contended that a college would not have the right to make attendance upon religious services a condition of remaining within its walls. The son of the relator has an undoubted legal right to join either Wheaton College or the Good Templars, and they have both an undoubted right to expel him if he refuses to abide by such regulations as they establish, not inconsistent with law or good morals."

There is no similarity between this and the case of *Standard Oil Co. v. Doyle*, 118 Ky. 662, 111 Am. St. Rep. 331, 82 S. W. 271, and many others of like import relied upon by appellant. These all relate to unlawful combinations and conspiracies between trading corporations or between individuals in trade, together with the use of unlawful and fraudulent measures in restraint of trade and to throttle competition. Of course, trading corporations have no such wide latitude or discretion in the scope and character of rules and by-laws they may adopt or enforce in conducting their business. They are limited and controlled both by statute and common law. But the mere fact that one's trade has been restrained, as Gott's admittedly has, gives him no ground to invoke the law, unless the means used to restrain it have been malicious and wrongful. And, as above indicated, the proof shows neither malice nor wrong on the part of appellee.

Considering the whole case, the judgment of the lower court is affirmed.

MICHIGAN SUPREME COURT.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY et al.

v.

BOARD OF TRUSTEES OF THE MICHIGAN ASYLUM FOR THE INSANE.

(— Mich. —, 144 N. W. 538.)

Evidence — records of public insane asylum — privilege.

The records of a public insane asylum containing information concerning the

Note. — Privilege of records of insane asylum.

As to whether hospital records are within the privilege extended to communications between physician and patient, see note to *Smart v. Kansas City*, 14 L.R.A. (N.S.) 565.

Concerning privilege as to information acquired by autopsy, see note to *Thomas v. Byron Twp.* 38 L.R.A. (N.S.) 1186.

The question whether the records of an insane hospital constitute privileged communications between physician and patient

appears to be one upon which there is little authority.

PETITION for a writ of mandamus to compel respondents to permit relators to inspect the records of the Michigan Asylum for the Insane for the purpose of determining the mental and physical condition of Vernon J. Willey, whose administratrix and next of kin intervene in opposition to the granting of the writ. Denied.

The facts are stated in the opinion.

Mr. H. E. Spalding, for relators:

The records of the state asylum at Kalamazoo are made and kept by officers and employees of the state in the discharge of official duties. As public records they are open to the inspection of the public under the terms of act No. 76 of 1903.

Kalamazoo Gazette Co. v. Kalamazoo County Clerk, 148 Mich. 460, 111 N. W. 1070; *Burton v. Tuite*, 78 Mich. 363, 7 L.R.A. 73, 44 N. W. 282; *Day v. Button*, 96 Mich. 600, 56 N. W. 3; *People v. Kemp*, 76 Mich. 410, 43 N. W. 439; *Hempton v. State*, 111 Wis. 127, 86 N. W. 596, 12 Am. Crim. Rep. 657; *Groesbeck v. Seeley*, 13 Mich. 329; *Townsend v. Pepperell*, 99 Mass. 40; *United States v. Cross*, 9 Mackey, 365; *Evanston v. Gunn*, 99 U. S. 660, 25 L. ed. 306; *De Armond v. Neasmith*, 32 Mich. 231; *Hart v. Walker*, 100 Mich. 406, 50 N. W. 174; *Hustin v. Council Bluffs*, 101 Iowa, 33, 36 L.R.A. 211, 69 N. W. 1130, 1 Am. Neg. Rep. 227; *Kyberg v. Perkins*, 6 Cal. 674.

Aside from the statute, the relators, as parties to the suit in the Wayne circuit court, have the right at common law to inspect the records for the purpose of obtaining information to enable them properly to prepare for the trial of such suit.

1 Greenl. Ev. § 475; 34 Cyc. 592; *Burton v. Tuite*, 78 Mich. 363, 7 L.R.A. 73, 44 N. W. 282; *State ex rel. Ferry v. Williams*, 41 N. J. L. 332, 32 Am. Rep. 219; *Re Caswell*, 18 R. I. 835, 27 L.R.A. 82, 49 Am. S. Rep.

communications between physician and patient appears to be one upon which there is little authority.

In a comparatively recent case, *Liske v. Liske*, 135 N. Y. Supp. 176, however, a view not altogether in accord with the result reached in *MASSACHUSETTS MUT. L. INS. CO. v. MICHIGAN ASYLUM*, was taken. In the case referred to the insanity law provided for the maintenance of state hospitals for the indigent insane, and for the care, treatment, and personal examination of the

314, 29 Atl. 259; *Brewer v. Watson*, 61 Ala. 310; *Excise Commission v. State*, — Ala. —, 80 So. 812; *Daly v. Dimock*, 55 Conn. 579, 12 Atl. 405; *State ex rel. Colscott v. King*, 154 Ind. 621, 57 N. E. 535; *Sloan Filter Co. v. El Paso Reduction Co.* 117 Fed. 504.

Mr. James H. McDonald also for relators.

Messrs. Grant Fellows, Attorney General, Thomas A. Lawler and L. W. Carr, Assistant Attorneys General, for respondent:

The records of the asylum were not open to inspection as public records.

Davis v. Supreme Ledge, K. H. 165 N. Y. 159, 58 N. E. 891; *Sovereign Camp*, W. W. v. Grandon, 64 Neb. 39, 89 N. W. 448; *Buffalo Loan, Trust & J. D. Co. v. Knights Templar & M. Mut. Aid Asso.* 126 N. Y. 450, 22 Am. St. Rep. 839, 27 N. E. 942.

Mr. Edwin H. Lyon, with Mr. Charles H. Chase, for interveners:

Plaintiff is not entitled to inspect and examine the records, because the resolution of the board shows "that the information contained in such records was obtained by physicians in their professional character, and was necessary to enable them to prescribe for said Vernon J. Willey.

Dick v. Supreme Body, I. C. 138 Mich. 372, 101 N. W. 564; *People v. Pratt*, 133 Mich. 125, 67 L.R.A. 923, 94 N. W. 752; *Thomas v. Byron Twp.* 168 Mich. 593, 38 L.R.A.(N.S.) 1186, 134 N. W. 1021, Ann. Cas. 1913C, 686; *Aetna L. Ins. Co. v. Deming*, 123 Ind. 384, 24 N. E. 86, 375; *Weitz v. Mound City R. Co.* 53 Mo. App. 39; *Beave v. St. Louis Transit Co.* 212 Mo. 331, 111 S. W. 52; 10 Enc. Ev. p. 103; *Kelly v. Levy*, 29 N. Y. S. R. 659, 8 N. Y. Supp. 849; *Lowenthal v. Leonard*, 20 App. Div. 330, 46 N. Y. Supp. 818; *Mott v. Consumers' Ice Co.* 52 How. Pr. 148; *Smart v.*

Kansas City, 208 Mo. 162, 14 L.R.A.(N.S.) 565, 123 Am. St. Rep. 415, 105 S. W. 709, 13 Ann. Cas. 932; *Elliott*, Ev. § 635; *Price v. Standard Life & Acci. Ins. Co.* 90 Minn. 264, 95 N. W. 1118.

Moore, J., delivered the opinion of the court:

This is a petition for a writ of mandamus to compel the board of trustees of the Michigan Asylum for the Insane, at Kalamazoo, to permit the relators to inspect the records of the asylum containing information concerning the mental and physical condition of one Vernon J. Willey, who was a patient in the asylum from July, 1910, until his death in December, 1912.

On August 6, 1910, relators began a suit in the circuit court for the county of Wayne, in chancery, against Vernon J. Willey and others, for the cancelation of certain policies of life insurance which had been issued by the insurance company, one of the relators, to Willey in April, 1910, and in which the other defendants and Willey's estate were named as beneficiaries. After the commencement of the suit, Willey died, and the suit is now pending against his administratrix and the other defendants.

It is the claim of the complainants in said suit that the issuance of the policies was induced by certain false and fraudulent representations by Willey in his application for insurance that he was in good physical condition, when he was in fact suffering from general paresis. In July, 1910, a few months after the issuance of the policies, Willey was admitted to the Michigan Asylum for the Insane, at Kalamazoo, and remained there until his death in December, 1912.

It is claimed that the information sought

condition of patients, and made it incumbent upon those in charge of asylums to "make or cause to be made entries from time to time of the mental state, bodily condition, and medical treatment of such patient during the time such patient remains under his care;" it also provided that on the hearing of writs of habeas corpus brought by insane persons, the medical history of the patient as it appeared in the case book should be given in evidence, and the superintendent or medical officer in charge of the institution should be sworn touching the patient's mental condition. It was held that the relation of physician and patient, as contemplated by § 834 of the Code, did not exist between an inmate of an insane asylum and the hospital physicians, and that the latter's testimony was admissible in an action to annul the inmate's marriage on the ground of insanity. The court said: "The public policy of the state demands the maintenance of such institutions and the care and treatment of the inmates, which necessarily involve their medical examination. I do not think that the relation arising by operation of law between a patient committed by legal process to a state institution for the insane and the official physicians in charge thereof is within the professional relation contemplated by § 834 of the Code of Civil Procedure, or that such section was designed to exclude the testimony of such official physicians, whose duty it is, under the police power of the state, to make physical examinations of irresponsible patients. The purpose of the protection being here absent, the legislative enactments as to the duties of medical officers in the state institutions for the insane, and as to the making of public records relative to their condition, indicate that the testimony objected to was properly admitted."

J. T. W.

is necessary to prepare for the trial of the above-mentioned lawsuit.

In the return of the respondents is the following:

"Respondent admits that relators made application to the board of trustees on the 18th day of July, 1913, for permission to inspect the records of said asylum showing the condition of said Vernon J. Willey for the purposes set forth, and admit that on the 5th day of August, 1913, the respondent board denied such request; that the following is the action taken by said respondent: 'The communication of Messrs. Walker and Spaulding, of Detroit, under date of August 18, 1913, asking that they be permitted to inspect the records of this institution in order that they, as attorneys for the Massachusetts Mutual Life Insurance Company, may secure information to be used in a suit now pending against the heirs of Vernon J. Willey to set aside certain life insurance contracts, and the board being advised that the information contained in such records was obtained by physicians in their professional character, and was necessary to enable them to prescribe for said Vernon J. Willey, and that said physicians have once declined to permit an examination of such records or disclose any information so obtained. Resolved, that we hereby approve of the action of the medical staff in refusing an inspection of such records, and declining to disclose any information secured in the manner aforesaid, and the aforesaid request is therefore declined, and the secretary instructed to forward a copy of this resolution to the attorneys for said insurance company.'

"VI. Answering paragraph 6, respondent states and shows unto the court that the said records contain information essential and necessary for the proper care and treatment of the insane patients confined in said asylum, and such records are for the purpose of determining the proper treatment to be given such patients as are inmates of said asylum, and that the records of said asylum with reference to the said Vernon J. Willey were made for the purposes herein enumerated. Said board respectfully denies that such records are public documents, and denies that the relators are entitled to inspect them, and respectfully submit that it is not the duty of the respondent to permit relators to inspect said records for the purposes set forth in said petition, or for any other purpose."

Counsel for relators contend for two propositions: (1) The records of the asylum are open to the inspection of the relators under the terms of act No. 76 of 1903. (2) The relators, as parties to the suit pending in the Wayne circuit court, have the right

at common law to inspect the records of the asylum for the purpose of obtaining information necessary to enable them to prepare for the trial of such suit.

We quote from the brief of counsel:

"The records of the state asylum at Kalamazoo are made and kept by officers and employees of the state in the discharge of official duties. As public records they are open to the inspection of the public under the terms of act No. 76 of 1903."

Act No. 76 provides as follows: "The officers having the custody of any county, city, township, town, village, school district, or other public records in this state, shall furnish proper and reasonable facilities for the inspection and examination of the records and files in their respective offices, and for making memoranda or transcripts therefrom, during the usual business hours, to all persons having occasion to make examination of them for any lawful purpose: Provided, that the custodian of said records and files may make such reasonable rules and regulations with reference to the inspection and examination of them as shall be necessary for the protection of said records and files, and to prevent the interference with the regular discharge of the duties of such officer; and provided further, that such officer shall prohibit the use of pen and ink in making copies or notes of records and files."

"Under this act, it was held, in *Kalamazoo Gazette Co. v. Kalamazoo County Clerk*, 148 Mich. 460, 111 N. W. 1070, that records of marriage licenses and returns showing marriages in the office of the county clerk are public records, and open to the inspection of those who have occasion to inspect them. A writ of mandamus was therefore held properly granted by the circuit court, requiring the respondent to permit relator's reporters to examine such records."

Many other cases are cited to this proposition.

The attorney general calls attention to the title of act 76, and suggests that the words "or other public records in the state" must be limited to the public records of those municipalities mentioned in the title, and that the statute does not apply to the records mentioned in relator's petition. The title of the act, so far as it is important, is as follows: "An Act to Facilitate the Inspection of the Records and Files in the Offices of the County, City, Township, Town, Village, and School Districts in This State, Amending § 1 of an Act to Facilitate the Inspection of the Records and Files in the Offices of County, City, and Township Officers in This State."

In reply to this contention, counsel for relators say (we again quote from the

brief): "In the view I take of the case it is unnecessary to consider the objection raised with reference to the title of the statute. The reply to the second and important proposition is this: The general and well-settled rule is that all public records are open to the inspection of all persons who show an interest therein, and irrespective of whether the records are such as could be introduced in evidence, and also of whether the matter recorded concerns a single person, a number, or the public at large."

This proposition is urged with much earnestness, and many authorities are cited in favor of it. Some of them are cases directly within the terms of the statute in relation to inspection. Others relate to the common-law right of inspection of public records. None of them are directly in point, though, if no question of privilege was involved in the case, it might be said they were persuasive.

Of the cases cited but three of them relate to the use of records for the purpose of showing physical or mental condition.

In the case of *Hempton v. State*, 111 Wis. 127, 86 N. W. 596, 12 Am. Crim. Rep. 657, Mr. Hempton was on trial for murder. His defense was that he was insane. He sought to have the records of the Insane Hospital introduced to establish that fact. He was not asserting a privilege; on the contrary, he was waiving it. Clearly not the instant case.

Another case cited is *Townsend v. Pepprell*, 99 Mass. 40. The patient was not a party to the litigation. It was a contest between the two towns as to where the woman patient was settled while she was insane. No question of privilege was presented.

The third case, and one upon which much stress is laid, is *Krapp v. Metropolitan L. Ins. Co.* 143 Mich. 369, 114 Am. St. Rep. 651, 106 N. W. 1107. In that case the proofs of death were permitted in evidence because there was a provision in the policy as follows: "The proofs of death shall be evidence of the facts therein stated in behalf of, but not against, the company." The certificate of death was allowed in evidence because it was made under a general law of the state, which in express terms provided: "All certificates of death, local registers, or county records authorized under this act, or certified copies thereof, shall be prima facie evidence in all courts, and for all purposes, of the facts recorded therein." See § 4617, Comp. Laws. Clearly that is not the instant case. We shall refer to this case later.

The statute (§ 10,181, Comp. Laws 1897, as amended by act 234, Session Laws of 51 L.R.A.(N.S.)

1909), so far as its provisions are material here, reads: "No person duly authorized to practise physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient, in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon."

This language has frequently been construed by this court. Many of the cases may be found in the note to the compiler's section. The construction has been invariably to preserve the privilege granted by the language of the statute. Similar statutes have also been before this court. See *Shinglemeyer v. Wright*, 124 Mich. 230, 50 L.R.A. 129, 82 N. W. 887; *People v. Pratt*, 133 Mich. 125, 67 L.R.A. 923, 94 N. W. 752; *Dick v. Supreme Body*, 1 C. 138 Mich. 372, 101 N. W. 564.

In *Thomas v. Byron Twp.* 168 Mich. 593, 38 L.R.A.(N.S.) 1186, 134 N. W. 1021, Ann. Cas. 1913C, 686, a physician was allowed to testify to the conditions he found as the result of an autopsy. In the opinion Justice McAlvay, speaking for the court, said: "In a case where a physician has been allowed to testify as to the communications privileged by the statute, Mr. Justice Cooley, speaking for the court, said: 'This evidence ought not to be passed over without remark. It is surprising evidence for many reasons. One of these is that the physician had no business to give it. (The statute is cited and quoted.) Every reputable physician must know of the existence of this statute, and he must know from its very terms, as well as from the obvious reasons underlying it, that it is not at his option to disclose professional secrets. A rule is prescribed which he is not to be "allowed" to violate; a privilege is guarded which does not belong to him, but to his patient, and which continues indefinitely, and can be waived by no one but the patient himself.' *Storrs v. Scougale*, 48 Mich. 387, 12 N. W. 502, and cases cited. . . . From the examination of this witness we conclude, by the questions asked, the answers to which were excluded as privileged, that he had, during the lifetime of the patient, made such an examination of her person, and received such information, as was necessary to diagnose her case and prescribe for her, and also that he had disclosed to defendant's attorney such facts. We must conclude from the record that, on account of this relation which existed between the witness and deceased, it was possible for him to proceed within a few hours after her death to hold an autopsy."

It will be noticed that the statute goes farther than to forbid giving testimony.

Its language is: "No person duly authorized to practise physic or surgery shall be allowed to disclose any information," etc.

In *Davis v. Supreme Lodge, K. H.* 165 N. Y. 159, 58 N. E. 891, in discussing the question of privilege, it was said: "The defendants's counsel then produced the records of the board of health of Brooklyn, which were identified by the clerk of the department, and offered to prove by the original certificate filed therein by the attending physician the cause of death of the deceased member's two aunts above referred to by the certificate of the respective attending physicians on the occasion of their last illness. The court inquired if the evidence was offered to prove the cause of death, and the defendant's counsel replied that it was. The court thereupon excluded the record, and the defendant's counsel excepted. Thus it will be seen that the question involved in this exception was the right of the defendant's counsel to prove by the certificate of the physician in attendance during the last illness of the deceased's aunts the cause of death or the particular disease from which they died. It was admitted that the physician had no knowledge on that subject except such as he acquired in his professional capacity and when the relation of physician and patient existed. That testimony of this character is expressly prohibited by § 834 of the Code cannot be denied. That the proof offered and excluded was inadmissible, I may assume to be a proposition too clear for argument, unless the prohibition contained in the section of the Code referred to has been repealed. This court has held that the statements of the attending physician, for the purpose of establishing the cause of death either of the insured himself or of his ancestors or their descendants, although not parties to nor beneficiaries under the contract, were not admissible. They are excluded, not only for the purpose of protecting parties from the disclosure of information imparted in the confidence that must necessarily exist between physician and patient, but on grounds of public policy as well. The disclosure by a physician, whether voluntary or involuntary, of the secrets acquired by him while attending upon a patient in his professional capacity, naturally shocks our sense of decency and propriety, and this is one reason why the law forbids it. The form in which the statements are sought to be introduced is of no consequence, whether as a witness on the stand or through the medium of an affidavit or certificate. All are equally under the ban of the statute. *Grattan v. Metropolitan L. Ins. Co.* 80 N. Y. 281, 36 Am. Rep. 617; *Renihan v. Dennin*, 103 51 L.R.A. (N.S.)

N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320; *Redmond v. Industrial Ben. Assn.* 150 N. Y. 167-172, 44 N. E. 769; *Westover v. Aetna L. Ins. Co.* 99 N. Y. 56, 52 Am. Rep. 1, 1 N. E. 104; *Nelson v. Oneida*, 156 N. Y. 219, 66 Am. St. Rep. 556, 50 N. E. 802; *Buffalo Loan, Trust & S. D. Co. v. Knights Templar & M. Mut. Aid Assn.* 12 N. Y. 450, 22 Am. St. Rep. 839, 27 N. E. 942. . . . But the contention of the learned counsel for the defendant is, as of course it must be, that the prohibition contained in § 834 of the Code, as construed by these adjudications, has been repealed, not by any amendment to the Code, or by any general law, but by an obscure provision of the charter of the city of New York. . . . It is by the use of this latter vague expression, found among numerous provisions in a local and special law enacted solely for the government of a city, that a general rule of evidence, which is part of the Code of Civil Procedure, and which has been in force in some form for more than half a century, has been repealed, if at all. This is really what the contention of the learned counsel for the defendant amounts to, and, unless it can be successfully maintained, it is clear that the evidence offered was properly excluded. It should be noted, also, that it was not offered to prove the fact of death, since there was no issue on that question, but solely to prove the cause of death, and that, too, not in any local matter over which the health department had jurisdiction, but in a controversy concerning the enforcement of a contract obligation between private parties in a court of general jurisdiction. This local statute, when reasonably and properly construed and understood, and limited to the purpose for which it was enacted, does not, in my opinion, abolish any part of the Code, or affect any general rule of evidence applicable throughout the state at the time of its enactment."

Counsel for relator says that in the *Krapp Case*, 143 Mich. 369, 114 Am. St. Rep. 651, 106 N. W. 1107, this court considered the above case, and expressly declined to follow it. If reference is made to the opinion in the *Krapp Case*, it will appear that the *Davis Case* was distinguished from the one then under consideration, for the reason that the record offered in evidence was not made under a general law of the state, but under the provisions of a city charter. It could well be said that it was not in point in the *Krapp Case*, for the reasons stated in the opinion; while it is quite as certain that it is in point in the case we are now considering, for the reason that the records which it is sought to reach here are not kept under any general law of the state, nor does any statute make them "prima facie

evidence in all courts, and for all purposes of the facts recorded 'herein.'

In *Sovereign Camp, W. W. v. Grandon*, 64 Neb. 39, 89 N. W. 448, where it was sought to use a record made under the provisions of an ordinance, the court said: "There is another reason which, in our opinion, makes it incompetent. If signed by a physician, it contains matter relating to his patient which the physician is not allowed to disclose as a witness upon the trial against the objection of his patient or those representing him. That a record of this character, reciting privileged communications, may be used in evidence against a party where the testimony of the physician making it could not be received is a proposition so inconsistent with reason and natural rules of justice that we cannot give our consent thereto. The court properly refused to allow the certificate in evidence." See also *Buffalo Loan, Trust & S. D. Co. v. Knights Templar & M. Mut. Aid Asso.* 126 N. Y. 450, 458, 22 Am. St. Rep. 839, 27 N. E. 942.

In this connection the language used in *Smart v. Kansas City*, 208 Mo. 162, 14 L.R.A.(N.S.) 565, 123 Am. St. Rep. 415, 105 S. W. 709, 13 Ann. Cas. 932, is germane. The records of a city hospital kept in accordance with the ordinances of the city were sought to be introduced in evidence in the trial court, upon the ground that they were public records, but were excluded. In affirming the case, the court said: "The defendant's next contention is that the court erred in excluding the evidence of Dr. Frederick. He was one of the attending physicians at the City Hospital, and was the keeper of and had charge of the records of the institution, which were required to be kept by the ordinances of the city. The defendant offered to prove by him the diagnosis of plaintiff's case, as shown by said official record, when she was in the hospital in the years 1895, 1896, and 1898,—the latter when her leg was amputated. The plaintiff objected to the evidence offered, because the entries made were privileged communications, first made to the attending physicians in order that they might correctly diagnose her case and properly treat her. The diagnosis of the case was made by an examination of the patient and by interrogating her regarding the complaint. This is necessary to be known by the physician in order that he may prescribe the proper treatment, and when he once acquires that information the law declares it to be confidential communications, and disqualifies the physician from divulging the same upon the witness stand. . . . This is undoubtedly the rule as announced by all the authorities; and, that being so, 81 L.R.A.(N.S.)

it seems that it must follow as a natural sequence that, when the physician subsequently copies that privileged communication upon the record of the hospital, it still remains privileged. If that is not true, then the law which prevents the hospital physician from testifying to such matters could be violated both in letter and spirit, and the statute nullified, by the physician copying into the record all the information acquired by him from his patient, and then offer or permit the record to be offered in evidence containing the diagnosis, and thereby accomplish, by indirection, that which is expressly prohibited in a direct manner."

In *Price v. Standard Life & Acci. Ins. Co.* 90 Minn. 264, 95 N. W. 118, it was said: "At the trial an objection was made and overruled to the introduction in evidence by the defendant of the register of patients kept at the Northwestern Hospital, with the entries therein relating to the insured. These entries were made by the superintendent in charge, who was a female physician, in the usual course of business at the hospital, and showed when the patient entered, when he departed therefrom, and the nature of the disease from which he was said to be suffering. This superintendent produced the register, and testified that the entries concerning the insured were made after Dr. Kimball, the physician in charge, had observed the case long enough and knew sufficiently about the patient to state the kind of disease, and were based wholly upon information received by her from the doctor. The witness had no personal knowledge of the patient, and had no recollection of the case, apart from the record. Therefore the entries amounted to nothing more or less than what the superintendent wrote in the register what the attending physician told or reported to her concerning Price's illness. To permit these entries to be introduced in evidence was to disregard in a very noticeable manner the rule forbidding the introduction of hearsay testimony, as well as the spirit of the statute which prohibits the examination of a physician as to certain matters without the consent of his patient (Gen. Stat. 1894, § 5662), although this last objection does not appear to have been made at the trial. The information communicated by Dr. Kimball to the superintendent of the hospital was acquired by the former while attending the patient, and was necessary to enable him to prescribe or act for him. Dr. Kimball would not have been allowed to make any such disclosure, and the statutory restriction upon him could not be evaded by introducing in evidence testimony of a third party as to what

the doctor said about the case. But the entries did not even rise to the dignity of a repetition of what the doctor said to a third party, for the superintendent remembered nothing, except that she made the entries. This testimony should have been excluded."

We are constrained to hold the action of the trustees is justified.

The writ is denied, but without costs.

MICHIGAN SUPREME COURT.

AMEL STOLL, by Next Friend,
v.

ARLAND HAWKS, Plff. in Err.

(— Mich. —, 146 N. W. 229.)

Infant — time for rescinding contract for fraud.

An infant need not wait until arriving

at majority before rescinding a purchase of personal property for fraud of the seller.

(March 27, 1914.)

ERROR to the Circuit Court for St. Joseph County to review a judgment in plaintiff's favor in an action brought to recover the purchase price of a horse sold by defendant to plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. Alfred S. Frost and E. Frost, for plaintiff in error:

An infant has no authority under the law of Michigan to affirm or rescind a voidable contract while the infancy continues.

Armitage v. Widoe, 36 Mich. 124; Dunton v. Brown, 31 Mich. 182; Lansing v. Michigan C. R. Co. 126 Mich. 666, 86 Am. St. Rep. 567, 86 N. W. 147; Minock v. Shortridge, 21 Mich. 304.

Herman Stoll could not act as agent for his son, for he was an infant, and could not

Note. — Right of infant to disaffirm contract or conveyance before majority.

- I. Introduction, 28.
- II. Contracts relating to person or personal property of infant, 28.
- III. Contracts relating to real property of infant.
 - a. Executory contracts, 31.
 - b. Executed contracts.
 1. Deeds, 31.
 2. Leases, 32.
 3. Mortgages, 32.

I. Introduction.

As to the right of an infant to rescind sale of corporate stock, generally, see note to Wuller v. Chuse Grocery Co. 28 L.R.A. (N.S.) 128.

"The deed, mortgage, etc., of an infant being voidable only, and not void, holds good until some act has been done by the infant to avoid it." 22 Cyc. 554. The question under annotation is whether the contract or conveyance can be avoided during infancy.

This note, being limited to a discussion of the time of disaffirmance, is not concerned with the general question as to what contracts may be disaffirmed. Therefore, general statements concerning the right of disaffirmance at a particular time are intended to be construed merely as rules relating to the time of disaffirmance of such contracts as may be disaffirmed.

Cases recognizing the right of disaffirmance during minority, but not raising that point specifically, are not included in this note.

It is reasonable that the lack of discretion which renders most of an infant's contracts voidable will also prevent the disaffirmance of such contracts before the discretion of majority is attained. This gen-51 L.R.A. (N.S.)

eral rule has, of course, always been subject to the exception that an infant must be permitted to disaffirm his contracts before majority where the postponement of disaffirmance might result in irreparable loss to him. And, as an infant is always liable to sustain such loss where he has parted, or is about to part, with anything except real property, the rule has come to be stated that contracts relating to personalty may be disaffirmed during minority, but that contracts relating to realty may not be disaffirmed until majority.

This statement of the rule, however, is somewhat inexact and indefinite. The reason for permission to disaffirm at all during infancy being, as stated above, the prevention of loss to the infant, the law is always concerned with the consideration moving from him, and not that moving from the other party. Hence, it should not be said that contracts relating to personalty may be disaffirmed, and that contracts relating to real property may not be disaffirmed, during minority, but rather that contracts relating to the personalty of the infant may be disaffirmed, and that contracts relating to the realty of the infant may not be disaffirmed. But even such statement is open to the objection of not making a possible distinction between executory and executed conveyances of land.

II. Contracts relating to person or personal property of infant.

Many cases recognize the principle that an infant may repudiate a contract relating to his personalty during minority. Shipman v. Horton, 17 Conn. 481 (sale of goods); Carpenter v. Carpenter, 45 Ind. 142 (exchange of gelding for stallion); Indianapolis Chair Mfg. Co. v. Wilcox, 59 Ind. 429 (purchase of shares of stock); Rice v. Boyer, 108 Ind. 472, 58 Am. Rep.

legally appoint an agent or attorney to act for him.

Armitage v. Widoe, 36 Mich. 124; *Mecham, Agencies*, § 51; *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Lawrence v. McArter*, 10 Ohio, 37; *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756; *Cole v. Penoyer*, 14 Ill. 158; *Fonda v. Van Horn*, 15 Wend. 631, 30 Am. Dec. 77.

Where there is no responsible principal to whom resort may be had, the law presumes that the person contracting does so upon his own personal responsibility, and intends to bind himself; for in no other way could the contract have any validity.

1 Am. & Eng. Enc. Law, 2d ed. 1122.

Messrs. D. L. Akey, B. E. Andrews, and E. H. Andrews, for defendant in error:

An infant stands on the same footing as an adult in respect to his rights to reclaim money on failure of consideration, or be-

cause obtained by fraud, or to rescind contracts for good reasons.

1 *Parsons, Contr.* 5th ed. pp. 294, 322; *Stafford v. Roof*, 9 Cow. 626; *Boal v. Mix*, 17 Wend. 120, 31 Am. Dec. 285; *Matthewson v. Johnson, Hoffm.* Ch. 560; *Shipman v. Horton*, 17 Conn. 481; *Cummings v. Powell*, 8 Tex. 80.

Where personal property or executory contracts are involved the infant may avoid at any time. This is to enable him to recover personal property before it is lost, or to avoid immediate consequences of his contracts, while land may be recovered at any time.

16 Am. & Eng. Enc. Law, 2d ed. 298,

Moore, J., delivered the opinion of the court:

The plaintiff is an infant. It is his claim that he purchased of defendant, for \$180, a horse, which was warranted to be sound and all right, when, in fact, it was

53. 9 N. E. 420 (note given as purchase price of buggy and harness); *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12 (contract of partnership); *Bailey v. Barnberger*, 11 B. Mon. 113 (sale of land warrant); *Adams v. Beall*, 67 Md. 53, 1 Am. St. Rep. 379, 8 Atl. 664 (contract of partnership); *Cogley v. Cushman*, 16 Minn. 397, Gil. 354 (purchase-money mortgage on horses); *Betts v. Carroll*, 6 Mo. App. 518 (purchase-money mortgage on interest in printing office); *Star v. Watkins*, 78 Neb. 610, 111 N. W. 363 (note given as purchase price of horse); *Heath v. West*, 26 N. H. 191 (purchase of horse, and mortgage for purchase price); *Chapin v. Shafer*, 49 N. Y. 407 (mortgage of horse); *Stern v. Meikleham*, 56 Hun, 475, 10 N. Y. Supp. 216 (purchase of headgear); *Petrie v. Williams*, 68 Hun, 539, 23 N. Y. Supp. 237 (contract for services of attorney); *Pippen v. Mutual Ben. L. Ins. Co.* 130 N. C. 23, 57 L.R.A. 505, 40 S. E. 822 (policy of life insurance); *Mathereson v. Davis*, 2 Coldw. 443 (*dictum*); *Scott v. Buchanan*, 11 Humph. 468 (*dictum*); *Gage v. Mencer*, — Tex. Civ. App. —, 144 S. W. 717 (purchase of shares of stock); *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194 (exchange of harness and \$5 for mare); *Covault v. Nevitt*, — Wis. —, 146 N. W. 1115 (employment of janitor); *Re Hüntenberg*, 153 Fed. 768 (exchange of claims for wages and money loaned for grocery store); *Newry & E. R. Co. v. Combe*, 3 Exch. 565, 5 Eng. Ry. & C. Cas. 633, 18 L. J. Exch. N. S. 325 (purchase of shares of stock).

And, without specifying the limitation of the rule to personal property, the syllabus in *Bell v. Swainsboro Fertilizer Co.* 12 Ga. App. 81, 76 S. E. 756, says that a contract made by an infant may be disaffirmed during minority.

The infant payee of a note may disaffirm his contract of assignment before attain-

ing majority. *Briggs v. McCabe*, 27 Ind. 327, 89 Am. Dec. 503.

And an infant who sells a judgment to his attorney may disaffirm his contract during infancy, and recover the amount collected by the attorney on the judgment. *Vance v. Calhoun*, 77 Ark. 35, 113 Am. St. Rep. 111, 90 S. W. 619.

Under a statute empowering a minor to disaffirm certain contracts "either before his majority or within a reasonable time afterwards," a disaffirmance of a contract for legal services may be made during minority. *Spencer v. Collins*, 156 Cal. 298, 104 Pac. 320, 20 Ann. Cas. 49.

In *Farr v. Sumner*, 12 Vt. 28, 36 Am. Dec. 327, it is said, *obiter*, concerning a minor that "in general, he cannot while an infant, unless in case of evident necessity, disaffirm a contract made by him; as the same want of discretion which prevents him from making a binding contract would prevent him from avoiding one which might be beneficial to him."

This *dictum* is, however, designated as unsound in *Hoyt v. Wilkinson*, 57 Vt. 404, where it is held that a note given in purchase of a horse by an infant may be avoided during minority.

In *Murphy v. Johnson*, 45 Iowa, 57, where an infant was seeking to disaffirm a contract of employment, it is held that neither a statute holding a minor bound by his contracts "unless he disaffirms them within a reasonable time after he attains his majority" nor the common law is authority for the proposition that a minor can disaffirm his contracts during infancy.

This case, however, is overruled on this point by *Childs v. Dobbins*, 55 Iowa, 205, 7 N. W. 496, in which an infant is permitted to take advantage of his disaffirmance during infancy of a purchase of shrubbery, the language of the court being that "contracts which relate only to the person or

blind. After he found out the situation, an effort to compromise having failed, he returned the horse to the defendant, and demanded a return of his money. The defendant claims he never represented the horse to be sound, and that he did not sell to the plaintiff, but to his father.

The testimony was in sharp conflict. Nearly all the questions involved are questions of fact, which were properly submitted to a jury, which found against the contention of defendant.

There is a question of law involved. It is stated by counsel as follows: "If this contract had been made by the infant with the defendant, as the infant claims in his testimony, it would be a voidable contract only, and could be rescinded by the infant after he arrived at the age of twenty-one years, and not before; for an infant has no authority under the law of Michigan to affirm or rescind a voidable contract while the infancy continues. *Armitage v. Widoe*, 36 Mich. 124, 129; *Dunton v. Brown*, 31 Mich. 182; *Lansing v. Michigan C. R. Co.* 126 Mich. 666, 86 Am. St. Rep. 567, 86 N. W. 147; *Minock v. Shortridge*, 21 Mich. 304."

We think the principle of law that is at-

tempted to be here stated is not applicable to the instant case. The plaintiff is seeking to rescind, not because he is an infant, but because a fraud has been perpetrated upon him.

1 Parsons, Contracts, 9th ed. 368, states the rule to be: "An infant stands on the same footing as an adult in respect to his rights to reclaim money on a failure of consideration, or because obtained by fraud, or to rescind contracts for good cause."

16 Am. & Eng. Enc. Law, 2d ed. 298, reads: "But in other transactions, especially where personal property or executory contracts are involved, the infant may avoid at any time. This distinction is for the infant's benefit to enable him to recover personal property before it is lost, or to avoid immediate consequences of his contracts, while land may be recovered at any time."

If the rule was otherwise, it would be pretty safe to perpetrate fraud upon infants in relation to personal property; for, before there could be a disaffirmance after the infant had reached his majority, the fruits of the fraud would be beyond his reach.

Judgment is affirmed.

to personal property may be avoided at any time."

Certain *dictum* in *Boody v. McKenney*, 23 Me. 517, is to the effect that a sale of personal property by a minor cannot be disaffirmed during minority.

The court, in *Towle v. Dresser*, 73 Me. 252, in holding to the contrary, says: "The learned judge who uttered the *dictum* in *Boody v. McKenney*, 23 Me. 525, would never have recognized it as an authority or decision of the point. It was purely a *dictum*, put forth, apparently, on the strength of the case in 7 Cow. 179 [*Roof v. Stafford*] in a discussion of the decided cases for the purpose of seeing how far the remarks in them were capable of being harmonized."

An infant may disaffirm during minority an agreement to refrain from criminal prosecution. *Tucker v. Eastridge*, 51 Ind. App. 632, 100 N. E. 113.

An infant's contract for services may be avoided before majority. *Aborn v. Janis*, 62 Misc. 95, 113 N. Y. Supp. 309; *Whitmarsh v. Hall*, 3 Denio, 376.

Thus, where an infant who has shipped as mariner in a whale ship abandons the ship before the completion of the voyage, he thus legally disaffirms his contract during his minority, and may maintain an action of *quantum meruit* for his services. *Vent v. Osgood*, 19 Pick. 572.

And in *Dallas v. Hollingsworth*, 3 Ind. 537, an action by an infant for the value of services performed, it is held that he might avoid at any time the contract under which the work was performed and recover 51 L.R.A. (N.S.)

the value of his services, although the payment of wages was conditioned on his remaining in the service a specified time.

And an infant may disaffirm a contract of apprenticeship during his minority. *Harney v. Owen*, 4 Blackf. 337, 39 Am. Dec. 662.

In a number of cases where infants have been permitted to disaffirm their contracts for services, the specific point under discussion was not raised. Such cases are therefore not within the scope of this note.

In *Baker v. Kennett*, 54 Mo. 82, it is said: "In cases of sales of land the general doctrine seems now to be that the infant cannot conclusively avoid the conveyance until he arrives at age." Then, without observing the distinction between the sale or conveyance and the purchase of land by an infant, the court proceeds on the theory that the infant purchaser of land cannot disaffirm his contract before majority. While this case is not expressly opposed to the rule permitting a disaffirmance of contracts relating to the personality of the infant, it has that effect. In such a case the infant has parted with personality which he may not be able to recover if he has to wait until majority before he can disaffirm. Where, however, the infant has parted with land, as in case of a sale or conveyance by him, he is in no danger of losing his property by his inability to disaffirm before attaining majority.

On the other hand, in *Ex parte McFerren*, — Ala. —, 47 L.R.A. (N.S.) 543, 63 So. 159, holding that an infant lessee may disaffirm his lease, the language of the court

is so indefinite as to establish a doubt whether the case is put upon the ground of the personal consideration moving from the infant, or upon the ground that all contracts, regardless of the nature of the consideration, may be disaffirmed during minority.

And, in the case of contracts involving the personal property of an infant, there is no distinction between executory and executed contracts, as far as the right of disaffirmance during minority is concerned. *Riley v. Mallory*, 33 Conn. 201 (purchase of gun); *Gonackey v. General Acci. F. & Life Assur. Corp.* 6 Ga. App. 381, 65 S. E. 53 (settlement of rights under insurance policy); *Wuller v. Chuse Grocery Co.* 241 Ill. 398, 28 L.R.A.(N.S.) 128, 132 Am. St. Rep. 216, 89 N. E. 796, 16 Ann. Cas. 522, affirming 147 Ill. App. 224 (purchase of shares of stock); *Falconer v. May, S. & Co.* 165 Ill. App. 598 (purchase of household furniture); *Bailey v. Barnberger*, 11 B. Mon. 113 (sale of land warrant).

And it is said, *obiter*, in *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418, that any voidable executed contract relating to personality may be disaffirmed by an infant during minority.

And *dictum* in *Bool v. Mix*, 17 Wend. 120, 31 Am. Dec. 285, is to the effect that "it seems that a sale and manual delivery of chattels by an infant may be avoided while under age."

The reason for the rule is given in *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345, where it is said: "If the subject of the sale be personal property, and a delivery to, and possession by, the vendee, follows, and there are no legal means to regain the property till the minor arrives at full age, so as to decide whether he will ratify the contract or not, the property may all be wasted and gone beyond recovery, and, in many cases, for a very inadequate consideration. In such cases the principle of protection would be of little use, could it not be exercised before maturity. We lay down the rule, then, that a sale and delivery of personal property by a minor, for a good consideration, but made without fraud by him, may be rescinded by the minor before arriving at full age."

In the celebrated case of *Stafford v. Roof*, 9 Cow. 626, reversing 7 Cow. 179, in distinguishing between the rule in respect to contracts relating to personality and those relating to realty, the court says: "The true rule, then, appears to me to be this: that where the infant can enter, and hold the subject of the sale till his legal age, he shall be incapable of avoiding till that time; but where the possession is changed, and there is no legal means to regain and hold it in the meantime, the infant, or his guardian for him, has the right to exercise the power of rescission immediately. Now the common law gives no action or other means by which the mere possession of personal property can be reclaimed and held subject to the right of avoidance."

Michigan alone seems to be opposed to 51 L.R.A.(N.S.)

the general rule permitting contracts relating to the person or personality of infants to be disaffirmed during minority. However, as all the cases which have yet arisen in that jurisdiction have involved executed contracts, it is not improbable that the general rule will be applied to executory contracts.

In *Dunton v. Brown*, 31 Mich. 182, it is held that an executed contract of partnership is unavoidable by a minor during infancy.

So, a settlement of a claim for damages for personal injuries to an infant cannot be repudiated during minority. *Lansing v. Michigan C. R. Co.* 126 Mich. 663, 86 Am. St. Rep. 567, 86 N. W. 147.

And in *Armitage v. Widoe*, 36 Mich. 124, an action by an infant for the recovery of money paid on a contract of purchase of lands, it is held that an infant cannot disaffirm such a contract before coming of age.

III. *Contracts relating to real property of infant.*

a. *Executory contracts.*

While no cases have been discovered involving executory contracts relating to the real property of an infant, it is not improbable that there may be grounds for a distinction between them and executed contracts. A realization of this will, at least, result in a more careful and less general statement of the rule concerning the power of disaffirming contracts relating to real property.

b. *Executed contracts.*

1. *Deeds.*

As stated above, this note is concerned only with the nature of the property parted with by the infant. Cases of purchases of real property by an infant, where the consideration parted with by him is personality, are therefore considered *supra*, II.

See, in particular, *Baker v. Kennett*, 54 Mo. 82, *supra*, II.

The deed of an infant may not be disaffirmed during his minority. *Chapman v. Chapman*, 13 Ind. 396; *Welch v. Bunce*, 83 Ind. 382; *Shroyer v. Pittenger*, 31 Ind. App. 158, 67 N. E. 475 (*dictum*); *Irvine v. Irvine*, 5 Minn. 61, Gil. 44; *Shipley v. Bunn*, 125 Mo. 445, 28 S. W. 754; *Bool v. Mix*, 17 Wend. 120, 31 Am. Dec. 285; *Matthewson v. Johnson*, Hoffm. Ch. 560; *Wetmore v. Kissam*, 3 Bosw. 321 (*dictum*); *McCormic v. Leggett*, 53 N. C. (8 Jones, L.) 425; *Scott v. Buchanan*, 11 Humph. 468 (*dictum*); *Matherson v. Davis*, 2 Coldw. 443 (*dictum*); *Cummings v. Powell*, 8 Tex. 80; *Sims v. Everhardt*, 102 U. S. 300, 26 L. ed. 87 (*dictum*).

It is not improbable, however, that the infant may enter and take the profits during minority.

In *Bool v. Mix*, 17 Wend. 120, 31 Am. Dec. 285, it is said, *obiter*: "The deed of an infant cannot be avoided until he becomes

of age, although he may enter and take the profits in the meantime. . . . Some of the old books say that an infant may avoid his deed by entry before he comes of age; but that is not the doctrine of the present day. He may enter while within age and take the profits until the time arrives when he has a legal capacity to affirm or disaffirm the deed; but the deed is not rendered utterly void by the entry; it may still be confirmed after he arrives at full age."

Zouch ex dem. Abbott v. Parsons, 3 Burr. 1794, is to the same effect. It is said: "In the case of feoffments by an infant, he might enter during his minority, to revest his possessory right, for the sake of the profits; but still the feoffment was voidable only, and he might elect to confirm it when he attained his full age."

However, it is said in *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409, that the conveyance of an infant "can be revoked by entering upon the land and taking the profits while an infant." The court held that although disaffirmance by subsequent deed would have to be done after majority, equity would aid an infant in canceling her deed during minority.

Without deciding whether or not the deed of an infant can be disaffirmed during minority, it is held, in *Philips v. Green*, 3 A. K. Marsh, 7, 13 Am. Dec. 124, that no act of disaffirmance during minority is necessary to effect an avoidance of such deed.

Dictum in *Lancaster v. Lancaster*, 13 Lea, 126, suggests an opinion at variance with the established rule.

And, while it does not appear from the facts in the case that the infant attempted to avoid his deed during minority, it is said, in *Doe ex dem. Jackson v. Woodruffe*, 7 U. C. Q. B. 332, that a deed of bargain and sale is voidable either before or after the grantor comes of age.

See also *Ryan v. Morrison*, — Okla. —, 135 Pac. 1049, *infra*, III. b, 2.

2. Leases.

"The principle upon which it is held that an infant should not be absolutely bound by such a lease, executed during his infancy, but that it is voidable, against him, would also establish that he should not be bound by any act done by him during minority, either in confirmation or avoidance of that lease; but that the power of making his election when he attains full age, and of then avoiding or confirming the lease, as he may think fit, should be preserved to him during the entire of his minority, and that he should not be deprived of such power by an act done by him during that period." (*O'Brien, J., in Slaton v. Trimble*, 14 Ir. C. L. Rep. 342.)

An infant who leases his property cannot avoid his act during minority. *Hartshorn v. Earley*, 19 U. C. C. P. 139; *Lipsett v. Perdue*, 18 Ont. Rep. 575.

Thus, the life lease of an infant is not disaffirmed by a subsequent conveyance in 51 L.R.A. (N.S.)

fee during his minority. *Emmons v. Murray*, 16 N. H. 385.

But, under a statute providing that "the contract of a minor, if made while he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within one year's time afterwards," a minor may disaffirm before majority both a lease and conveyance of his lands. *Ryan v. Morrison*, — Okla. —, 135 Pac. 1049.

3. Mortgages.

In *Singer Mfg. Co. v. Lamb*, 81 Mo. 221, it was held that the mortgage of a minor cannot be disaffirmed by the execution of a deed conveying the same property during minority. In this case the infant, after attaining his majority, executed a quitclaim deed to one holding under a subsequent deed from the grantee in the warranty deed, but subsequently executed a deed to the mortgagee, affirming the mortgage. It was held in effect that the latter deed operated as an affirmation of the mortgage, the quitclaim not having the effect to prevent such affirmation.

Neither can the conveyance of an infant's land by her guardian during her minority amount to a disaffirmance of a prior mortgage executed by the infant. *Shreeves v. Caldwell*, 135 Mich. 323, 106 Am. St. Rep. 396, 97 N. W. 764, 3 Ann. Cas. 592.

The disaffirmance of a mortgage given by a minor cannot be made by him during infancy. *Watson v. Ruderman*, 79 Conn. 687, 66 Atl. 515. But the court held that such mortgage may not be made the subject of foreclosure until and unless its status shall have been first established as that of a conveyance not subject to avoidance at the will of the mortgagor. In denying the right of a court of equity to compel the present exercise by or for the infant defendant of his right of affirmation or disaffirmance, the court said: "It follows that, in the absence of other facts than that of an infant's participation in a contract or conveyance, there cannot exist a situation in which, through the operation of an estoppel, validity will be given to it, or through equitable intervention it will be set aside, and thus, by one means or the other, an effect be given to the transaction different from that which the general policy of the law has seen fit to attach to it. In other words, a court, whether of equity or of law, will not hold itself justified in depriving an infant, who was of the age of presumed natural capacity at the time of his participation in a property transaction, of the right of privilege which is deemed essential to his proper protection of affirming or disaffirming it upon his arrival at the age of legal capacity, unless there appears in the situation presented some fact in addition to such participation,—some fact which is recognized as furnishing the basis for equitable interposition generally, or as laying the foundation for an estoppel. The active fraud or false representation as to age by

the infant has been recognized as furnishing such a fact."

In *Gilchrist v. Ramsey*, 27 U. C. Q. B. 500, an action against an infant on a mortgage, it is said: "We cannot see on what principle an infant defendant may not defend an action for the purpose of raising the question of infancy, and thereby avoiding his deed. If, as Lord Mansfield says, the infant could enter during minority to vest his possessory right, for the sake of the profits, after having conveyed away his estate, and let the grantee into possession, we are unable to understand why the infant may not also defend his possession for the sake of the profits, never having given it up. This leaves it apparently, still in his power, on coming of age, to affirm his deed."

In holding that a minor might plead her infancy in defense to an action of foreclosure, the court, in *Schneider v. Staihr*, 20 Mo. 269, said: "The weight of authority seems to be that, in cases of sales of land, infants cannot conclusively avoid the conveyance until they are of age. . . . As in this instance, the effect of the omission of the wife to plead her infancy would be to subject her estate to be sold under execution, by which an innocent purchaser might be injured, and as this proceeding is in the nature of an action to subject her estate to the payment of a debt, from analogy to the course in a suit on a contract by which an infant is jointly bound with others, we see no impropriety in permitting her to set up her infancy, though under age, in avoidance of this claim against her."

E. L. D.

OKLAHOMA SUPREME COURT. (Division No. 2.)

J. W. RIPPY & SON, Plff. in Err.,
v.
ART WALL PAPER MILLS.

(— Okla. —, 136 Pac. 1080.)

Monopoly — purchase from single dealer.

1. An agreement of a retailer to buy a particular line of goods exclusively from a certain manufacturer thereof, for a limited period of time, and confined to a particular locality, in consideration of other covenants therein of mutual advantage to the parties, and when otherwise unobjectionable under the law, is not invalid because in restraint of trade.

Same — theoretical restraint of trade.
2. A contract between individuals, the main purpose and effect of which are to

Headnotes by BREWER, C.

Note. — As to the validity of agreement to patronize particular concern exclusively, see note to *Peerless Pattern Co. v. Gauntlett Dry Goods Co.* 42 L.R.A.(N.S.) 843. 51 L.R.A.(N.S.)

promote, advance, and increase the business of those making it, will not be held to be in restraint of trade and commerce merely because its operation might possibly, in some slight or theoretical way, incidentally and indirectly restrict such trade and commerce.

Evidence — burden of proof — fraud.

3. In a suit for a balance due for goods under the terms of a written contract, where the answer admits the execution of the contract and the receipt of the goods at the price claimed, and defends on the grounds that the contract is illegal and unenforceable, and was procured through fraud, the burden of proof is on the defendant.

Contract — written — negotiations.

4. All prior and contemporaneous oral negotiations are merged into a written contract finally entered into, and which fully covers the subject-matter of such negotiations.

(November 25, 1913.)

ERROR to the District Court for Oklahoma County to review a judgment in plaintiff's favor in an action brought to recover the purchase price of certain goods sold and delivered under the terms of a written contract executed by the parties. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. M. Fulton for plaintiff in error.

Mr. E. G. McAdams, for defendant in error:

The contract in question is not in restraint of trade, or in violation of public policy, for the reason that the life of the contract is reasonable, and it nowhere attempts to regulate or fix the price of the goods wherein the public is interested.

Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co. 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. Rep. 490; Trentman v. Wahrenburg, 30 Ind. App. 304, 65 N. E. 1057; Brown v. Rounsavell, 78 Ill. 589; Live Stock Asso. v. Levy, 22 Jones & S. 32; Diamond Match Co. v. Roeder, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; Olmstead v. Distilling & Cattle-Feeding Co. 77 Fed. 265; Arnold v. Kreutzer, 67 Iowa, 214, 25 N. W. 138; Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn. 230, 91 N. W. 892; Hopkins v. United States, 171 U. S. 578, 592, 43 L. ed. 290, 296, 19 Sup. Ct. Rep. 40; Anderson v. United States, 171 U. S. 604, 616, 43 L. ed. 300, 306, 19 Sup. Ct. Rep. 50; United States v. Joint Traffic Asso. 171 U. S. 505, 568, 43 L. ed. 259, 287, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 245, 44 L. ed. 136, 149, 20 Sup. Ct. Rep. 96; United States Chemical Co. v. Provident

Chemical Co. 64 Fed. 946; California Steam Nav. Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511; Smalley v. Greene, 52 Iowa, 241, 35 Am. Rep. 267, 3 N. W. 78; Schwalm v. Holmes, 49 Cal. 665; Re Greene, 52 Fed. 104; Re Grice, 79 Fed. 627; Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; Welch v. Phelps & B. Wind Mill Co. 89 Tex. 653, 36 S. W. 71; Com. v. Grinstead, 111 Ky. 203, 56 L.R.A. 709, 63 S. W. 427; Southern Fire Brick & Clay Co. v. Garden City Sand Co. 223 Ill. 616; Heimbuecher v. Goff, 119 Ill. App. 373; Norton v. W. H. Thomas & Sons Co. 99 Tex. 578, 91 S. W. 780; Angelica Jacket Co. v. Angelica, 121 Mo. App. 226, 98 S. W. 805; Fuller v. Hope, 163 Pa. 62, 29 Atl. 779; New York Bank Note Co. v. Kidder Press Mfg. Co. 192 Mass. 391, 78 N. E. 463; National Fireproofing Co. v. Mason Builders' Assn. 145 Fed. 260; American Brake Beam Co. v. Pungs, 73 C. C. A. 157, 141 Fed. 923; Ferris v. American Brewing Co. 155 Ind. 539, 52 L.R.A. 305, 58 N. E. 701; Weiboldt v. Standard Fashion Co. 80 Ill. App. 67; Cottingham v. Swan, 128 Wis. 321, 107 N. W. 336.

But, should the court hold the contract partially in restraint of trade, defendants would not be relieved of their obligation to pay the plaintiff for the goods purchased by them under the contract.

Central New York Teleph. & Teleg. Co. v. Averill, 199 N. Y. 128, 32 L.R.A.(N.S.) 494, 139 Am. St. Rep. 878, 92 N. E. 206.

Defendants having admitted signing the contract, the burden of proof rests upon them to show that it was not a sale, as well as the allegations of fraud and misrepresentations.

Central of Georgia R. Co. v. Goodwin, 1 Ann. Cas. 810, note; Jennings v. Broughton, 17 Beav. 234, 22 L. J. Ch. N. S. 585, 17 Jur. 905, 1 Week. Rep. 441; Holt v. Sims, 94 Minn. 157, 102 N. W. 386; Anderson v. McPike, 86 Mo. 293; McCready v. Phillips, 44 Neb. 790, 63 N. W. 7; Mulhall v. Mulhall, 3 Okla. 252, 41 Pac. 577; Gatlin v. Vaut, 6 Ind. Terr. 254, 91 S. W. 38; 20 Cyc. 108; Horn v. Gibson, 24 Okla. 481, 103 Pac. 563.

The terms of the contract are free from doubt and ambiguity, and cannot, at the instance of one of the parties, be altered or contradicted by parol evidence.

Garrison v. Kress, 19 Okla. 433, 91 Pac. 1130; McNinch v. Northwest Thresher Co. 51 L.R.A.(N.S.)

23 Okla. 386, 138 Am. St. Rep. 803, 100 Pac. 524.

Brewer, C., filed the following opinion:

The Art Wall Paper Mills, a corporation of Dallas, Texas, brought this suit in the district court against J. W. Ripy & Son, a copartnership, to recover the purchase price of certain goods, wares, and merchandise sold and delivered in pursuance to a certain written contract executed by the parties. We will hereafter refer to the parties as they were called in the trial court. The case was tried to a jury, and a verdict returned in favor of the plaintiffs. The defendants, plaintiffs in error here, bring up the case on case made, and in their brief seem to rely upon the following alleged errors: First, Overruling defendant's demurrer to the petition. Second, Placing the burden of proof upon the defendant. Third. The exclusion of evidence offered by defendant.

1. The defendants claim that plaintiff's petition is demurrable for the reason that the suit is based upon a certain written contract of trade agreement attached to and made a part of the petition, and which it is alleged shows upon its face that it is an agreement in restraint of trade and commerce, and is therefore void; and that, being void, the plaintiff cannot recover for the goods sold and delivered in pursuance of its terms. The portion of the agreement which it is claimed has the above effect is a provision inserted in it requiring the defendants to handle only the wall papers manufactured and kept for sale by plaintiff during the life of the contract, which was from April 5th to January 5th following. In other words, that the defendants agreed that for the limited period of time named in the contract they would buy all their wall papers from the plaintiff. We do not believe that this agreement has the effect contended for. It is not pointed out, and from a reading of the contract we do not believe it can be pointed out, wherein this contract has the effect of restraining trade, or competition in trade, so as to bring it within the denunciation of the law. The plaintiffs are wholesale dealers in wall paper, and had traveling salesmen in Oklahoma and Indian territory at the time this contract was made, in 1904. The defendants are retail dealers in Oklahoma City. In return for defendant's agreement that for a certain period of time they would buy their wall paper exclusively from plaintiff, and would keep in stock a complete line of the same, the reciprocal agreement was made by plaintiff that its traveling salesmen, in the two territories named, would send their "stock fill in orders" to be filled from defendant's stock, and for which

sales they received the profits. If plaintiff was going to give defendants the benefit of certain sales made by its traveling salesmen from samples of its line of papers in stock, it certainly was not unreasonable to require defendants to carry, for the time being, only its line of papers. It seems to us that the effect of this agreement, when all of its terms are considered, is to promote and foster the trade of both parties, rather than otherwise. The contract does not undertake to fix the price at which defendants might sell the goods. It does not restrict the plaintiff from selling its goods to others, nor does it restrict either party from selling goods to any other person or class of persons. The parties themselves are not competitors, nor does the contract affect the competitors of defendants, nor can we see wherein it could injuriously affect the public. We think these views find ample support in the authorities.

An agreement of a retailer to buy a particular line of goods exclusively from a certain manufacturer thereof, for a limited period of time, and confined to a particular locality, in consideration of other covenants therein of mutual advantage to the parties, and when otherwise unobjectionable under the law, is not invalid because in restraint of trade. *Threlkeld v. Steward*, 24 Okla. 403, 138 Am. St. Rep. 888, 103 Pac. 630; *Trentman v. Wahrenburg*, 30 Ind. App. 304, 65 N. E. 1057; *Brown v. Rounsavell*, 78 Ill. 589; *Live Stock Asso. v. Levy*, 22 Jones & S. 32; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Olmstead v. Distilling & Cattle-Feeding Co. (C. C.)* 77 Fed. 265; *Arnold Bros. v. Kreutzer*, 67 Iowa, 214, 25 N. W. 138; *Kronschabel-Smith Co. v. Kronschnabel*, 87 Minn. 230, 91 N. W. 892.

A contract between individuals, the main purpose and effect of which are to promote, advance, and increase the business of those making it, will not be held to be in restraint of trade and commerce merely because its operations might possibly, in some slight or theoretical way, incidentally and indirectly restrict such trade and commerce. This view is fully sustained by the Supreme Court of the United States in various decisions. In *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50, it is said: "Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged 51 L.R.A. (N.S.)

such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. As is said in *Smith v. Alabama*, 124 U. S. 465, 473, 31 L. ed. 508, 510, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564: "There are many cases, however, where the acknowledged powers of a state may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations." The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and bona fide purpose of property and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce, and to be therefor void."

In *Whitwell v. Continental Tobacco Co.* 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454, Judge Sanborn, after discussing contracts and agreements which would constitute a combination or conspiracy in restraint of trade, adds: "If, on the other hand, it promotes, or but incidentally or indirectly restricts, competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation." And cites to support the statement the following authorities: *Hopkins v. United States*, 171 U. S. 578, 592, 43 L. ed. 290, 296, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 604, 618, 43 L. ed. 300, 306, 19 Sup. Ct. Rep. 50; *United States v. Joint Traffic Asso.* 171 U. S. 505, 568, 43 L. ed. 259, 287, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 245, 44 L. ed. 136, 149, 20 Sup. Ct. Rep. 96; *United States Chemical Co. v. Provident Chemical Co. (C. C.)* 64 Fed. 946; *California Steam Nav. Co. v. Wright*, 6 Cal. 258, 65 Am. Dec. 511; *Smalley v. Greene*, 52 Iowa, 241, 35 Am. Rep. 267, 3 N. W. 78; *Schwalm v. Holmes*,

49 Cal. 665; Re Greene (C. C.) 52 Fed. 104, 115-117; Re Grice (C. C.) 79 Fed. 627, 644; Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285, 286; People v. Gillson, 109 N. Y. 389, 398, 4 Am. St. Rep. 465, 17 N. E. 343; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 755, 28 L. ed. 585, 590, 4 Sup. Ct. Rep. 652; Welch v. Phelps & B. Wind Mill Co. 89 Tex. 653, 36 S. W. 71; Com. v. Grinstead, 111 Ky. 203, 56 L.R.A. 709, 63 S. W. 427; Walsh v. Dwight, 40 App. Div. 513, 58 N. Y. Supp. 91, 93; Brown v. Rounsavell, 78 Ill. 589; Noyes, Intercorporate Relations, § 388, p. 563."

2. The court correctly placed the burden of proof upon the defendants. The plaintiff sued for a balance due for goods sold under a contract, setting out the contract and a complete verified statement of account showing debits and credits and balance due. The defendant admitted the execution of the contract, the receipt of the goods, and also referred in the answer to the contract and invoices, but claimed an additional credit of a few dollars. The answer then averred matter tending to avoid liability for payment for the goods received, because of the alleged illegality of the contract and fraud in procuring the same. The plaintiff then in open court conceded the additional credits claimed, and remitted the same. This left the attack upon the validity of an admitted contract as the only issue. The defendants had the burden of proof upon them to sustain the issues thus tendered.

3. The evidence which it is contended the court erred in refusing to admit was intended to cover several different contentions. It is only referred to in the brief by general statements of counsel in the main, and is not brought into the brief. We have gone into the record, however, and made some search, and find that the real complaint is in the rejection of oral evidence clearly intended to either vary, modify, contradict, enlarge or destroy the plain and unambiguous meaning of the written contract. For instance, evidence was offered and refused that during the prior and contemporaneous negotiations terminating in the written contract, it was agreed that plaintiff would not sell its goods to any other dealer in Oklahoma and Indian territory; there was no hint of such an agreement in the writing which the parties formally executed, and it very fully defined the rights and duties of both parties. The expressed purpose of the evidence was to so ingraft by oral evidence onto a written contract, legal and valid and in no sense immoral or against public policy, a new and 51 L.R.A. (N.S.)

foreign meaning, so as to render the contract when so enlarged invalid as against public policy, to the end that the law would then strike down the contract when so enlarged, affording defendants a means of escape from liability. This evidence was properly rejected, and the same may be said of the rulings on the other rejected evidence.

The jury passed on the evidence, and its verdict was approved by the trial court. To our minds the verdict was right.

The cause should be affirmed.

Per Curiam:

Adopted in whole.

Petition for writ of error denied by the Supreme Court of the United States.

OREGON SUPREME COURT. (Department No. 2.)

ELMER PERRY ADAMS, Appt.,
v.

F. C. BROSIUS, Respnt.

(— Or. —, 139 Pac. 729.)

Damages — mental suffering — physician's breach of contract.

Mental suffering by a man because a physician whom he has employed to attend his sick wife delays upon the way, and thereby fails to minister to her suffering, is not an element of damages to be recovered for breach of the contract.

(March 17, 1914.)

APPEAL by plaintiff from an order of the Circuit Court for Hood River County sustaining a demurrer to the complaint in an action brought to recover damages for mental anguish claimed to have been suffered by plaintiff because of an alleged breach of contract for professional services to his wife. Affirmed.

The facts are stated in the opinion.

Messrs. John F. Logan, Isham N. Smith, and John H. Stevenson, for appellant:

A party whose contracted right has been invaded has a right to the recovery of damages for mental suffering caused by the breach of contract and wilful tort.

Note. — Mental suffering as element of damages in action against physician or surgeon.

For notes discussing mental suffering as an element of damages under other circumstances, particularly in telegraph cases, see various notes in 49 L.R.A. (N.S.) pages 206 to 343. For cases involving failure to secure services of a physician because of negligence

Lindh v. Great Northern R. Co. 99 Minn. 408, 7 L.R.A.(N.S.) 1018, 109 N. W. 23; Renihan v. Wright, 125 Ind. 536, 9 L.R.A. 514, 21 Am. St. Rep. 249, 25 N. E. 822; Head v. Georgia P. R. Co. 79 Ga. 358, 11 Am. St. Rep. 434, 7 S. E. 217, 8 Am. Neg. Cas. 135; Lyles v. Western U. Tele. Co. 77 S. C. 174, 12 L.R.A.(N.S.) 534, 57 S. E. 725; Thurman v. Western U. Tele. Co. 127 Ky. 137, 14 L.R.A.(N.S.) 499, 105 S. W. 155; Cashion v. Western U. Tele. Co. 124 N. C. 459, 45 L.R.A. 160, 32 S. E. 746; Bright v. Western U. Tele. Co. 132 N. C. 317, 43 S. E. 841; Western U. Tele. Co. v. Stephens, 2 Tex. Civ. App. 129, 21 S. W. 148; Gerock v. Western U. Tele. Co. 142 N. C. 22, 54 S. E. 782; Reese v. Western U. Tele. Co. 123 Ind. 294, 7 L.R.A. 583, 24 N. E. 163; Western U. Tele. Co. v. Stratemeier, 6 Ind. App. 125, 32 N. E. 871; Western U. Tele. Co. v. Robinson, 97 Tenn. 638, 34 L.R.A. 431, 37 S. W. 545; Gray v. Western U. Tele. Co. 108 Tenn. 39, 56 L.R.A. 301, 91 Am. St. Rep. 706, 64 S. W. 1063; Western U. Tele. Co. v. Griffin, 27 Tex. Civ. App. 306, 65 S. W. 661; Postal Tele. Cable Co. v. Terrell, 124 Ky. 822, 14 L.R.A.(N.S.) 927, 100 S. W. 292; Green v. Western U. Tele. Co. 136 N. C. 489, 67 L.R.A. 985, 103 Am. St. Rep. 955, 49 S. E. 165, 1 Ann. Cas. 349; Cowan v. Western U. Tele. Co. 122 Iowa, 379, 64 L.R.A. 545, 101 Am. St. Rep. 268, 98 N. W. 281; Stuart v. Western U. Tele.

Co. 66 Tex. 580, 59 Am. Rep. 623, 18 S. W. 351; Western U. Tele. Co. v. Henderson, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419; Mentzer v. Western U. Tele. Co. 93 Iowa, 752, 28 L.R.A. 72, 57 Am. St. Rep. 294, 62 N. W. 1; Lyne v. Western U. Tele. Co. 123 N. C. 129, 31 S. E. 350, 5 Am. Neg. Rep. 85; Western U. Tele. Co. v. Frith, 105 Tenn. 167, 58 S. W. 118; Barnes v. Western U. Tele. Co. 27 Nev. 438, 65 L.R.A. 666, 103 Am. St. Rep. 776, 76 Pac. 931, 1 Ann. Cas. 346; Louisville & N. R. Co. v. Hull, 113 Ky. 561, 57 L.R.A. 771, 68 S. W. 433; Cates v. Western U. Tele. Co. 151 N. C. 497, 24 L.R.A.(N.S.) 1286, 66 S. E. 592; Blecker v. Colorado & S. R. Co. 50 Colo. 140, 33 L.R.A.(N.S.) 386, 114 Pac. 481; Aaron v. Ward, 203 N. Y. 351, 38 L.R.A.(N.S.) 204, 96 N. E. 736; Stark v. Johnson, 43 Colo. 243, 16 L.R.A.(N.S.) 674, 127 Am. St. Rep. 114, 95 Pac. 930, 15 Ann. Cas. 868; Johnston v. Disbrow, 47 Mich. 59, 10 N. W. 79; Speck v. Gray, 14 Wash. 589, 45 Pac. 143.

Messrs. Charles J. Schnabel, J. B. Offner, and Newton C. Smith, for respondent:

A husband's mental suffering over his wife's condition is not the basis of recovery.

Hyatt v. Adams, 16 Mich. 180; Western U. Tele. Co. v. Cooper, 71 Tex. 507, 1 L.R.A. 728, 10 Am. St. Rep. 772, 9 S. W. 598; Pacific Exp. Co. v. Black, 8 Tex. Civ. App. 363, 27 S. W. 830; Gulf, C. &

in delivery of telegrams, see pages 236 and 336 of that volume.

In Smith v. Overby, 30 Ga. 241, the court recognizes that mental suffering of the mother is a proper element of compensatory damages for malpractice resulting in the death of a child at birth.

In Lathrope v. Flood, 6 Cal. Unrep. 637, 63 Pac. 1007, an action for abandonment of a patient during childbirth, the jury was allowed to consider mental suffering and humiliation in connection with the physical injury and suffering occasioned by such abandonment. The case was, however, reversed on rehearing because the instructions permitted the jury to consider the death of the child in assessing the damages, for which there was no warrant in the pleadings or evidence. 135 Cal. 458, 57 L.R.A. 215, 67 Pac. 683.

In Manser v. Collins, 69 Kan. 290, 76 Pac. 851, mental suffering is recognized as an element of damages only when it is connected with physical pain, the court saying: "Where mental suffering is an element of physical pain, or a consequence of it, damages for it may be recovered. Mental suffering, however, resulting from the injury, which arises in the mind, but is not a part of the pain naturally attendant upon, and connected with, the injury, cannot be regarded as an element of damage."

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In Dorris v. Warford, 124 Ky. 768, 9 L.R.A.(N.S.) 1090, 100 S. W. 312, 14 Ann. Cas. 602, the proper rule for determining the amount of recovery by a young woman for negligence in treating her broken arm, whereby it became crooked, is stated to be reasonable compensation for the bodily pain and mental suffering endured by her and the permanent impairment of her ability to earn money, due to defendant's negligence. The opinion does not make it clear whether mental suffering resulting from the fact that the arm was deformed could be considered, but apparently the court did not intend to include such mental suffering.

In Coombs v. King, 107 Me. 376, 78 Atl. 468, Ann. Cas. 1912C, 1121, 3 N. C. C. A. 167, plaintiff was permitted to recover for "mental chagrin, mortification, and discomfort at her disfigurement," resulting from a burn received while under X-ray treatment.

In Hyatt v. Adams, 16 Mich. 180, it is held that the right of action for mental suffering is restricted to the person who receives the injury, and a husband is not entitled to recover for his own mental suffering resulting from the suffering of his wife before her death, due to defendant's malpractice, nor for his mental suffering resulting from her death, which was due to such malpractice.

R. L. S.

S. F. R. Co. v. Box, 81 Tex. 671, 17 S. W. 375; Missouri P. R. Co. v. Martino, 2 Tex. Civ. App. 634, 18 S. W. 1066, 21 S. W. 781; Woodstock Iron Works v. Stockdale, 143 Ala. 550, 39 So. 335, 5 Ann. Cas. 578; 8 Am. & Eng. Enc. Law, 2d ed. 685.

Future mental anguish does not afford the basis of damages.

Carlson v. Oregon Short Line & U. N. R. Co. 21 Or. 450, 28 Pac. 497; Smith v. Reeder, 21 Or. 541, 15 L.R.A. 172, 28 Pac. 890; Perham v. Portland General Electric Co. 33 Or. 480, 40 L.R.A. 799, 72 Am. St. Rep. 730, 53 Pac. 14; Phillips v. Dickerson, 85 Ill. 11, 28 Am. Rep. 607; Hardy v. Milwaukee Street R. Co. 89 Wis. 183, 61 N. W. 771, 7 Am. Neg. Cas. 283; Illinois C. R. Co. v. Cole, 165 Ill. 334, 46 N. E. 275; Hall v. Cedar Rapids & M. City R. Co. 115 Iowa, 18, 87 N. W. 739; Texas Mexican R. Co. v. Douglass, 69 Tex. 694, 7 S. W. 77; 13 Cyc. 41, note 13.

Anguish over the condition of others is not the basis of recovery.

Maynard v. Oregon R. & Nav. Co. 46 Or. 15, 68 L.R.A. 477, 78 Pac. 983; Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303; Keyes v. Minneapolis & St. L. R. Co. 36 Minn. 290, 30 N. W. 888; 8 Am. & Eng. Enc. Law, 2d ed. p. 664; 13 Cyc. 41.

Damages for anguish unaccompanied by actual injury are not recoverable.

Wilcox v. Richmond & D. R. Co. 17 L.R.A. 804, 3 C. C. A. 73, 8 U. S. App. 118, 52 Fed. 264; Texarkana & Ft. S. R. Co. v. Anderson, 67 Ark. 123, 53 S. W. 673; North Chicago Street R. Co. v. Duebner, 85 Ill. App. 602; Cole v. Gray, 70 Kan. 705, 79 Pac. 654.

Mental anguish must be accompanied by an actual injury in order to maintain an action.

Indianapolis & St. L. R. Co. v. Stables, 62 Ill. 313; West Chicago Street R. Co. v. Liebig, 79 Ill. App. 567; Nelson v. Crawford, 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335; Deming v. Chicago, R. I. & P. R. Co. 80 Mo. App. 152; Mitchell v. Rochester R. Co. 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121; Gulf, C. & S. F. R. Co. v. Trott, 86 Tex. 412, 40 Am. St. Rep. 866, 25 S. W. 419.

Damages for mental anguish arising from a breach of contract or negligence are not recoverable where there has been no physical injury.

Shellabarger v. Morris, 115 Mo. App. 566, 91 S. W. 1005.

Mental anguish and distress alone cannot be made the basis for a recovery of damages for a breach of contract.

McBride v. Sunset Teleph. Co. 96 Fed. 81.

Any mental anguish which may not have 51 L.R.A. (N.S.)

been connected with the bodily injury, but caused by some conception arising from a different source, could not properly have been taken into consideration by the jury.

Chicago v. McLean, 133 Ill. 148, 8 L.R.A. 765, 24 N. E. 527; Braun v. Craven, 175 Ill. 401, 42 L.R.A. 199, 51 N. E. 657, 5 Am. Neg. Rep. 15.

Mental anguish is not a recoverable element of actual damage growing out of a mere breach of contract.

Birmingham Waterworks Co. v. Vinter, 164 Ala. 490, 51 So. 356.

Mental anguish alone, not arising from some physical injury or pecuniary loss caused by the negligent or wrongful act of another, is not a basis for an action for damages, in the absence of a statute authorizing such a recovery.

Kyle v. Chicago, R. I. & P. R. Co. 105 C. C. A. 151, 182 Fed. 613.

As a general rule, the right to recover for mental sufferings resulting from bodily injuries is restricted to the person who has suffered the bodily hurt.

Western U. Teleg. Co. v. Strate-meier, 6 Ind. App. 125, 32 N. E. 871; Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72; Black v. Carrollton R. Co. 10 La. Ann. 33, 63 Am. Dec. 586; Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303; Whitney v. Hitchcock, 4 Denio, 461; Cowden v. Wright, 24 Wend. 429, 35 Am. Dec. 633; Pennsylvania R. Co. v. Kelly, 31 Pa. 372; Oakland R. Co. v. Fielding, 48 Pa. 320; Western U. Teleg. Co. v. Cooper, 71 Tex. 507, 1 L.R.A. 728, 10 Am. St. Rep. 772, 9 S. W. 598; Pullman Palace Car Co. v. Trimble, 8 Tex. Civ. App. 335, 28 S. W. 96.

McNary, J., delivered the opinion of the court:

This is an action to recover from defendant a judgment of \$50,000, for mental anguish claimed to have been suffered by plaintiff on account of an alleged breach of contract for professional services affecting the wife of plaintiff. As this appeal is from an order sustaining a demurrer to the complaint for insufficiency, we deem it politic to set out the complaint *in hæc verba*.

"At and during all the periods of time named herein, the defendant, F. C. Brosius, was then and now is a physician and surgeon authorized and licensed to practise his profession within the state of Oregon, and was and is now engaged in the practice of his profession, and held himself out to be competent and faithful in his treatment of physical and bodily ailments, and skilful in the administration of his profession and in waiting upon his patients. During all the times herein named and up to the death of Alida Lucinda

Adams, the said Alida Lucinda Adams was the wife of this plaintiff, Elmer Perry Adams, and that the plaintiff and his wife resided at Parkdale, Oregon. That the defendant was engaged in the practice of his profession at Hood River, Oregon, and in and throughout the adjacent vicinity and adjoining country, and that Parkdale, Oregon, was embraced within the territory in and through which the said defendant practised his profession, and the said Parkdale, Oregon, is distant from Hood River, Oregon, approximately 22 miles. About March 5, 1912, the above-named Alida Lucinda Adams met with a mishap or accident, in and by which a miscarriage was produced, and that at said time the said Alida Lucinda Adams was pregnant. Thereafter and on March 6, 1912, this plaintiff employed the defendant, F. C. Brosius, in his capacity as physician, to wait upon, attend, and care for his said wife, and on said day at about the hour of 4 o'clock P. M. the said defendant entered into and accepted the employment as physician aforesaid.

"By virtue of his employment it was necessary for said defendant to travel from Hood River, Oregon, to Parkdale, Oregon, and the said defendant entered upon the journey, traveled 16 miles by 8 o'clock P. M. of March 6, 1912, and thereupon failed, neglected, and refused further to pursue his journey on said day. At said time the said defendant was made acquainted with the condition of the said Alida Lucinda Adams, and of the necessity for prompt and immediate medical attention to be administered to her, and with such knowledge wilfully, negligently, and recklessly, in disregard of his duty as physician, failed, neglected, and refused further to pursue his journey on said night. That at the times the said defendant so failed, neglected, and refused to continue his journey to the home of this plaintiff, the said defendant was within one to two hours' travel thereof. That such failure, refusal, and neglect of the said defendant to so pursue his journey and discharge the contract with this plaintiff was without cause, reason, or provocation. After the defendant entered in the employ of the plaintiff, the plaintiff, relying thereon, failed to employ any other or further medical attendant, or provide any other or different medical assistance than that upon which this plaintiff relied should be furnished by the defendant, F. C. Brosius, until the period of time, hereafter stated, when the plaintiff was informed that the defendant refused further to pursue his journey and discharge his duty as physician. About 9 o'clock P. M. of March 6, 1912, this plaintiff was informed that the

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said defendant, F. C. Brosius, had discontinued his journey, and had refused further to pursue his journey that night, and thereupon this plaintiff endeavored to procure the attendance of another physician to wait upon his wife, and that, by reason of the lateness of the hour and the remoteness of the residence of this plaintiff, and the difficulty of telephonic or other communication at such late hour of night, that this plaintiff was unable to procure any other physician or any additional or other medical help or attendance until about the hour of 2 o'clock A. M. of March 7, 1912, at which time the plaintiff succeeded in procuring another and different medical attendant and physician, to wit, Dr. Kanaga, of Hood River, Oregon, who thereupon started from Hood River to Parkdale and arrived there at 6 o'clock A. M. of March 7, 1912. At the time of so procuring such other physician, the above-named Alida Lucinda Adams was then in a sinking condition, and, by reason of the extremely dangerous character of her affliction, medical attendance was then ineffectual, and the said Alida Lucinda Adams gradually sank to her death. In and by reason of the negligence, carelessness, and recklessness of the above-named defendant, F. C. Brosius, as above set forth, plaintiff has been caused to suffer, now suffers, and will hereafter suffer, grievous mental, physical, and nervous pain and anguish. The matters and things herein complained of were not occasioned through any fault or neglect on the part of this plaintiff, but have been caused solely through the recklessness, negligence, and carelessness of the said defendant. In and by the matters and things herein alleged and set forth, this plaintiff has been injured to his damage in the sum of \$50,000."

It is noticeable that the complaint is not based upon the claim that defendant's breach of contract was responsible for, or in any wise contributed to, the physical injury of plaintiff's wife; nor that the observance of the contract of employment on the part of defendant would have ameliorated the sufferings of the wife; nor have prolonged her life. Likewise, there is no charge made that defendant's presence at the bedside of plaintiff's wife would have prevented or even delayed her death.

The pleading proceeds upon the theory that defendant's nonobservance of the contract caused plaintiff to suffer grievous mental and physical pain and anguish.

The doctrine that mental suffering accompanying personal injury or physical pain is always the subject of compensation is so firmly implanted in the jurisprudence of the several states of the Union as to become a legal maxim. In most

cases, however, the mental anguish should be connected with the bodily injury, and be fairly and reasonably the natural consequence that flows from it, and damages for prospective mental anguish are not recoverable, as being too speculative. 13 Cyc. 41; Maynard v. Oregon R. & Nav. Co. 46 Or. 15, 68 L.R.A. 477, 78 Pac. 983.

With much conviction, counsel for plaintiff press upon our consideration the case of Larson v. Chase, 47 Minn. 310, 14 L.R.A. 85, 28 Am. St. Rep. 370, 50 N. W. 239, wherein that distinguished jurist Mr. Justice Mitchell said: "It is also elementary that, while the law as a general rule only gives compensation for actual injury, yet, whenever the breach of a contract or the invasion of a legal right is established, the law infers some damage, and, if no evidence is given of any particular amount of loss, it declares the right by awarding nominal damages. . . . Where the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act."

Giving way to the correctness of the doctrine, the naked fact remains that plaintiff's declaration does not contain matters coming within the sweep of this principle, for plaintiff's mental suffering was not the direct, proximate, and natural result of defendant's nonobservance of the contract. On the contrary, it was but a sympathetic reflection of his wife's anguish and distress, superinduced by his natural devotion and sympathy for her. The direct and proximate result of the breach of the contract was the suffering and mental anguish of the wife, and the physical injury which she may have sustained by reason of the omission of the contractual duties upon the part of defendant.

Distressing as the situation must have been to plaintiff, it is impossible to see upon what rule of law he can claim damages for injury to his feelings. His mental anguish could only be from alarm and sympathy for his wife's sufferings; she was the direct sufferer, which caused him anxiety and concern. We think the sympathetic mental sufferings of plaintiff on account of the suffering and pain of the wife, caused by defendant's failure to observe his professional contract, are too remote and consequential to be actionable. Indeed, it is the person who suffers the injuries proximately resulting from the wrong done, and such person alone, who is entitled to compensation, except in cases where death results and the cause of action is made to survive to relatives or personal representatives by virtue of the statute. Had death not claimed her for its victim, plaintiff's wife possibly could have maintained 51 L.R.A.(N.S.)

an action against defendant for the mental anguish and physical pain, if any, which she sustained as a result of the broken contract, but for plaintiff no action is maintainable for purely mental distress. Western U. Teleg. Co. v. Stratemeier, 6 Ind. App. 125, 32 N. E. 871; Long v. Morrison, 14 Ind. 595, 596, 77 Am. Dec. 72; Black v. Carrollton, 10 La. Ann. 33, 63 Am. Dec. 586; Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303; Whitney v. Hitchcock, 4 Denio, 461, 463; Cowden v. Wright, 24 Wend. 429, 430, 35 Am. Dec. 633; Pennsylvania R. Co. v. Kelly, 31 Pa. 372, 379; Oakland R. Co. v. Fielding, 48 Pa. 320, 327; Western U. Teleg. Co. v. Cooper, 71 Tex. 507, 512, 1 L.R.A. 728, 10 Am. St. Rep. 772, 9 S. W. 598; Pullman Palace Car Co. v. Trimble, 8 Tex. Civ. App. 335, 337, 28 S. W. 96.

Possessing these views, we are forced to affirm the judgment of the Circuit Court.

McBride, Ch. J., and Bean and Eakin, JJ., concur.

MINNESOTA SUPREME COURT.

VILLAGE OF MINNEOTA, Resp.,

v.

JACK MARTIN, Appt.

(124 Minn. 498, 145 N. W. 383.)

Indictment — pleading village ordinance.

1. In a criminal prosecution for violation of a village ordinance, the complaint is sufficient if it refers to the ordinance by number, chapter, or section, and it is not necessary to introduce the ordinance in evidence.

License — auctioneer — excess of fee.

2. It is not made to appear that a \$25 per day license fee for auctioneers, which villages are authorized to impose by chapter 138, Laws of 1905 (Gen. Stat. 1913, § 1269), is so large as to be beyond the scope of legislative discretion.

(February 6, 1914.)

Headnotes by HOLT, J.

Note. — Validity of license fee exacted of auctioneers as affected by amount.

Generally, as to limit of amount of license fees, see note to State ex rel. Toi v. French, 30 L.R.A. 415.

As to validity of license fee exacted of telegraph or telephone companies as affected by amount, see note to Troy v. Western U. Teleg. Co. 27 L.R.A.(N.S.) 627.

As to validity of license upon business of lending money as affected by excessive amount of fee, see note to Louisville v. Pooley, 25 L.R.A.(N.S.) 583.

As to validity of license tax on peddlers

A PPEAL by defendant from a judgment of the District Court for Lyon County convicting him of violating a village ordinance requiring a license fee of auctioneers. **Affirmed.**

The facts are stated in the opinion.

Messrs. J. E. Regan and Ivan Bowen, for appellant:

The ordinance is unconstitutional and unreasonable.

State ex rel. Cook v. Bates, 101 Minn. 301, 112 N. W. 67; State ex rel. Freeman v. Zimmerman, 86 Minn. 355, 58 L.R.A. 78, 91 Am. St. Rep. 351, 90 N. W. 783; Gray v. Building Trades Council, 91 Minn. 182, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172; Tiedeman, Mun. Corp. pp. 208-213; Cooley, Taxn. pp.

1125, 1140; Gray, Limitations of Taxing Power, p. 695; State v. Cassidy, 22 Minn. 313, 21 Am. Rep. 765; St. Paul v. Traeger, 25 Minn. 248, 33 Am. Rep. 462; State ex rel. Beek v. Wagener, 77 Minn. 494, 46 L.R.A. 442, 77 Am. St. Rep. 681, 80 N. W. 633, 778, 1134; Margolies v. Atlantic City, 67 N. J. L. 82, 50 Atl. 367; Rochester v. Upman, 19 Minn. 113, Gil. 78; Mankato v. Fowler, 32 Minn. 364, 20 N. W. 361; Duluth v. Krupp, 46 Minn. 435, 49 N. W. 235; State v. Hovorka, 100 Minn. 252, 8 L.R.A.(N.S.) 1272, 110 N. W. 870, 10 Ann. Cas. 398; St. Paul v. Dow, 37 Minn. 20, 5 Am. St. Rep. 811, 32 N. W. 860; Willis v. Standard Oil Co. 50 Minn. 297, 52 N. W. 652; State ex rel. Mudeking v. Parr, 109 Minn. 151, 134 Am. St. Rep. 759, 123 N. W. 406; 8 Cyc.

so high as to be prohibitory in effect, see note to People use of State Bd. of Health v. Wilson, 35 L.R.A.(N.S.) 1074.

"It is well settled that the amount of an occupation tax imposed in the exercise of the police power may include not only the cost of issuing a license, but also a reasonable compensation for the expense of supervision over the licensed occupation. But whenever it is manifest that the amount of such tax imposed in the exercise of the police power is substantially in excess of the reasonable expense of issuing a license and of regulating the occupation to which it pertains, or is virtually prohibitory, the act or ordinance imposing the tax is invalid." 25 Cyc. 611.

"The fact, however, that the city derives a revenue incidentally from the reasonable exercise of the police power in regulating and controlling the business [of auctioneers], is no serious objection to such an ordinance." And "what is a reasonable license fee must depend largely upon the sound discretion of the city council, having reference to all the circumstances and necessities of the case. The general rule is that a reasonable license fee should be intended to cover the expense of issuing it, the services of officers, and other expenses directly or indirectly imposed. . . . But the business of an auctioneer is a lawful and useful one, and there would seem to be no reasonable warrant, from its nature or the expenses that might be directly or indirectly incurred in regulating it, for exacting so large a sum as a license fee, the result of which, it appears, is not to regulate, but to suppress, such business." Mankato v. Fowler, 32 Minn. 364, 20 N. W. 361.

And accordingly, in this case, an ordinance exacting a license fee of \$300 as a condition of the issuance of the required license to an auctioneer was held void on the ground that the amount exacted was unauthorized as a tax, and was so unreasonable as a license fee as to render the ordinance invalid as a police regulation. *Ibid.*

As said in Margolies v. Atlantic City, 67 N. J. L. 82, 50 Atl. 367, "the power to li-

cense is a police power, and must be exercised by the imposition of a reasonable fee." And in this case it was held that a license fee of \$2,500 for stores selling goods at auction "is so large, and so out of proportion to any lawful purpose to which it could be applied in the use of the police power, that it must unhesitatingly be declared to be unreasonable and illegal;" and that a city ordinance, so far as it exacts such a fee, is illegal and void.

So, in Sipe v. Murphy, 49 Ohio St. 536, 17 L.R.A. 184, 31 N. E. 884, a city ordinance exacting from any person desiring to sell at auction any goods which have been imported into the city for the purpose of being thus sold, a license fee of \$25 for each day and part of day he desires so to sell such goods, was held to be unreasonable and invalid, for the reason (among others) that the effect thereof was largely to prohibit, under the name of a license, the sale at auction of goods brought into the city for that purpose, which enter into daily use and consumption, and which would not be excluded by any police regulation as being detrimental to public health, comfort, and convenience.

And a charge of \$25 per day for a license for the selling of any stock of goods or merchandise or part thereof at auction has been held to be unreasonable and oppressive, and not authorized by a statutory provision giving power to license for the purpose of regulating business. Stull v. DeMattos, 23 Wash. 71, 51 L.R.A. 892, 62 Pac. 451. The court said: "It may be true, as the respondents argue, that, under an authority to license for the purpose of regulation, the amount proper to be charged as a license fee must be left largely to the discretion of the municipal authorities, and that the fee exacted need not be confined to the mere expense incident to the issuance of the license, but may be made sufficiently large to cover all costs that will be incurred in the oversight of the regulated business by the police officers, and create a fund sufficient to prosecute violators of the regulations imposed, even though incidentally the revenues of the municipality may be

1039; *Wiggins v. Chicago*, 68 Ill. 377; *State ex rel. Mince v. Schoenig*, 72 Minn. 528, 75 N. W. 711; *State v. Canda Cattle Car Co.* 85 Minn. 459, 89 N. W. 66; *Mutual Ben. L. Ins. Co. v. Martin County*, 104 Minn. 179, 116 N. W. 572; *Des Moines v. Des Moines Waterworks Co.* 95 Iowa, 348, 64 N. W. 274; *Ottumwa v. Zekind*, 95 Iowa, 622, 29 L.R.A. 734, 58 Am. St. Rep. 447, 64 N. W. 646; 21 Am. & Eng. Enc. Law, 778, 789; *State v. Finch*, 78 Minn. 123, 46 L.R.A. 437, 80 N. W. 856; *Duluth v. Marsh*, 71

Minn. 248, 73 N. W. 962; *Sipe v. Murphy*, 49 Ohio St. 536, 17 L.R.A. 184, 31 N. E. 884; *Ex parte Hutchinson*, 137 Fed. 949; *Peoria v. Gugenheim*, 61 Ill. App. 374; *Brooks v. Mangan*, 86 Mich. 576, 24 Am. St. Rep. 137, 49 N. W. 633; *Caldwell v. Lincoln*, 19 Neb. 569, 27 N. W. 647; *Carrollton v. Bazzette*, 159 Ill. 284, 31 L.R.A. 522, 42 N. E. 837.

It is an encroachment by the legislature on the prerogatives of the judiciary.

Re Senate, 10 Minn. 78, Gil. 56; Meyer

increased thereby; and also that it is only when the ordinance is plainly unreasonable and prohibitive in its character that the courts may interfere and pronounce it invalid. But, conceding this, as well as all else that can justly be claimed for the power to regulate the business of selling goods at auction, we think the present ordinance cannot be sustained as a legitimate exercise of that power."

And in *Caldwell v. Lincoln*, 19 Neb. 569, 27 N. W. 647, involving an ordinance exacting a license fee of \$12 per day for not less than ten days, of any person desiring to conduct the business of selling at auction any bankrupt or other stock of goods, wares, or merchandise, the court said: "The business of an auctioneer is a lawful and useful one, and that of selling goods at auction is supposed to be; and an ordinance taxing the business must be so framed as to provide for all persons who desire to engage in the business, either from year to year or temporarily; but it must be in the nature of a tax, and not so oppressive as to prohibit, and must be reasonable, considering the nature of the business or occupation. The ordinance in this case is clearly in conflict with both of these principles, and is void."

But a license tax of \$5 per day, required by an ordinance of a city containing not more than 2,000 inhabitants, to be paid for a license for any sale at public auction, has been held not to be so large as to be unreasonable and oppressive. *Fretwell v. Troy*, 18 Kan. 271.

In this case, the court further said that the mere amount of the license charge, regarded as a municipal tax, did not prove its invalidity. "For, while it may not be true that a city having authority to collect revenue by license may impose any sum, however large, as license, and thus in effect destroy certain kinds of business, yet before, in such a case, an ordinance imposing a license is declared void on account of the amount thereof, it should appear that the necessities of the city do not require so large a revenue, or that there has been an unjustifiable attempt to discriminate against certain kinds of business by casting the whole burden of taxation upon them." *Ibid.*

And under statutory authority given to a city to license all and every kind of business for purposes of revenue, an ordinance providing for licensing auctioneers, and ex 51 L.R.A. (N.S.)

acting a license charge or tax of \$25 per day for selling any stock of goods or part thereof at auction, is a valid exercise of the taxing power, granted without limitation as to the amount of the tax to be imposed, and cannot be held invalid by reason merely of the excessive amount of the tax. *Stull v. DeMattos*, supra.

Here, again, the court said: "If, however, it be conceded that the courts have power to declare a municipal ordinance levying a license tax on business invalid on the ground that the tax imposed is so oppressive and unreasonable as to amount to confiscation, rather than taxation, they will not determine the question by a mere inspection of the amount of the tax imposed. All presumptions and intendments are in favor of the validity of the tax. It will be presumed, in the absence of a contrary showing, that the municipal authorities acted justly and honestly, and not in disregard of the rights of the citizens or property holders of the municipality; that a necessity for the revenue to be derived from the tax exists; that an equally high rate has been levied upon all business and on all property; and, however large the particular tax complained of may appear to be, it will be presumed to be in harmony with all other taxation, and not an unjust or unreasonable discrimination. In other words, the mere amount of the tax does not prove its invalidity. To determine the amount of revenue required by the needs of the municipality, when not limited by constitutional barriers, is within the sole discretion of the legislative authorities, and the courts have no warrant to interfere with that discretion."

In *Decorah v. Dunstan Bros.* 38 Iowa, 96, it was held that an ordinance passed under a general power to regulate and license the sale of property by auctioneers, which provided that the fee for a license for the sale of property by auctioneers "shall not exceed \$20 for the first day of such license, and \$20 per day for each subsequent day included in such license," was not invalid on the ground that it was not definite in the amount required to be paid for the license; nor was it otherwise objectionable, whether it was construed as fixing the fee at \$20, or as leaving it for the mayor to determine and fix a less sum where the amount to be sold or other cause should justify it.

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v. Berlandi, 39 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513; 1 Dill. Mun. Corp. 361; Meyers v. Chicago, R. I. & P. R. Co. 67 Iowa, 555, 42 Am. Rep. 50, 10 N. W. 896; Burlington v. Unterkircher, 99 Iowa, 401, 68 N. W. 798; Murphy v. Chicago, R. I. & P. R. Co. 247 Ill. 614, 93 N. E. 381; Twin City Separator Co. v. Chicago, M. & St. P. R. Co. 118 Minn. 491, 137 N. W. 193; State ex rel. Richey v. McGrath, 95 Mo. 193, 8 S. W. 425; Reiser v. William Tell Sav. Fund Asso. 39 Pa. 137; Titusville Iron Works v. Keystone Oil Co. 122 Pa. 627, 1 L.R.A. 361, 15 Atl. 917; Com. ex rel. Roney v. Warwick, 172 Pa. 140, 33 Atl. 373; People ex rel. Vanderveer v. Wilson, 52 Hun, 388, 5 N. Y. Supp. 280.

The village authority to license is superseded by that given county boards.

License Tax Cases, 5 Wall. 462, 18 L. ed. 497.

Messrs. Gislason & Gislason and James H. Hall, for respondent:

Whether the license fee is a reasonable one must depend largely upon the sound discretion of the governing body of the village, having reference to all the circumstances and necessities of the case.

O'Hara v. Collier, 173 Mich. 611, 139 N. W. 870; Grand Rapids v. Braudy, 105 Mich. 670, 32 L.R.A. 116, 55 Am. St. Rep. 472, 64 N. W. 29; Grand Rapids v. Norman, 110 Mich. 544, 68 N. W. 269; People v. Blom, 120 Mich. 45, 78 N. W. 1015.

The unreasonableness of the fee is not subject to review by the courts, nor is it important whether licenses of this nature produce a revenue to the village or not, and if such an ordinance, so passed, under delegation of power, be oppressive, the remedy lies with the legislature or common council, and not with the courts.

St. Paul v. Colter, 12 Minn. 41, Gil. 16, 90 Am. Dec. 278; Wolf v. Lansing, 53 Mich. 367, 19 N. W. 38; Van Baalen v. People, 40 Mich. 258; Wiley v. Owens, 39 Ind. 429; Cooper v. District of Columbia, Mac Arth. & M. 250; Perdue v. Ellis, 18 Ga. 586; Tenney v. Lenz, 16 Wis. 566; Columbia v. Beasley, 1 Humph. 232, 34 Am. Dec. 646; Darling v. St. Paul, 19 Minn. 389, Gil. 336.

Holt, J., delivered the opinion of the court:

The question presented on this appeal is the validity of an ordinance of the village of Minneota requiring an auctioneer to pay a license fee of \$25 for each day that he pursued his calling as such within the village. Defendant was convicted of a violation of this ordinance, and appeals from the judgment.

There was no settled case, so that the only record before us is the complaint, finding

ings, and judgment. The point is made that, the evidence not being here, the ordinance cannot be considered. This would be true if the law had remained the same as it was when the village was incorporated. But the general village law of 1875 was amended by chapter 145, Gen. Laws of 1885, bringing all villages under its operation, whether formed under general or special laws. The substance of the law, as subsequently amended by chapter 122, Gen. Laws 1889, and applicable here, is found in § 1265, Gen. Stat. 1913, and reads: "It shall be sufficient pleading of the by-laws, rules, or ordinances of a village to refer to the section and number or chapter thereof. They shall have the effect of general laws within the village and need not be given in evidence upon the trial of civil or criminal actions." In other words, the court takes judicial notice of the provisions of the ordinance in this action, and must consider its validity.

The ordinance in question was passed in 1901. The law then conferred precisely the same power upon the village council (§ 1224, Gen. Stat. 1894, being chapter 122, Gen. Laws of 1889) given by chapter 138, Laws of 1905 (Gen. Stat. 1913, § 1269), in respect to restraining or licensing auctioneers, hawkers, and peddlers. The fact that chapter 122, Laws of 1889, was repealed in terms by Rev. Laws, of 1905, does not change the situation, because chapter 138, Laws of 1905, went into effect prior to such repeal. There is no escape from the conclusion that the legislature has authorized a village to impose a license fee of \$25 per day on an auctioneer. The law giving the authority, so far as material to the matter in hand, reads: "To restrain or license, regulate and tax auctioneers, hawkers and peddlers; and in all such cases they may fix the price of said license or tax, and prescribe the term of the continuance of such license, and may revoke such license when in the opinion of the village council the good order or public interests of the village require it: Provided, that the council may, in any case where in their opinion the public interests of the citizens of the village require it, refuse to grant any license for the above purposes; and provided, also, that twenty-five [\$25] dollars a day shall be construed by the courts of said state as a reasonable price per day for an auctioneer's license issued under the above provision."

We agree with appellant that the court is not bound by the legislative construction of what is a reasonable license fee. If such construction contravenes constitutional guaranties, courts should not hesitate to hold it for naught. Meyer v. Berlandi, 39 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513. But it is elementary

that courts should not set aside a statute unless satisfied beyond a doubt of its infringement upon some right guaranteed by state or Federal Constitution. That it so does must be made to appear either from evidence or from matters of which courts have judicial notice or knowledge. In this case there is no evidence and no findings of fact which bear on the reasonableness of the fee. *Littlefield v. State*, 42 Neb. 223, 28 L.R.A. 588, 47 Am. St. Rep. 697, 60 N. W. 724. In *State, Trenton Horse R. Co. Prosecutor, v. Trenton*, 53 N. J. L. 132, 11 L.R.A. 410, 20 Atl. 1076, it is said: "The judicial power to declare it void can only be exerted when, from the inherent character of the ordinance or from evidence taken showing its operation, it is demonstrated to be unreasonable." An ordinance "will be presumed to be reasonable, unless the contrary appears from the law itself, or is established by proper evidence." *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85.

Although the statute authorizes villages to license and tax auctioneers, we think it plain that in this ordinance is found no attempt to tax, and the legality of the fee must rest on the reasonableness thereof within the scope of a proper exercise of the police power.

It is well settled that upon this last-mentioned basis a license fee may be of sufficient amount to include the expense of issuing the license and the cost of the necessary police surveillance connected with the business or calling licensed. And when the license relates to a vocation or business which the municipality has the power to regulate, the license fee may be sufficiently large to work a restraint. *Duluth v. Krupp*, 46 Minn. 435, 49 N. W. 235; *State v. Jensen*, 93 Minn. 88, 100 N. W. 644. While it is true that the legislature may, not under the pretense of regulating and licensing a lawful calling or business, prohibit, it is nevertheless true that frequently individuals must subordinate their rights to a certain extent to the demands of the public welfare. No authority can be found holding an auctioneer not subject to the police power of regulation. *People ex rel. Schwab v. Grant*, 126 N. Y. 473, 27 N. E. 964, states that "the right to regulate, control, and limit the number of persons employed in such business has been exercised by the legislature as one of its acknowledged police powers, from colonial times to the present, and, I believe has never been questioned." What a regulatory license fee shall be is largely within the legislative discretion. *St. Paul v. Colter*, 12 Minn. 41, Gil. 16, 90 Am. Dec. 278.

It is insisted that this case is ruled by *Mankato v. Fowler*, 32 Minn. 364, 20 N. 61 L.R.A.(N.S.)

W. 361, wherein the business of an auctioneer is designated as a lawful and useful one. And in *Duluth v. Krupp*, supra, the vocation of the auctioneer is conceded to be on a higher plane than that of peddling, which is apt to degenerate into a nuisance if not regulated and restrained. Each occupation is lawful, and may be useful, both to the individual who pursues it and to the community. But we believe both are equally liable to abuse. No doubt, the legislature was convinced thereof, or else such substantial license fee, indicating a purpose to restrain, would never have been authorized. *State v. Finch*, 78 Minn. 121, 46 L.R.A. 437, 80 N. W. 856. And we may observe that no one about the time of the enactment of this statute could have walked on the main streets of our large cities, especially near railroad depots, without being convinced that the business of auctioneers was fast degenerating into a nuisance, and had become a subject of restraint. In *Decorah v. Dunstan Bros.* 38 Iowa, 96, an auctioneer's license fee of \$20 per day was upheld; but in *Ottumwa v. Zekind*, 95 Iowa, 622, 29 L.R.A. 734, 58 Am. St. Rep. 447, 64 N. W. 646, a license fee of \$25 per day for a transient merchant was held prohibitive, Justice Deemer observing with reference to the first-mentioned case: "The fee charged an auctioneer may well be larger than that imposed upon a transient merchant, on account of the character of the business, and the greater necessity for supervision over the auctioneer. Again, there was no showing that the fee demanded of defendants in that case was an unreasonable one." We cannot say that the business of an auctioneer is not of the kind liable to become inimical to the welfare of the community unless restrained in villages and cities.

Because a yearly license of \$300 was held prohibitive and invalid in *Mankato v. Fowler*, supra, it does not necessarily follow that a *per diem* license fee of \$25 must fall. If an auctioneer could get but a single day's work under the Mankato ordinance, he was compelled to pay \$300 to secure it. There it also appeared from the findings that the ordinance was prohibitive, for it was found that no auction had taken place in the year the ordinance was in operation, whereas previously such auctions were frequent. Nor may it be said that a *per diem* license fee may not properly be much larger than the proportion of a legitimate annual fee. In *Re White*, 43 Minn. 250, 45 N. W. 232, concerning the validity of a peddler's license of \$3 *per diem*, the court states: "There is a clear distinction between the case of persons who are engaged the whole year in one place, in some permanent busi-

ness, and that of hawkers and peddlers who are transient, and usually remain only a short time in one place. What might be an excessive fee, estimated by the day, as to the former, might not be so as to the latter. The cost of issuing the license would be the same for the short term as for the long one, and the expense of police supervision (which may undoubtedly be taken into account in fixing the amount of the license fee) may be relatively much greater in the case of a temporary and transient business."

As stated before, we are left in the dark in this case as to the extent to which auctions may be called for in villages like Minneota. It may be that during any one year the village will not afford legitimate opportunity for an auction except for a day or two. Usually the legislature leaves the reasonableness of the fee to the municipality, and when its proper lawmaking body has exercised its discretion as to the amount, courts reluctantly interfere, and only when it is clear that there has been an abuse of discretion. Here the legislature itself has exercised its judgment as to what is a reasonable license fee. We may well assume that the legislators informed themselves of the situation, and did not act merely on such knowledge as courts are charged with possessing. As this case is presented by the record, we are unable to say that it appears beyond reasonable doubt to our minds that this license fee is oppressive, prohibitive, or unreasonable.

We do not think any other question meriting discussion is raised by the appeal.

Judgment affirmed.

NEBRASKA SUPREME COURT.

MYRL A. WARRICK

v.

WILLIAM I. FARLEY, Appt.

(— Neb. —, 145 N. W. 1020.)

Animal — interference with dog fight — liability for injury.

1. One who voluntarily exposes himself to danger by attempting to separate two

Headnotes by HAMER, J.

Note.—*What scienter is necessary to charge owner with liability for injuries inflicted by dog to person or property of another.*

This note supplements the earlier one appended to *Emmons v. Stevane*, 24 L.R.A. (N.S.) 458. For annotation on related subjects reference may be had, in addition to annotation referred to at the close of the earlier note, to the note appended to *Mc-51 L.R.A. (N.S.)*

fighting dogs then engaged in a combat cannot recover damages from the owner of the dog by which he is bitten, because he has himself helped to create the condition and the danger.

Same — protection of own dog.

2. Where a dog is allowed to run at large, and bites the owner of another dog with which he is in a fight, and the owner is bitten while negligently attempting to separate the fighting dogs, there is no liability for damages because of the injury unless the evidence shows that the owner of the dog which committed the injury knew that his dog was accustomed to bite persons, and then the injury must not be carelessly brought about or contributed to by the plaintiff, and, if it is, the plaintiff cannot recover.

(March 13, 1914.)

A PPEAL by defendant from a judgment of the District Court for Hamilton County in plaintiff's favor in an action brought to recover damages for injuries sustained through the bite of defendant's dog. Reversed.

The facts are stated in the opinion.

Messrs. John A. Whitmore and Hainer, Craft, & Aylsworth for appellant.

Messrs. J. H. Grosvenor and W. A. Prince, for appellee:

The owner or keeper of a dog is responsible for injuries resulting from vicious or mischievous acts of such dog, if it be first established by the evidence that, prior to the infliction of such injuries, such owner or keeper had a knowledge, either actual or constructive, of its mischievous propensities.

Rowe v. Ehrmantraut, 92 Minn. 17, 99 N. W. 211; *Fake v. Addicks*, 45 Minn. 37, 22 Am. St. Rep. 716, 47 N. W. 450, 1 Am. Neg. Cas. 150; *Knowles v. Mulder*, 74 Mich. 202, 16 Am. St. Rep. 627, 41 N. W. 896; *Reynolds v. Hussey*, 64 N. H. 64, 5 Atl. 458, 1 Am. Neg. Cas. 319; *Mann v. Weiland*, 81* Pa. 243; *Turner v. Craighead*, 83 Hun, 112, 31 N. Y. Supp. 369; *Emmons v. Stevane*, 77 N. J. L. 570, 24 L.R.A. (N.S.) 460, 73 Atl. 544; *Buckley v. Leonard*, 4 Denio, 500; *State, Evans, Prosecutor, v. McDermott*, 49 N. J. L. 163, 60 Am. Rep. 602, 6 Atl. 653, 1 Am. Neg. Cas. 164.

Not only did Farley know that the dog

Clain v. Lewiston Interstate Fair & Racing Asso. 25 L.R.A. (N.S.) 691, dealing with scienter as a condition of liability for damages by trespassing dogs.

As shown by the earlier note, in order to render the owner of a dog liable for injuries inflicted by it, it is not enough that the dog was vicious or had a tendency to bite mankind, but it must be shown that the owner had knowledge of its vicious propensities. As a reason for this, one of the

was vicious, but every member of his family also knew it.

Barclay v. Hartman, 2 Marv. (Del.) 351, 43 Atl. 174; *Boler v. Sorgenfrei*, 86 N. Y. Supp. 180; *McConnell v. Lloyd*, 9 Pa. Super. Ct. 25; *Gladman v. Johnson*, 15 L. T. N. S. 476, 36 L. J. C. P. N. S. 153, 15 Week. Rep. 313; *King v. Muldoon*, 131 App. Div. 847, 116 N. Y. Supp. 308; *Duval v. Barnaby*, 75 App. Div. 154, 77 N. Y. Supp. 337; *Soronsen v. Von Pustau*, 112 App. Div. 437, 98 N. Y. Supp. 431; *Fake v. Addicks*, 45 Minn. 37, 22 Am. St. Rep. 716, 47 N. W. 450, 1 Am. Neg. Cas. 150; *Emmons v. Stevane*, 77 N. J. L. 570, 24 L.R.A.(N.S.) 462, 73 Atl. 544.

The jury, in fixing the damages, may take into consideration the fear suffered by plaintiff.

Ayers v. Macoughtry, 29 Okla. 399, 37 L.R.A.(N.S.) 865, 117 Pac. 1088.

Where the plaintiff proves his case with-

later cases points out that the natural presumption from the habits of dogs is that they are tame, docile, and harmless both as to persons and property, and that the owner of an animal is bound to take notice of the general propensities of the class to which he belongs, but that he is under no obligation to guard against injuries which he has no reason to expect, on account of some disposition of the individual animal different from the species generally, unless he has actual notice of such disposition. *Domm v. Hollenbeck*, 259 Ill. 382, 102 N. E. 782. From this the court concludes that the owner or keeper of a domestic animal of a species not inclined to do mischief, such as dogs, is not liable for any injury committed by it to the person of another, unless it be shown that the animal had a mischievous propensity to commit such an injury, and that the owner had notice of it, or that the injury was attributable to some other neglect on his part; but that if the owner of a vicious animal knows its character and disposition to commit injury to mankind, he is liable for all injuries it may inflict.

While it is necessary to prove owner's knowledge of its vicious propensities (*Merkle v. Schaeffer*, 80 N. J. L. 74, 76 Atl. 326), the proof may be made by evidence of facts and circumstances from which an inference of knowledge arises (*Domm v. Hollenbeck*, supra).

It has been held that something more must be shown than that he could have learned of the dog's vicious propensities by the exercise of reasonable care. *Ibid*.

On the other hand, it is held that proof that the dog was of a ferocious nature is sufficient to charge the owner with knowledge that, under some circumstances, the dog would attack persons; in other words, that proof of the savage and ferocious disposition is equivalent to express notice. *Holt v. Myers*, 47 Ind. App. 121, 93 N. E. 51 L.R.A.(N.S.)

out disclosing negligence on his part, contributory negligence is a matter of defense, the burden of proving which is on defendant.

Chicago, B. & Q. R. Co. v. Putnam, 45 Neb. 441, 63 N. W. 826, 12 Am. Neg. Cas. 233; 5 Enc. Pl. & Pr. 1; *Union Stock Yards Co. v. Conoyer*, 38 Neb. 488, 41 Am. St. Rep. 738, 56 N. W. 1081.

Hamer, J., delivered the opinion of the court:

The plaintiff, Myrl A. Warrick, recovered a judgment against the defendant, William I. Farley, in the district court of Hamilton county, for damages by reason of an injury sustained through the bite of defendant's dog. The defendant appeals.

The defendant objects that the verdict is not sustained by sufficient evidence. This involves a consideration of the disposition of the dog, whether to bite mankind, and

1002, denying rehearing of 47 Ind. App. 118, 93 N. E. 31.

A complaint which alleges that the defendant kept dogs which he knew were accustomed to bite mankind, and that the plaintiff was bitten by one of them, a ferocious and vicious bulldog, is not objectionable because it does not allege that the particular dog was accustomed to bite mankind. *Slater v. Sorge*, 166 Mich. 173, 131 N. W. 565.

And the owner of a dog is sufficiently put on inquiry to render him chargeable with notice where he had been warned of the dog's vicious propensities, and had been told of its biting a child, even though he did not believe the statement to be true. *Halm v. Madison*, 65 Wash. 588, 118 Pac. 755.

It is not necessary that the dog's disposition or peculiarity be such as to render it liable and inclined to bite all with whom it comes in contact, it being sufficient if the dog has bitten one person prior to the injury sued for, and the owner has knowledge thereof. *Ayers v. Macoughtry*, 29 Okla. 399, 37 L.R.A.(N.S.) 865, 117 Pac. 1088.

The keeping of a dog, with knowledge on the part of the owner or his wife that the same had bitten or attempted to bite one or several persons prior to the time of the attack upon the plaintiff is evidence sufficient to support a verdict rendered on an instruction declaring defendant liable if he had notice, either actual or constructive, of the vicious and dangerous character of the dog. *Ibid*.

Indeed, it is not necessary in an action for personal injury to show that the dog previously had bitten someone to the owner's knowledge, and knowledge of the owner that the disposition of the animal is such that it is likely to commit a similar injury to that complained of is sufficient. *Slater v. Sorge* and *Domm v. Hollenbeck*, supra; *Holt v. Myers*, supra.

whether the defendant knew or had reason to believe that his dog had such a disposition. We have read the evidence. It appears that the defendant owned a bulldog. The plaintiff owned a coach dog. The plaintiff seems to have been standing on the sidewalk in front of a drug store in the city of Aurora and was talking with a gentleman named Elmore. He had with him his coach dog. The daughter of the defendant came along, and the defendant's bulldog was with her. The defendant's dog seems to have attacked the plaintiff's dog, and the plaintiff separated the dogs and put his dog in the drug store. Shortly afterwards the defendant's daughter returned, and she was accompanied by the defendant's dog. Immediately there was a resumption of hostilities between the two dogs. In trying to separate the dogs the plaintiff was severely bitten by the defendant's dog. The defendant set up the defense that his dog was

gentle and that he himself had no knowledge of the fact that he was inclined to bite any person. He also claimed that the dog was accustomed to play with his own children and the children of the neighborhood; that he was of a gentle disposition; and there is much testimony tending to show that fact, although it is not claimed that he did not fight other dogs. He would perhaps have been an unnatural bulldog if he had not had some fights with other dogs. It is also claimed that the plaintiff was negligent in the manner in which he handled the dogs when he undertook to separate them, and that his injury occurred because of such negligence in handling and attempting to separate two infuriated fighting dogs then in a fight.

It is to be considered: (1) Whether the defendant's dog had a propensity to bite mankind; and (2) whether the defendant had notice of such propensity.

When a person keeps a dog for the purpose of guarding his property against trespassers or criminals, it is not unreasonable to infer knowledge on his part of the propensity of the dog to attack and bite mankind, and negligence in allowing him to be at large. *Ibid.*

Though WARRICK v. FARLEY uses the words "accustomed to bite persons," the case would not seem clearly to militate against the rule that knowledge of a custom to bite persons is not necessary, and that it is sufficient if the dog is of such a ferocious nature that it is likely to bite mankind. It will be observed that in the syllabus by the court the question of *scienter* is so intermingled with the question of contributory negligence that it is by no means clear that the court would have held that knowledge of a custom to bite mankind was essential to recovery if there had been no contributory negligence which was held sufficient to bar a recovery. Turning to the opinion, it is found that the court goes no further than to say that under the declaration alleging that defendant knew that the dog was accustomed to bite mankind, the plaintiff must prove that the dog was accustomed to bite mankind and that the plaintiff knew it. Of course it does not follow that the plaintiff would be required to make such proof where there was no such allegation.

Of course, in an action to recover for injuries sustained by being struck by a team frightened by a dog, in which the complaint alleges negligence upon the part of the owner of the dog in keeping it with knowledge of its vicious propensities, the plaintiff must prove that the defendant was the owner of the dog, with knowledge of its vicious propensities, or prove circumstances from which it must appear to all reasonable persons that he must have had such knowledge. *Mabrey v. Haverstick*, 175 Ill. App. 309.

§1 L.R.A. (N.S.)

Imputed knowledge.

And notice to one joint owner is notice to all the owners. *Halm v. Madison*, *supra*.

The owner of a dog may be charged with notice of its vicious propensities by reason of his wife's knowledge that it has bitten human beings. *Ayers v. Macoughtry*, *supra*.

Effect of statutes.

Proof of *scienter* is unnecessary in an action for the killing of a cat by a dog taken into the street without being muzzled and led, as required by ordinance, the dog having chased the cat upon the plaintiff's premises before killing it. *Buchanan v. Stout*, 139 App. Div. 204, 123 N. Y. Supp. 724.

And it is held in *Legault v. Malacker*, — Wis. —, 145 N. W. 1081, that the Wisconsin statute makes allegation and proof of *scienter* unnecessary as well in case of injuries to persons as in the case of injuries to cattle by dogs.

So it was held in *Forsythe v. Kluckhohn*, — Iowa, —, 142 N. W. 225, that whether the action was based upon the state statute or upon a municipal ordinance, proof of *scienter* was unnecessary.

And recognizing that proof of *scienter* was required at common law, it was held in *Malafronte v. Miloni*, — R. I. —, 86 Atl. 146, that the purpose of a statute unqualifiedly rendering the owner of a dog liable for injuries caused by it was to dispense with the necessity of proof of *scienter*. To the same effect is *Kleybolte v. Buffon*, — Ohio, —, 105 N. E. 192.

The case of *Faulkner v. Hall*, 150 Ky. 416, 150 S. W. 506, merely enforced the liability unconditionally imposed by statute upon every person owning or harboring a dog, for injuries inflicted by it.

L. A. W.

John Powell, chief of police, knew the defendant's dog and had seen him on the streets with the Farley children, Alice and John. He gave his opinion that he did not think that the dog was a very bad dog. Robert Mitchel, the night watch, testified that he had not noticed anything wrong with the dog in its conduct towards persons. Mrs. Steenburg testified that she saw the dog every day; that the dog played with the Farley children, with Blanche McKee, Thomas Peterson, with the Williamson children, the Haughey girls, Arthur Ronin, and her own boys. She saw the boys pick the dog up by his feet and handle him in a very rough manner and he did not get angry at this. He seems to have been willing to endure almost any amount of rough treatment at the hands of these children. Mrs. Haughey, the wife of Dr. Haughey, testified that she knew the Farley dog; she saw him, and that her children played with the dog, especially the youngest girl, who was about twelve years old; she also saw the Williamson children, Thomas Peterson, and Dr. Steenburg's boys playing with the dog. They would run and hide and the dog would hunt them. Mrs. Williamson testified as to the gentleness of the dog and its daily companionship with the children. Her children were seven, nine, and eleven years old. She knew that the dog was always gentle with these children. Walter Boyd testified that the dog was with his brother-in-law's little boy, a little fellow three years of age, and that the dog and the child would play in the house. Mr. Ronin testified that the dog was the companion of his little grandson and other little neighborhood children. He had seen the dog on his porch and in his yard playing with his little grandson and other little children. The grandson was seven years old. George Verbeck testified that he had observed the Farley children and other children playing with this dog; that he had seen him a great many times with other children than the Farley children. The children and the dog would chase each other about the place. He never saw the dog show his teeth, growl, or show any tendency to bite anybody. He appears to have been the pet and companion of the children of the neighborhood.

The defendant's daughter testified that she had seen many children, ranging in age from four to twelve years, play with the dog; that they would tie a rope on his collar, and the dog would pull them on roller skates in front of the house; sometimes they would roll over him; at other times they would tie a handkerchief around his nose and watch him get it off with his paw. They also fed him candy. The defendant's

wife testified to the same facts. The defendant's testimony is along the same line. He had seen the children tie his feet together with a handkerchief or a string. He had seen them tie a handkerchief about the dog's nose. Mr. Serf testified that he frequently saw the dog, and that when he went by the house the dog would come out in a friendly way. He frequently went by the Farley home and often in the nighttime. The dog was always friendly. He would come out and walk a little ways with the witness. Lewis G. Bald testified that the dog was unusually friendly. He testified to meeting the dog and petting him and that the dog went with him. He often saw the dog play with the children. R. Y. Barnes, who had formerly been the city marshal, testified that for two years he had passed the Farley residence as often as at least twice a day, and sometimes four times a day, and that he always found the dog playful and friendly. He described the dog as a very pretty dog, and clean and nice, and he would speak to him and pet him. He had never seen any tendency on the part of the dog to attack any person.

The evidence shows conclusively that the dog was generally of an amiable disposition and that he played with the children in the neighborhood. The evidence would seem to indicate that there was no reason to apprehend danger from this dog under ordinary circumstances. That he would fight dogs was, perhaps, natural for a bulldog—perhaps for most breeds of dogs.

W. J. Elmore, a witness for the plaintiff, testified that Mr. Warrick separated the dogs when the defendant's dog first came by, and put his coach dog in the drug store; that the defendant's dog went on down the street; that there was a little girl with the dog. Presently the little girl came back. By that time the coach dog was out of the drug store, and the bulldog came by.

Q. You say the bulldog rushed in and grabbed the coach dog. What, if anything, did Mr. Warrick do—describe what he did?

A. He grabbed these dogs and tried to part them, and he had them by the collar, and this dog reached around and grabbed him.

Q. And as soon as they commenced to fight that time (the second time) Mr. Warrick grabbed both of them by the collar?

A. Yes, sir.

Q. And lifted them off their front feet?

A. Well, he lifted them off their front feet, but they was still on the back.

Q. And he was holding the dogs apart?

A. Yes.

Q. And they were both trying to get together?

A. Well, Mr. Warrick's dog didn't at-

tempt to get to the other one; the bulldog was doing all the lunging.

Q. The other dog didn't try to fight at all?

A. He tried, but he wasn't vicious like the other dog.

Glenn Mason, witness on the part of the defendant, testified: "A. Well, I was in front of McKee & Hartquest's drug store and with a bunch of men there after we got back from a trip in the automobile, and I heard somebody say, 'Here he comes;' and about the same time they said that the two dogs were close together, and Mr. Warrick grabbed them by the collar and picked them up. . . . He lifted them clear up, and they were too heavy to hold that way, and they would strike the ground again, and then he would pull them back up; and it seemed he couldn't lift them the second time as high as he did the first time— (continuing) Well, they came back down to the ground and the dogs—I don't know whether it was the second or third time—one of the dogs, Mr. Farley's dog, got a hold of Mr. Warrick's dog on the side and just pulled the skin right out on the dog and let loose; he got loose from him again."

Luther French, a witness for the plaintiff, testified: "Mr. Warrick stepped out of the way, and Mr. Farley's dog had hold of Mr. Warrick's dog about the shoulders or neck; and Mr. Warrick grabbed his dog by the collar and also Mr. Farley's dog, and he was pulling on Mr. Warrick's dog to get him off I believe, and they were trying to get the dogs parted there anyway, and the first thing I knew the bulldog had bit Mr. Warrick."

It is, seemingly, the undisputed evidence that the plaintiff took each dog by the collar and lifted them both clear of the ground. Holding them in that manner, they would be sure to snap at each other. From the circumstances as detailed no one may be certain that the bite which the plaintiff received was not intended for the coach dog. We are of the opinion that the plaintiff was guilty of negligence, and that he, himself, by his negligence, made the injury possible. If he had taken either dog by the collar and attempted to drag him away from the other, he would, in all probability, not have been injured. We do not think that the evidence sustains the verdict.

It appears that the plaintiff was bitten because he caught these dogs by their respective collars and held them up so that they could snap at each other. As well expect two cats suspended together by their tails and facing each other not to fight, as to expect peace between these dogs when they were held up fronting each other and with their heads near enough together so

that they could snap at and reach each other. Elmore testified that the dogs were about the same size. A coach dog will fight, probably not so well as a bulldog; but, if this coach dog understood that his master was helping him by holding the other dog, he would try to do his whole duty, from a dog's standpoint, because of the spirit of loyalty to his master. A bulldog held up that way would probably delight in the mad revelry of the battle; and, no doubt, almost any dog would fight under the same circumstances. Ordinary prudence demands more careful conduct of the plaintiff and greater regard for his own safety. The injury of the plaintiff was clearly due to his own neglect.

The owner of a dog is not liable for injury caused by it unless it is vicious and notice of the fact that it is vicious is brought home to him. *Trumble v. Happy*, 114 Iowa, 624, 87 N. W. 678.

The owner of ordinary domestic animals is not liable for injury which they do to another unless the animal was accustomed to injuring persons, or had an inclination to do so to the knowledge of the owner. *Smith v. Causey*, 22 Ala. 568; *Le Forest v. Tolman*, 117 Mass. 109, 19 Am. Rep. 400, 1 Am. Neg. Cas. 138.

Where, in an action to recover for personal injury caused by a domestic animal, it does not appear that the animal ever injured anyone before or since, or that anyone ever had any difficulty with it other than that on which plaintiff founds his suit, nonsuit should be granted, since there is no evidence that defendant had knowledge of the vicious character of the animal. 2 Cyc. 390.

Under a declaration that the defendant kept a dog that he knew was accustomed to bite mankind, it is not enough for the plaintiff to prove that the dog had a savage and ferocious disposition, and that defendant knew it; but he is bound to prove the allegation that the dog was accustomed to attack and bite mankind, and that defendant knew that.

There is no doubt that, in case of animals not inclined to do mischief, a previous mischievous propensity must be shown, and, the *scienter* clearly established, the gist of the action is not the keeping of the animal, but the keeping with knowledge of the mischievous propensity, whether proceeding from a savage disposition or not. *Mann v. Weiland*, 81* Pa. 243. In *Beck v. Dyson*, 4 Campb. 198, 16 Revised Rep. 774, Lord Ellenborough directed a nonsuit because the evidence was not sufficient to warrant the jury in inferring that the defendant knew that the dog was accustomed to bite. In a like case Lord Abinger non-

sued because it did not appear that the owner had knowledge of the vicious propensity of his dog. *Hogan v. Sharpe*, 7 Car. & P. *755. In *Martinez v. Bernhard*, 106 La. 368, 55 L.R.A. 671, 87 Am. St. Rep. 306, 30 So. 901, it is said by the court: "The owner of a gentle animal, which has always been of a kind temper, and has never attempted to bite anyone, and has never given occasion to suspect that it would bite, is not liable in damages by the mere fact that the animal has bitten someone."

Where a dog has been around the premises for four years and had never shown symptoms of viciousness, and he bit the plaintiff, and it was shown that he had just been stepped on, and that boys had been throwing dirt at him, held, that the vicious character of the dog was not shown so as to warrant a verdict against the owner. *Cuney v. Campbell*, 78 Minn. 59, 78 N. W. 878, 6 Am. Neg. Rep. 97.

The plaintiff's contributory negligence in teasing defendant's dog, but for which the injury would not have occurred, is a defense to the action, it matters not when or where the injury was inflicted. *Bush v. Wathen*, 104 Ky. 548, 47 S. W. 599.

In *Hathaway v. Tinkham*, 148 Mass. 85, 19 N. E. 18, it was said by Mr. Justice Allen: "It is, however, essential to a plaintiff's right to recover that he should have been in the exercise of ordinary care himself." Where the plaintiff interferes with a dog and is bitten, due care should be shown. The same should be true where he interferes with two dogs that are fighting. *Raymond v. Hodgson*, 161 Mass. 184, 36 N. E. 791, 1 Am. Neg. Cas. 130. In the case cited, "the plaintiff testified that his dog was making great outcries; that he rushed up to the dogs, looked for a collar on the defendants' dog, and, seeing none, seized the defendants' dog by the tail, and pulled it away from his dog; and that, as the dogs became separated, the defendants' dog bit his hand, which had hold of the tail." The plaintiff requested the judge to rule that he was not obliged to satisfy the jury that he exercised due care, under the undisputed circumstances of the case. The judge refused so to rule. The jury returned a verdict for the defendants, "on the ground of want of due care on the part of the plaintiff; and the case comes before us on the plaintiff's exceptions to the refusal to rule as requested." The supreme court of Massachusetts, by Judge Lathrop, delivering its opinion, cited several Massachusetts cases, and then said, referring to these cases: "We have no doubt that where the plaintiff incites or interferes with a dog, and is bitten, his due care must be shown; and that 61 L.R.A. (N.S.)

the same is true where he interferes with two dogs that are fighting. . . In the case at bar the plaintiff voluntarily submitted himself to danger; and we have no doubt that the ruling of the court below was right."

The logic of the Massachusetts case seems to be conclusive. Applying that logic to the instant case, it is clear that the plaintiff voluntarily submitted himself to danger and did not exercise due care. He held these dogs, that were then engaged in fighting, up in front of him. They were standing on their hind legs and snapping at each other, and he was supporting them by holding them up. By his conduct he voluntarily incurred the danger. He failed to exercise reasonable discretion. He was guilty of contributory negligence. While the purpose of the plaintiff was a proper one,—he was trying to stop the fight,—he took no consideration of his own danger. He unnecessarily exposed himself.

The judgment of the District Court is reversed.

Rose and Sedgwick, JJ., not sitting.

Fawcett, J., concurring:

I concur in the judgment of reversal on the ground of the insufficiency of the evidence to show any previous disposition of defendant's dog to bite mankind, and on the further ground that plaintiff was guilty of negligence in voluntarily exposing himself to a danger that was clearly apparent.

Petition for rehearing denied.

NEW MEXICO SUPREME COURT.

ELOISA LUNA DE BERGERE et al.

v.

LUCIANA CHAVES et al., Appts.

(14 N. M. 352, 93 Pac. 762.)

Parties — ejectment — tenants in common.

1. Tenants in common need not join in a

Headnotes by **MILLS, Ch. J.**

Note. — Extent of recovery in ejectment by tenants in common against stranger.

This question was treated in the note to *Williams v. Coal Creek Min. & Mfg. Co.* 6 L.R.A. (N.S.) 710, and only the cases decided subsequently to the compilation of that note are included in the present annotation.

The authorities which have determined the extent of recovery in ejectment by a

suit in ejectment to recover possession of lands, although they may do so if they so desire.

Ejectment — recovery by tenant in common.

2. A tenant in common may sue separately in ejectment, and, if the defendant shows no title, he is entitled to recover possession of the entire estate, in subordination, however, to the rights of his cotenants.

Deed — contract — form.

3. In the case at bar the paper relied on is not a deed, but is an executory contract for the giving of a deed to the Galisteo ranch, by Manuel A. Otero, to Jesus M.

Sena y Baca upon the approval of the Bartolome Baca grant.

Limitation of actions — executory contract — adverse possession.

4. The instrument in writing under which Jesus M. Sena y Baca took possession of the Galisteo ranch, being an executory contract, the statute of limitations, under which title by adverse possession might be gained, would not begin to run until Sena y Baca, or those claiming under him, distinctly and unequivocally repudiated the title of Manuel A. Otero to the Galisteo ranch.

(January 14, 1908.)

tenant in common against a stranger are, as is stated in the earlier note, divided into two classes, namely, those in which the court, looking upon the right of possession as the gist of the tenant's claim, give him the whole of the common land, and those in which the court, regarding the title as the main thing to be considered, measure his recovery by the extent of his interest in the property. The rule based upon the right of possession has been adopted in recent cases of first impression in three jurisdictions (Alabama, Hawaii, and Michigan), and one jurisdiction (New Mexico) has renounced the rule limiting the recovery to the extent of the complaining cotenant's title, and adopted the rule that a tenant in common may sue separately, and as against a stranger recover the entire property, while one court (Oklahoma supreme court), considering the question for the first time, has adopted the rule that a tenant's recovery must be limited to the extent of his title.

Because of the extensive treatment of the question in 6 L.R.A.(N.S.) 710, it has been deemed necessary to do little more than cite the later cases to the rules adopted therein.

Thus, it has been held that, as against a stranger to the title, one or more, less than all, tenants in common may sue for and recover the entire tract which is the subject of the tenancy in common, and that the recovery inures to the benefit of all. *Lecroix v. Malone*, 157 Ala. 434, 47 So. 725; *Blake-ney v. DuBose*, 167 Ala. 627, 52 So. 746; *Hooper v. Bankhead*, 171 Ala. 626, 54 So. 549; *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449; *Godfrey v. Rowland*, 17 Haw. 577, 7 Ann. Cas. 993 (court reviewed the authorities, and adopted the rule, basing its decision on the ground that ejectment is a possessory action and does not adjudicate title); *Jett v. Hunter*, 51 Tex. Civ. App. 92, 111 S. W. 176; *Caruthers v. Hadley*, — Tex. Civ. App. —, 115 S. W. 80; *Kirby v. Blake*, 53 Tex. Civ. App. 173, 115 S. W. 674; *Wadsworth v. Vinyard*, — Tex. Civ. App. —, 131 S. W. 1171; *Hill v. Whitworth*, — Tex. Civ. App. —, 162 S. W. 434; *Craver v. Mossbach*, 57 Wash. 682, 107 Pac. 1037, 109 Pac. 1016. And see *DE BERGERE v. CHAVES*, wherein the New Mexico supreme court renounces the rule limiting the recovery, and adopts the rule that a tenant in common may sue separately in ejectment, 51 L.R.A.(N.S.)

and, as against a stranger to the title, recover possession of the entire estate, subject, however, to the rights of his cotenants.

And in Michigan it has been held that, by virtue of Public Acts 1903, No. 55, one claiming under a tenant in common may, as against one having no interest in the title, recover possession of the entire tract of land which was the subject of the tenancy in common. *Lamb v. Lamb*, 139 Mich. 166, 102 N. W. 645.

And in Kansas it was held in the recent case of *Horner v. Ellis*, 75 Kan. 675, 121 Am. St. Rep. 446, 90 Pac. 275, that one tenant in common may, in an action of ejectment, recover the entire premises from one who has no title, although the court said that "the question in ejectment is, Who has the superior title?" In connection with this case see *King v. Hyatt*, 51 Kan. 504, 37 Am. St. Rep. 304, 32 Pac. 1105, as set out in 6 L.R.A.(N.S.) 719.

But, as before indicated, the rule that a tenant in common bringing an action for the recovery of the subject of the tenancy can recover to the extent of his interest only was adopted in *Moppin v. Norton*, — Okla. —, 137 Pac. 1182.

In South Carolina, where the courts adhere to the general rule that a tenant in common may recover only to the extent of his interest (see 6 L.R.A.(N.S.) 722), it was held in *Whitaker v. Manson*, 84 S. C. 29, 137 Am. St. Rep. 835, 65 S. E. 953, that when cotenants are very numerous, and it is impracticable to bring them all before the court, one tenant in common may, by virtue of a statute providing that when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue for the benefit of the whole, etc.,—maintain an action against a stranger to recover the common land for the benefit of all the cotenants.

But under the rule that recovery is limited to the title of the complaining cotenant, a title good by prescription against one of the cotenants defeats a joint action for the recovery of land brought by tenants in common. *Williamson v. Youmans*, 136 Ga. 222, 71 S. E. 138.

Upon the general question as to what title or interest will support an action of ejectment, see the note to *Hancock v. McAvoy*, 18 L.R.A. 781. G. J. C.

A PPEAL by defendants from a judgment of the District Court for Santa Fé County in plaintiffs' favor in an action brought to recover possession of certain land. Affirmed.

Statement by Mills, Ch. J.:

This is a suit in ejectment, brought by the plaintiffs, to recover the possession of a certain tract of land situated in Santa Fé county, New Mexico, and known as the "Galisteo ranch." A jury was waived and the evidence in the case was taken by the Hon. John R. McFie, judge of the first judicial district court of the territory of New Mexico, but on March 3, A. D. 1906, the said judge disqualified himself, and by consent of all the parties the cause was referred to the Hon. Edward A. Mann, associate justice of the supreme court of this territory, who heard the arguments and rendered a judgment in the case. It will be unnecessary to trace the title to the Galisteo ranch back of June 22, 1878, at which time the title to the ranch was in Manuel Antonio Otero, as all of the parties to this controversy trace their claims to him as the common source. On June 22, 1878, Manuel A. Otero and one Jesus M. Sena y Baca entered into a contract or agreement, written in Spanish, a translation of which reads as follows, to wit:

Know all men by these presents, that I, the undersigned, Manuel Antonio Otero, resident of the county of Valencia, in the territory of New Mexico, for consideration, have sold and transferred in favor of Jesus M. Sena y Baca and Agapita Ortiz, his wife, a ranch known as the ranch of Galisteo, which is situated in the county of Santa Fé and territory aforesaid, known as the ranch which was formerly of the deceased Don Miguel E. Pino, and that I will give and execute the documents of conveyance of the said ranch in favor of Jesus M. Sena y Baca and Agapita Ortiz, as soon as there shall be adjudicated and approved by the surveyor general the grant of Bartolome Baca of a tract which was ceded to him by the Governor Melgarez in the year 1819, and the which is situate in the county of Valencia in the territory of New Mexico, and, furthermore, they will take possession of the aforesaid ranch and will have and enjoy all the products of the same until the proper documents may be executed, and in conformity with the above stated; and the said Jesus M. Sena y Baca so agrees and has signed here jointly with me. In witness whereof, we sign the present in La Constancia, county of Valencia, this 22d day of June, A. D. 1878.

Manuel A. Otero.

Jesus M. Sena y Baca.

Under this contract or agreement Sena y Baca went into possession of the lands in controversy, and so remained until his death in the year 1885, when his rights descended to his widow, who continued in possession until July 10, 1888, when she quitclaimed her rights in it to one Jesse D. Rumberg, and at the same time delivered to him the original contract or agreement between her husband and Otero, both of which instruments Rumberg had placed of record. Rumberg continued in possession of the property until July 18, 1889, when he quitclaimed the same to Jose de la Cruz Chaves, and from Jose de la Cruz Chaves the property came into the possession of his heirs at law, the defendants herein. The contract or agreement between Sena y Baca and Otero, and which is set out above, was handed over to the several occupants of the property, and was introduced in evidence on the trial of this case. Indeed, the contract or agreement seems to have been executed in duplicate, as both the plaintiffs and defendants have one, which are identical, except that the one held by the defendants has certain interlineations in it setting out a consideration of \$1,000 for the alleged sale. During all of the time that the property was in the possession of Sena y Baca and his privies their possession was continuous. They farmed the land, made certain improvements on it by building fences and acequias, have received rentals for parts of it which were farmed on shares, and have exercised all of the control over the property which its owner might do. The evidence discloses that Manuel Antonio Otero attempted to get the Bartolome Baca grant approved by the surveyor general of New Mexico, but that official made an unfavorable report on the validity of the grant, and recommended that it be rejected, but before Congress took any action on this report of the surveyor general the court of private land claims was created, and empowered to adjudicate and determine the validity of land grants made by the governments of Spain and Mexico in New Mexico and other territories. The Oteros prosecuted their claim for the confirmation of the Bartolome Baca grant before the court of private land claims, and secured a favorable decision from that court for a part of the grant, but on appeal the Supreme Court of the United States, in 1897, finally rejected the grant. After the creation of the court of private land claims the successors of Sena y Baca brought a proceeding in such court for the confirmation of the Galisteo grant, and succeeded in getting that part of it known as the "Galisteo ranch," the property in controversy, confirmed. On April 3, 1901, after the final rejection of the Bartolome Baca grant, the

plaintiffs herein, as heirs of Manuel Antonio Otero, brought this suit to recover the possession of the Galisteo ranch. Judgment was finally entered by the learned judge below in favor of the plaintiffs, and, from such judgment, the defendants appealed to this court.

Mr. A. B. Renehan, for appellants:

When the statute of limitations has once begun to run, nothing will toll it, and one disability cannot be tacked to another.

McDonald v. Hovey, 110 U. S. 619, 28 L. ed. 269, 4 Sup. Ct. Rep. 142; Bauserman v. Blunt, 147 U. S. 657, 37 L. ed. 320, 13 Sup. Ct. Rep. 466; Stanley v. Schwalby, 162 U. S. 273, 40 L. ed. 966, 16 Sup. Ct. Rep. 754; Davis v. Coblens, 174 U. S. 725, 43 L. ed. 1149, 19 Sup. Ct. Rep. 832; 13 Rose's Notes (U. S.) p. 624, "Cumulative Disabilities;" 19 Am. & Eng. Enc. Law, 2d ed. 224-226.

Plaintiffs must recover, if at all, on the strength of their own title and not on the weakness of that of the defendants.

King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925; Smith v. McCann, 24 How. 403, 16 L. ed. 716.

Plaintiffs are estopped by laches to have or recover the said premises.

Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618; Kirk v. Hamilton, 102 U. S. 78, 26 L. ed. 82; Naddo v. Bardon, 2 C. C. A. 335, 4 U. S. App. 642, 51 Fed. 493.

In ejectment, the burden of proof is upon the plaintiffs to show their title to the identical land claimed by the defendants.

Maxwell Land Grant Co. v. Dawson, 151 U. S. 603, 38 L. ed. 285, 14 Sup. Ct. Rep. 458.

In an executory contract of purchase, the possession is originally rightful, and it may be that until the party in possession is called upon to restore it, he cannot be ejected without a demand or notice to quit.

Malarin v. United States, 1 Wall. 282, 17 L. ed. 594; Costigan v. Wood, 5 Cranch, C. C. 507, Fed. Cas. No. 3,285; Jones v. Temple, 87 Va. 210, 24 Am. St. Rep. 649, 12 S. E. 404; Williamson v. Paxton, 18 Gratt. 475; Stackhouse v. Doe, 5 Blackf. 570; Getty v. Peters, 82 Mich. 661, 10 L.R.A. 465, 46 N. W. 1036; Lowndes v. Huntington, 153 U. S. 1, 38 L. ed. 615, 14 Sup. Ct. Rep. 759.

If the title to the Galisteo ranch has not been shown to be in the plaintiffs' ancestor by derivation from the original allottees, then it outstands the said original allottees, their heirs or assigns, whoever they may be.

Simmons v. Wagner, 101 U. S. 260, 25 L. ed. 910; Hanrick v. Partick, 119 U. S. 172, 30 L. ed. 405, 7 Sup. Ct. Rep. 147; Smith v. McCann, 24 How. 403, 16 L. ed. 716.

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The Galisteo ranch was a perfect grant at the time of the cession, as to which the statute of limitations will run before the confirmation, survey, or patent.

Hays v. United States, 175 U. S. 248, 44 L. ed. 150, 20 Sup. Ct. Rep. 80; United States v. Chaves, 159 U. S. 452, 462, 40 L. ed. 215, 220, 16 Sup. Ct. Rep. 57; United States v. Conway, 175 U. S. 60, 44 L. ed. 72, 20 Sup. Ct. Rep. 13; Ainsa v. New Mexico & A. R. Co. 175 U. S. 81, 44 L. ed. 81, 20 Sup. Ct. Rep. 28.

Messrs. Catron & Gortner, for appellees:

The paper relied on was a contract placing Sena y Baca in possession and enjoyment, for and under Otero, with an obligation on Otero to transfer him the title at a later day.

Williams v. Paine, 169 U. S. 76, 42 L. ed. 667, 18 Sup. Ct. Rep. 279; Jackson ex dem. Shipley v. Moncrief, 5 Wend. 29; Ogden v. Brown, 33 Pa. 248; Phillips v. Swank, 120 Pa. 84, 6 Am. St. Rep. 691, 13 Atl. 712; Bell v. McDuffie, 71 Ga. 264; Jackson ex dem. Livingston v. Niven, 10 Johns. 335; Neave v. Jenkins, 2 Yeates, 107; Sherman v. Dill, 4 Yeates, 295, 2 Am. Dec. 408; Stouffer v. Coleman, 1 Yeates, 393; Stokely v. Trout, 3 Watts, 163; Stewart v. Lang, 37 Pa. 201, 78 Am. Dec. 414; Jackson ex dem. Green v. Clark, 3 Johns. 424; Schenley v. Pittsburgh, 104 Pa. 472.

A possession so taken is not adverse. It is expressly a possession in recognition of, and on behalf of, the owner.

1 Cyc. 1047, 1061; Hart v. Bostwick, 14 Fla. 178; Tyler, Ejectment, 875; Brandt ex dem. Walton v. Ogden, 1 Johns. 156; Jackson ex dem. Bonnell v. Sharp, 9 Johns. 163, 6 Am. Dec. 267; Jackson ex dem. Gansevoort v. Parker, 3 Johns. Cas. 124; Gay v. Moffit, 2 Bibb, 507, 5 Am. Dec. 633; M'Gee v. Morgan, 1 A. K. Marsh. 62; Kirk v. Smith, 9 Wheat. 241, 6 L. ed. 81; Jackson v. Berner, 48 Ill. 203; Floyd v. Mintsey, 7 Rich. L. 181; Williams v. Cash, 27 Ga. 507, 73 Am. Dec. 739; Jackson ex dem. Young v. Camp, 1 Cow. 605; Woods v. Dille, 11 Ohio, 455; McManus v. Matthews, — Tex. Civ. App. —, 55 S. W. 589; Durst v. Skillern, — Tex. Civ. App. —, 45 S. W. 840; Greeno v. Munson, 9 Vt. 37, 31 Am. Dec. 605; 1 Am. & Eng. Enc. Law, 2d ed. 810; Tilghman v. Little, 13 Ill. 241; Alderson v. Marshall, 7 Mont. 288, 16 Pac. 576; Jones v. Pelham, 84 Ala. 208, 4 So. 22; Brunson v. Morgan, 84 Ala. 598, 4 So. 589; Estes v. Long, 71 Mo. 605; Parish School Directors v. Edrington, 40 La. Ann. 633, 4 So. 574; Avery v. Baum, Wright (Ohio) 576; Thayer v. Society of United Brethren, 20 Pa. 62; Bidwell v. Evans, 156 Pa. 30, 26 Atl. 817; Davis v. Hurst, — Tex. —, 14 S. W. 610;

Udell v. Peak, 70 Tex. 547, 7 S. W. 786; Wild v. Serpell, 10 Gratt. 405; Reed v. Shepley, 6 Vt. 602; Holley v. Hawley, 39 Vt. 534, 94 Am. Dec. 350; Swann v. Thayer, 36 W. Va. 46, 14 S. E. 423; Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151; Moshier v. Reding, 12 Me. 478; Gwynn v. Jones, 2 Gill & J. 173; Lyebrook v. Hall, 73 Miss. 509, 19 So. 348; Carson v. Broady, 56 Neb. 648, 71 Am. St. Rep. 691, 77 N. W. 80; Den ex dem. Decker v. Adams, 12 N. J. L. 99; People ex rel. Chrome Steel Co. v. Paulding, 22 Hun, 91; Jackson ex dem. Corson v. Cairns, 20 Johns. 301; Huntington v. Mattfield, — Tex. Civ. App. —, 55 S. W. 361; Holman v. Bonner, 63 Miss. 131; Hannibal & St. J. R. Co. v. Miller, 115 Mo. 158, 21 S. W. 915.

Plaintiffs are tenants in common of the title, and, as such, are entitled to the possession of the entire premises, or any portion thereof.

Sedgw. & W. Trial of Title to Land, § 300; Freeman, Cotenancy & Partition, §§ 343, 344; Barrett v. French, 1 Conn. 364, 6 Am. Dec. 241; Hibbard v. Foster, 24 Vt. 542; Crook v. Vandevort, 13 Neb. 505, 14 N. W. 470; Stark v. Barrett, 15 Cal. 362; Collier v. Corbett, 15 Cal. 183; Croft v. Rains, 10 Tex. 523; Watrous v. McGrew, 16 Tex. 510; Grassmeyer v. Beeson, 18 Tex. 766, 70 Am. Dec. 309; Hutchins v. Bacon, 46 Tex. 414; Read v. Allen, 56 Tex. 176; Sowers v. Peterson, 59 Tex. 216; Sharon v. Davidson, 4 Nev. 416; Simmons v. Spratt, 26 Fla. 461, 9 L.R.A. 347, 8 So. 123; Smith v. Starkweather, 5 Day, 210; Bush v. Bradley, 4 Day, 298; Cushing v. Miller, 62 N. H. 525; Coit v. Wells, 2 Vt. 318; Chandler v. Spear, 22 Vt. 388; Robinson v. Sherwin, 36 Vt. 74; King v. Bullock, 9 Dana, 41; Rabe v. Fyler, 10 Smedes & M. 440, 48 Am. Dec. 763.

MILLS, CH. J., delivered the opinion of the court:

It is evident from an examination of the record that this case was ably contested by the attorneys for both the plaintiffs and the defendants, and that every effort was used to secure and present to the trial court all of the evidence which minds trained in the subtlety of legal procedure by many years of active practice before the courts believed would be useful to the respective sides which they represented in the controversy now before us.

The questions discussed by counsel in their briefs are numerous and involve complicated points of law, but in our opinion the real questions on which this case must finally be decided can be compressed into a small compass, by brushing to one side what, under our opinion of this case, are 51 L.R.A. (N.S.)

collateral and comparatively unimportant matters, many of which are elaborately argued in the briefs submitted to us by counsel. We will endeavor to dispose of this case along these lines.

1. We do not consider as well taken the contention of the appellants that the plaintiffs below could not maintain this suit without joining their tenants in common as parties. No provision of our laws, so far as we are aware, requires that all of the tenants in common should join in a suit to recover possession of real property. In fact, this court has held in *Neher v. Armijo*, 9 N. M. 325, 54 Pac. 236: "Defendant insists that these plaintiffs as tenants in common could not be joined as parties plaintiff, and their having so joined is fatal to their case. We do not interpret the law to be as defendant contends, but believe the better rule to be that tenants in common may join in ejectment and recover the whole property demanded so held by them in common, or they may sue separately and recover each one only his whole interest." The opinion in the *Neher v. Armijo* Case, that tenants in common may join in an ejectment case and "recover the whole property demanded so held by them in common, or they may sue separately and recover," is we think correct, but we think that that case is incorrect in limiting such recovery in case a suit is brought by one of several tenants in common to "each one only his whole interest," and to that extent the case of *Neher v. Armijo* is reversed. We think the true rule to be that a tenant in common may sue separately in ejectment, and that, if the defendant shows no title, he is entitled to recover possession of the entire estate, "in subordination, however, to the rights of his cotenants." As is well said in *Hardy v. Johnson*, 1 Wall. 371, 17 L. ed. 502: "The action of ejectment determines no rights but those of present possession; and that one tenant in common has such rights as against all parties but his cotenants, or persons holding under them, is not questioned." That a tenant in common may sue without joining the other tenants in common is also held as late as 1898, when the Supreme Court of the United States quotes approvingly from *Davis v. Coblens*, 12 App. D. C. 51, 61, as follows, to wit: "The original rule at common law was that tenants in common could only sue separately, because they were separately seised, and there was no privity of estate between them. *Mobley v. Bruner*, 59 Pa. 481, 98 Am. Dec. 360; *Corbin v. Cannon*, 31 Miss. 570, 572; *May v. Slade*, 24 Tex. 205, 207; 4 Kent, Com. 368. The practice soon became general, however, in the United States, to permit them to sue either jointly or severally as they might elect. 7

Enc. Pl. & Pr. 316, and cases cited. This seems to have been the practice in the District of Columbia, and, so far as we are advised, has never been questioned. Tenants in common may join in an action if they prefer to do so, but it is with the risk of the failure of all, if one of them fail to make out a title or right to possession." And the Supreme Court adds to this quotation the words: "These remarks express the rule correctly." *Davis v. Coblens*, 174 U. S. 719, 43 L. ed. 1147, 19 Sup. Ct. Rep. 832. The law is also laid down in 15 Cyc. 8, to be that it is not necessary that all the tenants in common shall unite in the action, although they may join in it for their common estate.

2. We will now consider the agreement in writing signed by Otero and Sena y Baca, on which this controversy is largely based, to determine whether it is a deed or an agreement to convey, for the decision of this point is of vital importance to the parties to this case. From the standpoint of performance, contracts have been divided into two classes,—executed and executory. "A contract is executed where everything that was to be done is done, and nothing remains to be done. A grant actually made is within this category. Such a contract requires no consideration to support it. A gift consummated is as valid in law as anything else. *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629. An executory contract is one where it is stipulated by the agreement of minds, upon a sufficient consideration, that something is to be done or not to be done by one or both of the parties. Only a slight consideration is necessary. *Pillans v. Van Mierop*, 3 Burr, 1663; *Forth v. Stanton*, 1 Wms' Saund. 210, note 2, and the cases there cited." *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558. An examination of the contract or agreement entered into between Otero and Sena y Baca, and which is set out in full in the statement of facts preceding this opinion, convinces us that it was an executory contract (although it contains words of present purchase and sale) for the conveyance of the Galisteo ranch by Otero to Sena y Baca upon the happening of a certain contingency, *viz.*, the adjudication and approval of the Bartolome Baca grant. The wording of the contract provided that Sena y Baca could take possession of the Galisteo ranch and enjoy the products of the same until the proper documents were executed to convey the title to him, which documents were to be executed on the favorable adjudication and approval (confirmation) of the Bartolome Baca grant. The wording of the agreement is unequivocal and plain that the deed of conveyance to

the Galisteo ranch was to be made when the Bartolome Baca grant was favorably adjudicated and approved. Nor can it be contended that the contract of June 22, 1878, was a deed, for it is signed by both Otero and Sena y Baca, and not alone by Otero, the then owner of the Galisteo ranch. If the instrument in question had been signed by Otero alone, there would have been more force than now exists in the contention of the appellants that it was a deed transferring the title to real estate, rather than a mere agreement to execute deeds to convey on the happening of certain events. Another thing which leads us to conclude that the writing was an executory contract, and not a deed, is that it is not acknowledged before any officer having the power to take acknowledgments to deeds, nor before anyone, and as long ago as 1852 our legislature passed an act which was approved on January 12th of that year, which provided in § 5 that "every instrument in writing by which real estate is transferred or affected, in law or equity, shall be acknowledged and certified to in the manner hereinafter prescribed." Laws 1851-52, p. 374. Section 6 of the same act sets out the officers before whom such acknowledgments might be taken. This law was in force at the time of the signing of the agreement or contract on June 22, 1878, and must have been known to the parties who signed it, for the evidence discloses that one of them at least was a man of affairs, and one who was familiar with the working of the legislative bodies of the territory. In arriving at a conclusion as to whether or not the writing which is the basis of this controversy is a deed or contract, we must consider it as an entirety. We cannot pick out a few words or a line here and there, and determine from them what it is. As the Supreme Court of the United States says: "We agree generally that, although there are words of conveyance *in presenti* in a contract for the purchase and sale of lands, still, if, from the whole instrument, it is manifest that further conveyances were contemplated by the parties, it will be considered an agreement to convey, and not a conveyance. The whole question is one of intention, to be gathered from the instrument itself. *Jackson ex dem. Shipley v. Moncrief*, 5 Wend. 26; *Ogden v. Brown*, 33 Pa. 247; *Phillips v. Swank*, 120 Pa. 76, 6 Am. St. Rep. 691, 13 Atl. 712;" *Williams v. Paine*, 169 U. S. 55, 42 L. ed. 658, 18 Sup. Ct. Rep. 279. We have gone over the written instrument dated June 22, 1878, very carefully, and have come to the conclusion that it is not, and was not intended to be, a deed for the conveyance of the Galisteo ranch, but that it was an executory con-

tract, by the terms of which a deed for its conveyance was to be delivered by Manuel Antonio Otero to Jesus Sena y Baca, on the favorable adjudication and confirmation of the Bartolome Baca grant. As the Bartolome Baca grant was finally rejected by the Supreme Court of the United States, no necessity arose for Otero or his heirs to give deeds of conveyance for the Galisteo ranch.

3. Holding that the instrument in writing under which Sena y Baca took possession of the Galisteo ranch and held the same was an executory contract, we must determine the nature of the possession of the said ranch by Sena y Baca and his successors in title, with the view of determining whether or not title has been acquired by adverse possession. The evidence in this case discloses that Sena y Baca, in obtaining the confirmation of the Galisteo grant, deraigned his title through Manuel Antonio Otero by virtue of the executory contract, and thus recognized the title of his vendor to the premises. No claim was made by the defendants that their title arose from any other source. Sena y Baca then entered into the possession of the lands in controversy by virtue of the contract, and with the permission of Manuel Antonio Otero, and it is generally held that a possession by permission or license from the owner is not adverse, and cannot ripen into title, no matter how long continued, or however exclusive it may be. 1 Cyc. 1030, and cases cited in note 66, from twenty-seven states, and from England, Canada, and the Supreme Court of the United States. The possession of the occupant under such circumstances is considered as the possession of him upon whose pleasure it continues. *Pulaski County v. State*, 42 Ark. 118. And again in 1 Cyc. 1044, the rule is stated to be, and many cases are cited in its support, that, "where one enters into and holds possession of lands under an executory contract of purchase or bond for title, the entry and possession are in subordination to the title of the vendor until payment or performance of all the conditions by the vendee, or until the vendee has distinctly and unequivocally repudiated the title of his vendor, which repudiation is brought expressly or by legal implication to the vendor's knowledge." The reason for this rule forbidding a person who has gone into possession under a contract to purchase, to repudiate his contract, is the injustice of allowing a person who has obtained possession by admitting title of another, to enjoy that title, and, in case of failure of proof of it, hold the premises himself. *Howard v. McKenzie*, 54 Tex. 171; *Kirk v. Taylor*, 8 B. Mon. 262; *McKelvain v. Allen*, 58 51 L.R.A. (N.S.)

Tex. 383; *Clouse v. Elliott*, 71 Ind. 302. The evidence in this case nowhere discloses that Sena y Baca, or his assigns, ever distinctly and unequivocally repudiated the title of Manuel Antonio Otero. When Sena y Baca disposed of whatever title he had in the Galisteo ranch to Rumberg, he did so by a quitclaim deed, and handed Rumberg the executory contract which he had in his possession, and this contract appears to have always been given to the occupants of the real estate in controversy down to the present day, for we find it in the possession of the defendants when this suit is brought, and it is introduced by them in evidence to support their claim that they own the property in fee.

We are aware that many points are raised in the briefs of both appellants and the appellees which we have not discussed; but, as before stated, under the view which we have taken of this case, we do not think that it is necessary for us to discuss or determine them, and we therefore refrain from so doing, although we have read and considered them with much care.

Finding no reversible error in the judgment of the court below, the same is therefore affirmed; and it is so ordered.

Pope, Parker, and Abbott, JJ., concur. **McFie, J.**, having heard a part of this case below, and **Mann, J.**, having decided the case below, took no part in this decision.

Petition for rehearing denied.

Affirmed by the Supreme Court of the United States, December 8, 1913 (231 U. S. 482, 58 L. ed. 325, 34 Sup. Ct. Rep. 144).

NEW YORK COURT OF APPEALS.

LOTUS N. SOUTHWORTH, Trustee of Remington Automobile & Motor Company, Bankrupt, Resp.,
v.

ANDREW D. MORGAN, Appt.

(205 N. Y. 293, 98 N. E. 490.)

Conflict of laws — foreign corporation — stockholder's liability.

1. The liability of a subscriber to stock of a corporation located in another state is to be determined by its laws in a suit to enforce the liability in the courts of the

Note.—*Issuance of stock at discount as affecting stockholder's liability for debts.*

The earlier cases on this question are collected in the note to *Security Trust Co. v. Ford*, 8 L.R.A. (N.S.) 263. The doctrine

state of the subscriber's domicile, in so far as they do not violate the law or settled policy of such domicile.

Evidence — foreign law — presumption.

*2. In the absence of proof of the foreign law in an action in which it is applicable, the court will presume that the common law is in force, and that it is the same as the local common law.

Judgment — assessing stock — effect on stockholders.

3. A judgment of a Federal court direct-

*For presumption as to law of another state or country, see notes in 67 L.R.A. 33, 34 L.R.A. (N.S.) 261, and 38 L.R.A. (N.S.) 40.

there stated, that the stockholder is liable to creditors for the full value of the stock even though he has received, for a sum less than its par value, stock purporting to be fully paid up, is adhered to in *Utica Fire Alarm Teleg. Co. v. Waggoner Watchman Clock Co.* 166 Mich. 618, 132 N. W. 502, and *First Nat. Bank v. Northup*, 82 Kan. 638, 136 Am. St. Rep. 119, 109 Pac. 672.

So, in *Johns v. Clothier*, — Wash. —, 139 Pac. 755, one who had subscribed for stock under an agreement that he was to pay only a certain per cent of the par value was held liable upon the suit of a receiver for the unpaid portion of his capital stock in favor of creditors who had no knowledge of such agreement.

And stockholders who had paid only a nominal consideration for their stock were held liable upon their unpaid stock subscriptions in *German-American State Bank v. Soap Lake Salts Remedy Co.* — Wash. —, 137 Pac. 461.

In *Wait v. McKee*, 95 Ark. 124, 128 S. W. 1028, stockholders who had executed notes for stock subscriptions, on which notes a credit of 50 per cent was indorsed, leaving only the remaining 50 per cent payable, were held liable for the full amount of their several stock subscriptions, notwithstanding the wrongful credits on the note.

And in *Moore v. United States One Stave Barrel Co.* 238 Ill. 544, 128 Am. St. Rep. 153, 87 N. E. 536, a creditor of a corporation who took stock of the corporation at a discount in payment of his debt was held liable for the unpaid portion of his stock subscription.

So, the purchasers of original stock from the corporation at less than par are liable to the par value of the stock to creditors who have acted upon the faith of the capital as represented by the stock. *McAllister v. American Hospital Asso.* 62 Or. 530, 125 Pac. 286.

The purchasers of preferred stock to whom were given a certain number of shares of the common stock as bonus were held liable in *Gordon v. Cummings*, — Wash. —, 139 Pac. 489, to an assessment upon the common stock at the suit of a receiver, although they believed at the time their sub-

scription was made that the stock was non-assessable.

ing a call upon the stockholders of an insolvent corporation to meet a deficiency in its assets to cover its obligations is not conclusive in an action in the courts of the state of a stockholder's residence that he is bound, under his subscription contract, to pay more than he agreed to pay for the stock, although that was less than the par value.

Corporation — stock — trust fund — issuance at discount — liability.

4. A subscriber to stock of a corporation whose contract provides that, upon payment of a portion of the par value of the stock, it shall be issued as fully paid and non-assessable, cannot, under the trust fund theory, be compelled to pay in for the benefit

It was further held in this case that although the common stock thus given out exceeded the authorized amount of such common stock, the holders thereof were liable to the creditors, since, as to creditors, there can be but one kind of stock, that is, the capital stock of the corporation, and within the limit of the authorized capital stock no person can hold a share, by whatever name it may be called, without meeting the responsibilities and the liabilities that the law attaches to such holding.

So, in *Holcombe v. Trenton White City Co.* 80 N. J. Eq. 122, 82 Atl. 618, preferred stockholders to whom common stock was issued as a bonus were held liable to an assessment for the unpaid portion of such common stock.

In *Knight & W. Co. v. Tampa Sand Line Brick Co.* 55 Fla. 728, 46 So. 285, stockholders to whom stock was gratuitously issued upon their purchase of the bonds of the company were held liable upon the corporation's insolvency, to the corporation creditors, for the full amount remaining unpaid upon the stock so issued to them. It is stated to be immaterial whether the stockholders formally subscribed for the stock or not; that their acceptance and holding thereof was equivalent to a formal contract of subscription importing a promise to pay.

So, subscribers to the bonds of a corporation in whose subscription contract it was provided that there should be delivered the bonds "and in addition thereto an amount of the capital stock of the" corporation equal, at its par value, to the par value of the bonds subscribed and fully paid for by such subscriber, were held liable to creditors of the corporation on the stock in *Gillett v. Chicago Title & T. Co.* 230 Ill. 373, 82 N. E. 891.

In *French v. Busch*, 189 Fed. 480, an action to recover an unpaid subscription on stock which had been issued as a bonus to bondholders in the company, the defense alleged was that by agreement among the bondholders no liability could be shown upon such stock; but it was held that as the stock assessed exceeded in amount the

of creditors the difference between the contract price and the par value.

(April 30, 1912.)

APPPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Oneida County in plaintiff's favor in an action brought to recover an alleged unpaid balance upon two shares of stock. Reversed.

The facts are stated in the opinion.

Mr. Howard C. Wiggins, with Mr. A. D. Morgan, for appellant:

The complaint should have been dismissed for failure to allege compliance with § 15 of the general corporation law.

Union Trust Co. v. Sickels, 125 App. Div. 105, 109 N. Y. Supp. 262; Welsbach Co. v. Norwich Gas & Electric Co. 180 N. Y. 533, 72 N. E. 1152; Wood & Selick v. Ball, 190 N. Y. 217, 83 N. E. 21; Halsey v. Henry Jewett Dramatic Co. 190 N. Y. 231, 123 Am. St. Rep. 546, 83 N. E. 25.

No contractual or statutory liability was alleged or proven.

Thatcher v. Morris, 11 N. Y. 437; Otis v. Harrison, 36 Barb. 216; Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54, 113 Am. St. Rep. 863, 77 N. E. 877; Ruse v. Mutual Ben. L. Ins. Co. 23 N. Y. 522; Christensen v. Eno, 106 N. Y. 97, 60 Am. Rep. 429, 12

stock issued as bonus, it was no defense to an assessment on the stock under the statutory liability to show that, as to some of the stock, the bondholders might be estopped from demanding contributions from each other to the extent of the stock issued as a bonus to the bonds which others received.

In Merchants' Mut. Adjusting Agency v. Davidson, — Cal. App. —, 137 Pac. 1091, the doctrine that the creditor of an insolvent corporation cannot enforce payment of unpaid balances on stock sold by the corporation in good faith at less than par in order to procure necessary capital wherewith to conduct its business is disapproved, and the right of a creditor under such circumstances to enforce the unpaid stock subscription is affirmed.

It is stated in First Nat. Bank v. Northup, 82 Kan. 638, 136 Am. St. Rep. 119, 109 Pac. 672, that a creditor who becomes such with knowledge that stock purporting to be fully paid up and nonassessable was issued at a discount may not recover of the stockholders of the corporation the balance unpaid. Property was received in this case as payment for the corporate stock, but the value of the property was fixed at a certain amount, and it is stated by the court that the real transaction amounted to an agreement to issue stock at a discount.

The right of a bondholder who had become such with knowledge that stock had not been fully paid, to recover the unpaid 51 L.R.A. (N.S.)

N. E. 648; Thompson v. Knight, 74 App. Div. 316, 77 N. Y. Supp. 599; Bostwick v. Young, 118 App. Div. 490, 103 N. Y. Supp. 607; Sanger v. Upton, 91 U. S. 56, 23 L. ed. 220; Stoddard v. Lum, 159 N. Y. 273, 45 L.R.A. 551, 70 Am. St. Rep. 541, 53 N. E. 1108; Glenn v. Garth, 133 N. Y. 18, 30 N. E. 649, 31 N. E. 344.

Messrs. L. N. Southworth and George E. Dennison, for respondent:

Section 15 of the general corporation law has no application to the case at bar.

Union Trust Co. v. Sickels, 125 App. Div. 105, 109 N. Y. Supp. 262; Sawyer v. Hoag, 17 Wall. 610, 21 L. ed. 731; Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 368; Handley v. Stutz, 139 U. S. 417, 35 L. ed. 227, 11 Sup. Ct. Rep. 530; Myers v. Seeley, 10 Nat. Bankr. Reg. 411; Nathan v. Whitlock, 3 Edw. Ch. 215; Beals v. Buffalo Expanded Metal Constr. Co. 49 App. Div. 589, 63 N. Y. Supp. 637; Thomas v. Roddy, 122 App. Div. 851, 107 N. Y. Supp. 473; Hebbard v. Southwestern Land & Cattle Co. 55 N. J. Eq. 18, 36 Atl. 122.

Where an assessment has been ordered by an equity court, an action at law may be brought against the stockholder to collect his unpaid subscription.

Clevenger v. Moore, 71 N. J. L. 149, 58 Atl. 88; Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co. 57 N. J. Eq. 627, 42 Atl. 585; Hood v. McNaughton, 54 N. J. L.

portion, was denied also in Biggs v. Western, 248 Mo. 333, 154 S. W. 708.

See note to Easton Nat. Bank v. American Brick & Tile Co. 8 L.R.A. (N.S.) 271, as to the effect of creditor's knowledge that stock was improperly issued as fully paid upon his right to resort to holder of same.

The principles applied in *SOUTHWORTH v. MORGAN* were held decisive of the case of *Milliken v. Caruso*, 205 N. Y. 559, 98 N. E. 493. It will be noticed that the decision in *SOUTHWORTH v. MORGAN* involved a New Jersey corporation, and, in the absence of proof of any statute of that state, the case was decided upon common-law principles. The case of *Milliken v. Caruso*, supra, involved a North Dakota corporation.

How far the payment for stock in a corporation by a transfer of property will protect the shareholder against creditors of the company is discussed in the note to *Van Cleve v. Berkey*, 42 L.R.A. 593.

As to bonus stock of corporation, see note to *Dummer v. Smedley*, 38 L.R.A. 490.

As to the liability of transferee of corporate stock on unpaid subscription, see note to *Perkins v. Cowles*, 30 L.R.A. (N.S.) 283.

As to the effect upon one's right as a stockholder of the fact that paid-up stock was wrongfully issued to him for a sum less than its par value, see note to *Shaw v. Staigt*, 20 L.R.A. (N.S.) 1077.

W. A. E.

425, 24 Atl. 497; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Re Remington Automobile & Motor Co.* 82 C. A. 421, 153 Fed. 345; *Rathbone v. Ayer*, 84 App. Div. 186, 82 N. Y. Supp. 235; *Stoddard v. Lum*, 159 N. Y. 273, 45 L.R.A. 551, 70 Am. St. Rep. 541, 53 N. E. 1108.

A "contractual" or "common-law liability" was alleged and proven.

Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757; *Marshall v. Sherman*, 148 N. Y. 9, 34 L.R.A. 757, 51 Am. St. Rep. 654, 42 N. E. 419; *Knickerbocker Trust Co. v. Iselin*, 185 N. Y. 54, 113 Am. St. Rep. 863, 77 N. E. 877; *Waters v. Quimby*, 27 N. J. L. 296, 28 N. J. L. 533; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Hood v. McNaughton*, 54 N. J. L. 425, 24 Atl. 497; *Hebberd v. Southwestern Land & Cattle Co.* 55 N. J. Eq. 31, 36 Atl. 122; *Kraft v. Griffon Co.* 82 App. Div. 29, 81 N. Y. Supp. 438; *Rathbone v. Ayer*, 84 App. Div. 186, 82 N. Y. Supp. 235; *Stoddard v. Lum*, 159 N. Y. 265, 45 L.R.A. 551, 70 Am. St. Rep. 541, 53 N. E. 1108; *Thompson v. Knight*, 74 App. Div. 316, 77 N. Y. Supp. 599; *Lang v. Lutz*, 39 Misc. 3, 78 N. Y. Supp. 200, affirmed in 180 N. Y. 254, 73 N. E. 24; *Lowry v. Inman*, 46 N. Y. 119; *Howarth v. Angle*, 162 N. Y. 179, 47 L.R.A. 725, 56 N. E. 489; *Cloee v. Potter*, 155 N. Y. 150, 49 N. E. 686; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. ed. 731; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203; *Hawley v. Upton*, 102 U. S. 314, 26 L. ed. 179; *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 963; *Patterson v. Lynde*, 106 U. S. 521, 27 L. ed. 266, 1 Sup. Ct. Rep. 432; *Richardson v. Green* (*Washburn v. Green*) 133 U. S. 30, 33 L. ed. 516, 10 Sup. Ct. Rep. 280; *Handley v. Stutz*, 139 U. S. 427, 35 L. ed. 234, 11 Sup. Ct. Rep. 530; *Camden v. Stuart*, 144 U. S. 113, 36 L. ed. 366, 12 Sup. Ct. Rep. 585; *Re Monarch Corp.* 177 Fed. 464; *Babbitt v. Read*, 173 Fed. 712; *Beals v. Buffalo Expanded Metal Constr. Co.* 49 App. Div. 589, 63 N. Y. Supp. 637; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co.* 67 N. J. Eq. 627, 42 Atl. 585; *Boney v. Williams*, 55 N. J. Eq. 691, 38 Atl. 189.

If the contract was violated by the corporation, that is no defense as against the creditors, or the trustee representing the creditors.

Phoenix Warehousing Co. v. Badger, 6 Hun, 293; *Yonkers Gazette Co. v. Jones*, 30 App. Div. 316, 51 N. Y. Supp. 973; *Beals v. Buffalo Expanded Metal Constr. Co.* 49 App. Div. 589, 63 N. Y. Supp. 635; *Lyell Ave. Lumber Co. v. Lighthouse*, 137 App. Div. 422, 121 N. Y. Supp. 802; *Meyer v. 61 L.R.A. (N.S.)*

Blair, 109 N. Y. 605, 4 Am. St. Rep. 500, 17 N. E. 228; *White Mountains R. Co. v. Eastman*, 34 N. H. 124; *McDermott v. Harrison*, 30 N. Y. S. R. 324, 9 N. Y. Supp. 184; *Briggs v. Cornwell*, 9 Daly, 436; *Moosbrugger v. Walsh*, 89 Hun, 564, 35 N. Y. Supp. 550; *Bosley v. National Mach. Co.* 123 N. Y. 550, 25 N. E. 990; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Ogilvie v. Knox Ins. Co.* 22 How. 380, 16 L. ed. 349; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203; *Chubb v. Upton*, 95 U. S. 665, 24 L. ed. 523.

Collin, J., delivered the opinion of the court:

The plaintiff, trustee of the bankrupt corporation, Remington Automobile & Motor Company, seeks to recover from the defendant a sum unpaid, as plaintiff alleges, upon a subscription by the defendant for two shares of the capital stock of the corporation.

The trial court found as facts: The bankrupt was organized in 1900 under the laws of New Jersey. Its authorized capital stock was \$250,000, divided into 2,500 shares of the par value of \$100 each. Soon after its incorporation, the board of directors adopted a resolution as follows: "Resolved, that for the purpose of securing a local interest in the Remington Automobile & Motor Company on the part of the citizens of Iliion (New York) that 200 shares of the stock be issued, to be sold at \$25 per share, and that the proceeds of such sale be placed in the treasury to be used for regular expenses." Thereafter, in pursuance of the resolution, the general manager and secretary of the corporation presented to the defendant a writing which contained the agreements that the plant of the corporation was to be located and its business to be carried on at Iliion, and that the defendant would purchase two nonassessable shares of the capital stock of the corporation at \$25 for each share, and no more would ever have to be paid upon them. The defendant signed the agreement and purchased the two shares of stock upon the distinct understanding and agreement made between the defendant and the general manager and secretary of the corporation that \$25 per share fully paid for the stock. He paid \$50 for the two shares of stock at the time he received them. The corporation located its plant at Utica, New York, and not at Iliion. In December, 1902, the company was adjudged a bankrupt, and in April, 1906, the United States district court granted an order directing a call or assessment upon the defendant and others of \$75 per share to meet the deficiency in the assets of said corporation to meet the obligations of its creditors, said assessments to be paid on or before July 1,

1906, and the defendant was duly served with a copy of said order. The court found as a conclusion of law that the plaintiff was entitled to recover the sum of \$150,—a conclusion which the facts found do not support.

The liability of the defendant is to be determined by the law of the state of New Jersey. That state, through its laws, gave the corporation its existence, powers, liabilities, and the limits within which it was free to act, and a citizen of this state, who became a shareholder in it, entered into contract relations, the extent and obligation of which depend upon those laws, in so far as they do not violate a statute or the settled public policy of this state. *Lowry v. Inman*, 46 N. Y. 119; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 55 Am. St. Rep. 414, 44 N. E. 349; *Molson's Bank v. Boardman*, 47 Hun, 135.

The relevant laws of New Jersey are not disclosed or laid before us by the printed record; nor do the findings make known the provisions of the charter of the bankrupt other than that stated relating to the authorized capital stock. We are confined to the case as the record presents it. The laws of other states are facts which must be alleged and proved, and of which we cannot take judicial notice either in their language or their interpretation. *Genet v. Delaware & H. Canal Co.* 163 N. Y. 173, 177, 57 N. E. 297; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 55 Am. St. Rep. 414, 44 N. E. 349.

In the absence of those facts, we must presume that the common law of New Jersey is the same as the common law of New York. *Ruse v. Mutual Ben. L. Ins. Co.* 23 N. Y. 516, 522.

It is urged by the respondent, at this point, that the order of the United States district court directing the assessment of the shares of the defendant conclusively determined the validity and the amount of the assessment. It is true that the regularity and validity of the proceeding in that court and its conclusions cannot be attacked in this action; but the existence or nonexistence of an obligation on the part of the defendant to pay the assessment was not within the subject-matter of which that court took jurisdiction. To enable the plaintiff to enforce the liability of the delinquent shareholders to the extent only which the deficiency in the corporate assets required and to effect parity of contribution between them, it was necessary that an account of the assets and debts, of the entire amount of the capital remaining unpaid upon the issued shares, and the part of the face value of his shares unpaid by each stockholder, should be taken, and the aggregate

assessment required equitably rated by the court, and it is upon those issues that its order is beyond attack in this action. *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; *Howarth v. Angle*, 162 N. Y. 179, 47 L.R.A. 725, 56 N. E. 489. In the former case the court, speaking of an analogous order of a court of Illinois, said: "But the order was not, and did not purport to be, a judgment against anyone. It did not undertake to determine the question whether any particular stockholder was or was not liable in any amount. It did not merge the cause of action of the company against any stockholder on his contract of subscription, nor deprive him of the right, when sued for an assessment, to rely on any defense which he might have to an action upon that contract." p. 337. The respondent does not contend that the charter provision dividing the authorized capital stock into shares "of the par value of \$100 each" prohibited the creation of an actual share or interest upon a consideration less than \$100, or secures to the creditors or their representative the right of collecting upon each share, as the discharge of the corporate debts demands, the difference between the consideration and \$100.

Inasmuch as no statute of the state of New Jersey, nor provision of the charter of the corporation relative to the liability of the defendant, was proven, we turn to the common law, remarking parenthetically, however, that we have not been referred to and have not found any domestic statute which prescribes, as a condition to the exercise here of the rights derived from the state of New Jersey, that the shareholders shall be liable to the creditors or their representative up to the nominal value of their stock, and there is therefore no statutory, as there is no charter, prohibition against the issuance of the shares of the capital stock for less than their par value as named in the charter, and no statutory mandate that the shares shall be deemed issued and held subject to the payment of such value. Nor do the principles of the common law of this state work such results. In *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648, 650, the action was brought by a judgment creditor of an insolvent corporation organized under the laws of Illinois to recover 40 per cent of the authorized par value of \$100 each of 25 shares of the stock of the company issued to but unsubscribed for by the defendant, upon which the 40 per cent was not paid, but, as a gratuity, was credited as paid, when the stock was issued. Judge Andrews, writing for this court, which reversed the judgment in favor of the plaintiff, said

(citing authorities): "But the liability of a shareholder to pay for stock does not arise out of his relation, but depends upon his contract, express or implied, or upon some statute; and in the absence of either of these grounds of liability, we do not perceive how a person to whom shares have been issued as a gratuity has, by accepting them, committed any wrong upon creditors, or made himself liable to pay the nominal face of the shares as upon a subscription or contract." p. 102. The principles which determined our judgment in that case were reaffirmed in *Christensen v. Colby*, 110 N. Y. 660, 18 N. E. 480.

In the case at bar, no statute supports the alleged liability of the defendant, and the express agreement between the corporation and the defendant was that the defendant should pay 25 per cent of the nominal value of the shares and no more. The respondent contends, however, and therein he has been successful in the courts below, that the creditors of the corporation represented by the plaintiff have the right to compel the payment of the unpaid 75 per cent because the capital stock is a trust fund for the security of the creditors, and that a liability in their favor to the extent of the unpaid part of the nominal value of the actual shares exists and can be enforced. Such contention availed the plaintiff in the *Christensen* Case until it reached this court, the general term saying therein that the practical effect of the transaction was to take out of the assets, to which the creditors were entitled, the 40 per cent indorsed as paid upon the stock, when in fact it was not paid. It is strenuously urged that this case is not controlled by the principles which decided the *Christensen* Case, for the reason that the defendant subscribed for the two shares of the capital stock, while in the *Christensen* Case the stock certificate was merely issued to and accepted by the defendant. The subscription, as expressed in the agreement between the defendant and the corporation, has been completely fulfilled by the payment in full of the sum it bound him to contribute, and therewith his liability to the corporation or the creditors terminated, unless there issued from the trust fund doctrine, through implication, a contract which, in the paramountcy given it by the fact that it was the irresistible product of the law, nullified the expressed stipulation that \$25 was the whole sum to be paid upon each share, and substituted in its place the requirement that, as to the creditors, there should be paid \$100, or so much thereof as the satisfaction of their demands made necessary. That doctrine has not such potency. Its peculiar vigor is that, contrary to the 51 L.R.A. (N.S.)

common law of England, it secures to the creditors of insolvent corporations or their representatives the right of enforcing subscriptions for shares of which the corporation has deprived itself by release or defeasance. It declares that the capital or capital stock of a corporation is a substitute for the personal liability which subsists in individual or partnership undertakings, and is a fund set apart as a security for the payment of the corporate debts. The capital or capital stock which it thus segregates is not the capital stock authorized or named in the charter of the corporation. If it were, the members would be bound by the doctrine to contribute on account of it the sum within its named value needed to pay the debts of the insolvent corporation. The statement in the charter does not create a security for the creditors. It creates authorized or potential capital stock and shares which, transferred into actual shares through the acquisition of subscribing members and their payments, produces the money or property which, put into a single corporate fund, is the actual capital or capital stock on which the business is undertaken, and the assets or fund contemplated by the trust fund doctrine which the directors or stockholders may not lawfully diminish by appropriating or squandering it or giving it away. And as there is not a fund or security in the nominal or potential shares, there is none in the excess of the nominal value over the subscribed value of the shares. The subscription agreements, as they are enforceable through their express provisions or implication or statutory conditions, are the sources and the measure of the duty of the subscribers. *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648; *Burrall v. Bushwick R. Co.* 75 N. Y. 211. The doctrine further declares that unpaid subscriptions are a part of the capital, and that a subscriber cannot be discharged to the injury of creditors by arrangement or device to which creditors do not give their assent, and by which he is to pay less than his subscription. *Stoddard v. Lum*, 159 N. Y. 265, 45 L.R.A. 551, 70 Am. St. Rep. 541, 53 N. E. 1108; *Ward v. City Trust Co.* 192 N. Y. 61, 84 N. E. 585; *Hazard v. Wight*, 201 N. Y. 399, 94 N. E. 855. The doctrine does not create or nullify subscriptions. It lays hold of the assets of an insolvent corporation, and in doing that it compels subscribers to fulfil their legal obligations and perform their legal duties; but it does not beget those duties or obligations; it does not make unlawful or invalid a subscription which, apart from it, was valid and lawful. The question with it is; Has the subscriber fully performed

the subscription agreement as it in fact and in law exists? And an affirmative finding renders it inapplicable and inoperative. In the case at bar there were not statutory conditions upon which the shares might be owned. The agreement between the defendant and the corporation expressed with completeness the obligation and liability of the defendant for his shares. He has fulfilled the obligation and thereby destroyed the liability. The trust fund doctrine is inapplicable, and the findings of fact do not constitute a cause of action.

We have not considered or determined either the manner or the extent in which a statute of New Jersey, inimical to the express agreement of the corporation and the defendant, would, through implication, affect it, or the effect of the statement of the corporation that it would locate its plant and carry on its business at Ilion, because the record submitted to us does not present those questions.

The judgment should be reversed, and a new trial granted; costs to abide the event.

Haight, Vann, Willard Bartlett, Hisscock, and Chase, JJ., concur.

Cullen, Ch. J., concurs in memorandum, as follows:

I concur on the sole ground that, as shown in the opinion of Collin, J., the question involved in the appeal is settled by the authority of the previous decisions of this court. Were it an original one, I should reach a contrary conclusion.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA, Appt.,
v.

K. L. LAWING.

(164 N. C. 492, 80 S. E. 69.)

Courts — review of municipal action.

1. The court will not ordinarily supervise the action of municipal authorities in establishing fire limits.

Note. — Power to prohibit or restrict repair of wooden buildings within fire limits.

Absolute prohibition.

That structures already in existence may be confiscated by a municipality in view of overriding necessity, such, for instance, as prevention of the spread of a conflagration, is conceded. Whether the two single facts, that a structure is built of combustible material, and that it is located within fire limits, create a sufficiently urgent

51 L.R.A.(N.S.)

Constitutional law — forbidding repair of buildings — taking of property.

2. There is no unconstitutional taking of property by forbidding the repair of frame buildings within the fire limits of a municipal corporation, so as to make and keep them habitable.

(November 26, 1913.)

A PPEAL by the State from a judgment of the Superior Court for Lincoln County acquitting defendant of the charge of violating a town ordinance regulating buildings within the fire limits of the town. Reversed.

The facts are stated in the opinion.

Mr. A. L. Quickel, for the State:

Laws and ordinances prescribing fire limits, and regulating buildings and repairs within these limits, come under what is known as the police power of the state.

State v. Johnson, 114 N. C. 846, 19 S. E. 599; State v. Tenant, 110 N. C. 612, 15 L.R.A. 423, 28 Am. St. Rep. 715, 14 S. E. 387; Davison v. Walla Walla, 52 Wash. 453, 21 L.R.A.(N.S.) 454, 132 Am. St. Rep. 983, 100 Pac. 981; State v. Moore, 104 N. C. 714, 17 Am. St. Rep. 696, 10 S. E. 143; State v. Pendergrass, 106 N. C. 666, 10 S. E. 1002; State v. Moore, 113 N. C. 701, 22 L.R.A. 472, 18 S. E. 342.

An act of the legislature will never be declared unconstitutional, unless it plainly and clearly appears that the general assembly has exceeded its power.

State v. Baskerville, 141 N. C. 818, 53 S. E. 742.

The police power, under our Federal system of government, has been left with the states, and the only limit to its exercise in the enactment of laws by their legislatures is that they will not prove repugnant to the fundamental law, the state Constitution, and the Federal Constitution, or laws made under its delegated powers.

State v. Moore, 113 N. C. 702, 22 L.R.A. 472, 18 S. E. 342; Durham v. Eno Cotton Mills, 141 N. C. 644, 7 L.R.A.(N.S.) 321, 54 S. E. 453; Brown v. Keener, 74 N. C. 714.

The ordinance does not violate the Federal Constitution.

necessity to warrant confiscation, is the extreme form of the question involved in a more or less modified degree, in a policy of gradual confiscation by the prohibition of repairs.

The argument *contra* was thus expressed in First Nat. Bank v. Sarilla, 129 Ind. 201, 13 L.R.A. 481, 28 Am. St. Rep. 185, 28 N. E. 434, where, however, the ordinance only prohibited repairs in excess of \$300: "It will not be contended by anyone that the establishment of fire limits will justify the condemnation and removal of wooden

State v. Call, 121 N. C. 643, 28 S. E. 517; *State v. Davis*, 157 N. C. 650, 39 L.R.A.(N.S.) 136, 73 S. E. 130.

This being a police regulation, the defendant could acquire no vested right to violate its terms from having erected his building prior to the enactment of the law.

State v. Johnson, 114 N. C. 846, 19 S. E. 599; *State v. Stovall*, 103 N. C. 418, 8 S. E. 900.

Mr. T. W. Bickett, Attorney General, also for the State.

Mr. L. B. Wetmore, for appellee:

It looks hard that defendant should be punished for carrying out the true purpose and spirit of the law, even though he may have violated the letter of the law.

First Nat. Bank v. Sarlls, 129 Ind. 201,

13 L.R.A. 481, 28 Am. St. Rep. 185, 28 N. E. 434.

The ordinance is not only confiscatory in its natural and unavoidable effect, but it is unreasonable also. It has the effect of taking the property of the citizen from him without due process of law, and is therefore unconstitutional.

Ibid.; *Seneca v. Cochran*, 84 S. C. 279, 26 L.R.A.(N.S.) 124, 66 S. E. 288; *People ex rel. Standard Bill Posting Co. v. Hastings*, 77 Misc. 453, 137 N. Y. Supp. 186; *State v. Lyle*, 100 N. C. 497, 6 S. E. 379.

The first and main test of an ordinance being valid or not is its reasonableness or unreasonableness, and it is a matter of law for the courts to declare.

buildings previously constructed, simply because they are wooden buildings. Before their destruction or compulsory removal can be justified, they must become nuisances. Yet this ordinance, by forbidding repairs, would accomplish by indirection what could not be done directly. It would first compel the owner to allow it to become and remain a nuisance, and then punish him for so doing by destroying or removing his property."

But this statement is extreme. Notwithstanding the well-settled rule that building ordinances are in general not retroactive, the prevention of danger from possible fires will no doubt justify some direct confiscation (even apart from the matter of repairs) of certain structures *in esse* which are not nuisances. See, for instance, *Re Newell*, 2 Cal. App. 767, 84 Pac. 226 (a movable tent "house" used as a place of business); *Salem v. Maynes*, 123 Mass. 372, and *Knoxville v. Bird*, 12 Lea, 121, 47 Am. Rep. 326 (new structures scarcely under way); *Seattle v. Hinckley*, 2 L.R.A.(N.S.) 398, and note (fire escape). The question is one of degree; and the reasonableness which is requisite to bring within the scope of the police power regulations adopted in pursuit of the policy of ultimately discontinuing wooden buildings within fire limits is found, if at all, in contrasting the magnitude of the private loss with the increment to the public safety.

In *Morton v. Wessinger*, 58 Or. 80, 113 Pac. 7, it was held that an ordinance which made it unlawful to construct frame buildings, or "to alter or enlarge the same," within fire limits, was not intended to and could not apply to the completion of a new frame structure partially finished at the time the ordinance was adopted. Compare this case with *Salem v. Maynes* and *Knoxville v. Bird*, *supra*, on the showing made as to the extent to which the work had progressed. On the subject of remodeling, reconstructing, or augmenting building as construction or erection within fire limit statute or ordinance, see note to *Mayville v. Roing*, 26 L.R.A.(N.S.) 120.

The plainest case for outright confiscation by an absolute prohibition of repairs

would seem to be where a building is in such a dangerous condition that it cannot be made safe by repairs. This was the situation in *Monteleone v. Royal Ins. Co.* 47 La. Ann. 1563, 56 L.R.A. 784, 18 So. 472. Speaking *obiter*, the court gave indication that in such case the prohibition was legitimate. The same opinion was expressed in *Com. v. Hayden*, 211 Mass. 296, 97 N. E. 783.

In such case, however, the building practically amounts to a nuisance. On the subject of municipal power over wooden building as nuisances, see note in 38 L.R.A. 170.

In *First Nat. Bank v. Sarlls*, *supra*, the limitation of permissible repairs to those which might be made for \$300, was held arbitrary. The building "may be a mere wreck or remnant which \$300 would practically rebuild, or it may be valuable, worth many thousands of dollars, and the cost of repairs, although \$300 or more, relatively insignificant." The court was of the opinion that, under general welfare clauses of their charters, cities may doubtless prevent the repair of a wooden building within fire limits, "when to repair would practically be to rebuild," but cannot, "at least without express statutory authority, enforce a general sweeping prohibition of all repairs;" and a query was made even as to the constitutionality of such statutory authority, although the court did not have to decide the point. The case is no authority as to what may be done under an appropriate statute short of absolute prohibition, for, aside from that provision of the charter permitting legislation for the "general welfare," the only clause available to sustain the ordinance was one authorizing the city to "prevent the erection of wooden buildings" within the established fire limits.

Under ordinary conditions, as is conceded in *STATE v. LAWING*, *State v. Johnson*, 114 N. C. 846, 19 S. E. 599, and *State v. Shannonhouse*, — N. C. —, 80 S. E. 881, *infra*, minor repairs must be permitted. A proprietor, because his building is within fire limits, cannot be compelled to let it go to rack and ruin. *O'Brien v. Louer*, 158 Ind.

Abbott, Mun. Corp. § 545; Barger v. Smith, 156 N. C. 326, 72 S. E. 376.

Clark, Ch. J., delivered the opinion of the court:

The charter of Lincolnton (Laws 1899, chap. 369, § 70) provides: "Said board of aldermen may establish fire limits in said town, within which it shall be unlawful for any person to erect, construct, or repair any building of wood or other material inflammable or peculiarly [subject] to fire."

Under authority of above provision of law, the aldermen enacted town ordinance, § 34, as follows: "No person shall erect any building or structure unless the outer walls thereof be of brick, stone or concrete, and covered with metal, stone or other nonin-

flammable roofing, within the fire limits as designated by § 33, on page 8 of the printed ordinances of said town; nor shall any person remove any building, not so constructed from without into, said prescribed fire limits, nor from one place to another within said fire limits; provided, the above ordinance shall not apply to the construction or repair of hitching stalls within said fire limits." The prescribed fire limits are very restricted, and are in the center of the town, and mostly abutting on the courthouse square.

It appears from the special verdict that within the fire limits of the town, the defendant owns a hotel building consisting of a main building, three stories high, constructed of brick, with a two-story ell ex-

211, 61 N. E. 1004; Seneca v. Cochran, 84 S. C. 279, 28 L.R.A. (N.S.) 124, 66 S. E. 288. But as to what degree of restriction or rate of confiscation is reasonable, the cases, as might be expected, are not entirely in accord.

Discretionary prohibition by withholding permit.

In *Ex parte Fiske*, 72 Cal. 125, 13 Pac. 310, the court considered an ordinance which provided: "No wooden building within the fire limit shall be altered, changed, or repaired without permission in writing signed by a majority of the fire wardens, approved by a majority of the committee on fire department and the mayor, which permit shall fully express the alterations, changes, or repairs allowed, a copy of which shall be filed by the grantee, etc." No doubt was entertained with respect to the validity of this section, except with reference to the provision that certain officers might grant permission to make repairs; and that was sustained upon the ground that an absolute prohibition of repairs would work useless hardships in many cases, and, as a general rule for exceptions could not be established beforehand, the power to grant relief was properly conferred on certain officers, whom the court must presume would not exercise it wantonly nor for purposes of profit or oppression. A similar provision was present and impliedly approved in *Griffin v. Gloversville*, 67 App. Div. 403, 73 N. Y. Supp. 684.

And in *State v. Johnson*, supra, the court, referring to *Ex parte Fisk*, sustained the validity of an ordinance providing: "It shall be unlawful without the consent of the board, for any person or corporation to erect, alter, or repair any wooden building within said fire limit." And in accord with these two cases is *State v. Shannonhouse*, — N. C. —, 80 S. E. 881, *infra*.

But in an earlier North Carolina case, *State v. Tenant*, 110 N. C. 612, 15 L.R.A. 424, 28 Am. St. Rep. 715, 14 S. E. 387, an ordinance which required a permit for the erection of any house or building within

the city limits, or any improvement or change in any such building, without specifying the conditions under which permits could be withheld, was declared unconstitutional because it gave arbitrary power to the city authorities. A very similar provision, expressly applicable to repairs, was looked upon with disfavor in *Com. v. Corson*, 36 Pa. Super. Ct. 7, where the ordinance was held void for uncertainty; and in *Newton v. Belger*, 143 Mass. 598, 10 N. E. 464, a like ordinance was held void on the ground that no statutory authority existed under which it could be passed; so, also, in *State v. Crepeau*, 29 R. I. 340, 71 Atl. 449. For a valid statutory authorization to withhold permits in Massachusetts, see *Greene v. Damrell*, 175 Mass. 394, 56 N. E. 707.

In *Roanoke v. Bolling*, 101 Va. 182, 43 S. E. 343, the city permitted the repair of damaged buildings not more than one half destroyed, and provided that the city engineer should determine the amount and extent of damage. Where the evidence before the court showed that the building was not more than one half destroyed, it was held that the city was without power to withhold a permit to repair. The court expressly referred to the power granted by charter or statute, which extended only to the prohibition of the erection of wooden buildings within fire limits, to the abatement of nuisances, and the enactment of laws for the general welfare; but the opinion impliedly suggests more fundamental objections to the possibility of vesting an unregulated discretion in administrative officers.

And in *Harvey v. Elkins*, 65 W. Va. 305, 64 S. E. 247, it was held that the exercise of discretion under an ordinance permitting the withholding of permits must be reasonable, and could not be used to prevent minor repairs to a wooden building, such as replacing a window and part of a wall taken out to remove a safe, changing an inside partition, repapering, changing the electric lights, and painting the building outside. Compare *State v. Shannonhouse*, — N. C. —, 80 S. E. 881.

tending out therefrom, and the ell (constructed prior to the establishment of any fire limit in the town) is of wood, being an ordinary frame building with a shingle roof. The roof of shingles had become decayed and in such a rotten condition that it leaked badly. The defendant, after the passage of the ordinance above quoted, removed the old rotten shingle roof, and recovered the same with sheet iron.

It cannot be doubted that the people of the state, acting through their legislature, have authority to authorize the governing body of any town to establish fire limits for the protection of life and property therein which would be endangered by fire. There is nothing here to show that the town authorities have acted unreasonably in the

establishment of fire limits. Whether they have acted with judgment or not is a matter for the people of the town who can correct their action, if not agreeable, by making their wishes known to the authorities, or by the election of a new board, if necessary. This court has neither the information nor the authority to supervise their conduct, ordinarily at least, though in a case of palpable oppression an injunction might possibly lie until the people of a town can pass upon the matter in the election of officers. As was said by Pearson, Ch. J., in *Brodnax v. Groom*, 64 N. C. 250, as to the action of county commissioners in matters within their jurisdiction: "This court is not capable of controlling the exercise of power on the part of the general

In *Sioux Falls v. Kirby*, 6 S. D. 62, 25 L.R.A. 621, 60 N. W. 156 a provision requiring a permit to make repairs to wooden buildings was held invalid on the ground that it created an arbitrary power, although the ordinance contained a clause requiring the issuance of the permit if the inspector is satisfied that the repair is "in compliance with the provisions of this chapter." There was a dissent, however, from this very extreme view.

On the power to enforce the requirement of a permit by making the failure to obtain one a misdemeanor punishable by fine and imprisonment, see *State v. Zurich*, 49 La. Ann. 447, 21 So. 977 (held not to exist apart from statute); and *New Orleans v. Danne-man*, 51 La. Ann. 1093, 25 So. 931 (otherwise under express statutory authority).

Generally, on the subject of power of municipality to require permit to construct or repair building within its limits, see note in 13 L.R.A.(N.S.) 737; and as to its power, when granting permit, to impose conditions as to length of time of the continuance of structure, see note in 18 L.R.A.(N.S.) 402.

Power of municipality under charter or statute.

As to what constitutes repair within a fire limit statute or ordinance, see note in 26 L.R.A.(N.S.) 124.

Power to forbid the erection of wooden buildings within fire limits is sometimes held to be inherent in municipal corporations as such, or at least easily inferable from general welfare clauses (*McQuillin*, Mun. Corp. § 948); but the power to restrict repairs, being an encroachment upon tangible private property, might well be more strictly limited within express terms of conferment. *State v. Schuchardt*, 42 La. Ann. 49, 7 So. 67, in line with the *Sarlis* Case, quoted supra, on this point, held that power to prohibit the repair of a roof with combustible material could not be inferred from a charter clause permitting the establishment of fire limits and the prohibition of the erection or recon-

struction of wooden buildings therein. *Similiter*, *Reg. v. Howard*, 4 Ont. Rep. 377. An even stricter application of the rule was made in *Com. v. Hayden*, 211 Mass. 296, 97 N. E. 783, where the word "alterations" was held, in the light of the context, not to include repairs. See also *Com. v. Corson*, supra (in a jurisdiction where, in general, all authority of boroughs with respect to fire limits must be express. *McQuillin*, Mun. Corp. § 948); and *Roanoke v. Bolling*, supra.

And see, on the strict construction of confiscatory clauses, *Louisville v. Webster*, 108 Ill. 414, where the right to prohibit the "erection or repair" of wooden buildings was assumed, and even, *arguendo*, the right to direct their destruction if damaged more than 50 per cent of their value; but the ordinance involved was held invalid because not strictly in pursuance of statutory authority as to the manner of procedure.

But in *Ex parte Cain*, 56 Tex. Crim. Rep. 538, 120 S. W. 999, it was said that power to prevent the making of an addition to, or the covering with shingles or other combustible material of, "any building now within the fire limits," unless such "repairs" are less than 20 per cent of the value of the building, was "inherent" in all cities for the "prohibition of and protection against conflagration." The ordinance was applied, however, with respect to an "addition" to a wooden building.

In *Ex parte Heidelberg*, 51 Tex. Crim. Rep. 581, 103 S. W. 395, the extent of the power conferred upon the municipality was to prohibit the repair of wooden buildings only. The ordinance adopted extended to wooden and other sorts of buildings. For this reason it was held invalid, and a conviction for repairing a wooden building was set aside, as made under an invalid ordinance. The case does not in any way reflect on the power of the legislature to give the authority specified in the statute.

But power to prohibit repair of a wooden building damaged by fire to more than 30 per cent of its value has been held to be authorized by a charter provision permitting the prohibition of the erection or "ad-

assembly or of the county authorities, and it cannot assume to do so without putting itself in antagonism as well to the general assembly as to the county authorities, and erecting a despotism of five men, which is opposed to the fundamental principles of our government and usages of all times past. For the exercise of powers conferred by the Constitution, the people must rely upon the honesty of the members of the general assembly and of the persons elected to fill places of trust in the several counties. This court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the Con-

stitution upon the legislature department of the government or upon the county authorities." The above has been cited and approved in very numerous cases. See Citations in Anno. ed.

It may be noted that, since this ordinance was adopted May 13, 1912, there has been an election of a new governing board for the said town, and the ordinance must have been approved by the people of the town and the new officials, as it has not been repealed.

The decisions are thus summed up: "The prevention of and protection against conflagration is generally recognized as an ap-

dition" to buildings within fire limits whose outer walls are not composed of certain materials. *Davidson v. Walla Walla*, 52 Wash. 453, 21 L.R.A.(N.S.) 454, 132 Am. St. Rep. 983, 100 Pac. 981. Compare *Roanoke v. Bolling*, 101 Va. 182, 43 S. E. 343, supra, and *Harvey v. Elkins*, 65 W. Va. 305, 64 S. E. 247, supra.

And authority to prescribe the materials to be used in buildings has been held to warrant restrictions of major repairs without a permit, or any repairs at all, if the building is damaged to more than one third of its value. *State v. Shannonhouse*, — N. C. —, 80 S. E. 881, infra.

Prohibition against increase of fire risk; manner of repair.

It seems to be generally conceded that all repairs of wooden buildings which tend to increase the existing fire risk may be forbidden by ordinances passed under appropriate statutory authority.

A prohibition of repairs with other than fireproof material, enacted under a charter provision which gave power to prohibit the erection, placing, or repairing of wooden buildings within established fire limits, was sustained in *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89, which was an action of trespass for the removal by the authorities of a new shingle roof erected by plaintiff's testatrix. In *Skaneateles v. Hennessey*, 62 Misc. 347, 116 N. Y. Supp. 788, the court departed from the issue to express an opinion upholding the same restriction stated in somewhat more general terms. The provision was also present in *Chimene v. Baker*, 32 Tex. App. 520, 75 S. W. 330, but not passed upon, the ordinance being sustained as to a prohibition of the erection of a building with combustible materials. See, however, *State v. Schuchardt* and other cases cited supra.

In *O'Brien v. Louer*, 158 Ind. 211, 61 N. E. 1004, supra, the ordinance forbade repair in any manner that would make the building more susceptible to fire, and required a permit from the city authorities to make repairs. The case, however, is authority only for the proposition that a remodeling of the store fronts and interior partitions of the lower floor is not within the prohibition of this ordinance. 51 L.R.A.(N.S.)

In *Brady v. Northwestern Ins. Co.* 11 Mich. 425, the court entertained no doubt of the validity of an ordinance prohibiting the repair of a building partially destroyed by fire without the permission of the common council, and providing that permission should not be granted where the repairs would "increase the fire risk." And see also *State v. Johnson*, 114 N. C. 846, 19 S. E. 599.

There seems to be a possible distinction, however, between the fire risk of a district and that of a particular building; and in line with the decision in *STATE v. LAWING*, a law directed toward diminishing the risk of the district is sometimes applied in a case where the effect of the proposed improvements will be to make the building itself less dangerous than it is as it stands. *Lederer Realty Corp. v. Hopkins*, — R. I. —, 71 Atl. 456.

The earlier cases on this branch of the subject are collected in the note to *Davison v. Walla Walla*, 21 L.R.A.(N.S.) 454.

Patterson v. Johnson, 214 Ill. 481, 73 N. E. 761, involved an ordinance which, without regard to fire limits, made it unlawful to repair, reconstruct, or remove any frame building injured more than 50 per cent of its original value by wear and tear, by the effect of the elements, or by fire. Upon an issue which arose over the removal of such a building, the validity of the ordinance was sustained.

The rule laid down in *State v. Shannonhouse*, supra, with respect to the keeping up of existing wooden buildings within fire limits, was as follows: The prohibition of trivial repairs is not within the scope of the police power, and cannot be effected; the unqualified prohibition of repairs by ordinance, where the building is damaged more than one third of its value, is valid under statutory authority to "prescribe the character of any building, and the materials to be used in any building, within fire limits." Between these two extremes and under the same statutory authority, administrative officers may be vested with discretionary power to withhold permits to make repairs, and it was held not an unreasonable exercise of such discretion to refuse to permit a piazza to be torn away and replaced with new timber. C. F. L.

propriate exercise of the police power by municipalities, and the enactment of ordinances establishing fire limits, and forbidding the use of inflammable materials in buildings or in the erection thereof within such limits, has been uniformly sustained as proper methods of its exercise. While some courts hold that this power is inherent in a municipality, it nevertheless usually exists only by reason of an express grant or a necessarily implied statutory or constitutional delegation." 28 Cyc. 741.

Even in the absence of statutory authority, it has been held that the town authorities have the power to prohibit the repairing or altering of wooden buildings within prescribed limits. *Ex parte Fiske*, 72 Cal. 125, 13 Pac. 310; *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89; *State v. O'Neil*, 49 La. Ann. 1171, 22 So. 352; *Brady v. Northwestern Ins. Co.* 11 Mich. 425. In *First Nat. Bank v. Sarlls*, 129 Ind. 201, 13 L.R.A. 481, 28 Am. St. Rep. 185, 28 N. E. 434, it was held that the power to prohibit the repair of a building did not exist unless granted by the general law or by the charter of a town. This last is the case here.

In our own state, in *State v. Tenant*, 110 N. C. 609, 15 L.R.A. 423, 28 Am. St. Rep. 715, 14 S. E. 387, the ordinance was held invalid solely because it left the matter of such building to the arbitrary discretion of the board of aldermen, and did not, as in this case, prescribe a uniform rule of action governing the exercise of the discretion.

In this instance, the town, under the express provisions of the charter, has power to pass the ordinance prohibiting the erecting or repairing of a wooden building, and, in *State v. Johnson*, 114 N. C. 846, 19 S. E. 539, an ordinance such as the one now under consideration was sustained against the defendant, who was prosecuted for making repairs to a house that had been partially destroyed by fire.

In *Durham v. Eno Cotton Mills*, 141 N. C. 635, 7 L.R.A. (N.S.) 321, 54 S. E. 460, Walker, J., says, in speaking of a somewhat similar act to protect the waters of creeks, etc., from pollution: "The design of the act is not to take property for public use, nor does it do so within the meaning of the Constitution. It is intended to restrain and regulate the use of private property to as to protect the common right of all the citizens of the state. Such acts are plainly within the police power of the legislature, which power is the mere application to the whole community of the maxim, *Sic utere tuo, ut alienum non lãdas*; nor does such restraint, although it may interfere with the profitable use of the property by its owner, make it an appropriation

to a public use, so as to entitle him to compensation." After citing various authorities it is further said: "Many instances of such an exercise of this power can be found. The state regulates the use of property in intoxicating liquors by restraining their sale, not on the ground that each particular sale does injury, for then the sale would be prohibited, but for the reason that their unrestricted sale tends to injure the public morals and comfort. The state is not bound to wait until contagion is communicated from a hospital established in the heart of a city; it may prohibit the establishment of such a hospital there, because it is likely to spread contagion. So, the keeping of dangerous explosives and inflammable substances and the erection of buildings of combustible materials within the limits of a dense population may be prohibited because of the probability or possibility of public injury. Such instances might be indefinitely multiplied; but these are sufficient to illustrate this case. The object of this legislation is to protect the public comfort and health. For that purpose the legislature may restrain any use of private property which tends to the injury of those public interests."

It is urged that the placing of a metal roof upon this wooden ell makes it not more dangerous, but less so. But this loses sight of the object of the ordinance, which is not only to prohibit the building of wooden buildings within the prescribed limits, but, while not requiring the pulling down of the wooden buildings now within the limits, prohibits their repair in order to prevent their indefinite continuance therein, as would be the case if they can be repaired from time to time. As was said in *State v. Johnson*, supra, this does not prohibit slight repairs, such as putting in broken windows, or hanging a shutter, or fixing up the steps. But it does prohibit such repair, as in this case, of putting on a new roof, which makes the building habitable and thereby insures its continuance. This is contrary to the spirit and the letter of the ordinance, and defeats its purpose, which is to permit only brick, concrete, or stone buildings to be erected, and contemplates the discontinuance of wooden buildings as fast as they become by decay unfit for further use or habitation. The substantial repair of such buildings is therefore forbidden.

In *State v. Baskerville*, 141 N. C. 818, 53 S. E. 744, Hoke, J., says: "It is well established that an act of the legislature will never be declared unconstitutional, unless it plainly and clearly appears that the general assembly has exceeded its powers." In *Ogden v. Saunders*, 12 Wheat. 213, 6 L.

ed. 606, and Cooley, Const. Lim. 7th ed. 253, the Supreme Court of the United States held that "no act should be held unconstitutional unless it is clearly so beyond a reasonable doubt."

The action of the legislature authorizing the enactment of this ordinance, and of the board of aldermen in passing it, is not a taking of private property for public uses; but it is the restriction of the defendant in the unlimited use of his property by virtue of the police power (Dill. Mun. Corp. 301, 727), for the purpose of protecting the community from the dangers to which the public would be exposed by the continuance of a wooden building in that locality, by the requirement that, when it becomes unusable by decay, it shall be replaced by a safer construction than wood.

Upon the special verdict the court should have directed that the jury return a verdict of guilty.

Reversed.

OKLAHOMA SUPREME COURT.

LENA L. EBERLE et al., Plffs. in Err.,
v.

R. H. DRENNAN et al.

(40 Okla. 59, 130 Pac. 162.)

Reference — report — effect.

1. Under § 2812, Comp. Laws 1909, a trial before a referee is conducted in the same manner as a trial by the court, and

Headnotes by KANE, J.

Rehearing headnotes by DUNN, J.,

Note. — Effect of bankruptcy of principal contractor upon lien rights of subcontractors or materialmen.

As to the effect of the death of the principal contractor upon the rights of a subcontractor or materialman to a lien, or to payment by the owner, see the note to Vernon v. Harper, 20 L.R.A. (N.S.) 45.

Effect as between trustee and subcontractor or materialman—generally.

There are no equitable considerations in favor of the general creditors of the bankrupt contractor which render the provision of § 67 of the bankruptcy act, denying the privilege of liens to claims which would not have been valid against the creditors if there had been no bankruptcy, applicable to a mechanics' lien in favor of a subcontractor. Re Emslie, 42 C. C. A. 350, 102 Fed. 291, 4 Am. Bankr. Rep. 126. To the same effect is Crane Co. v. Pneumatic Signal Co. 94 App. Div. 53, 87 N. Y. Supp. 917, 11 Am. Bankr. Rep. 747, affirmed without opinion in 182 N. Y. 545, 75 N. E. 1128; and 61 L.R.A. (N.S.)

when he is to report the facts, his report has the effect of a special verdict.

Mechanics' lien — contract with agent.

2. Section 6151, Comp. Laws 1909, requires that the labor or material for which a lien is claimed must be furnished under a contract with the owner of the land; but a contract made through the agency of one who is authorized to represent the owner, or whose acts are fully ratified by the owner with full knowledge of all the facts, is the contract of the owner of the land, within the meaning of the statute.

Pleading — defect of parties — demurrer.

3. It is well settled that a defect of parties must be taken advantage of by demurrer if the defect appears upon the face of the pleading, otherwise by an answer; and if such objection is not made by way of demurrer or answer, then the defect is deemed to be waived.

Mechanics' lien — contract with contractor — sufficiency.

4. Where the referee finds upon sufficient evidence that certain materialmen and laborers furnished material and performed labor which was used for the construction of a building under a contract with the contractor, such materialmen and laborers are entitled to obtain a lien upon the land whereon such building is erected, in accordance with the provisions of § 6153, Comp. Laws 1909.

Appeal — ruling on demurrer — non-compliance with rules.

5. The supreme court will not pass upon assignments of error based upon the action of the court below in sustaining a demurrer to a pleading, where the party complaining fails to comply with that part of court rule No. 25 (20 Okla. xii., 95 Pac. viii.) which requires him to set forth the material parts of the pleading upon which he relies, to-

Re Cramond, 145 Fed. 966, 17 Am. Bankr. Rep. 22, following Re Emslie, supra.

In South End Improv. Co. v. Harden, — N. J. Eq. —, 52 Atl. 1127, upon a bill of interpleader filed by the owner to determine the relative priorities of the claims of materialmen who had filed stop notices, the court held that the legal demands of the materialmen, followed by service of notices upon the builder, created a lien or equitable assignment of the amount due the materialmen on the funds in the hands of the builder; and the rights of all materialmen who had served legal stop notices before the filing of the petition in bankruptcy by the builder were enforceable in the state court.

A mechanics' lien claimant who, upon the adjudication of the contractor in bankruptcy, participates in a creditors' meeting and proves his claim, having waived the lien as required by § 56b of the bankruptcy act as a condition of such participation, cannot assert the lien against the proceeds of the contract, in the trustees' hands, though the waiver was by mistake made broader than

gether with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court.

Statute — construction — mechanics' lien.

6. The provisions of the mechanics' lien law should be interpreted so as to carry out the object had in view by the legislature in enacting it; namely, the security of the classes of persons named in the act, upon its provisions being in good faith substantially complied with on their part.

Mechanics' lien — inaccuracy in contractor's name — effect.

7. Where materials are furnished by a subcontractor to a firm of building contractors composed of K. & S., for the erection of a building, and in his statement for a lien such subcontractor names K. as the person with whom he dealt as the contractor, and where there is nothing to indicate that the owner of the land whereon the building was erected was misled or injured by the failure of the subcontractor to correctly state the name of the contractor, such subcontractor's lien will not be declared invalid because of such error.

On Petition for Rehearing.

Mechanics' lien — parties — contractor.

8. Under the provisions of § 6156, Comp. Laws 1909, where an action is brought by a subcontractor or materialman to enforce a lien against the property of the owner, the original contractor is an indispensable party thereto.

Same — bankruptcy — trustee.

9. Where, however, in such case, the original contractor during the construction of a building is adjudged a bankrupt, the bankruptcy trustee should be made a party defendant in actions by subcontractors or

was intended, the intention being to waive only the lien upon the bankrupt's property, and not upon the improvement itself, since, after the payment into the bankruptcy court of the amount due under the contract, the fund constitutes assets, and the waiver applies to it. *Brown v. City Nat. Bank*, 72 Misc. 201, 131 N. Y. Supp. 92, 26 Am. Bankr. Rep. 638.

—steps taken within four months of contractor's bankruptcy.

A mechanics' lien or stop notice filed by a subcontractor within four months before the contractor's bankruptcy is neither a lien obtained by legal proceedings, nor an encumbrance created by the bankrupt, so as to render it assailable by the trustee as within the liens or assignments invalidated by § 67 of the bankruptcy act. *Re Emslie*, 42 C. C. A. 350, 102 Fed. 291, 4 Am. Bankr. Rep. 126; *Fehling v. Goings*, 67 N. J. Eq. 375, 58 Atl. 642, 13 Am. Bankr. Rep. 154, followed in *National Fire Proofing Co. v. 61 L.R.A. (N.S.)*

materialmen, and the unenforceable judgment taken against him made the basis upon which the liens claimed against the property are predicated.

Same — enforcement — effect of bankruptcy.

10. Where, on the construction of a building, the principal contractor becomes a bankrupt, and the owner requests or consents to an order of the bankruptcy court directing the receiver or trustee of such contractor to complete his contract, and such order is made, the mere fact of bankruptcy of the original contractor will not preclude recovery against the owner, or the enforcement of a lien against the property for services rendered or materials furnished within the scope of the contract.

Appeal — reversal — absence of party — new trial.

11. On an action brought to enforce against the property liens claimed by subcontractors and materialmen, and the original contractor is not made a party, the judgment will not be reversed and rendered, but the case will be remanded to allow such original contractor to be made a party, and a new trial granted therein.

(December 3, 1912.)

ERROR to the District Court for Oklahoma County to review a judgment in plaintiffs' favor in a suit to foreclose a mechanics' lien. Reversed.

The facts are stated in the opinion.

Mr. John S. Hunter for plaintiffs in error.

Messrs. Burwell, Crockett, & Johnson for Oklahoma Brick Company.

Messrs. Oliver C. Black and H. Y. Thompson, for trustee:

An adjudication in bankruptcy of a build-

Daly, 76 N. J. Eq. 35, 74 Atl. 152, affirmed without opinion in 77 N. J. Eq. 583, 78 Atl. 1135.

But it is held in *Fairlamb v. Smedley Constr. Co.* 36 Pa. Super. Ct. 17, 22 Am. Bankr. Rep. 824, that a suit by a subcontractor against a contractor, in which the owner is summoned as garnishee, is "a legal proceeding" within the meaning of § 67 of the bankruptcy act providing that all liens obtained through legal proceedings within four months prior to the filing of the petition are void, and that the property affected by the lien shall be discharged therefrom. It was held, therefore, that where the suit was brought within four months of bankruptcy, the proceeding would be dissolved at the motion of the trustees who intervened.

—filing lien after contractor's bankruptcy.

Where the lien arises from the act of filing, and not from doing work or furnishing material, the filing of a lien after bank-

ing contractor does not cut off the right of a materialman to file and enforce a lien.

Crane Co. v. Pneumatic Signal Co. 94 App. Div. 53, 87 N. Y. Supp. 917, 11 Am. Bankr. Rep. 747; *Remington, Bankr.* 684; *Re Huston*, 7 Am. Bankr. Rep. 92; *Re Grissler*, 13 Am. Bankr. Rep. 508; *Re Schrom*, 3 Am. Bankr. Rep. 352; *Re Fixen & Co.* 2 Am. Bankr. Rep. 830.

A trustee in bankruptcy is bound to use due diligence to get in the assets of the estate.

Re Reinboth, 19 Am. Bankr. Rep. 15.

The trustee, under the bankrupt law, has the same remedies and in the same court as the bankrupt would have had had not the bankruptcy intervened, and the same remedies as the creditor of the bankrupt.

Hull v. Burr, 18 Am. Bankr. Rep. 541; *Re Richards*, 11 Am. Bankr. Rep. 581, 127 Fed. 772.

ruptcy is ineffective to give the lienor any rights as against the contractor's trustee.

Thus, pointing out that the lien given by the New Jersey statute upon money due for public improvements does not arise from doing the work or furnishing materials, but from filing notice, the court in *John Agnew Co. v. Board of Education*, — N. J. Eq. —, 89 Atl. 1046, held that an order of the bankruptcy court appointing a general receiver for the bankrupt contractor, directing the transfer of the estate to the receiver by the bankrupt, and enjoining all other persons from transferring or otherwise interfering with the assets, placed the property *in custodia legis*, and rendered ineffectual the subsequent filing of laborers' and materialmen's liens against the fund due the contractor. See also *Re Roeber*, *infra*.

So, it is held that, in view of § 70a of the bankruptcy act, vesting title to the bankrupt's property in the trustee as of the date of the adjudication, the lien upon the amount due for a public improvement under a statute providing that the same attaches from the date of its filing cannot, as against the contractor's trustee in voluntary bankruptcy, be created by filing the same after the filing of the petition, where the adjudication occurs on the same day. *Garretson v. Clark*, — N. J. Eq. —, 57 Atl. 414. In this case it appeared that the lien was filed before the adjudication, but the court said in effect that this made no difference where the petition was filed and the adjudication made on the same day.

But, where the mechanics' lien statute is construed by the state court to give a preferential statutory right in the nature of an equitable lien until the expiration of the time allowed for filing a lien, the failure of a subcontractor to file a lien until after the adjudication of the contractor in bankruptcy does not give the trustee priority

Kane, J., delivered the opinion of the court:

This was a suit to foreclose a mechanics' lien, commenced by the defendant in error, *R. H. Drennan*, who was plaintiff below, against *Lena L. Eberle* and *John M. Eberle*, in which the other defendants in error and the cross petitioner, the *Oklahoma Brick Company*, were made defendants. A referee made findings of fact and conclusions of law, upon which there was a decree entered in favor of all the lienholding defendants, except the *Oklahoma Brick Company* (and a few other claimants who did not appeal), whereupon *Lena L. Eberle* and *John M. Eberle*, plaintiffs in error, commenced this proceeding in error, to reverse the decree of the several lienholds, and the brick company appealed from the action of the court in refusing to allow its lien.

It seems: That on the 7th day of July, 1906, *Robert Kruger* and *John M. Eberle* signed a written contract in their own

over the subcontractor, where he filed a lien within the time allowed by the state statute. *Crane Co. v. Pneumatic Signal Co.* 94 App. Div. 53, 87 N. Y. Supp. 917, 11 Am. Bankr. Rep. 747, affirmed without opinion in 182 N. Y. 545, 75 N. E. 1128. In rendering a like decision in *Re Grissler*, 69 C. C. A. 406, 136 Fed. 754, 13 Am. Bankr. Rep. 508, the court refers to a contrary decision rendered by it in *Re Roeber*, 57 C. C. A. 565, 121 Fed. 449, 9 Am. Bankr. Rep. 303, which, pointing out that the state (New York) statute gave a lien from the time of the filing of notice thereof, followed decisions of the state court cited as holding that, until the filing of the lien, the subcontractor is merely a general creditor, and holding that therefore the intervention of the contractor's bankruptcy before such filing gave the trustee rights superior to those of the subcontractor. In the *Grissler* Case it is declared that after the decision in *Re Roeber*, the New York court of appeals held in *John P. Kane Co. v. Kinney*, 174 N. Y. 69, 66 N. E. 619, that the mechanics' lien act gave a preferential right during the time allowed for filing. It is also to be noted that this correction of *Re Roeber*, *supra*, re-establishes the excellent opinion of the district court in that case in 121 Fed. 444, 9 Am. Bankr. Rep. 778, which, until the decision of the *Grissler* Case, stood reversed.

Where, by stipulation between the contractor's trustee and the subcontractor who filed a lien after the bankruptcy, the liens were discharged and the money paid to the trustee, it was held that the subcontractor's lien was valid, and that he was entitled to payment out of the fund received by the trustee. *Re Huston*, 7 Am. Bankr. Rep. 92 (referee), citing and following the unreported case of *Re Smith*, decided by Judge Thomas in the eastern district of New York.

An agreement between the owner and

name, by the terms of which Kruger was to erect and complete a brick business house for Eberle on certain lots which, it afterwards developed, belonged to Eberle's wife. In pursuance to said contract, said Kruger, together with one Henry Sessing, proceeded to erect the house upon said lots, and it was in furnishing materials to Kruger on this contract the liens sought to be foreclosed arose. That on the 19th day of December, 1906, and before the completion of said building, Robt. Kruger filed his voluntary petition in bankruptcy, and was on the same day adjudged a bankrupt, and Robt. Eacock was duly appointed receiver for the bankrupt estate, and the proceedings in bankruptcy were then and there duly referred to the referee in bankruptcy for final settlement. Thereafter the defendants in error filed with the clerk of the district court their several mechanics' lien statements against the property in controversy, and about the same time they

each filed with the court of bankruptcy their money demand and claim against the estate of Robt. Kruger, bankrupt, covering the same items and subject-matter, and in like amount as set forth in their several mechanics' lien statements, except they did not plead their claim for a mechanics' lien in the bankruptcy court. Each of the claims thus filed was approved in favor of the claimants, and judgment rendered thereon against the estate of Robt. Kruger. Thereafter Mr. Drennan commenced this action, as aforesaid, making the Eberles the trustee in bankruptcy, and all the other lien claimants parties defendant.

The contentions of plaintiffs in error are indicated by the following propositions in the form of questions quoted from the brief of their counsel: "(1) Can a mechanics' lien be had or maintained where the contract for the improvement of a tract or piece of land is not made with the owner? (2) Can a subcontractor or materialman

principal contractor extending the time for completing the work is binding upon the contractor's trustee in bankruptcy in a controversy between the trustee and subcontractors claiming to have filed liens within the time allowed thereafter after the completion of the work. *Harrison v. Knaff*, — Tenn. —, 161 S. W. 1003.

The superiority of the claimant's rights over those of the contractor's trustee is held by a New York court not to have been affected by the amendment of 1910 to § 47a of the bankruptcy act, wherein it was enacted that the trustee, as to all property in, or coming into, the custody of the bankruptcy court, shall be vested with all the rights of a lien creditor; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights of a judgment creditor holding an execution duly returned unsatisfied. *Hildreth Granite Co. v. Watervliet*, 161 App. Div. 420, 146 N. Y. Supp. 449, 31 Am. Bankr. Rep. 703, reversing 82 Misc. 243, 143 N. Y. Supp. 867, 30 Am. Bankr. Rep. 789.

Right to enforce lien against the property improved.

On this point the present note supplements the earlier one appended to *Pike Bros. Lumber Co. v. Mitchell*, 26 L.R.A. (N.S.) 409. It will be observed that in the case just cited the right to enforce the lien against the improvement was denied, while in *EBERLE v. DRENNAN* it is allowed.

In *Hastings v. Thompson*, 47 Pa. Super. Ct. 424, involving an action against the owner to enforce a mechanics' lien, it was held that the plaintiff's claim attached as of the date when the first work was done, and that during the time allowed by the 51 L.R.A. (N.S.)

statute for filing the lien, the plaintiff had a preferential statutory claim which was perfected by filing the lien after the adjudication of the contractor in bankruptcy. It was therefore held, as in cases in the above subdivisions involving the respective rights of the trustee and the subcontractor under similar state statutes, that the lien was not obtained through legal proceedings so as to render it null under § 67 of the bankruptcy act. The court further held that the plaintiff's lien extended to work done after the adjudication, and that his rights in this respect were not affected by the Pennsylvania statute providing that where bankruptcy proceedings are instituted against any contractor or owner, they operate to suspend all proceedings upon any contract or subcontract with him, and if he be adjudged a bankrupt, then the contractor or subcontractor may, at his option, refuse to proceed further under the contract.

Pike Bros. Lumber Co. v. Mitchell, supra, which is also reported in 132 Ga. 675, 26 L.R.A. (N.S.) 409, 64 S. E. 998, was followed in *Rome Brick Co. v. West*, 134 Ga. 65, 67 S. E. 400, holding that, in order to foreclose a materialman's lien for materials furnished the contractor to be used in improving the property of another, it is necessary that the materialman have judgment against the contractor in a previous action, or that the contractor be sued concurrently in the foreclosure proceedings with the owner of the property improved; and that, if the contractor be adjudged a bankrupt, so that no judgment *in personam* can be had against him in an action at law, his immunity from liability to a personal judgment will not give the materialman a right to foreclose his lien in equity against the property improved. Note, in this connection, *EBERLE v. DRENNAN*. L. A. W.

or workman bring an action and foreclose his mechanics' lien against the owners of property, where there is no privity of contract between the owner and such subcontractor or materialman or workman, without making the original contractor, or his personal representative, a party to such action, and procuring first a personal judgment against the original contractor? (3) Were any of the mechanics' lien claimants in this case subcontractors or materialmen that come within the terms of our statute?"

The referee found, and his findings are entitled to the same weight as the special verdict of a jury, that John M. Eberle and Lena Eberle were husband and wife, and that the title to the property described was in Lena Eberle; that whilst the title to the land in question was in Lena Eberle, and the contract for the building was signed by John M. Eberle, yet he was acting as the agent of the wife in his transactions with Kruger, and all his actions were ratified by his wife, with full knowledge of all that had been done. As this finding is amply supported by the evidence, it disposes of the first contention of plaintiffs in error.

It is true, as contended by counsel, that the statute (§ 6151, Comp. Laws 1909) requires that the labor or material for which a lien is claimed must be furnished under a contract with the owner of the land, but a contract made through the agency of one who is authorized to represent the owner, or whose acts are fully ratified by the owner with full knowledge of all the facts, is the contract of the owner of the land within the meaning of the statute.

On the second proposition, the referee found that, the claims having been adjudicated and allowed in the bankruptcy court, the trustee being a party to this action, and a general prayer for relief being asked, the principal obligor is sufficiently a party to this action to entitle the parties otherwise entitled thereto to a foreclosure. No authorities are cited in support of this proposition by counsel for any of the parties. Counsel for plaintiffs in error cites some authorities to the effect that an original contractor is a necessary and indispensable party to an action to foreclose a mechanics' lien by a subcontractor. Phillips, *Mechanics' Liens*, § 395, p. 643; Rockel, *Mechanics' Liens*, § 229, p. 553; O'Brien v. Gooding, 194 Ill. 466, 62 N. E. 898; 27 Cyc. 435. Those cases differ from the one at bar, however, in that there was no trustee in bankruptcy in them who was made a party to the foreclosure proceedings. Whatever may be said upon the merits of the foregoing contention or the correctness of the referee's conclusion, the second conten-

tion of the plaintiffs in error must be decided against them on another ground. It is well settled that a defect of parties must be taken advantage of by demurrer if the defect appears upon the face of the pleading, otherwise by an answer; and if such objection is not made by way of demurrer or answer, then the defect is deemed to be waived. *Wyman v. Herard*, 9 Okla. 35, 59 Pac. 1009; *Miller v. Campbell Commission Co.* 13 Okla. 75, 74 Pac. 507; *Culbertson v. Mann*, 30 Okla. 249, 120 Pac. 918. The plaintiffs in error, having failed to raise this question in any of their pleadings, are precluded from raising it at this time.

On the third proposition the referee found that the successful lienholders furnished the material and performed the labor which was used in the construction of said building under contracts with Kruger, the contractor. The statute (§ 6153, Comp. Laws 1909) provides that "any person who shall furnish any such material or perform such labor under a subcontract with the contractor, or as an artisan or day laborer in the employ of such contractor, may obtain a lien. . . ." There is no contention that the finding of the referee is not based upon sufficient evidence. It seems to us that under that finding the materialmen and laborers embraced therein were entitled to a lien.

There is another assignment of error, to the effect that the court erred in sustaining a demurrer to the first, third, and fourth counts of the plea and answer, filed by these plaintiffs in error to the amended petition and several cross petitions in the district court. As counsel has not complied with rule 25 of this court, in that he has not set forth the material parts of the pleadings to which the demurrer was sustained, together with such other statements of the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court, we will not pass upon this assignment.

The finding of the referee in relation to the claim of the Oklahoma Brick Company was set aside by the court, and a new finding of fact by the court was substituted therefor, as follows: "That the Oklahoma Brick Company furnished the material, consisting of building brick for use in the erection of the building in controversy herein, to N. E. Sessing and Robt. Kruger, a partnership composed of Robt. Kruger and N. E. Sessing; that said brick were all used in the erection of said building, but that, the same having been furnished to the said firm of Sessing & Kruger, the said Oklaho-

ma Brick Company is not entitled to any lien on said building; that there remains due and unpaid on said account the sum of \$223.56."

On the authority of *First Nat. Bank v. Oklahoma Nat. Bank*, 29 Okla. 411, 118 Pac. 574, the cross petitioner contends that the court below was without authority to reject the findings of the referee and substitute findings of its own. Without passing upon that question, it seems to us the court drew an erroneous conclusion of law from the facts found by it. It is true that there is some evidence in the record tending to support the findings of the court that Kruger and Sessing were partners in so far as the brickwork of the building under construction was concerned; but, it being admitted that the brick company furnished the material for use in the building in controversy under a contract with Kruger, a member of the firm, the fact that Kruger and Sessing were partners would not deprive the claimant of its lien merely because its statement named Kruger alone as the person to whom the materials were furnished. The purpose of the mechanics' lien law is to afford security to a designated class of persons. The statute provides the procedure to be followed in order to come within the provisions of the law, and if one of that class furnishes material which is actually used in the construction of a building, and subsequently complies with the provisions of the law relative to the procedure necessary to establish a lien, he should not be divested of his right by reason of his failure to state with precision the party to whom the material was furnished. This is particularly true where it is not made to appear that the party against whose property the lien is claimed has been injured by reason of any such technical defect. The essential fact to be set out in the lien statement is that certain materials were furnished which were actually used in the construction of the building on certain described premises. The purpose of naming the contractor in such statement is apparently to apprise the owner under what authority the material was furnished, and thereby afford him protection as to payments to be made to the contractor; and unless the owner has been misled to his injury by reason of the erroneous designation of the parties by whom the materials were furnished, such a defect is not fatal.

In *Putnam v. Ross*, 46 Mo. 337, the notice of claim stated that the indebtedness was due from Ross & Shane, contractors. It turned out that the claim was against Ross alone, his former partner. The owners of the premises insisted that the error in the notice was fatal to the plaintiffs' 51 L.R.A. (N.S.)

lien but the court says: "The defendants' view seems to be founded upon the theory that the mechanics' lien enactment is in derogation of the common law, and that its provisions are therefore to be construed with a rigid strictness against those who seek to avail themselves of its intended benefits. There may be decisions which lend support to that theory, but the better opinion is that the provisions of the mechanics' lien law should be interpreted so as to carry out the object had in view by the legislature in enacting it; namely, the security of the classes of persons named in the act, upon its provisions being in good faith substantially complied with on their part. It has become the settled policy of this state, as in most, if not all, the states, to secure mechanics and materialmen by giving them a lien upon the property they have contributed to improve or create. The law itself has grown up from small beginnings to its present unquestioned importance. And the whole course of legislation on the subject shows that it has been the intention of the legislature to avoid unfriendly strictness and mere technicality. The spirit and purpose of the law is to do substantial justice to all parties who may be affected by its provisions. It has therefore been enacted (Gen. Stat. 1865, p. 911, § 19) that when a party who deals with the principal contractor, and not directly with the owner, wishes to avail himself of the benefits of the enactment, he shall notify the owner, ten days in advance of filing the lien, of his purpose to do so, stating in the notice the amount of his claim, and 'from whom it is due.' The plaintiffs sought to comply with that requirement, but failed to state with precision who was their debtor, giving the name of a business firm, instead of the name of the party who had been the senior member of that firm. He gave the name of his real debtor, but erroneously coupled with it the name of a third party who was not liable. Were the defendants misled to their injury by this mistake? If so, they ought not to suffer in consequence of the plaintiffs' inadvertence. But there is no probability that they were harmed by the error. At all events, it is not to be so presumed in the absence of evidence. If the error wrought the defendants any harm, it cannot be difficult for them to show it; but they aver nothing and prove nothing in that direction. Their objections rest on purely technical and overcritical grounds."

Substantially the same conclusion was reached in *Tibbetts v. Moore*, 23 Cal. 208, 9 Mor. Min. Rep. 348, where it was held that a notice which stated that the materials were furnished to "Moore & Company"

was sufficient, although the materials were in fact furnished to Moore alone. And in *Hauptman v. Catlin*, 3 E. D. Smith (N. Y. C. P.) 666, where it was held that where a notice stated a claim against A and B, his wife, upon a contract with A alone, and the contract was in fact made by the husband, acting merely as the agent of his wife, the notice was sufficient.

The supreme court of Kansas (First Presb. Church v. Santy, 52 Kan. 462, 34 Pac. 974) passed upon the same question in a case somewhat similar to the case at bar. In that case the materials were actually furnished to a partnership, but in the lien statement the subcontractor named only the individual member with whom he dealt as the contractor. In discussing the question now under consideration, Mr. Justice Allen says: "In the statement filed by the Hutchinson Hardware Company, the trustees are named as the owners of the building, and George E. Thompson, one of the contractors, alone is named as the contractor. It is urged that this is insufficient; that the church corporation should have been named as the owner, and the firm name of Thompson, Hanna, & Company should have been given as the contractors. Section 3, art. 12, of the Constitution reads: 'The title to all property of religious corporations shall vest in trustees, whose election shall be by the members of such corporation.' In the statement five persons are named as trustees of the First Presbyterian Church of Hutchinson. As the legal title to the property, under the constitutional provision, is vested in the trustees, and, as they were named, not as individuals, but as trustees of the church corporation, the statement is clearly sufficient in that respect. George Thompson, one of the firm of Thompson, Hanna, & Company, is alone named as the contractor. It appears that the materials furnished by the hardware company were in fact sold and charged to Thompson, but were so sold to be used in the erection of the church building, and the items charged were entered on the daybook as for the church. Thompson alone was not the contractor, but he was the head of the firm who were the contractors. He, in fact, bought all of the hardware from the company for the purpose of using it in the erection of the building. It was so used. The plaintiff in error had the full benefit of it, and unless the defendants in error have failed to comply substantially with the law, they should be protected in their lien. The object of naming the contractor would seem to be to apprise the owner and other persons by what authority and under whom the subcontractor claims a right to his lien. Now, it might

happen, doubtless often does, that subcontractors are not informed as to the names of all persons interested in the original contract and the firm name in which the contract is taken. It would not be just, nor does the spirit of the statute require, that subcontractors should be defeated of their liens if they make a mistake by incorrectly naming the original contractors, where the name is given of the contractor with whom they dealt, and who was, in fact, in charge of the work of erecting the building as a contractor. *Tibbetts v. Moore*, supra; *Davis v. Livingston*, 29 Cal. 283; *Putnam v. Ross*, 46 Mo. 337; *Brown v. Welch*, 5 Hun, 582."

It seems to us that under the foregoing authorities the court should have allowed the lien of the Oklahoma Brick Company upon its own findings of fact. In all other respects the judgment of the court below is affirmed, and the cause remanded, with directions to enter judgment in accordance with the views herein expressed.

All the Justices concur, except Dunn, J., absent.

A petition for rehearing having been filed, Dunn, J., on November 4, 1913, handed down the following response:

On the coming down of the original opinion in this case plaintiffs in error filed their petition for rehearing, as also did H. Y. Thompson, successor of W. C. Pierce, who was trustee in bankruptcy for Kruger, the original contractor. It is insisted by plaintiffs in error: First, that by and on account of the bankruptcy of the original contractor, the claims for liens against the property of these plaintiffs in error on the part of the subcontractors and materialmen were wiped out; that there is but one debt, which is the debt of the contractor, and when this is settled, either by payment or bankruptcy, the foundation for the lien fails, and to support this claim cite the case of *Pike Bros. Lumber Co. v. Mitchell*, 132 Ga. 675, 26 L.R.A. (N.S.) 409, 64 S. E. 998, and some other cases from that jurisdiction. Counsel for the lien claimants as against this contention cite, among others, the following authorities: *Re Huston*, 7 Am. Bankr. Rep. 92; *Crane Co. v. Pneumatic Signal Co.* 42 Misc. 338, 86 N. Y. Supp. 711, 94 App. Div. 53, 87 N. Y. Supp. 917, 11 Am. Bankr. Rep. 747; *Re Grissler*, 69 C. C. A. 406, 136 Fed. 754, 13 Am. Bankr. Rep. 508—to support the proposition that an adjudication of bankruptcy of the original contractor does not cut off the right of a subcontractor or materialman to file and enforce his lien against the owner's land; and in our judgment it was not the inten-

tion of the legislature in its passage of the mechanics' lien act to provide that the insolvency or bankruptcy of the principal contractor should defeat the claims mentioned. See also *John P. Kane Co. v. Kinney*, 174 N. Y. 69, 66 N. E. 619. It is true § 6156, Comp. Laws 1909, provides that the original contractor shall be made a party defendant in all such actions, and it is further true that where he has become a bankrupt he cannot be sued and the liability enforced personally against him, but the very purpose of the act is to subject the property of the owner to the payment of the debts incurred by the original contractor when he does not pay them himself, and it would be a strange anomaly if, when that very condition arises and the original contractor availed himself of the bankruptcy statute, the law which was made to protect such of his creditors would then, when needed most, wholly fail. When the owner begins to construct his building, engages his contractor, and the contractor purchases material or employs laborers, they all act with this statute in view, and with the knowledge on the part of all that the liability of the original contractor to materialmen and laborers within the scope of his contract may, on his failure to meet it, be enforced against the property. Under the authorities, the death of the original contractor will not defeat such claims, and his executor or administrator is properly made a party to the proceeding. *Vernon v. Harper*, 79 Ohio St. 181, 20 L.R.A.(N.S.) 44, 86 N. E. 882. And we can see no reason why the trustee in bankruptcy might not likewise be made the party defendant. Hence we conclude and agree with counsel for the claimants that the bankruptcy of the original contractor in this case did not wipe out the right to the lien of the materialmen and subcontractors.

But, it is contended, and the record discloses, that although nominally made a party, no prayer was made against the trustee, and no judgment taken establishing the debt of the subcontractors and materialmen as a foundation for their lien against the property of the plaintiffs in error, and this failure is made the ground for the insistence of the plaintiffs in error that the action must fail and the liens awarded by the judgment of the trial court be set aside and its judgment reversed. In this contention we are constrained to concur.

The statute § 6156, supra, provides: "In such actions all persons whose liens are filed as herein provided, and other encumbrances, shall be made parties, and issues shall be made and trials had as in other cases. Where such action is brought by a subcontractor, or other person not the orig-

inal contractor, such original contractor shall be made a party defendant, and shall at his own expense defend against the claim of every subcontractor, or other person claiming a lien under this act, and if he fails to make such defense the owner may make the same at the expense of such contractor; and until all such claims, costs, and expenses are finally adjudicated, and defeated or satisfied, the owner shall be entitled to retain from the contractor the amount thereof, and such costs and expenses as he may be required to pay: Provided, that if the sheriff of the county in which such action is pending shall make return that he is unable to find such original contractor, the court may proceed to adjudicate the liens upon the land and render judgment to enforce the same with costs." No contention is made in this case that the proviso contained in the statute existed, and hence the terms of the statute are before us. While there is some conflict in the authorities on the proposition, in our judgment the great weight of them makes the original contractor in an action to enforce a lien such as in this case, not only a proper and necessary, but indispensable, party to the proceeding. Authorities supporting in full, or inferentially and effect, this proposition, may be noted as follows: *Alberti v. Moore*, 20 Okla. 78, 14 L.R.A.(N.S.) 1036, 93 Pac. 543; *Emmet v. Rotary Mill Co.* 2 Minn. 286, Gil. 248; *Estey v. Hallack & H. Lumber Co.* 4 Colo. App. 165, 34 Pac. 1113; *Sayre-Newton Lumber Co. v. Park*, 4 Colo. App. 482, 36 Pac. 445; *Union P. R. Co. v. Davidson*, 21 Colo. 93, 39 Pac. 1095; *Steinmann v. Strimple*, 29 Mo. App. 478; *Edward McLundie & Co. v. Mount*, 145 Mo. App. 660, 123 S. W. 966; *O'Neil Lumber Co. v. Greffet*, 154 Mo. App. 33, 133 S. W. 113; *Wagner v. St. Peter's Hospital*, 32 Mont. 206, 79 Pac. 1054; *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 76, 60 Pac. 594, 991; *Kerns v. Flynn*, 51 Mich. 573, 17 N. W. 62; *Godfrey Lumber Co. v. Kline*, 160 Mich. 565, 125 N. W. 682; *Augir v. Warder*, 68 W. Va. 752, 33 L.R.A.(N.S.) 69, 70 S. E. 719; *Flake v. Central Hardware Co.* 96 Miss. 838, 51 So. 461; *Tracy v. Kerr*, 47 Kan. 656, 28 Pac. 707.

The supreme court of Kansas in the case last cited, after quoting the foregoing statute, which is a part of the practice act adopted by us, speaking on this subject, says: "The language is so plain, the command that the contractor be made a party so imperative, that requirement is so mandatory, and the result of a failure or refusal to make him a party is so specifically stated, that there seems to be no fair ground, either by construction or otherwise, on which to place approval of the ruling

of the trial court." Which ruling was to the effect that he was not an indispensable party. Dealing further with the same subject, it is said: "It may be suggested that if the subcontractor, or other person not the original contractor, neglect or refuse to make the contractor a party, the owner may do so on his own motion, and while it is probably true that the trial court would permit or order this to be done, yet the plain command of the statute is that the contractor shall be made a party, and we think it is primarily the duty of the party instituting such an action to do so."

Speaking to this same point, the Colorado court of appeals in the case of *Estey v. Hallack & H. Lumber Co.* 4 Colo. App. 165, 34 Pac. 1115, says: "*Davis v. John Mouat Lumber Co.* 2 Colo. App. 381, 31 Pac. 187, is conclusive of this case. The necessity of making the contractor a party is carefully examined and discussed fully. The court said: 'It has been often held that the contractor was an indispensable party to the action. With this we agree, and adjudge that the contractor is not only a proper, but a necessary and indispensable, party, against whom a debt must be established as the foundation of the decree for the foreclosure of the lien.' This conclusion is well sustained by authority. See *Phillips, Mechanics' Liens*, § 397; *Vreeland v. Ellsworth*, 71 Iowa, 347, 32 N. W. 374; *Kerna v. Flynn*, 51 Mich. 573, 17 N. W. 62; *Sinnickson v. Lynch*, 25 N. J. L. 317; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. The conclusion is founded on principle and sound legal logic. No privity of contract exists between the owner and the subcontractor; the contractor is the primary debtor; if the amount could be collected from him there would be no resulting claim against the property of the owner; the claim against the property is secondary, ancillary. Not only must there be a primary judgment against the contractor, but there must be an adjudication or settlement of the amount due subcontractors,—matters of which the owner can have no knowledge whatever,—and in order to fix the amount for which subcontractors could charge the property, an adjudication or accounting between the owner and the contractor is indispensable. It is claimed that by proceeding to trial without urging and relying upon the want of the contractor as a necessary party the irregularity was waived. In such cases there can be no waiver. A judgment against the contractor is an indispensable prerequisite to a lien upon the property. The owner and subcontractors cannot adjudicate and settle the accounts and equities between the contractor and the subcontractors, nor can they adju-

dicating and adjust claims and matters between the owner and the contractor. In one case the owner and contractor are the contracting parties; in the other, the contractor and subcontractors. The right to the lien is purely statutory, is subsidiary and contingent, dependent upon the enforcing the judgment against the contractor. The owner is not primarily liable; hence the indispensable necessity of the contractor being before the court as a party to a triangular adjudication, and the necessity, primarily, of a judgment against the contractor as a basis of proceedings against the property of the owner."

We therefore hold that the original contractor, by and through his trustee in this case, was an indispensable party to the proceeding brought for the purpose of establishing the liens in this case.

In reference to the claim of the estate of the bankrupt, represented by H. Y. Thompson, Esq., it is claimed that Robert Kruger, the original contractor, became a bankrupt during the time he was engaged in constructing the building, and had earned, under his contract, something over \$1,400, but the same had not been paid because not due until the completion of the building. The receiver of the bankrupt applied to the referee in bankruptcy for an order directing him to complete the building, in order that the estate might receive the amount of money due, and at the same time J. M. Eberle, one of the plaintiffs in error, and agent for the other in the construction of the building, appeared in court and urged the referee to finish the building. Under this an order was made, and the building was completed at an additional expense to the bankrupt's estate, for all of which the trustee asked a lien. This the referee allowed, but the trial court denied, holding that the contractor and his trustee in bankruptcy, having failed to build and deliver to the owners the building, and having failed to pay for the materials furnished by the various lien claimants, were not entitled to recover any judgment or lien upon the building, from which action the trustee, by cross petition in error, has brought the matter to this court for review, and asks judgment upon the evidence to discover which we are referred to the 1,100-page record before us. None or but little of the evidence is set out in the abstract and briefs, either to support or defeat the claim of the trustee. The presumption is that the judgment of the trial court is correct, and the burden in this court is upon him who assails it to show that it is wrong. We have no way of knowing that the claim made and lien claimed by the trustee does not include within it some or all of the

claims of the other parties who are likewise seeking to enforce them against the property of plaintiffs in error. The inequitable result of such a situation is too apparent to require more than its statement, if true, to reject it. We will not, however, foreclose the trustee in this manner, but will remit his claim to the same course that we do the others, for the authority was vested in the bankruptcy court to authorize the business of this bankrupt to be conducted for a limited period by the receiver. See bankruptcy act, § 2 (5); 1 Remington, Bankr. § 387; Re Richards (D. C.) 127 Fed. 772; Re Reinboth, 16 L.R.A.(N.S.) 341, 85 C. C. A. 340, 167 Fed. 672, 19 Am. Bankr. Rep. 15. And, if otherwise entitled to the lien, the fact that it arose out of service rendered by the contractor's receiver or trustee in bankruptcy will not be sufficient to defeat it.

This action has been an expensive one for all the parties, and it is to be deplored that it cannot be ended at this time, but it is better to conclude it later and have justice rendered between the parties than to conclude it now, and perhaps wrongfully.

The case of Godfrey Lumber Co. v. Kline, 160 Mich. 565, 125 N. W. 682, was one similar to the case at bar. In that case the plaintiffs failed because the principal contractor was not made a party defendant, just as the plaintiff and the other lien claimants have failed in this case, and for the same reason. That court, exercising, in our judgment, a righteous discretion, decreed that "the decree of the circuit court is reversed, with costs of both courts in favor of defendant, and the cause will be remanded to the circuit court, with permission to amend the bill of complaint by making the principal contractor a party defendant. Casserly v. Wayne Circuit Judge, 124 Mich. 157, 83 Am. St. Rep. 320, 82 N. W. 841; Prather Engineering Co. v. Detroit, F. & S. R. Co. 152 Mich. 585, 116 N. W. 376. If the parties so elect, the case may proceed to a hearing on the record already made."

The same order will be made in the case at bar. The filing of the claims in the bankruptcy court was not a compliance with the mechanics' lien statute, and could not affect this case, except, of course, any allowance there secured would reduce the amount of the lien, and, in our judgment, the order of the court appointing the referee was sufficiently broad, and was intended to require him to report the evidence. The entire matter on the record is before the court, and the parties may amend their pleadings, making the trustee in bankruptcy a party, with a prayer for judgment against him; and, if the present record already 61 L.R.A.(N.S.)

made is sufficiently broad upon which to predicate a finding by the court, the parties may, if they elect, avail themselves thereof, tendering such additional evidence as they may desire. The determination of the mooted points of law, it is hoped, will enable these litigants to settle the case and so close up the controversy; but, should this not be accomplished, it is expected that the evidence relied on for recovery in this court will be properly abstracted and the requirements of rule 25 as to briefs observed.

The petition for rehearing is otherwise denied.

Hayes, Ch. J., and Turner, Williams, and Kane, JJ., concur.

OREGON SUPREME COURT.
(In Banc.)

CHARLES H. MALZER, Resp't.,
v.
HENRY SCHISLER, Appt.

(67 Or. 356, 136 Pac. 14.)

Contract — parol sale of land — delivery of deed to stranger.

The fact that, by direction of the purchaser, the deed was made to a stranger, does not change the rule that a parol contract to purchase real estate may be enforced if the deed has been executed and delivered.

(November 11, 1913.)

Note. — Action for purchase price on oral contract of sale of land where deed has been delivered.

As to taking possession of real property as part performance to satisfy the statute of frauds, see the note to Roberts v. Templeton, 3 L.R.A.(N.S.) 790.

As to deed delivered in escrow as satisfying the statute of frauds, see note to Moore v. Ward, 43 L.R.A.(N.S.) 391.

The general rule is that where a parol contract for the sale of land has been executed as to the part within the statute of frauds, by delivery and acceptance of a deed for the premises, the statute has no application, and the vendor may recover the purchase price in an action upon the contract. This was the rule (except where otherwise noted) laid down in the following cases: Worden v. Sharp, 56 Ill. 104; Knight v. Collings, 227 Ill. 348, 81 N. E. 346; Rogan v. Arnold, 233 Ill. 19, 84 N. E. 58 (*dictum*); Schlueter v. Leady, 103 Ill. App. 425; Huston v. Stewart, 64 Ind. 388; Stephenson v. Arnold, 89 Ind. 426 (holding that the fact that the contract provided for a conveyance by a third person did not prevent its enforcement by the vendor, in case the conveyance bargained for is executed);

APPEAL by defendant from a judgment of the Circuit Court for Wallowa County in plaintiff's favor in an action brought to recover a balance due on the purchase price of certain land. Affirmed.

Statement by Eakin, J.:

This is an action to recover a balance due on the purchase price of land. Plaintiff sold a certain tract of land to defendant for the consideration of \$1,700, and by defendant's direction conveyed the tract directly to Denny. Defendant paid \$700 cash at the time of the contract, and assumed and agreed to pay a mortgage then existing on the land in the sum of \$800. This left a balance of \$200, which defendant agreed to pay within a few days. The complaint alleges that he has not paid the \$200, and neglects and refuses so to do. After a demurrer to the complaint was over-

ruled, defendant answered, denying the allegations of the complaint, and as an affirmative defense pleaded the statute of frauds, to which a demurrer was sustained. Defendant then filed an amended answer, which is a specific denial of every allegation of the complaint, except that he has not paid the \$200. Upon the trial the defendant objected to the proof offered by the plaintiff to establish the agreement of sale and promise to pay, for the reason that it is an attempt to prove by parol an agreement for the sale of real estate, which objection was overruled. Upon trial verdict was rendered for the plaintiff. Defendant appeals.

Mr. Thomas M. Dill, for appellant:

Under the statute of frauds, an agreement for the sale of real property, or any interest therein, is void unless the same is in

Ayers v. Slifer, 89 Ind. 433 (holding that an action on account for the purchase price lies); Luzader v. Richmond, 128 Ind. 344, 27 N. E. 736 (*dictum* to effect that parol contract for the sale of land would be taken out of the statute of frauds upon delivery of a deed to a third person for use of the vendee, provided such delivery was unconditional); McCoy v. McCoy, 32 Ind. App. 38, 102 Am. St. Rep. 223, 69 N. E. 193; Dorr Cattle Co. v. Des Moines Nat. Bank, 127 Iowa, 153, 98 N. W. 918, 4 Ann. Cas. 519 (deed unconditionally delivered to authorized agent of vendee); Atchison, T. & S. F. R. Co. v. English, 38 Kan. 110, 16 Pac. 82; Hunter v. Simrall, 5 Litt. (Ky.) 62 (*dictum*); Grant v. Settle, 1 Ky. L. Rep. 344; Gaines v. Fitch, 14 Ky. L. Rep. 620; Linscott v. McIntire, 15 Me. 201, 33 Am. Dec. 602; Pomeroy v. Winship, 12 Mass. 514, 7 Am. Dec. 91 (*dictum*); Wilkinson v. Scott, 17 Mass. 249 (The court said: "It is not a case within the statute of frauds, because it is not a contract for the sale of lands. That contract was executed and finished by the deed. This is only a demand for money arising out of that contract"); Brackett v. Evans, 1 Cush. 79; Nutting v. Dickinson, 8 Allen, 540; Basford v. Pearson, 9 Allen, 387, 85 Am. Dec. 764 (holding that an action of contract will lie to enforce any oral promise to pay money presently in consideration of real estate sold and conveyed, but that where the contract is for an exchange of lands at agreed valuations, and one party only delivers a deed, the action must be upon the implied promise to pay the agreed value of the land conveyed, on a count for land sold and conveyed); Root v. Burt, 118 Mass. 521; Huff v. Hall, 56 Mich. 456, 23 N. W. 88; Gardner v. Gardner, 106 Mich. 18, 63 N. W. 988; Bennett v. Knowles, 111 Mich. 226, 69 N. W. 491; Kratz v. Stocke, 42 Mo. 351 (holding that acceptance of the deed constituted a waiver of the statute of frauds); Skow v. Locke, 3 Neb. (Unof.) 176, 91 N. W. 204; Sowards v. Moss, 58 61 L.R.A. (N.S.)

Neb. 119, 78 N. W. 373, reversed on rehearing in 59 Neb. 71, 80 N. W. 268, on ground that there was not an unconditional delivery of the deed; Friedman v. Ender, 116 N. Y. Supp. 461 (holding that delivery of deed ratified and validated the oral contract); Johnson v. Hathorn, 2 Keyes, 476, 3 Keyes, 126, 2 Abb. App. Dec. 465; Farmer v. Willard, 71 N. C. 284; Smith v. Arthur, 110 N. C. 400, 15 S. E. 197 (possession of deed secured by fraudulent means,—held that bringing action for purchase money affirmed deed); Thayer v. Luce, 22 Ohio St. 62 (*dictum*); Simmons v. Edens, 1 Tenn. Civ. App. 56, as cited in 1914 Cyc. Ann. 358; Showalter v. McDonnell, 83 Tex. 158, 18 S. W. 491.

MALZER v. SCHISLER adheres to this rule, and also is authority for the proposition that the rule covers cases where the deed is, pursuant to direction of the vendee, delivered to a third person. But in connection with MALZER v. SCHISLER, see Liddle v. Needham, 39 Mich. 147, 33 Am. Rep. 359, in which a father verbally agreed that if a third person would deed certain land to the son, he would give his note, etc., and the deed was executed, but its acceptance by the son denied; and in which it was held, the father having refused to execute the note, that there could be no recovery against him, and, assuming that the son had accepted the deed, that the undertaking, if one was implied, would have to be imputed to the son, the recipient of the deed, and not to the father.

But it has been held that the execution of the contract by a conveyance of the land must precede the bringing of the action for the purchase price. Butler v. Lee, 11 Ala. 885, 46 Am. Dec. 230.

Another line of cases, while seemingly holding that a verbal contract for the sale of real property is within the statute of frauds, notwithstanding it has been performed on one side by a conveyance of the property, allows recovery of unpaid pur-

writing, expressing the consideration, and is subscribed by the party to be charged.

Harper v. Goldschmidt, 156 Cal. 245, 28 L.R.A.(N.S.) 689, 134 Am. St. Rep. 127, 104 Pac. 451; *Browne*, Stat. Fr. 4th ed. § 345a; *Turnham v. Calumet & O. Min. Co.* 58 Or. 453, 112 Pac. 711, 115 Pac. 157; *Johnson v. Hanson*, 6 Ala. 351, 41 Am. Dec. 54; *Raub v. Smith*, 61 Mich. 543, 1 Am. St. Rep. 619, 28 N. W. 676; *Goddard v. Donaha*, 42 Kan. 754, 22 Pac. 708; *Baker v. Haswell*, 36 Okla. 429, 128 Pac. 1086; *Wardell v. Williams*, 62 Mich. 50, 4 Am. St. Rep. 814, 28 N. W. 796; *Jenning v. Miller*, 48 Or. 201, 85 Pac. 517.

To make such an agreement obligatory, it is necessary that the other party shall have accepted or assented to the terms of the agreement the writing contains.

Davis v. Brigham, 56 Or. 41, 107 Pac.

chase money, but upon the implied promise arising from the vendor's performance. But the difference between these and the preceding cases is technical, rather than substantial. Thus, it has been held that where a verbal contract for the sale of land has been executed on one side by a conveyance of the property, the proper action is upon an implied promise arising from the plaintiff's performance, implied promises not being embraced by the statute of frauds, and that no action can be maintained on the specific contract itself. *Fisher v. Wilson*, 18 Ind. 133, quoting *Browne*, Stat. Fr. §§ 115, 116, 124. See also *Basford v. Pearson*, 9 Allen, 387, 85 Am. Dec. 764, which, as shown *supra*, held that the recovery must be upon the implied promise to pay the agreed price, where there was an agreement for an exchange of lands at an agreed valuation, which contract was executed on one side only. And in *Wilson v. Clarke*, 1 Watts & S. 554, it was held that a vendor cannot recover the purchase price of land in an action based on a parol contract of sale, upon proof of performance of the contract on his part; but the court intimated that he might recover damages from the vendee for breach of the verbal agreement.

In some instances it has been held that where an oral contract for the sale of real estate has been executed as to the part within the statute of frauds, by a conveyance of the property, the statute has no application, but that the action is upon the implied contract to pay arising from the conveyance, rather than upon the expressed contract of sale. However, the debt implied from the conveyance is the purchase price agreed upon. It has been so held in the following cases: *Murray v. Schult*, 73 N. J. L. 489, 63 Atl. 904; *Birch v. Baker*, — N. J. —, 90 Atl. 297. And in *Niland v. Murphy*, 73 Wis. 326, 41 N. W. 335, it was held that the statute of frauds does not apply in such a case, and that in an action for breach of the promise to pay

961, Ann. Cas. 1912B, 1340; 20 Cyc. 284, 285.

Where the contract to purchase land is void by the statute of frauds, an action to recover for the balance of the purchase price cannot be maintained.

Baldwin v. Palmer, 10 N. Y. 232, 61 Am. Dec. 743, and note.

Mere payment of portions of purchase money, unaccompanied by any other act, is not sufficient to take a parol agreement for the sale of land out of the statute of frauds.

Blanchard v. McDougal, 6 Wis. 167, 70 Am. Dec. 458; *Gangwer v. Fry*, 17 Pa. 491, 55 Am. Dec. 578; *Cooper v. Colson*, 66 N. J. Eq. 328, 105 Am. St. Rep. 660, 58 Atl. 337, 1 Ann. Cas. 997; *Browne*, Stat. Fr. 4th ed. §§ 461, 462; *Temple v. Johnson*, 71 Ill. 13; *Box v. Stanford*, 13 Smedes & M. 93, 51 Am. Dec. 142.

the contract price, the contract price and interest could be recovered.

In a few cases which have involved the question of delivery and acceptance of a deed as removing a parol contract for the sale of lands from the statute of frauds, the courts have also adverted to the fact that the vendee was put in, or entered into, possession, but the weight attached to the latter fact was not indicated. Thus, in the following cases it was held that the statute of frauds cannot be set up as a bar to an action on a parol contract for the purchase price of realty, where the conveyance has been executed and accepted and the purchaser put in possession, the ground being that in such case the contract is executed as to the part within the statute: *Merrell v. Witherby*, 120 Ala. 428, 74 Am. St. Rep. 41, 26 So. 974, reversing on rehearing 120 Ala. 418, 74 Am. St. Rep. 39, 23 So. 994; *Stringer v. Stringer*, 93 Ga. 320, 20 S. E. 242; *Curran v. Curran*, 40 Ind. 473; *Arnold v. Stephenson*, 79 Ind. 126; *Worley v. Sipe*, 111 Ind. 238, 12 N. E. 385; *Greenlees v. Roche*, 48 Kan. 503, 29 Pac. 590 (title bond delivered, accepted, and possession taken); *Botkin v. Middlesboro Town & Land Co.* 139 Ky. 677, 66 S. W. 747; *Wolfe v. Hauver*, 1 Gill, 84; *O'Grady v. O'Grady*, 162 Mass. 290, 38 N. E. 196; *Waldron v. Laird*, 65 Mich. 237, 32 N. W. 29 (deed and possession delivered to purchaser's son at his request,—decision put upon the ground of part performance); *Smith v. Davis*, 90 Mo. App. 533; *Tucker v. Dolan*, 109 Mo. App. 442, 84 S. W. 1126; *Griffith v. Thompson*, 50 Neb. 424, 69 N. W. 946; *Suber v. Richards*, 61 S. C. 393, 39 S. E. 540 (decision upon ground of part performance); *Hamilton v. Gilbert*, 2 Heisk. 680 (deed pursuant to agreement executed to third person); *Zabel v. Schroeder*, 35 Tex. 308. Of course, those cases wherein it appears that the decision turns upon the fact that possession was taken are not included herein.

G. J. C.

To take the case out of the statute of frauds, part performance must be of the identical contract alleged, which must be certain and definite, and proved as alleged.

Plymale v. Comstock, 9 Or. 318.

The assumption of, and agreement to pay, a real estate mortgage, constitute an agreement to answer for the debt, default, or miscarriage of another, and is void unless the same or some memorandum thereof, expressing the consideration, shall be in writing and subscribed by the party to be charged; and such agreement does not bind the purchaser personally, unless he assumes the payment of the debt.

Turnham v. Calumet & O. Min. Co. 58 Or. 453, 112 Pac. 711, 115 Pac. 157; *Nelson v. Boynton*, 3 Met. 396, 37 Am. Dec. 149; *Barker v. Bucklin*, 2 Denio, 45, 43 Am. Dec. 726; *Miles v. Miles*, 6 Or. 266, 25 Am. Rep. 522; *Walker v. Goldsmith*, 7 Or. 161; *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137; *Lewis v. Day*, 53 Iowa, 575, 5 N. W. 753.

A deed deposited in escrow, not containing the terms of the contract of sale, is insufficient to take the case out of the statute of frauds, even though payment has been made of the purchase price.

Cooper v. Thomason, 30 Or. 161, 45 Pac. 296; *Sursa v. Cash*, 171 Mo. App. 396, 156 S. W. 779.

Mr. J. A. Burleigh, for respondent:

There was such part performance as would take the transaction out of the statute of frauds, granting that it ever came within the statute.

Swift v. Mulkey, 14 Or. 64, 12 Pac. 76; *Cooper v. Thomason*, 30 Or. 161, 45 Pac. 296.

Courts will enforce a parol contract relating to land within the statute of frauds, when the refusal to execute it would amount to practising a fraud.

Browne, Stat. Fr. § 438.

Where one party has done acts in part execution of the contract, with the knowledge and consent of the other, this will take the case out of the statute of frauds.

Brown v. Lord, 7 Or. 302; *Plymale v. Comstock*, 9 Or. 321; *Wagonblast v. Whitney*, 12 Or. 83, 6 Pac. 399; *Wallace v. Scoggins*, 18 Or. 502, 17 Am. St. Rep. 749, 21 Pac. 558; *Cooper v. Thomason*, 30 Or. 175, 45 Pac. 296.

When a purchaser accepts a deed of conveyance to real property conveying to him the legal title, the deed draws after it possession, and his payment of the greater portion of the purchase price is such part performance as will take the transaction out of the statute of frauds, and renders parol proof admissible to establish the terms 51 L.R.A.(N.S.)

of the verbal contract upon the faith of which the parties acted.

Cooper v. Thomason, supra.

Where the purchaser of land pays a part of the purchase price, and takes possession by taking a deed of conveyance carrying with it possession, the sale is taken out of the statute.

Jerman v. Misner, 56 Or. 393, 108 Pac. 179.

Possession alone under a verbal contract, when delivered to the vendee, is an act of part performance which takes the case out of the statute of frauds, even without the additional circumstances of the payment of consideration or the making of improvements.

Sprague v. Jessup, 48 Or. 218, 4 L.R.A.(N.S.) 410, 83 Pac. 145, 84 Pac. 802.

The writings, when taken together and explained by the surrounding circumstances, are sufficient within the statute of frauds to show a valid contract by defendant with plaintiff to buy the property upon the terms as alleged.

Flegel v. Dowling, 54 Or. 40, 135 Am. St. Rep. 812, 102 Pac. 178, 19 Ann. Cas. 1159.

The agreement of a vendee to pay a balance of the purchase price to a stranger to the contract is not within the statute of frauds.

Strong v. Kamm, 13 Or. 172, 9 Pac. 331.

Eakin, J., delivered the opinion of the court:

Defendant makes but one point upon the appeal, namely, that the agreement of sale was in parol, and therefore that a promise by defendant to pay the \$200 cannot be established. We understand the rule in such a case to be that where there is an oral agreement for the sale of land, and the property has been conveyed to the vendee, the agreement is so far executed that it is thereby taken out of the statute of frauds. In an action to recover the balance of the purchase price, the agreement to pay may be shown by parol, including the consideration for the promise to pay. In 39 Cyc. 1918, it is stated: "As a general rule the statute of frauds is a good defense to an action by a vendor on an oral contract of sale of land to recover the purchase price, unless a deed has been executed and delivered to or accepted by the purchaser. A purchaser in possession under a contract for title cannot resist payment of the purchase price on the ground that he did not sign the contract." See also *Walker v. Owen*, 79 Mo. 563; *Cagger v. Lansing*, 43 N. Y. 550; *King v. Smith*, 33 Vt. 22. In 20 Cyc. 294, where many authorities are cited, it is said: "The statute is no bar to an action for the price of land actually

conveyed, where the deed has been accepted or title has otherwise passed, although the grantor could not have been compelled to convey, or the grantee to accept a deed, because the contract was oral." Defendant also suggests the point that the deed was not made to him, and that the property was not in his possession; but he made the contract of purchase and directed that the deed be made to Denny. Acceptance of the deed by Denny was acceptance by defendant. Plaintiff had no contract with Denny, and defendant's liability on his contract for the price is the same as though the deed were to himself. Our supreme court assumes the existence of this rule, and, going further, holds that a promise to pay the price to a third party is also binding upon the vendee, and may be proved by parol. See *Kiernan v. Kratz*, 42 Or. 474, 69 Pac. 1027, 70 Pac. 506; *Feldman v. McGuire*, 34 Or. 312, 55 Pac. 872; *Cooper v. Thomason*, 30 Or. 161, 45 Pac. 296. And this question was also involved in *McLeod v. Despain*, 4th Or. 536, 19 L.R.A.(N.S.) 276, 124 Am. St. Rep. 1066, 90 Pac. 492, 92 Pac. 1038.

The judgment of the Circuit Court is affirmed.

WASHINGTON SUPREME COURT.
(Department No. 1.)

EDWARD WEBSTER, Appt.,
v.

JOHN L. BEAU et al.

(77 Wash. 444, 137 Pac. 1013.)

Damages — breach of contract to establish business — loss of profits.

1. Loss of profits is not a proper element of damages for breach of contract to establish business.

Note. — Damages: measure of damages for breach of contract of partnership.

I. Introductory.

- a. In general, 81.
- b. Breach in failure to contribute, 83.

II. Profits as the measure of damages.

- a. In general, 84.
- b. Where term is completed before trial, 84.
- c. Prospective profits.
 - (1) In general, 86.
 - (2) Where prospective profits are not allowed, 88.
 - (3) Other bases of recovery where profits are speculative, 89.

III. Loss of time or earnings, 90.

IV. Expenses, 92.

V. Services, 93.

VI. Fraud—misappropriation, 94.
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lish a business in a distant and sparsely settled country.

Same — actual expenses.

2. Actual losses in the form of expenses incurred and time lost may be recovered for breach of a contract to form a partnership and establish a business in a distant and sparsely settled country.

(January 21, 1914.)

APPEAL by plaintiff from a judgment of the Superior Court for King County in defendants' favor in an action brought to recover damages for breach of a written contract to form a partnership and establish a fur business. Reversed.

The facts are stated in the opinion.

Messrs. William Martin and Hugh C. Todd for appellant.

Mr. Ira Bronson for respondents.

Crow, Ch. J., delivered the opinion of the court:

Action by Edward Webster against John L. Beau, H. T. Harding, and Ed Born to recover damages for the breach of a written contract. The complaint, which purports to state two causes of action, in substance, alleges: That plaintiff has passed a number of years in that portion of Alaska within the Arctic Circle, known as the "Mackenzie River Country," which is inhabited by fur-bearing animals. That during his sojourn there he acquired extensive and valuable information relative to the fur trade and the methods of obtaining furs from the native Indians and Eskimos. That in 1907, at Nome, Alaska, John L. Beau, one of the defendants, requested him to enter into negotiations with the view of jointly engaging in the fur-trading business. That later he asked that plaintiff accompany him to Seattle to confer with the defendants H. T. Hard-

VII. Particular contracts—illustrations, 94.

VIII. Miscellaneous, 95.

I. Introductory.

a. In general.

For the general subject of loss of profits as an element of damages for breach of contract, see the note to *Wells v. National Life Asso.* 53 L.R.A. 33.

For arbitrary or mala fide termination of partnership as basis of action in tort, see the note to *Com. v. Griffith*, 25 L.R.A.(N.S.) 959.

As to right of one partner of dissolved firm to maintain action at law against another for fraud practised upon dissolution with respect to assets, see the note to *Orockett v. Bursleson*, 6 L.R.A.(N.S.) 263.

It is not intended in general to include cases other than those of partnership, but a few agency cases are included.

ing and Ed Born. That further consultations were held in Seattle, all parties named being present. That on November 12, 1907, a verbal agreement previously made was reduced to writing by Beau, on behalf of himself and the defendants Harding and Born, in the form of a letter or proposition which Beau signed, and which plaintiff accepted and also signed. That the defendant Beau then requested that plaintiff proceed to San Francisco to ascertain the plans of the whaling fleet for the next season, and also to secure suitable men to assist in conducting the contemplated fur-trading business. That Beau then advanced \$95 to plaintiff for immediate expenses, and promised further advances as needed. That plaintiff went to San Francisco, where he wrote a number of letters and sent a telegram to the defendant

Beau, but received no answers. That in April or May, 1908, he mailed a registered letter to Beau, and received an answer in which Beau stated that he and his associates would not carry out the agreement. That plaintiff was capable of earning \$5 per day; and that, for money disbursed in necessary expenses and for loss of time, he had sustained a loss of \$1,985, upon which the \$95 advanced by Beau should be credited.

The written proposal upon which the second cause of action is also predicated reads as follows:

Seattle, Wash., Nov. 12, '07.

Mr. E. Webster,

Seattle, Wash.

Dear Sir.—

Reference our conversation regarding Mc-

Most of the cases are those where the breach consists in excluding the wronged partner from the business, or in refusing to go on with him in business. The damage which he has suffered is the value of what he has lost, which in general, and apart from misappropriation of property, etc., is the amount of profits which he would have realized from the business had it been carried on according to the partnership agreement. As to this there is general agreement in the authorities, and where the profits have been earned the matter presents no difficulty. Where the profits are prospective, they ought to be estimated if it can be done with reasonable certainty, but if they rest merely on speculation and conjecture, they cannot be allowed. There is no substantial support for the doctrine suggested in one or two cases that prospective profits, while theoretically allowable, can never be shown with sufficient certainty. Loss of time or earnings and expenses incurred in carrying out the contract cannot logically be allowed where the profits can be shown or estimated, as the profits are only what is left after deducting the expenses, and the loss of time or earnings would have occurred even if the contract had been carried out. But where the evidence as to prospective profits leaves the matter in conjecture, it is not fair or reasonable that the wronged partner should be dismissed empty-handed, and the courts in such case will seek out some other way of compensation, which may include his expenses incurred in carrying out the contract or the value of his time and earnings lost, and, as has also been held, even the value of his services rendered to the other partners.

Contracts to go into a partnership.

It is often difficult, if not impossible, to say whether at the time of breach a partnership had actually been entered upon or not. But it is not in general necessary to solve this question, for, even if at the time of breach the partnership had not been entered into, an action will lie for damages 51 L.R.A. (N.S.)

for the breach. *Goldsmith v. Sachs*, 8 Sawy. 110, 17 Fed. 726; *WEBSTER v. BEAU*; *Iloy v. Gronoble*, 34 Pa. 9, 75 Am. Dec. 628; *Hill v. Palmer*, 56 Wis. 123, 43 Am. Rep. 703, 14 N. W. 23. See also *Stone v. Dennis*, 3 Port. (Ala.) 231, where the plaintiff recovered damages for a breach of covenant, and the court considered that the partnership had not commenced (in which view it was possibly mistaken). "Nothing is more generally settled than that a refusal to carry out an agreement to form a copartnership gives rise to a cause of action." *Rockwell Stock & Land Co. v. Castroni*, 6 Colo. App. 521, 42 Pac. 180. But an action for damages for failure to go into a partnership will not be sustained where there is no evidence as to the terms on which the parties were to go in. *Figs v. Culer*, 3 Starkie, 139.

Nor is the question, whether the partnership has or has not begun, material upon the theory of the measure of damages. "The measure of damages is the same in both cases." *Ramsay v. Meade*, 37 Colo. 465, 86 Pac. 1018, where, however, the court considered that the partnership had begun. This is not disputed in *WEBSTER v. BEAU*, where the decision turns on the absence of an existing business, and not on the fact that the contract was executory, for, of course, there may be an executory contract to take a partner or a new partner into an existing business.

Reduction of damages by other employment.

Whether the damages of one who has been excluded from a business by his partner will be reduced by the profitable employment of his time after the exclusion does not seem to have been decided.

In *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756, it was held that one who had broken a contract of partnership could not insist that his partner's claim for profits must be limited to the period between the dissolution and his partner's subsequent entry into some other business, the court suggesting that possibly the defend-

Kenzie river expedition will say: We will arrange to place a stock of trade goods there at such a place as you and we may select. The stock, to consist of such wares as we may deem proper for the native trade purposes, shall constitute approximately the value of \$12,000, including duty and freight. The stock to be shipped on such carrier as will make best and lowest rates, concurrent with safety. The title and ownership of all wares and buildings erected shall be vested in us. You are to devote your time and efforts to handling and trading off the said wares and merchandise for fur, whalebone, etc., and for your services you are to receive thirty-three and one third (33 $\frac{1}{3}$) per cent of the net profit of the McKenzie "Your Stations." The fur and trade goods obtained by you in exchange and otherwise shall be

turned over to us on arrival of our boat each and every season; such furs are to be kept separate and distinct and sold to the best possible advantage, and separate and distinct accounts kept and rendered to you. All accounts and invoices and all matters pertaining to your station shall be subject to your inspection at all times. Two thirds, or 66 $\frac{2}{3}$ per cent, of the net profit, shall go to us. In taking stock of inventory for purpose of ascertaining profit or net results, the cost of building or equipment shall not be figured. We will put in another stock the second year as large or larger, if you advise us by mail to increase; otherwise practically same amount and commodities. Following propositions are to be part of our agreement, and you can avail yourself of any or either at any time:

ant could show that the plaintiff either was or might have been as profitably employed in business on his own account as he would have been, had the firm business been continued, but that the plaintiff might, perhaps, have disputed the competency of such evidence.

Exemplary damages.

There seems to be no ground in these matters for exemplary damages.

In *Hoy v. Gronoble*, 34 Pa. 9, 75 Am. Dec. 628, it was held to be error to allow damages against the defendant for "violation of faith," on breach of a contract to conduct the defendant's farm on shares, as this would be allowing vindictive damages.

But countenance was given to a claim for exemplary damages in *Ball v. Britton*, 58 Tex. 57, where the court, in sending a case back for a new trial, said: "Counsel for appellee insist that appellant was not entitled to exemplary damages, and refer us to the case of *Houston & T. C. R. Co. v. Shirley*, 54 Tex. 125, to the effect that such damages are not recoverable upon a breach of contract. In the case before us, there was a breach of contract, certainly; but there was much more. The plaintiff was, with every circumstance of contumely, excluded from a business in which he had an interest, and from premises in which he had a right to work, at least for the time being. The defendant appears to have taken the law into his own hands, and to have closed the partnership in a manner entirely too summary to be sanctioned by a court of justice."

b. Breach in failure to contribute.

The measure of damages for breach in failing to make an agreed contribution to the partnership funds differs widely according to the circumstances of the case. Where the case arises in adjustment of partnership accounts of a going concern, the measure of damages is the interest on the uncontributed money.

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Thus, where one partner is in default for the amount of the capital that he was to pay in, and the other partner continues the business notwithstanding, the amount which he may recover from the delinquent partner is the interest on the money that the delinquent was to pay in, and he cannot recover for loss of profits that they might have made, had the money been paid in. *Delp v. Edlis*, 190 Pa. 25, 42 Atl. 462.

And so in *Krapp v. Aderholt*, 42 Kan. 247, 21 Pac. 1063, where the plaintiff sued for a dissolution and accounting, and alleged that the defendant had excluded him from the business, the defendant could not recover more than interest for the plaintiff's failure to contribute his share of the capital.

See also to similar effect, *Hartman v. Woehr*, 18 N. J. Eq. 383, *infra*, II. a.

See also in this connection the following cases *infra*, VIII.: *Akin v. Luce*; *Westwood v. Cole*; and *Kinloch v. Hamlin*.

But where the defendant is to furnish all the capital, and his failure to do so prevents or breaks up the business, then the case is similar to the ordinary case of exclusion of the wronged partner from the business, or the refusal to go on with him, and the measure of damages is in general the loss of profits. *Dart v. Laimbeer*, 107 N. Y. 664, 14 N. E. 291.

Thus, in *Hunter v. Land*, 81* Pa. 296, where the breach was the failure of the defendant to advance money which he had agreed to furnish for a partnership between him and the plaintiff in the buying and selling of horses, prospective profits were allowed.

So, where on a publishing venture the defaulting partner had failed to furnish the book which the concern was to publish, it was held that his associates might sue him for damages for failure to furnish the book, as that was his failure to bring property into the partnership out of which profits might be made, and they recovered expenses and an additional amount, apparently as for loss of profits. *Gale v. Leckie*, 2 Starkie, 107,

First. If the profits during or within five years shall be such that we have during these five years, or before, our money and 100 per cent profit, then and in that event, from that time on you shall receive 50 per cent profit, and be the one-half owner of all stock and buildings, and title vested in you to that extent.

Second. If you at any time invest or put in 16½ per cent of all capital invested in your stations, then and immediately thereafter, you shall receive 50 per cent of the profits, and the 16½ per cent, or one sixth, of the property, shall then be vested in your name.

Third. If at any time you can establish the conditions as in article first, you shall

receive a salary in addition to the 50 per cent profit.

Fourth. In case you have made 100 per cent net profit or more the first year, then you shall have one half, or 50 per cent of the profit for your services, and same ratio if the net profits shall be large; this also applies to subsequent years.

Fifth. Any and all trading or buying the Schooner Abler does from spring 1909 on between point one-half distance between Point Barrow and your station, you shall receive twenty-five (25) per cent of the net profit. Of the profits derived from any purchases or trade made by Schooner Abler season 1908 from Camden Bay and East, you will receive 25 per cent of the profits. Losses

II. Profits as the measure of damages.

a. In general.

In most of the cases upon breach of a partnership contract, the breach is the exclusion of the wronged partner from the business, or the refusal to go with him in business. The measure of his damages in such case is his loss by the breach, which, apart from the question of misappropriation of contributed property, etc., is the amount of profits which he would have made, had the contract been carried out according to its terms.

The question of the recovery of profits by a wronged partner may be divided into the recovery of actual profits or estimated prospective profits. Where the term has expired before the suit or before the trial, and the business from which the plaintiff has been excluded has made profits, these may afford a definite basis of his loss; so where, irrespective of expiration of the partnership term, the partnership property is successfully used by one partner to the wrongful exclusion of the other, who elects to treat the excluding partner as his trustee. But the profits may be said to be prospective where none have been realized at the time of the trial, whether the business or venture from which the plaintiff was excluded is continuing or whether, by reason of the breach, either no partnership business has been carried on, or if begun it was broken up by such breach.

Exclusive use of partnership property.

The time for which profits are allowed will not cease at the expiration of the partnership if one of the partners wrongfully continues the exclusive use of the partnership property, for in such case the excluded partner may elect to treat the wrongdoer as his trustee, and require him to account for such property and any profits made by the use of it.

Thus, where one partner excluded the other from the business of the partnership, and took patents belonging to the firm and made profits with them, it was held that 51 L.R.A.(N.S.)

the excluded partner was entitled to receive his share of the profits and of the property, according to the terms of the partnership articles, and that the excluding partner held the property as trustee for that purpose. *Ambler v. Whipple*, 20 Wall. 546, 22 L. ed. 403.

So, in *Hartman v. Woehr*, 18 N. J. Eq. 386, the court said: "Even where the partnership has been legally dissolved, and one of two partners continues to carry on the business, unlawfully using the property of the other in it, the retiring partner is, at his option, entitled to his share of the profits made while his property is thus used." See also *Beller v. Murphy*, 139 Mo. App. 663, 123 S. W. 1029, *infra*, II. b.

In *Karrick v. Hannaman*, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. Rep. 135, the court said: "In a court of equity, a partner who, after a dissolution of the partnership, carries on the business with the partnership property, is liable, at the election of the other partner or his representative, to account for the profits thereof, subject to proper allowances. *Ambler v. Whipple*, *supra*; *Pearce v. Ham*, 113 U. S. 585, 28 L. ed. 1067, 5 Sup. Ct. Rep. 676; *Hartman v. Woehr*, 18 N. J. Eq. 383; *Freeman v. Freeman*, 136 Mass. 260; *Holmes v. Gilman*, 138 N. Y. 369, 20 L.R.A. 566, 34 Am. St. Rep. 463, 34 N. E. 205; 3 Kent, Com. 64."

b. Where term is completed before trial.

Under this head are properly included not only cases brought after the end of the term by time or by the completion of an adventure, but also those where the excluding partner has put an end to the business by a sale of the property, or the wronged partner has sued for a dissolution.

A partner excluded from the business is entitled to his share of the profits on the completion of the venture (*Pearce v. Ham*, 113 U. S. 585, 28 L. ed. 1067, 5 Sup. Ct. Rep. 676; *Canfield v. Johnson*, 144 Pa. 61, 2 Atl. 974; *Beller v. Murphy*, *supra*), or to the time of the decree of dissolution, when he sues for a dissolution (*Zimmerman v. Harding*, 227 U. S. 489, 57 L. ed. 608, 33

to be borne in same ratio as profit. You are to keep accurate account of all transactions.

Truly,
John L. Beau.

O. K. E. Webster.

For his second cause of action the plaintiff, after pleading the agreement, in substance, alleged that the defendants refused and neglected to purchase goods in the sum of \$12,000 for the partnership as agreed; that, as a result of such refusal, the entire season of 1908 was lost, together with profits that would have been earned by the plaintiff; that the portion of Alaska to which it was agreed the plaintiff should go with the goods was a section but little fre-

quented by traders, where heavy profits in the fur, ivory, and mercantile business would have been realized; and that the proposed partnership during the term of two years would have earned a net profit of \$75,000. Plaintiff demanded judgment for \$1,890 on his first cause of action, and for \$25,000 on his second cause of action.

The defendants John L. Beau and H. T. Harding admitted the execution of the written agreement by John L. Beau, but denied all other allegations of the complaint. The defendant Ed Born has been dismissed from the action, and no further notice will be taken of him. The first trial resulted in a verdict for \$14,905 in plaintiff's favor against the defendants Beau and Harding.

Sup. Ct. Rep. 387; *Hartman v. Woehr*, 18 N. J. Eq. 383).

In *Karrick v. Hannaman*, supra, where one partner excluded the other from the partnership affairs, carried on the business for his own benefit, and later sold off the property, the excluded party in his suit for dissolution, which came to trial after the partnership had expired by time, was allowed his share of the profits according to the partnership articles, and to his share of the property sold. The court said: "A partner who assumes to dissolve the partnership before the end of the term agreed on in the partnership articles is liable, in an action at law against him by his co-partner for the breach of the agreement, to respond in damages for the value of the profits which the plaintiff would otherwise have received. *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756; *Dennis v. Maxfield*, 10 Allen, 138."

Where after a time two partners who had paid their capital contributions in full excluded the third, who was partially in default, from the business, and he sued for a dissolution, it was held that he was entitled to his share of the profits, but would be charged with interest on the unpaid part of the share of the capital that he was to pay. *Hartman v. Woehr*, supra. This case was approved in *Beller v. Murphy*, supra, where A, being the owner of mining land, leased it for ten years to B and others and himself for mining operations, under a royalty of 10 per cent, and after a time B acquired part of the land, and B and A excluded the others from it, declared the lease forfeited, and leased the land to another concern at a royalty of 20 per cent. It was held that the remaining parties to the first lease, having waited until after the expiration of the ten years, were entitled to recover from A and B their shares of the extra 10 per cent royalty, and, although A died before the ten years and the partnership might be considered as having thereby expired, still there must be an accounting for the excess royalty received thereafter.

While it is not referred to by the court, it may be conjectured from the date of the 51 L.R.A. (N.S.)

trial in *Dennis v. Maxfield*, supra, that the adventure was then at an end and the profits fixed. In that case a captain of a whaling ship, hired by its owners at a compensation to be a certain proportion of the profits, was discharged while the voyage was still in progress, and it was held that he was not only entitled to his share of the profits prior to his discharge, but also to his share of the profits afterward, although these were in their nature contingent and speculative.

Where, during a term of a partnership for the manufacture and sale of gold pens, one of the partners was excluded by the other, he was allowed to recover the loss of those profits which he would have made during the stipulated term of the partnership. *Bagley v. Smith*, 10 N. Y. 489, 19 How. Pr. 1, 61 Am. Dec. 756. While this case was decided on broad grounds as to prospective profits, it is placed here as it is referred to in *Van Ness v. Fisher*, 5 Lans. 236, infra, II. c, as one where the excluding partner continued the business and the term had expired before the time of the trial.

Where, shortly before dissolution and in contemplation of it, a retiring partner secretly canceled contracts of the firm with outside parties, whereby it lost much business, in sustaining a judgment against the retiring partner, the amount of the profits of the season in the preceding year was considered and compared with that of the season following the dissolution, but the method of computation does not appear. *Axton v. Kentucky Bottlers Supply Co.* 159 Ky. 51, 166 S. W. 776.

The wronged partner of a repudiated partnership for operation in land was held entitled to recover his share of the profits based on the value of the land at the time of the breach, and was not limited to recovery of the value of his services. *Clarkson v. Whitaker*, 12 Tex. Civ. App. 483, 33 S. W. 1032, where A was to purchase land with the assistance of B, who was to manage it, and when it was all sold the profits, after repaying A, were to be divided, and shortly after A's death his successors repudiated the contract.

Upon the hearing of the defendants' motion for a new trial, the trial judge, being of the opinion that anticipated profits were too remote and speculative to be made the basis of a recovery, ordered the plaintiff to remit \$13,585 from the verdict, or accept a new trial. Plaintiff refused to make any remission, and a second jury trial was had before a different judge, who instructed the jury and tried the cause upon the theory that lost profits for one year only could be recovered, and that there could be no recovery for expenses or lost time. Following this instruction, the second jury returned a verdict for \$8,000 in plaintiff's favor against the defendant John L. Beau. Motions for a new trial were interposed by the plaintiff and the defendant

Beau. The defendants also interposed a motion for judgment notwithstanding the verdict. The latter motion was sustained, and a judgment of dismissal was entered, for the reason that the trial judge concluded that no contract between the parties had been proven. The plaintiff has appealed.

The trial judge in substance instructed the jury that the written instrument would not be binding upon the parties until (1) they agreed upon and selected a place or station in which to install their stock of goods, and (2) they had selected and approved a stock of goods which they deemed suitable for trading purposes. This instruction was given upon the theory that the written instrument itself contemplated the performance of these prerequisite conditions to make

c. Prospective profits.

(1) In general.

Of course, if the evidence shows that there would not have been any profits, there are, apart from matters of misappropriation or special agreement, no damages from the breach.

Thus, in *Jones v. Morehead*, 3 B. Mon. 377, it was held that a partner was not entitled to recover damages against a co-partner for excluding him from the business when under the circumstances there probably would not have been any profit, and necessarily the business must soon have been dissolved.

While prospective profits may not be recovered, on the ground of failure of proof, in cases where the basis of their recovery is merely speculation or conjecture, upon principle they are recoverable upon a breach of a contract of partnership.

Thus, prospective profits have been allowed to the plaintiff partner where the defendant partner excluded him from an existing retail business (*Ramsay v. Meade*, 37 Colo. 465, 86 Pac. 1018); sold the machinery and broke up a flour business in which the defendant was to furnish the capital, and the plaintiff was to manage the business (*Dart v. Laimbeer*, 107 N. Y. 664, 14 N. E. 291); failed in his contract to furnish steers on his farm, which the plaintiff was to conduct on shares with a share of profits in the steers (*Rule v. McGregor*, 117 Iowa, 419, 90 N. W. 811); failed in his contract to furnish live stock, to be managed on shares by the plaintiff on the plaintiff's farm (*Brown v. Hadley*, 43 Kan. 267, 23 Pac. 492); excluded plaintiff from a piece of real estate which they were to operate as partners (*Maguire v. Kiesel*, 86 Conn. 453, 85 Atl. 689); refused to carry out his contract, by which his house was to be managed as a hotel by the plaintiff on shares (*Crittenden v. Johnston*, 7 App. Div. 258, 40 N. Y. Supp. 87); refused to carry out his contract to permit the plaintiff to conduct his farm on shares (*Hoy v. Grenoble*, 34 Pa. 9, 75 Am. Dec. 628); failed to carry 51 L.R.A. (N.S.)

out his contract to provide the capital for the business of buying and selling horses (*Hunter v. Land*, 81 Pa. 296); excluded plaintiff from a quarry which they were to work, dividing the profits (*Treat v. Hiles*, 81 Wis. 280, 50 N. W. 896); failed in his contract to manufacture and introduce with due diligence a patented article, the patent of which had been assigned to him by the plaintiff for a fixed sum to be paid out of the net profits (*Winslow v. Lane*, 63 Me. 161).

In *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415, reported more fully in 1 Abb. App. Dec. 363, it was held in an action on breach of a contract to manage a farm on shares, that it was error to disallow all damages except the increased expense of hiring another farm and of removing to it. (Note that the authority of this case lies in very narrow compass, that the opinions of the judges were individual, and that the opinion of Judge Woodruff is criticized in *Wakeman v. Wheeler & W. Mfg. Co.* 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264.)

In *Gale v. Leckie*, 2 Starkie, 107, where an author failed to furnish a book to publishers who were to divide the profits with him, the jury found damages for £50 more than the amount of the paper and printing expenses, the court having charged them: "You will no doubt indemnify the plaintiffs against the expenses which they have incurred in paper and in printing; it is a waste of time to say that to this they are entitled in the strictest justice. The sum of £90 has been stated by the witnesses as the amount of the profit which would probably have been derived from the first edition, and it is doubtful whether it would have reached a second."

Judicial explanations.

"It is not true that loss of profits cannot be allowed as damages for a breach of contract. Losses sustained and gains prevented are proper elements of damage; . . . future profits, . . . so far as they can be properly proved, . . . may form the measure of damage. As they are

it a binding contract. There was evidence that the station and stock of goods had been agreed upon. As the jury found in appellant's favor on the issue involved, the instruction, although excepted to by appellant, could not have been prejudicial as against him; yet, in view of the new trial which must be ordered, we announce our approval of the instruction as given.

Other assignments of error, in substance, present two questions: (1) Whether appellant can recover damages occasioned by loss of anticipated profits; and (2) whether he can recover damages occasioned by loss of time, and for necessary disbursements. The trial judge at first held he could recover for loss of anticipated profits only, and that, the contract being one for a part-

nership which could be terminated at any time after the business had actually been installed, appellant's claim for lost profits should be confined to those that might have been earning during the year 1908. He further held appellant could not recover for loss of time, or for expenses incurred. As before stated, a verdict was returned for \$8,000; but later the trial judge sustained respondents' motion for judgment *non obstante veredicto*, on the theory that no valid contract had been shown. We conclude that he erred in sustaining the motion, and also erred in the theory upon which he tried the case.

There was sufficient evidence to be submitted to the jury upon the issue whether there was a definite, certain, and binding contract, and the jury, upon such evidence,

prospective, they must, to some extent, be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it, and then it is for the jury, under proper instructions as to the rules of damages, to determine the compensation to be awarded for the breach. When a contract is repudiated, the compensation of the party complaining of its repudiation should be the value of the contract." *Wakeman v. Wheeler & W. Mfg. Co.* supra (not a partnership matter).

In *Schrandt v. Young*, 2 Neb. (Unof.) 546, 89 N. W. 607, where the case was probably not a partnership, the court said in approving the right to recover the loss of future profits in sheep: "To our mind, such damages are no more contingent or uncertain than would be the damages resulting in a personal injury to a professional man, and yet the books are full of cases where such damages have been allowed, based upon the probable damages."

In *Maguire v. Kiesel*, 86 Conn. 453, 85 Atl. 689, where the defendant excluded the plaintiff from a partnership to operate in a certain piece of real estate, in holding that anticipated profits were to be considered in estimating the damages, the court said: "The measure of damages in the present case is therefore reasonable compensation for the loss which the plaintiff suffered in being wrongfully deprived of the benefit of the agreement. That which it provided for was a sharing of anticipated profits. Such profits were therefore within the contemplation of the parties. . . . The measure of the loss must be found in the profits which under the agreement the plaintiff would have been entitled to receive. . . . If the compensation is to be adequate, as the law endeavors, as best it can, to make it, prospective as well as past profits must be taken into account in so far as the former are established with the requisite degree of cer-

tainty in respect to both connection and amount. . . . The question which arises in such cases relates not so much to the legal right of recovery as to the sufficiency of proof. There will be questions as to the proximate or remote character of the connection between the claimed profits and the alleged breach, and as to the certainty of the proof as to the amount. . . . The requirement of the law, however, is not that prospective profits, in order to furnish a foundation for recovery, must be established with absolute certainty. It is sufficient that it be shown that they are, in the ordinary course of events, reasonably to be expected," and that, in making up an estimation of prospective profits, past profits might be taken into consideration.

Illustrations.

On a contract of partnership to run a lumber sawmill, where defendant sold the mill before the expiration of the term, and the plaintiff was to be entitled to one fourth of the income of the mill and a certain stipulated price per day for hauling, it was held that the plaintiff was entitled to recover as an item of damage one fourth of the value of the gross cut of the mill per day for the unexpired term of the partnership, less the expenses per day, and in addition the sum per day for hauling less the expenses of the hauling, but that he was not entitled to recover for loss on mules purchased, which he was obliged to purchase under the contract, and sold at a loss, nor for various other expenses in matters which became useless to him owing to the breach of the contract, as all these were part of his operating expenses. *Tygart v. Albritton*, 5 Ga. App. 412, 63 S. E. 521, where the court said: "We think the damages are not remote, speculative, or legally uncertain, but were clearly in the contemplation of the parties when the contract was made. The profits on the contract sued for are 'the immediate fruit of the contract,' and the loss thereof can be 'traced solely to the breach of the contract.'"

which was properly submitted, found a valid contract had been made. We hold that under the contract here involved appellant was not entitled to recover damages for loss of anticipated profits. The contract contemplated the establishment of a future business in a remote and sparsely settled country, under dangerous and adverse conditions. It did not pertain to any existing business. Any loss of profits would necessarily mean the loss of such anticipated profits as might possibly be earned in the future from a business not yet created, installed, or conducted. There was no going business which had previously earned profits sufficient to form a basis upon which to estimate probable future profits. Evidence offered to show a loss of profits in this action would necessarily con-

sist of opinions of witnesses, uncertain and speculative in character. Who could anticipate or foretell that circumstances or contingencies might not have arisen after the business had been actually installed, which would result in a total failure to earn any profits whatever? It is common knowledge that parties expecting profitable results frequently enter upon business enterprises which terminate in failure. This court, in common with others, has held that loss of profits under certain conditions may be the basis of a recovery in actions for damages, and appellant has cited the following cases from this court in support of that rule: *Skagit R. & Lumber Co. v. Cole*, 2 Wash. 57, 25 Pac. 1077; *Federal Iron & Brass Bed Co. v. Hock*, 42 Wash. 668, 85 Pac. 418; *Belch*

In *Treat v. Hiles*, supra, where the plaintiffs discovered a quarry and induced the defendant to buy it under an arrangement that they were to work it with the profits divided as long as the quarry might last, and soon after the purchase the defendant excluded the plaintiffs from the quarry and worked it thereafter for a period of three years next preceding the trial, it was held that the jury reasonably allowed the plaintiffs for prospective profits four times the amount of the profit of the third year.

But in an action by a partner excluded from a partnership for the term of twelve years, to build and conduct a tannery, it was held that he could not, in order to show probable profits, introduce evidence of experts as to what the profits would have been, but the facts should be shown. *Reed v. McConnell*, 101 N. Y. 270, 4 N. E. 718.

Yet in *Rhodes v. Baird*, infra, II. c (2), the court, in refusing to allow prospective profits as too speculative, held that expert opinion was proper to show the market value of property the use of which was lost to the plaintiff by the breach of contract.

—California statute.

Where the loss of prospective profits is the natural and direct consequence of the breach of the contract, they may be recovered under the California statute providing that "the measure of damages for the breach of a contract is 'the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.'" *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62, where, under the agreement, the defendant was to purchase land and provide the materials for its improvement and planting in lemon or orange trees, and the plaintiff was to give his time and attention to the improvement and management of the land, and was to be compensated by a share of profits therein, and he was excluded from the premises and the matter brought to an end by the conduct of the defendant before the expiration of the term. 51 L.R.A. (N.S.)

Election of remedies.

Where the plaintiff entered into a contract of partnership with the lessee of an opera house, the plaintiff to be manager during the term of the lease, and before his services were to begin the defendant excluded him from the partnership, and thereafter sold the lease at a considerable figure, it was held that the plaintiff had one of two remedies,—he must either treat the contract as existing and then go for his share of profits, or else consider it as repudiated and go for his damages; and that, having considered it as repudiated, and having brought an action for damages for the breach, in which he was allowed to recover for loss of profits, he could not claim a specific interest in the amount which had been received from the sale of the lease, as he had nothing whatever to do with that amount. *Greenwall Theatrical Circuit Co. v. Markowitz*, 97 Tex. 479, 65 L.R.A. 302, 79 S. W. 1069.

(2) Where prospective profits are not allowed.

While it may be doubted whether there is any substantial authority for the view that on principle prospective profits are too speculative for allowance, individual cases refusing such profits might by themselves seem to give some countenance to such a theory. Thus, in *Couch v. Parker*, 1 Tex. App. Civ. Cas. (White & W.) 192, where the plaintiff was employed to manage a herd of cattle, and was to have a share of increase, and was ousted before the contract expired, it was held error to permit him to give his estimate as to what would have been his share of the increase up to the time of the trial and after the defendant had ousted him from the control, as it was considered that such imaginary, speculative, and hypothetical profits were too remote to be the basis of a legitimate claim. Compare with preceding cases.

In *Rhodes v. Baird*, 16 Ohio St. 573, where the agreement was that the plaintiff was to rent land of the defendant for ten years, and set out a peach orchard, the

v. Big Store Co. 46 Wash. 1, 89 Pac. 174; Church v. Wilkeson-Tripp Co. 58 Wash. 262, 137 Am. St. Rep. 1059, 108 Pac. 596, 109 Pac. 113.

The first three cases cited either award damages for actual losses which were not in the nature of profits, or disclosed an established business which presented facts and practical experience upon which an estimate of lost profits could be intelligently predicated. In the Church Case a recovery was allowed only for commissions on sales shown to have been actually made. An examination of the authorities will show that the courts with marked uniformity have announced the doctrine that, where an established business has been interrupted or destroyed by breach of contract, or by tort, a

resulting loss of profits may become the basis of a recovery; there being a past experience sufficient to render the extent of such loss reasonably certain, and fairly susceptible of proof. Bogart v. Pitchless Lumber Co. 72 Wash. 417, 130 Pac. 490. The cases from this court cited by appellant, where the loss of profits was involved, are in harmony with this rule. The doctrine is equally well established that a loss of prospective profits will not become a basis of recovery in an action upon the breach of a contract to launch a new venture or business. "Where a profit has actually been made, this may be proved as very pertinent to the question what the future profits would probably have been, had not the business been interrupted, and as a material

profits to be divided, and after the plaintiff had expended a large amount of money in setting out trees, etc., the defendant declined to execute the lease stipulated for, and evicted the plaintiff, it was held that it was erroneous to permit the plaintiff to prove the value of possible profits by showing the value of the trees and their possible crop, as such profits were remote and contingent, and that the expenditures of the plaintiff could not be recovered. While the opinion is obscure, it apparently confines the plaintiff to the value of the use of the premises, and states: "As respects the property, the immediate or proximate consequence of the breach of the contract, by the eviction, was the loss of the use of the premises for the term. To the extent that the damages depended on the loss of the use of the property, its market value at the time of the eviction, subject to the performance of the contract on the part of the plaintiff, furnished the standard for assessing the damages. If it had no general market value, its value should have been ascertained from witnesses whose skill and experience enabled them to testify directly to such value, in view of the hazards and chances of the business to which the land was to be devoted." Compare with *Shoemaker v. Acker*, supra, II. c (1).

It was indeed the opinion of an intermediate court in *Van Ness v. Fisher*, 5 Lans. 236, while not necessary to the decision, that profits beyond the time of trial could not be recovered, because they could not be calculated, and it sought to limit the theory of the decision in *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756, supra, II. b, and the cases therein cited, to profits up to the time of trial. But the decision in the *Bagley Case* was on broad grounds, and the later New York cases show that the opinion in the *Van Ness Case* is not of value on the question.

• Speculative profits.

Where prospective profits rest on speculation and conjecture they cannot be allowed.

Thus, upon breach of a contract to com-

bine and hold stock for sale, it was held that plaintiff's speculative chance of possibly being able to sell a majority of the stock for a higher price than the current market value of ordinary stock, and the possibility that the plaintiff might have been able to combine with others in such a sale of the majority of the stock at a higher price, could not be considered in estimating the damages. *Havemeyer v. Havemeyer*, 13 Jones & S. 464.

For other cases of where prospective profits were held to be speculative, see *infra*, II. c (3).

—in a new business.

It will be seen that in *WEBSTER v. BEAU*, the court refused to permit an estimate to be made of prospective profits in a new business in a distant and sparsely settled country. While this decision may be supported on the ground that under the facts prospective profits would rest on speculation or conjecture, the court seems to go beyond what is necessary for the decision, and to suggest a general rule that prospective profits ought not to be allowed on breach of a partnership to go into a new business. It seems clear from the cases cited supra, c (1), that there is no such rule. It there appears that prospective profits in new ventures have been allowed in live stock contracts, in managing pieces of real estate, in publishing a new book, in buying and selling horses, etc.

It may be here noted that the following cases cited in the opinion in *WEBSTER v. BEAU* are not partnership cases: *Central Coal & Coke Co. v. Hartman*, 49 C. C. A. 244, 111 Fed. 96; *Kenny v. Collier*, 79 Ga. 743, 8 S. E. 58; *Paola Gas Co. v. Paola Glass Co.* 56 Kan. 614, 54 Am. St. Rep. 598, 44 Pac. 621; *Winslow Elevator Co. v. Hoffman*, 107 Md. 621, 17 L.R.A.(N.S.) 1130, 69 Atl. 394.

(3) Other bases of recovery where profits are too speculative.

It is the disposition of the courts in general to find some other measure of damages

aid to the jury in the solution of this question; but where no profit has ever been realized, the mere loss of an opportunity to try to make a profit is of too uncertain value to be compensated." 1 Sedgw. Damages, 9th ed. § 193.

Counsel cite and especially rely upon *Dennis v. Maxfield*, 10 Allen, 138, to sustain appellant's right to recover for loss of prospective profits herein. Commenting on that case Mr. Sedgwick, in his work on Damages, immediately after the quotation above made, further says: "In *Dennis v. Maxfield* the plaintiff was hired for a whaling voyage, and was to receive a certain 'lay' or percentage of the profits, and additional compensation if the cargo reached a certain amount. Being wrongfully dis-

missed, it was held he could recover compensation for both items of loss; the voyage having ended and the profits of the voyage being known. . . . This, it must be noted, is a contract where the profits are those of a business, not the profits of the plaintiff's individual exertions. He may in such a case wait until the business is completed, and the profit realized, and then recover his proportion, as he did in the case just cited; or, if the business has been so long established that he can reasonably prove that a profit will be realized, he may recover at once upon the breach. But if it is a new enterprise, and there is no proof that profit will be made, the plaintiff can prove no loss, and should recover no damages on account of the loss of profits; the burden of

where prospective profits are too speculative, as a basis of recovery.

Besides the cases *infra*, see also on this matter, *Howe Mach. Co. v. Bryson*; *Rogers v. Bemus*; *Hunt v. Reilly*; and *Johnson v. Arnold*, *infra*, III.; *Kiralfy v. Macauley*, *infra*, IV.; *Ball v. Britton*, *infra*, V. See also in this connection, *Rhodes v. Baird*, *supra*, II. c (1).

In *Reiter v. Morton*, 96 Pa. 229, where, after a contract for the manufacture of certain articles in iron, to continue for not less than fifteen years, had continued a little over a year, it was claimed by the plaintiff that the defendant wrongfully dissolved the partnership, it was held that it was error to allow the jury to find for prospective profits in a business of such a character to be carried on for so long a time. And the court laid down its opinion as to the measure of damages in such a case as follows: "We apprehend that in such an action as this the measure of damages would be the actual money value of the plaintiff's interest in the contract of partnership at the time of the breach. What would the interest sell for to a person willing to buy and having the means to buy? As illustrating this question, the actual state and condition of the property, business, and assets of the firm at the time, together with proof as to actual results accomplished, whether of profit or loss, or both, in the past, would be competent evidence. Beyond this, at least so far as conjectural profits in the future are concerned, it would not be safe to go. In these remarks we do not mean in any way to change or qualify the existing state of the law as to proof of profits in particular cases and in single transactions. There are many such when proof of the profit which might have been realized, had there been no breach, is eminently proper. What we decide now is the rule for this particular class of cases."

In *Shropshire v. Adams*, 40 Tex. Civ. App. 339, 89 S. W. 448, the court seems to have been of the opinion that one could not recover for the value of his share of a herd of cattle after several years' management by him under a contract in which he was

to have one fourth; that the matter was too speculative and that there was an easy and safe rule of damages in those cases, which was to take the plaintiff's proportion or one fourth of the cost of cattle at the time they were to have been bought, with interest; but the matter was not decided.

III. Loss of time or earnings.

The authorities are not agreed as to whether the loss of time or earnings of the wronged partner is or is not an element of damages upon a breach of the contract. Logically loss of time or earnings is not a proper element of damages where the value of the loss of profits can be shown; but on the other hand, where the amount of prospective profits cannot be shown beyond mere conjecture, it is fair and reasonable that loss of time or earnings should be shown as a substitute. It would seem that in the *Rockwell Case*, *infra*, the court takes the view that loss of time is not a proper element in any case, and such was probably the view of the courts in the *Adams* and *Williams Cases*, *infra*. In the *Meylert* and *M'Neill Cases*, where proof of loss of time or services was allowed, it does not appear that any effort was made to show what the prospective profits would have been. In most of the other cases under this subdivision, we have the loss of time or earnings allowed distinctly as a substitute for prospective profits when these are too speculative for allowance.

It has been held that the damages do not take the form of the *per diem* value of the labor of the person against whom the wrong is committed. *Rockwell Stock & Land Co. v. Castroni*, 6 Colo. App. 521, 42 Pac. 180, where the arrangement was that the plaintiff was to go to defendants' farm, superintend the erection of buildings for the hennery business, buy hens and manage them, and the profits were to be divided, and after the buildings were erected and the hens bought, the defendants declined to go on with the arrangement. It was held that it was error to admit, as an

proving a profit is upon him." This rule is well sustained by authority. *Kenny v. Collier*, 79 Ga. 743, 8 S. E. 58; *Central Coal & Coke Co. v. Hartman*, 49 C. C. A. 244, 111 Fed. 96; *Paola Gas Co. v. Paola Glass Co.* 56 Kan. 614, 54 Am. St. Rep. 598, 44 Pac. 621; *Winslow Elevator Co. v. Hoffman*, 107 Md. 621, 637, 17 L.R.A.(N.S.) 1130, 69 Atl. 394.

"Where a new business or enterprise is floated, and damages by way of profit are claimed for its interruption or prevention, they will be denied, for the reason that such business is an adventure, as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation." 13 Cyc. 59.

"The loss of profits to a business which

has been wrongfully interrupted by another is an element of damage for which a recovery may be had; but it must be made to appear that the business was an established one,—that is, that it had been successfully conducted for such a length of time, and had such a trade established, that the profits thereof are reasonably ascertainable." *States v. Durkin*, 65 Kan. 101, 68 Pac. 1091.

A clear distinction is manifest between an interruption of or an injury to an existing business which has been successfully conducted for a considerable period of time, and the prevention of the establishment of an entirely new business. When the business is in contemplation, but not established, profits that may be anticipated therefrom are too speculative, uncertain, and conjectural to be-

element of damage, the *per diem* value of the services of the plaintiff during the time that she had been on the farm, even though it was difficult to prove otherwise what she had suffered by the breach.

Where there had been previous contract relations between the parties, and the plaintiff had given them up at considerable loss when the contract of partnership was formed, it was held that it was error to permit the plaintiff to show this loss, as such evidence was not proper either to prove a breach or the amount of damages. Compensation for the contract broken according to its value, not at all according to any former contract, was all that the plaintiff could claim on a breach of the partnership agreement by the defendant. *Addams v. Tutton*, 39 Pa. 447.

So, it has been held that the loss of time or earnings is not an element of damages, as such loss is due to the contract, and not to the breach of it. In *Williams v. Barton*, 13 La. 404, where the defendant, at the solicitation of the plaintiff (his father-in-law), gave up his law practice in the city and entered upon the plaintiff's plantation, under an arrangement by which the latter was to provide the funds, and the plantation was to be conducted by the defendant and another, after a year the plaintiff brought an action for recovery of the land and personal property thereon. The defendant counterclaimed for the amount that his law practice would have probably given him during the time that he was on the plantation, but this was disallowed, as this loss was due to the contract, and not to the breach of it; but the court, on what ground does not appear, allowed him something over one third of the amount he claimed.

On the contrary, it has been held that one who has been deprived by the other contracting party of going on with a contract can recover as an element of his damage the amount of his earnings had he continued in his old business. *Meylert v. Gas Consumers' Ben. Co.* 26 Abb. N. C. 262, 14 N. Y. Supp. 148, where, upon the defendant's breach of a contract whereby the plain-

tiff was to act as their agent, the court allowed as an element of damage his probable earnings as a physician during the period from the making of the contract until its final abandonment. The court said: "I also find that, in consequence of the agreement between the plaintiff and the defendants, the former was induced to abandon his profession, from which he averaged an income of about \$700 a month, and that, in consequence of the failure of the defendants to perform their agreements, the plaintiff not only lost the amounts which he actually expended, but the earnings which the evidence reasonably establishes he otherwise would have made from his profession. I therefore find that the loss of those earnings is a legitimate subject of damage in this case, and that the plaintiff is entitled to recover therefor the sum of \$7,700, deducting therefrom the sum of \$250, which the evidence shows he earned from his profession during the time of the running of said agreements. I also find that the whole of the plaintiff's time was necessarily devoted to his effort to introduce the burner in question upon the Pacific slope."

In *Howe Mach. Co. v. Bryson*, 44 Iowa, 159, 24 Am. Rep. 735, where there was a breach of a contract of employment or of agency to sell sewing machines, the court held that the measure of the agent's damages was either the profits upon sales that he would have made, or else the loss of his time and his expenses, and, as the number of sales he could have made was uncertain, he was entitled to recover damages for loss of time, two of the judges dissenting on the ground that the recovery must be upon the contract, and that the profits were not too uncertain for recovery. This decision, so far as it denies recovery on estimated loss of profits, is disapproved in *Wakeman v. Wheeler & W. Mfg. Co.* 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264, but was followed in *Wilson Sewing Mach. Co. v. Sloan*, 50 Iowa, 367.

In *M'Neill v. Reid*, 9 Bing. 68, 2 Moore & S. 89, 1 L. J. C. P. N. S. 162, where the defendant failed in his agreement to intro-

come a basis for the recovery of damages in an action for the subsequent loss of such profits.

As there was evidence sufficient to sustain the finding of the jury that a valid and definite contract had been entered into between appellant and respondent Beau, and as, under the rule heretofore announced, appellant cannot recover damages for the loss of prospective profits, it necessarily follows that he is entitled to recover such losses as he actually sustained in the way of expenses incurred in performing his part of the agreement, and for loss of time while thus engaged. This was the view entertained by the court on the first trial, when appellant was ordered to remit a considerable amount of the verdict, or submit to a new trial, and is

the theory upon which the case must be again tried.

Upon the last trial there was an absolute failure of evidence sufficient to show that the defendant H. T. Harding was a party to the contract, or that he had authorized the respondent Beau to act for him when entering into the contract. As to the defendant Harding the judgment of dismissal was properly entered. As to the respondent Beau the judgment is reversed, and the cause is remanded for a new trial upon the issues joined between him and the appellant. The appellant will recover his costs in this court for the respondent Beau.

Mount, Parker, Gose, and Chadwick, JJ., concur.

duce plaintiff into his firm, relying on which the plaintiff had given up an opportunity for a very lucrative employment, it was held to be proper to state to the jury that they might see that the plaintiff considered that the value of what he was to receive was the equivalent at least of that to be given up.

Loss of time has been allowed as a substitute for loss of profits when these could not be estimated.

Thus, where the partners were to build a sawmill, and owing to a breach by the defendant there was delay in building the mill, it was held that the fair rental value of the property was a proper measure by which to estimate the damages, and that, instead of profits which would have been speculative, the plaintiff, who was to run the mill, might prove the value of his time during the period of the delay, as he was not limited to a single mode of measuring or estimating his damages. *Rogers v. Bemus*, 69 Pa. 432. See also *WEBSTER v. BEAU*.

Perhaps it was upon this theory that loss of time was allowed for in *Johnson v. Arnold*, 2 Cush. 46, where the defendant prevented the carrying out of a contract under which the plaintiff was to go from Massachusetts to Indiana and there manage the defendant's store for two years, the defendant providing the store and stock, and the plaintiff his time and services, and the profits were to be divided; and the plaintiff was allowed compensation for the loss of his time and for the expenses of removing his family from Massachusetts to Indiana and back again, against the defendant's contention that any recovery at all could be only for the loss of profits during the term of the contract.

In *Hunt v. Reilly*, 50 Tex. 99, where a partnership for the publication of a newspaper, etc., for a year, was ended after a few months by a suit against two of the three partners, attaching and enjoining the use of property which they under the agreement provided for use in the partnership, the remaining partner was held entitled to be compensated for loss of profits. But the 51 L.R.A. (N.S.)

appellate court, being dissatisfied with the amount allowed on the proof, held that he was on other proof entitled to recover what he could have earned in his trade during the time that he was thrown out of employment and unable to procure it, and also his expenses in procuring other employment, and gave him the option to take judgment for these amounts, or to go back and take a new trial with the idea that he might be able to adduce other evidence as to profits.

It may be noted in this connection that where the loss is a definite fixed sum, loss of time is not an element of damage. Thus, where the plaintiff came from the Sandwich islands to Massachusetts in pursuance of a contract with the defendant that the latter would employ him at \$1,500 a year as foreman, he was not entitled to recover, as part of his damages, his expenses in coming from the Sandwich islands, when the defendant refused to employ him on his arrival; nor was he allowed to recover for the loss of his time on the journey. It does not appear what he was allowed to recover, but it seems to be suggested that he was allowed to recover \$1,500. *Noble v. Ames Mfg. Co.* 112 Mass. 492.

IV. Expenses.

Expenses logically should be deducted from profits, the balance being the measure of loss. But where there is no sufficient evidence as to what the profits would have been, expenses incurred in carrying out the contract ought fairly to be allowed as an element of damages. And this was probably the theory on which they were allowed in *Gale v. Leckie*, supra, II. c (1); and such is the general rule.

Thus, in *Kiralfy v. Macauley*, 17 Ohio L. J. 331, where the plaintiff agreed to incur certain expenses, and provide the advertising, renting, and supplying of a building for theatrical performances, and the defendant was to bring his company to such building for such performances, and failed to do so, it was held that the court correctly charged the jury that, inasmuch as

there was no evidence tending to show what profits would have been realized, as this was a performance not in a usual theatrical house, the plaintiff was entitled to recover such expenditures as the jury might find reasonable and necessary, less any loss which the jury might find would have been incurred, had the contract been carried out. Distinguishing *Rhodes v. Baird*, *infra*. See also *WEBSTER v. BEAU*.

In *Woodbury v. Jones*, 44 N. H. 206, where the plaintiff, in Minnesota, in accordance with an agreement with the defendant to live upon the latter's farm in New Hampshire for a year, rented his real property in Minnesota, sold his personal property, and came on to New Hampshire, and thereafter the defendant excluded him from the premises, it was held that he could recover the expenses of his removal from Minnesota to New Hampshire, as those expenses were incurred after the contract had been made and in part performance of it, but that he could not recover any loss he had suffered on account of the sales of his property in Minnesota, unless it was clearly part of the contract. See also *Johnson v. Arnold*, *supra*, III.

In *United States v. Behan*, 110 U. S. 339, 28 L. ed. 168, 4 Sup. Ct. Rep. 81, where the government, having decided to give up a project, notified the contractor to stop work, and the contract was one in which the contractor had been required to make large preliminary expenses, and he brought an action for his preliminary expenses and for his profits, it was held that the profits were too speculative, and therefore must be disregarded, as also any possible losses, but that the contractor was entitled to his expenses.

Expenses in procuring other employment were held recoverable in a case where there was no adequate proof of profits. *Hunt v. Reilly*, 50 Tex. 99, *supra*, III.

But where the plaintiff recovers on the theory of profits, he cannot include his expenses and losses necessary in performing his part of the contract. *Tygart v. Albritton*, *supra*, II. c (1).

In *Rhodes v. Baird*, *supra*, II. c (2), it was held that the plaintiff's expenditures made in obtaining or performing the contract did not furnish the measure of his damages, or constitute the fact to which his evidence ought to have been directed, as this would be enabling a party to take his chances on a contract, and, if he made a bad bargain, to charge his losses upon his adversary, and if he had made a profitable one, to deprive him of its benefits. But this case is distinguished in *Kiralfy v. Macauley*, *supra*, this subdivision, as not laying down a general rule, but simply as stating what would not be fair in the particular case.

V. Services.

It has been held that the value of a partner's services actually rendered to the firm might be recovered, where he was excluded from a business, and the contract of part-

nership had no definite term, so that it was determinable at any time. Thus, in *Ball v. Britton*, 58 Tex. 57, where the plaintiff, possessing the requisite knowledge and skill, entered into a partnership with the defendant to construct and operate ice works, the defendant to supply the capital, and the plaintiff to be paid a certain sum a month, until it was repaid out of the profits, thereafter the profits to be equally divided, no time was set for the partnership. After the works were completed and operated a short time, the defendant excluded the plaintiff from the business. The court said that it could not protect the plaintiff against his omission to name a time for the duration of partnership, and that "under the circumstances, we think the measure of damages is the value of the services rendered by him, including his skill, his time and labor in constructing and operating the factory. Of course, from this would have to be deducted whatever he may have received of the profits, if anything, over and above what had been advanced to him by the defendant. This would be the measure of the actual damage."

And where, under the articles of copartnership, one of the partners was to receive a certain salary for superintendence, and the other partners excluded him from the superintendence, he was entitled to receive his salary until the time of the dissolution. *Jennings v. Beale*, 146 Pa. 125, 23 Atl. 225.

In *Hagenaers v. Hörbst*, 30 App. Div. 546, 52 N. Y. Supp. 360, affirmed in 164 N. Y. 603, 58 N. E. 1088, upon the breach of the contract of partnership, the plaintiff was allowed to recover that part of his compensation which was fixed in definite terms at so much a year, and was not allowed anything for profits; but he did not appeal from this decision, which was rendered in construction of a special agreement made at the time of the dissolution.

The reason of the decision does not seem very clear in *White v. Rodemann*, 44 App. Div. 503, 60 N. Y. Supp. 971, where it was agreed that the plaintiff was to pay the defendant a certain sum for a half interest in his school, which they were to conduct as partners. On the defendant's refusal to carry out the contract, the plaintiff recovered in the trial court the amount that he had paid down on the agreement, also some expenditures that he had made in advertising the school, and the value of his services rendered. But on appeal it was held that, inasmuch as it was found that the contract was only partial, and looked to a more complete agreement, it should be considered that the expenditures were made and the services rendered in view of a more complete agreement, which had not been made, and that therefore the recovery must be confined to the amount that the plaintiff had paid down on the agreement.

Allowance to excluding partner for services in making profits.

There is little in the cases as to allow-

ances to the excluding partner for his services in conducting the business. If the articles provide for such an allowance, it seems that it ought to be made in estimating profits.

Thus, where, by the articles, each partner was allowed a certain amount for personal expenses, the excluding partner was allowed this amount, as he managed the business after excluding the other partner. *Karrick v. Hannaman*, supra, II. b.

But where there is no provision in the articles, it does not seem that such an allowance rests on any principle of law.

In *Zimmerman v. Harding*, 227 U. S. 489, 57 L. ed. 608, 33 Sup. Ct. Rep. 387, the court on appeal affirmed with reluctance an allowance to the excluding partner for salary, there being no provision of that kind in the partnership articles, but the point was not properly raised on the appeal.

It is possible that such an allowance was considered proper in *Hartman v. Woehr*, supra, II. b, but the court's expression in the matter is of such obscurity as to be of no material value.

VI. *Freud—misappropriation.*

It is intended to include in this note only those cases of fraud where the wrongdoer contracted with the intent of not going on with the business.

Where the plaintiff's cause of action is that the defendant, not intending to go into partnership with him, succeeded in procuring him to furnish money in good faith for the purpose of a partnership, with the intent of defrauding the plaintiff out of it, the plaintiff may maintain an action at law to recover the money. *Hale v. Wilson*, 112 Mass. 444.

In *Child v. Swain*, 69 Ind. 230, where a person entered into partnership with two others, being himself an insurance agent for various companies, and having a good reputation, and the other two partners on coming in paid a certain consideration to such agent, and he a few days later absconded, whereby they lost the benefit of his reputation and had great difficulty in retaining any of his agencies, it was held that they were entitled to recover for his breach of the contract, as damages, the money that they had paid in on forming the partnership agreement, not as rescinding the contract, but because of a breach of it.

In *Crosby v. McDermitt*, 7 Cal. 146, where one partner, under the agreement, advanced money and materials, and the other partner appropriated them to his own use, a recovery was had for the money advanced with interest, and for a further sum which may have been the value of the materials furnished and appropriated, but this is not shown by the report.

VII. *Particular contracts—illustrations.*

Where a partnership agreement involved the taking and cutting of certain timber of one of the partners for shingles, at a cer-

tain price in a certain time, on a breach in failing to take the timber the measure of damages would be the difference between the value of the uncut timber as it stood at the time of the breach, and its value when converted into shingles at the stipulated rates in the articles of partnership, the claim to take the course and effect of any other claim against the partnership. *Northern v. Tatum*, 164 Ala. 368, 51 So. 17.

Where the defendant, being established in business, made an arrangement with the plaintiff by which the plaintiff was to manage the business, and was to be paid out of the profits \$15 a week until the profit amounted to \$800, when the defendant should take such profit, give to the plaintiff half of the business, and thereafter they should share the profits equally, the defendant excluded the plaintiff from the business when the profits had nearly equaled \$800. It was held that the plaintiff was entitled to recover such sum as would fairly compensate him for his loss, and in estimating this the value of the property which he was to receive, and which he had earned within a mere trifle, might be taken into consideration, and it would not be unreasonable compensation. *Gilbert v. Grubel*, 82 Kan. 478, 108 Pac. 798.

In *Holmes v. Gilman*, 138 N. Y. 369, 20 L.R.A. 506, 34 Am. St. Rep. 463, 34 N. E. 205, where a partner appropriated to his own use large amounts of money of his firm, and took out insurance in favor of his wife and paid the premiums wholly out of the firm's money, taking the policies in her name, and upon his death was indebted to the firm for an amount larger than the amount of the insurance policies, it was held that the other partner was entitled to recover the amount of such insurance.

It may be noted that in *McWhirter v. Douglas*, 1 Coldw. 591, where one of several partners made a certain promise to his copartner if he would continue in an extension of the old firm, instead of accepting another offer, it was held that the amount that he was to pay was not to be left to the future, but was to be presently estimated at the beginning of the term, or as near the beginning as the parties could attend to the matter, the promise being, "I will pay you the estimated discrepancy between what the business of H. & B. . . . promises for the next three years, as compared with an offer made to you by another party for same time, which we now presume to be, from \$1 to \$3,000, so soon as a correct amount can be arrived at."

Recovery of advances.

Where the defendant had paid the plaintiff a premium for every year of a partnership to last five years, and after about a year the plaintiff wrongfully ended the partnership, it was held that the defendant was entitled to recover four fifths of the premium which he had paid. *Corcoran v. Sumption*, 79 Minn. 108, 79 Am. St. Rep. 428, 81 N. W. 761, where the plaintiff had asked for profits, but it seems that he had

lost his right to claim that there was no dissolution.

In *Nelson v. Hatch*, 70 App. Div. 206, 75 N. Y. Supp. 389, affirmed in 174 N. Y. 546, 67 N. E. 1085, where the contract was that the plaintiff was to advance certain moneys for the prosecution of a lawsuit in which the defendants were counsel, and the defendants breached the contract after a certain sum had been advanced, it was held that the plaintiff was entitled to recover from them what he had advanced, and this was so although it appeared that afterward said suit was decided against the interests represented by the defendants.

In *Kerrigan v. Kelly*, 17 Mo. 275, the plaintiff recovered advances made to the owner of a house and lot on the understanding that they should use the house and lot as partners in the ice business, and that the plaintiff should be a part owner of the house and lot as well as of the business, and the owner of the house and lot refused to make a deed.

Concealment of property from partner.

In *Sneed v. Deal*, 53 Ark. 152, 13 S. W. 703, where two partners contemplating a dissolution renewed to themselves individually and secretly by negotiation with a lessor, a lease of property then occupied by the firm, and afterward sold out their interest in the firm and its property to a third partner, he knowing nothing about the new lease, it was held that the two partners who obtained the new lease took it in trust for the firm, and that the partner buying them out took the new lease. The same was held on similar facts in *Struthers v. Pearce*, 51 N. Y. 357.

As to right of one partner of a dissolved firm to maintain action at law against another for fraud practised upon dissolution with respect to assets, see the note to *Crockett v. Burleson*, 6 L.R.A. (N.S.) 263.

VIII. Miscellaneous.

In *Cane v. MacDonald*, 10 B. C. 444, where, after a partnership of architects had been formed, one of the partners received a government position in connection with the erection of a government building, and for a time paid in his salary to the firm, but later declared the firm dissolved and declined any longer to account for the salary, it was held that he could not be compelled to do so.

In *Battle v. Willox*, 40 Can. S. C. 198, where the owner of a sand quarry agreed with the plaintiff to enter into certain specified contracts with third parties, and the plaintiff was to indorse notes for the owner and was to have the right to take a certain share of the profits or a certain interest in the quarry, and the owner sold the quarry after making only part of the contracts, it was held that the plaintiff was entitled to recover the share of profits he would have made, had the defendant carried out his contract.

In *Jewett v. Brooks*, 134 Mass. 505, it 51 L.R.A. (N.S.)

was held that the measure of damages on a breach of a contract to conduct a farm on shares was the value of the contract, the court not deciding whether the contract was a partnership or not, but the case went back for a new trial on other grounds.

In *Skinner v. Tinker*, 34 Barb. 333, where the plaintiff recovered a verdict of \$4,000 for the refusal of the defendant to perform an agreement to enter into a partnership for the practice of dentistry in Cuba, the plaintiff, relying on the contract, had sold his practice in Brooklyn and put himself under bond not to practise there. It was held that the partnership having no definite term, a partner might dissolve it at any time, but that the plaintiff was entitled to his damages prior to the dissolution; but how the damages were measured does not appear.

Where one partner refuses to contribute his share of the capital, but the other partner avails himself of his services and does not end the relation, he cannot deprive the defaulting partner of his interest in the firm and profits. *Akin v. Luce*, 45 N. Y. S. R. 692, 18 N. Y. Supp. 392.

And where a partnership between A, B, and C was entered into on the understanding that C was to indorse A's notes to enable him to supply his share of the funds, and thereafter C declined to do so, B and C could not expel A for his failure to supply his share and exclude him from the profits. *Westwood v. Crissey*, 139 App. Div. 841, 124 N. Y. Supp. 97, reversing *Westwood v. Cole*, 66 Misc. 53, 120 N. Y. Supp. 884.

And where, after a certain period, one of the partners apparently abandoned what he believed to be a losing business, he could not recover for profits after that time. *Kinloch v. Hamlin*, 2 Hill, Eq. 19, 27 Am. Dec. 441.

It may be noted that in *Stone v. Dennis*, 3 Port. (Ala.) 231, the court has something to say both about loss of time and loss of profits, but its meaning is not clear; also that *McCollum v. Carlucci*, 206 Pa. 312, 98 Am. St. Rep. 788, 55 Atl. 979, is not so reported as to be of material value on the subject. B. B. B.

WEST VIRGINIA SUPREME COURT OF APPEALS.

CLARKE E. BROWN et al., Plffs. in Err.,
v.
AMOS HATHAWAY.

(— W. Va. —, 80 S. E. 959.)

Limitation of actions — action on foreign contract.

1. When properly construed, the clause of § 18, chap. 104, Code 1906, providing that, "upon a contract which was made and was

Headnotes by LYNCH, J.

to be performed in another state or country, by a person who then resided therein, no action shall be maintained after the right of action thereon is barred by the laws of such state or country," restricts, and does not enlarge, the statutory period of limitations prescribed by other sections of the same chapter.

Same — construction.

2. Such provision, when thus construed, means only that, if the right to maintain the action is in fact barred by *lex loci contractus*, it is also barred by *lex fori*, if the former period is less than the latter, or is complete before action thereon in this state.

(February 3, 1914.)

ERROR to the Circuit Court for Greenbrier County to review a judgment in

defendant's favor in an action on a bond and note executed in another state. Affirmed.

The facts are stated in the opinion.

Messrs. Craig & Wolverton, for plaintiffs in error:

The same limitation applies to foreign contracts sued upon in this state as if they had been sued upon in the state where they were made and were to be performed.

Nash v. Tupper, 1 Caines, 402, 2 Am. Dec. 197; Isenberg v. Rainier, 70 Misc. 498, 127 N. Y. Supp. 411.

Mr. S. N. Pace also for plaintiffs in error.

Mr. Henry Gilmer for defendant in error.

Note. — *Applicability of statute of the forum referring limitation to law of other jurisdiction, where period at forum is shorter than that prescribed by the foreign statute.*

The question under annotation presupposes that all the conditions contemplated by the statute of the forum are present, so that the statute would concededly apply and give effect to the limitation prescribed by the foreign statute, if it were shorter than that period prescribed by the law of the forum. Therefore, cases which turn upon the question as to where the cause of action is deemed to have arisen within the meaning of the statute, or upon considerations as to residence or other conditions affecting the applicability of the statute, are not within the scope of this note. On those points, see notes referred to in Index to L.R.A. Notes, "Conflict of Laws," § 43.

While there are many cases involving the construction and effect of statutes of the kind under consideration, there are but comparatively few which present the distinctive question above outlined. The majority of those in point sustain the decision in *BROWN v. HATHAWAY*, and hold that a statute which provides, under certain conditions, that if, by the law of the state where the cause of action arose, an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon at the forum, is inapplicable, if the limitation prescribed by the law of the forum is shorter than that prescribed by the foreign statute in question, and that in such case the general rule that limitation is governed by the law of the forum will prevail, assuming that, apart from the statute under consideration, there is a limitation at the forum applicable to the action in question, notwithstanding its foreign elements. *Hoggett v. Emerson*, 8 Kan. 262; *Fletcher v. Spaulding*, 9 Minn. 64, Gil. 54; *Drake v. Bigelow*, 93 Minn. 112, 100 N. W. 664; *Wright v. Mordaunt*, 77 Miss. 537, 78 Am. St. Rep. 536, 27 So. 640.

In *Hoggett v. Emerson*, supra, the court said: "The laws of the forum determine

the remedy. We must look to the laws of this state to determine whether the action was barred. Section 22 of our Code of Civil Procedure is the only one which refers to the limitation laws of other states. That provides that the limitations prescribed by the other sections of the statute may in some cases be reduced by the limitation law of the state in which the cause of action arose. It makes no provision for any enlargement of the limitations of our laws. More than that, it refers only to causes of action arising in another state between non-residents of this state. The petition does not show whether defendants in error were nonresidents or residents of Kansas at the times the notes were executed or matured."

In *Fletcher v. Spaulding*, 9 Minn. 64, Gil. 54, the court said: "We cannot see how this provision in any way affects the case at bar. The effect of it is simply to allow a citizen of Minnesota to plead the statute of limitations of a foreign state or country when it is more favorable than our own, and to allow the same citizen, when he is plaintiff in a foreign cause of action, which he has had from the time it accrued, the benefit of our own statute."

There are also some very strong *dicta* in the New York cases to the effect that the period prescribed by the statute of the forum would not, because of such a statute, be lengthened by the statute of the state where the action arose. Thus, in *Howe v. Welch*, 14 Daly, 80, the court said: "In order to prevent misunderstanding in the future, I deem it proper to say that but for the determination of the defendant to stake his case upon the efficiency of the Iowa statute as a bar, the courts of New York, after deciding that that statute had not run, would have tested the defendant's liability by the *lex fori*, the statute of limitations of the state of New York. In other words, if the debt were barred by the Iowa statute, no action could be maintained in a court of this state; but if the debt were not barred in Iowa, the statute of limitations of the state of New York might nevertheless have been a bar in this action." And in affirming *Isenberg v. Rainier*, 70 Misc. 498, 127 N. Y.

Lynch, J., delivered the opinion of the court:

Upon the return day of a notice pursuant to and for the purpose authorized by § 6, chap. 121, Code 1906, plaintiffs, Brown & Brown, partners, moved for judgment against defendant on two writings obligatory,—one dated October 23, 1895, for \$1,000, payable one day after date at Mt. Jewett Bank, Mt. Jewett, Pennsylvania; the other dated March 23, 1896, for \$250, payable two months after date at the same bank. The contracts were therefore to be performed in Pennsylvania. The parties thereto then resided, and plaintiffs have since continuously resided, in that state. Defendant, though a resident of this state since 1897, was and remained a resident of

Pennsylvania until after the right of action on the obligations had accrued.

Whether defendant may plead and rely on the statute of limitations of this state, to defeat a judgment on the obligations, presents the sole inquiry requiring examination. Under the statute of Pennsylvania, if applicable, the present action may be maintained; by our law the right to sue on similar contracts is barred in ten years after it accrues. Unless otherwise expressly provided, the general rule is that the law of the forum, and not the law of the place where the cause of action arose, governs as to remedies, as distinguished from the rights of the parties; and the statutes of limitations are part of the remedy, and not

Supp. 411, the court in 145 App. Div. 256, 130 N. Y. Supp. 27, said: "It may be said, however, that the apprehension expressed in one of the opinions that, under such circumstances as exist in the present case, a resident of this state might find himself open to suit by a nonresident without the protection of any statute of limitations, is unfounded. The effect of § 390a of the Code of Civil Procedure is not to substitute the foreign statute of limitations for our own, but to impose it as an additional limitation. Thus, an action, whether by a resident or nonresident, must be brought within the time limited by our general statute of limitations, and if it arose in a foreign state in favor of a nonresident, it cannot be brought after the time limited by the laws of the state in which the cause of action arose. Thus, a resident of this state, if not protected by the laws of the state in which the cause of action arose, by reason of his continued absence from that state, may still claim the protection of our own statute of limitations."

In *BROWN v. HATHAWAY*, the court said: "Though they cite *Nash v. Tupper*, 1 Caines, 402, 2 Am. Dec. 197, and *Isenberg v. Rainier*, 70 Misc. 498, 127 N. Y. Supp. 411, so construing a similar statute of New York, we decline to accept that construction." This statement regarding the holdings of the New York courts is clearly erroneous. The case of *Nash v. Tupper* did not arise under a statute, and the court enforced the common-law rule that the law of the forum applied. In the other case cited there is *dictum* supporting the statement, but, as will be seen (see same case, *supra*), the *dictum* was corrected, while the decision was being affirmed on appeal, both courts holding that the action was not barred by the foreign statute, while the local statute of limitations was not in question.

But in Kentucky where a statute which provides that "when a cause of action has arisen in another state or country, between residents of such state or country, or between them and residents of another state or country, and by the laws of the state or

country where the cause of action accrued, an action cannot be maintained thereon by reason of the lapse of time, no action can be maintained thereon in this state," is construed to apply only in case the parties to the suit were nonresidents of Kentucky at the time the action accrued (*Labatt v. Smith*, 4 Ky. L. Rep. 422, affirmed in 83 Ky. 599, overruling *Allen v. Hill*, 78 Ky. 119; *John Shillito Co. v. Richardson*, 102 Ky. 51, 42 S. W. 847; *Smith v. Baltimore & O. R. Co.* 157 Ky. 113, 162 S. W. 564), it is held, contrary to the cases above cited, that where both parties to the action were nonresidents at the time the action accrued, the foreign statute will be applied, whether the period of limitation prescribed is longer or shorter than that prescribed by the law of the forum. *Labatt v. Smith*, 83 Ky. 599; *John Shillito Co. v. Richardson*, 102 Ky. 51, 42 S. W. 847; *Smith v. Baltimore & O. R. Co.* *supra*, where the court said: "The construction of this statute is no longer an open question. It has been held that the necessary effect thereof is to declare that if a cause of action arising in another state or country, between residents of such state or country, or between them or residents of another state or country, is not barred by the laws of that state or country, it is not barred in action between the same parties in the courts of this state."

Even assuming, as held by the cases first cited, that a statute of the character under discussion does not apply so as to give the foreign statute precedence over a shorter statute of limitation at the forum, when there is such a statute otherwise applicable to the case, it may be that when the statutes of limitation of the forum are consulted, it will be found that they do not prescribe any period applicable to the particular cause of action in question, or that the running of the statute of the forum in the particular case has been prevented by the absence or nonresidence of the defendant, in which event the action, if not barred by the foreign statute, may be maintained. Upon this hypothesis, however, the result is not due to the effect of the statute under consideration to make the foreign statute

of the laws affecting rights of the parties to the contract.

But for plaintiffs it is urged that the concluding clause of § 18, chap. 104, Code 1908, when properly construed, contravenes thus rule, and in lieu of our own statutory bar substitutes that of Pennsylvania. It provides that, "upon a contract which was made and was to be performed in another state or country, by a person who then resided therein, no action shall be maintained after the right of action thereon is barred by the laws of such state or country." May the plain purport of the language and terms of this provision be so enlarged as to impress upon it by construction a meaning and purpose which, if intended, the legislature could have made clear by plain and unambiguous language? Plaintiffs would have us interpret it to mean that, upon a contract made and to be performed in another state, by a person who then resided therein, an action may be maintained in this state at any time after the cause of action arose therein, and before the expiration of the period of limitation fixed by such state, even though the right of action thereon were barred by the statute of this state. Though they cite *Nash v. Tupper*, 1 Caines, 402, 2 Am. Dec. 197, and *Isenberg v. Rainier*, 70 Misc. 498, 127 N. Y. Supp. 411, so construing a similar statute of New York, we decline to accept that construction. In our view, such construction does violence to the terms of the statute, and impresses on them a meaning not only not inferable therefrom, but in plain violation of the meaning and purport of the language employed. On the contrary, the clause, properly interpreted, means that, if the right to maintain an action on contracts made and to be performed in another state by one who then resided therein is barred by the laws of that state, no action thereon may be maintained in this state, though, if

made and to be performed in this state, it may not be so barred. Any other construction is unauthorized, and at variance with the decisions of other courts. When the will of the legislature is clearly expressed, it should control. All statutory provisions are to be construed and applied "according to the exact and specific language of the enactments." *Hatch v. Spofford*, 24 Conn. 432.

In construing a similar statutory provision, *Wright v. Mordaunt*, 77 Miss. 537, 78 Am. St. Rep. 536, 27 So. 640, holds that "its sole purpose and effect are to give to one sued in this state the benefit of a bar completed elsewhere." *Hoggett v. Emerson*, 8 Kan. 262, says the effect of such a clause is to reduce the limitation law of that state, but that "it makes no provision for any enlargement of the limitations of our laws." In *Fletcher v. Spaulding*, 9 Minn. 64, Gil. 54, it is said that the effect of the provision is simply to allow a citizen of Minnesota to plead the statute of limitations of a foreign state "when it is more favorable than our own," or to the same purpose "foreign statutes may also be taken advantage of against foreign plaintiffs when more favorable than our own. . . . Nor can we see any good reason why our citizens should rest under greater obligations toward foreign creditors than are imposed upon them in regard to our own."

The diversity of views among the courts discussing the clauses is perhaps more apparent than real. It is in part the result of a difference in phraseology. Some of them provide that no action shall be maintained if the bar of the foreign statute becomes complete "while the party to be charged was a resident of such state," or "while he resided therein," or "while the parties resided therein," or "when an action cannot be maintained by reason of the lapse of time." Hence each statute must and

of limitation prevail whether it prescribes a shorter or a longer period, but to the absence of an applicable limitation under the law of the forum. The question as to the effect of absence or nonresidence to prevent the running of the statute of limitations is not within the scope of the present note, but, in illustration of the point just made, the case of *McCann v. Randall*, 147 Mass. 81, 9 Am. St. Rep. 666, 17 N. E. 75, is here referred to, it being held in that case that, the defendant never having been a resident of Massachusetts, the Massachusetts statute of limitation never began to run in his favor, and the question was simply whether the action was barred by the foreign statute invoked by the defendant.

So, in *Crocker v. Pearson*, 41 Kan. 410, 21 Pac. 270, the court said in effect that the five-year limitation of the Kansas statute was not applicable, because it was not

shown that the defendant was ever in the state of Kansas after the mortgage debt became due, and that the case was controlled as to its limitation by the statute of the state where the mortgage and notes were executed and payable, the period prescribed by that statute being ten years, which had not expired. It will be observed, for the reason just stated, that this case is not in conflict with the *Hoggett Case*, but on the other hand impliedly recognizes the doctrine of that case.

A somewhat similar distinction is discussed in the note to *Louisville & N. R. Co. v. Burkhart*, 46 L.R.A.(N.S.) 687, in connection with the question as to the law governing limitation where an action is brought in one state upon a cause of action created by a statute of another.

J. W. M.

can only be properly interpreted in view of the terms used by the legislature. Thus, the difference in the terms of the several state statutes affords, to some extent, an explanation for the existence of the divergent views obtaining in the various jurisdictions relating to a conflict in limitation laws.

Our conclusion is that the Circuit Court properly construed and applied our statute. We therefore affirm its judgment of June 29, 1911.

ARIZONA SUPREME COURT.

JAMES A. FLEMING, Appt.,
and

L. E. HEWINS, Exr., etc., of E. B. Knox,
Deceased, Intervener, Appt.,
v.

WARRIOR COPPER COMPANY, Impleaded,
etc.

(— Ariz. —, 136 Pac. 273.)

Corporation — suit by minority stockholders — demand on management.

1. Demand on a corporation and its management to bring suit to recover corporate property which had been transferred

Note. — Necessity of applying to board of directors as a condition of right of stockholder to sue on behalf of the corporation.

The ordinary remedy for injuries to the corporation is to be sought primarily through corporate action. 10 Cyc. 964. Public policy requires that persons pooling their capital by becoming stockholders be prohibited from bringing actions or suits for the benefit of the corporation. Otherwise, no one would be safe in transacting business with a corporation, and dissolution would be inevitable.

But conditions frequently make it necessary, in the interest of justice and fair dealing, to permit a stockholder or stockholders to enforce corporate rights or restrain corporate action, and when such conditions exist the courts permit suits to be thus brought and maintained. Assuming that the corporation has a right of action in the premises, and that complainant is a stockholder in good standing who is indirectly injured, by virtue of his being a stockholder, on account of the injury to the corporation, what are the conditions that will enable him to sue in behalf of the corporation?

The note is limited to cases where the loss to the complaining stockholders is due solely to corporate loss, and the right of the complainant to sue is derivative, i. e., the stockholder claims the right to maintain a suit to enforce a corporate right be-
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to another corporation is not necessary to sustain a suit by minority stockholders, where the managers, who had complete control of the affairs of the corporation, are shown to have been hostile to plaintiffs, and to have acted upon a preconceived plan to accomplish the result complained of.

Courts — jurisdiction — foreign corporation — submission.

2. A foreign corporation cannot complain if the court exercises a jurisdiction to which it has submitted itself.

Same — title to local property — foreign claimant.

3. The courts of the state within which is situated property alleged to have been fraudulently transferred by a domestic to a foreign corporation have jurisdiction of a suit to set aside the transfer.

Corporation — fraudulent management — action by minority stockholder.

4. It is fraudulent for the management of a corporation to permit its real estate of great value to be sold under execution for a nominal sum, when there are funds in their possession sufficient to pay the judgment, and the corporation dissolved for the purpose of destroying the value of the stock of a minority stockholder, which will give him a right of action therefor.

Limitation of actions — fraud — discovery — unsound mind.

5. An action by an executor to set aside a transfer of the property of a corporation

cause of the effect indirectly upon himself as stockholder. Cases turning upon the standing of the stockholder are excluded. As to the right of stockholder to attack fraudulent transaction before he had acquired his stock, see note to Pollitz v. Gould, 38 L.R.A. (N.S.) 988.

One condition is that the stockholder cannot obtain the desired relief within the corporation, and the burden is upon him to show that this condition exists. The decisions show that if he proves to the satisfaction of the court that this condition exists, he has a prima facie right to bring suit in behalf of the corporation. The usual practice is to bring the suit in his own name and on behalf of all stockholders similarly situated, against the parties who are liable to the corporation. The corporation should also be made a party to the suit. As to the necessity of making the corporation a party to the suit, see note to Kelly v. Thomas, post, 122.

The stockholder may sufficiently prove that the condition above stated exists by showing that he made demand upon the corporate authorities to take such action in the premise as would do justice to the corporation, and that they refused to do so; or he may prove facts from which it is apparent that any such demand would have been useless. That he must show by one or the other of these two methods that no relief within the corporation is possible, in order to entitle him to maintain the suit, is a rule universally adopted by courts of equity.

of which his testator was a stockholder, on the ground of fraud, is not barred where the testator was insane from the time of the transfer until his death, and the executor began suit as soon as he discovered the fraud, while the statute provided that an action for relief from fraud shall not be deemed to have accrued until the fraud is discovered, and that the time of disability of a person of unsound mind shall not be deemed as a portion of the time limited for commencement of the action.

Laches — limitation period — freedom from fault.

6. Laches will not bar an action to set aside a transfer for fraud prior to the lapse of the limitation period, if complainant is free from fault.

(September 26, 1913.)

A demand upon and a refusal by the corporate authorities are, of course, a sufficient attempt to secure corporate action, and they are practically the only method of showing that a bona fide attempt to secure corporate action was made, so that in citing authorities the rule is usually stated in the form of demand and refusal, and showing that the attempt would be unavailing is treated as an exception to the general rule. Therefore, cases cited to the proposition that there must be a demand and refusal must be considered as broadly supporting the general rule and admitting the exception. The language used in every case shows that the court adopts this broad interpretation, yet the facts usually narrow the holding to simple demand and refusal. Of course, an honest but unsuccessful demand without a formal refusal, or a positive refusal without a demand, would have the effect of a demand and refusal.

In all the cases the term "corporate authorities" as above used includes the board of directors, and it may in some cases include the body of stockholders in meeting assembled, but that question is not here considered.

In the note to *Continental Securities Co. v. Belmont*, post, 112, the necessity of applying to a stockholders' meeting is considered, and it will be seen that even in those cases where such application is necessary, a prior application to the board of directors is required, so that all the cases there cited are equally in point here. In the cases included in this note, but not cited in the other one, the courts apparently assumed that an application to the board of directors was sufficient without further application to the stockholders, that question not being raised.

Subject to the broad construction above noted, the rule that a demand upon and a refusal by the board of directors to act in behalf of the corporation are a precedent condition to the stockholder's right to sue on behalf of the corporation is supported by the following cases:

U. S.—(*Equity rule No. 94 of United States Supreme Court affects Federal 51 L.R.A. (N.S.)*)

SEPARATE APPEALS by plaintiff and intervener from a judgment of the Superior Court for Gila County in defendant's favor in an action brought to set aside alleged fraudulent transfers of corporate property. Reversed.

The facts are stated in the opinion.

Mr. Eugene S. Ives, for appellants:

If there is a showing of fraud, courts will interfere with the internal management of corporations.

North American Land & Timber Co. v. Watkins, 48 C. C. A. 254, 109 Fed. 101; *Theis v. Spokane Falls Gaslight Co.* 49 Wash. 477, 95 Pac. 1074; *Rural Homestead Co. v. Wildes*, 54 N. J. Eq. 668, 35 Atl. 896, 53 N. J. Eq. 425, 32 Atl. 676; *Gray v.*

court decisions to some extent. See rule quoted, *infra*. But independently of that rule the Federal courts would adhere to the general rule above stated.) *Huntington v. Palmer*, 104 U. S. 482, 26 L. ed. 833; *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401 (not a direct holding); *Stewart v. Washington & A. S. S. Co.* 187 U. S. 466, 47 L. ed. 261, 23 Sup. Ct. Rep. 161; *Memphis v. Dean*, 8 Wall. 64, 19 L. ed. 326; *Corbus v. Alaska Treadwell Gold Min. Co.* 187 U. S. 455, 47 L. ed. 256, 23 Sup. Ct. Rep. 157; *Davenport v. Dows*, 18 Wall. 626, 21 L. ed. 938; *Detroit v. Dean*, 106 U. S. 537, 27 L. ed. 300, 1 Sup. Ct. Rep. 500; *Dimpfell v. Ohio & M. R. Co.* 110 U. S. 209, 28 L. ed. 121, 3 Sup. Ct. Rep. 573; *Taylor v. Holmes*, 127 U. S. 489, 32 L. ed. 179, 8 Sup. Ct. Rep. 1192; *Trask v. Maguire*, 18 Wall. 391, 21 L. ed. 938; *Porter v. Sabin*, 149 U. S. 473, 37 L. ed. 815, 13 Sup. Ct. Rep. 1008; *Hawes v. Oakland (Hawes v. Contra Costa Water Co.)* 104 U. S. 450, 26 L. ed. 827; *Foote v. Linck*, 5 McLean, 616, Fed. Cas. No. 4,913 (not a direct holding); *Morgan v. New Orleans, M. & C. R. Co.* 1 Woods, 15, Fed. Cas. No. 9,806; *Dannmeyer v. Coleman*, 8 Sawy. 51, 11 Fed. 97, 5 Mor. Min. Rep. 474; *Putnam v. Ruch*, 54 Fed. 216, reaffirmed in 56 Fed. 416; *Whitney v. Fairbanks*, 54 Fed. 985; *Bill v. Western U. Teleg. Co.* 16 Fed. 14; *Foote v. Cunard Min. Co.* 5 McCrary, 251, 17 Fed. 46; *Hutton v. Joseph Bancroft & Sons Co.* 83 Fed. 17; *Allen v. Wilson*, 28 Fed. 677; *Strang v. Edison*, 117 C. C. A. 455, 198 Fed. 813, writ of certiorari denied in 229 U. S. 612, 57 L. ed. 1351, 33 Sup. Ct. Rep. 772.

Ala.—*Hagood v. Smith*, 162 Ala. 512, 50 So. 374; *Crow v. Florence Ice & Coal Co.* 143 Ala. 541, 39 So. 401.

Colo.—*Miller v. Murray*, 17 Colo. 408, 30 Pac. 46; *Byers v. Rollins*, 13 Colo. 22, 21 Pac. 894; *Holmes v. Jewett*, 55 Colo. 187, 134 Pac. 665; *Smith v. Bulkley*, 18 Colo. App. 227, 70 Pac. 958.

Conn.—*Sheehy v. Barry*, 87 Conn. 656, 89 Atl. 259.

Ga.—*Atlanta v. Grant*, 57 Ga. 340.

Ill.—*Babcock v. Farwell*, 245 Ill. 14, 137

Fuller, 17 App. Div. 29, 44 N. Y. Supp. 883; Cook, Corp. § 664.

Directors and trustees of a corporation, to whom are applicable the ordinary principles governing the relationship of trustee and *cestui que trust*, may not wreck a corporation to their own advantage, and purchase at the resultant execution sale.

Cook, Corp. § 673; Clark & M. Priv. Corp. § 763; San Francisco Water Co. v. Pattee, 86 Cal. 623, 25 Pac. 135; Arrowsmith v. Gleason, 129 U. S. 86, 32 L. ed. 630, 9 Sup. Ct. Rep. 237; Raleigh v. Fitzpatrick, 43 N. J. Eq. 501, 11 Atl. 1; Hoffman v. Reichert, 147 Ill. 274, 37 Am. St. Rep. 219, 35 N. E. 527; J. W. Butler Paper Co. v. Robbins, 151 Ill. 588, 38 N. E. 153; De

Am. St. Rep. 284, 91 N. E. 683, 19 Ann. Cas. 74.

Ind.—Wright v. Floyd, 43 Ind. App. 546, 86 N. E. 970.

Iowa.—Dillon v. Lee, 110 Iowa, 156, 81 N. W. 245.

Kan.—Atchison, T. & S. F. R. Co. v. Sumner County, 51 Kan. 617, 33 Pac. 312.

Ky.—Shawhan v. Zinn, 79 Ky. 300; Reincke v. Bailey, 33 Ky. L. Rep. 977, 112 S. W. 569.

La.—Mioton v. Del Corral, 132 La. 730, 61 So. 771.

Me.—Kennebec & P. R. Co. v. Portland & K. R. Co. 54 Me. 173; Clarke v. Marks, — Me. —, 88 Atl. 718.

Mass.—Smith v. Hurd, 12 Met. 371, 46 Am. Dec. 690 (not a direct holding); Doherty v. Mercantile Trust Co. 184 Mass. 590, 69 N. E. 335 (a mere demand without pointing out to the directors the ground upon which they may act is not sufficient); Brewer v. Boston Theatre, 104 Mass. 378.

Mich.—Talbot v. Scripps, 31 Mich. 268.

Mo.—Vogeler v. Punch, 205 Mo. 558, 103 S. W. 1001; Loomis v. Missouri P. R. Co. 165 Mo. 469, 65 S. W. 962.

Mont.—Brandt v. McIntosh, 47 Mont. 70, 130 Pac. 413 (a demand upon the president and secretary is not sufficient); Moss v. Goodhart, 47 Mont. 257, 131 Pac. 1071 (same rule applies to a national bank).

N. J.—Herrick v. Dempster, 73 N. J. Eq. 145, 75 Atl. 810; Siegman v. Maloney, 65 N. J. Eq. 372, 54 Atl. 405.

N. Y.—O'Connor v. Virginia Pass. & Power Co. 184 N. Y. 46, 76 N. E. 1082; Greaves v. Gouge, 69 N. Y. 154; Bowne v. Smith, 44 Misc. 575, 90 N. Y. Supp. 204; Craig v. James, 71 App. Div. 238, 75 N. Y. Supp. 813; O'Brien v. O'Connell, 7 Hun, 228; Leslie v. Lorillard, 31 Hun, 305; McCoy v. Gas Engine & Power Co. 135 App. Div. 71, 119 N. Y. Supp. 864; Polhemus v. Polhemus, 108 App. Div. 353, 95 N. Y. Supp. 325, reversed on rehearing in 114 App. Div. 781, 100 N. Y. Supp. 263 (sustaining the rule, but applying an exception. See same case, *infra*).

N. C.—Coble v. Beall, 130 N. C. 533, 41 S. E. 793.
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Neufville v. New York & N. R. Co. 26 C. C. A. 306, 51 U. S. App. 374, 81 Fed. 10; Tobin Canning Co. v. Fraser, 81 Tex. 407, 17 S. W. 25; National Bank v. Texas Invest. Co. 74 Tex. 432, 12 S. W. 101; Seale v. Baker, 70 Tex. 291, 8 Am. St. Rep. 592, 7 S. W. 742; Ward v. Davidson, 89 Mo. 445, 1 S. W. 847; Jones v. Arkansas Mechanical & Agri. Co. 38 Ark. 20; Hoyle v. Plattsburgh & M. R. Co. 54 N. Y. 315, 13 Am. Rep. 595; Cumberland Coal & I. Co. v. Sherman, 30 Barb. 555, 1 Mor. Min. Rep. 322; Rouse v. Merchants' Nat. Bank, 46 Ohio St. 493, 5 L.R.A. 378, 15 Am. St. Rep. 644, 22 N. E. 293; Ashton v. Dashaway Assn. 84 Cal. 61, 7 L.R.A. 809, 22 Pac. 660, 23 Pac. 1091; 1 Morawetz, Priv.

Ohio.—Egbert v. Third Ward Bldg. Asso. 9 Ohio S. & C. P. Dec. 646.

Okla.—Starr v. Heald, 28 Okla. 792, 116 Pac. 188.

Pa.—Holton v. New Castle R. Co. 138 Pa. 111, 20 Atl. 937; Law v. Fuller, 217 Pa. 439, 66 Atl. 754; Pellio v. Bulls Head Coal Co. 231 Pa. 157, 80 Atl. 71.

Tenn.—Black v. Huggins, 2 Tenn. Ch. 780; Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

Tex.—New Birmingham Iron & Land Co. v. Blevens, 12 Tex. Civ. App. 410, 34 S. W. 828; Caffall v. Bandera Teleph. Co. — Tex. Civ. App. —, 136 S. W. 105.

Va.—Mount v. Radford Trust Co. 93 Va. 427, 25 S. E. 244; Virginia Pass. & Power Co. v. Fisher, 104 Va. 121, 51 S. E. 198.

Wash.—Elliott v. Puget Sound Wood Products Co. 52 Wash. 637, 101 Pac. 228; Seattle & N. R. Co. v. Bowman, 53 Wash. 416, 102 Pac. 27.

W. Va.—Rathbone v. Parkersburg Gas Co. 31 W. Va. 798, 8 S. E. 570; Park v. Petroleum Co. 25 W. Va. 108; Park v. New York & K. Oil Co. 26 W. Va. 486.

Wis.—State v. Milwaukee Electric R. & Light Co. 136 Wis. 179, 18 L.R.A. (N.S.) 672, 116 N. W. 900; Elmergreen v. Weimer, 138 Wis. 112, 119 N. W. 836.

Wyo.—Smith v. Stone, — Wyo. —, 128 Pac. 612.

Eng.—Foss v. Harbottle, 2 Hare, 461; Bagshaw v. Eastern Union R. Co. 7 Hare, 114, 6 Eng. Ry. & C. Cas. 152, 18 L. J. Ch. N. S. 193, 13 Jur. 602; Gregory v. Patchett, 33 Beav. 595; Atwood v. Merryweather, L. R. 5 Eq. 464, note; Mozley v. Alston, 1 Phill. Ch. 790, 4 Eng. Ry. & C. Cas. 636, 16 L. J. Ch. N. S. 217, 11 Jur. 315; Lord v. The Governor, 2 Phill. Ch. 740, 1 Hall & Tw. 85, 18 L. J. Ch. N. S. 65, 12 Jur. 1059; Gray v. Lewis, 43 L. J. Ch. N. S. 281, L. R. 8 Ch. 1035, 29 L. T. N. S. 12, 21 Week. Rep. 923.

Other cases cited, *infra*, throughout this note, are in harmony with the rule as above stated.

As above noted, the latter part of the general rule is usually treated as an exception to the more limited rule just stat-

Corp. §§ 519, 520, 523, 525; 2 Morawetz, Priv. Corp. §§ 787, 789, 803.

The suit may proceed to judgment for the benefit of all of the stockholders, regardless of what may be determined as to the original plaintiff.

Farish v. Cieneguita Copper Co. 12 Ariz. 235, 100 Pac. 781.

A person under disability by reason of insanity cannot be guilty of any such neglect as will amount to laches, for laches, being inexcusable delay in asserting one's rights, implies knowledge of those rights, and therefore cannot be imputed to one who is *non compos mentis*.

18 Am. & Eng. Enc. Law, 2d ed. 107, 108; Crowther v. Rowlandson, 27 Cal. 376.

ed. And so no demand upon and refusal by the board of directors to bring suit are necessary to enable the stockholder to do so on behalf of the corporation, where it clearly appears that the control of the corporation is still in the parties who have committed the wrongful act complained of, as it would be folly to ask men to sue themselves, or to maintain an action in good faith to which they necessarily are hostile.

U. S.—(Equity rule No. 94, *infra*, does not apply in such case) Harrison v. Thomas, 50 C. C. A. 98, 112 Fed. 22; Columbia Nat. Sand Dredging Co. v. Washed Bar Sand Dredging Co. 136 Fed. 710; Berwind v. Canadian P. R. Co. 98 Fed. 158; Price v. Union Land Co. 110 C. C. A. 20, 187 Fed. 886; Monmouth Invest. Co. v. Means, 80 C. C. A. 527, 151 Fed. 159; Field v. Western Life Indemnity Co. 106 Fed. 607, affirmed in 103 C. C. A. 77, 179 Fed. 673, writ of certiorari denied in 219 U. S. 586, 55 L. ed. 347, 31 Sup. Ct. Rep. 470; Delaware & H. Co. v. Albany & S. R. Co. 213 U. S. 435, 53 L. ed. 862, 29 Sup. Ct. Rep. 540; Howard v. National Teleph. Co. 182 Fed. 215.

Ala.—Bell v. Montgomery Light Co. 103 Ala. 275, 15 So. 569; Montgomery Traction Co. v. Harmon, 140 Ala. 505, 37 So. 371; Crow v. Florence Ice & Coal Co. 143 Ala. 541, 39 So. 401; Ellis v. Vandergrift, 173 Ala. 142, 55 So. 781.

Ariz.—FLEMING v. WARRIOR COPPER CO.

Colo.—Duquesne Gold Min. Co. v. Glaser, 46 Colo. 186, 103 Pac. 299; Grout v. First Nat. Bank, 48 Colo. 557, 111 Pac. 556, 21 Ann. Cas. 418.

Iowa.—Reed v. Hollingsworth, — Iowa, —, 135 N. W. 37.

Ky.—Chilton v. Bell County Coke & Improv. Co. 153 Ky. 775, 156 S. W. 889; Lebus v. Stansifer, 154 Ky. 444, 157 S. W. 727.

Me.—Trask v. Chase, 107 Me. 137, 77 Atl. 698; Pride v. Pride Lumber Co. 100 Me. 452, 84 Atl. 989.

Md.—Davis v. Gemmell, 70 Md. 356, 17 Atl. 259.

Mich.—Miner v. Belle Isle Ice Co. 93 Mich. 97, 17 L.R.A. 412, 53 N. W. 218; 51 L.R.A. (N.S.)

The statute of limitations ceased to run against the testator of Hewins from the time of the filing of the original complaint by Fleming.

10 Cyc. 971.

Mr. Ernest L. Tustin, with Messrs. Alderman & Elliott, for appellee:

Equity will not, in the absence of fraud, interfere with the management of a corporation or the direction of its affairs.

North American Land & Timber Co. v. Watkins, 48 C. C. A. 254, 109 Fed. 101; Theis v. Spokane Falls Gaslight Co. 49 Wash. 477, 95 Pac. 1074; Hennessy v. Muhleman, 40 App. Div. 175, 57 N. Y. Supp. 854; Converse v. Dimock, 22 Fed. 573; Tanner v. Lindell R. Co. 180 Mo. 1, 103 Am. St. Rep. 534, 79 S. W. 155; Ellerman

Edwards v. Michigan Tontine Invest. Co. 132 Mich. 1, 92 N. W. 491; Torrey v. Toledo Portland Cement Co. 150 Mich. 86, 113 N. W. 580; Robinson v. De Luxe Motor Car Co. 70 Mich. 163, 135 N. W. 807.

Minn.—Rothwell v. Robinson, 39 Minn. 1, 12 Am. St. Rep. 608, 38 N. W. 772.

Mo.—Hingston v. Montgomery, 121 Mo. App. 451, 97 S. W. 202; Loomis v. Missouri P. R. Co. 165 Mo. 469, 65 S. W. 962 (but though the allegations bring the case within this exception, the suit cannot be maintained if the proof shows that defendants never were qualified to act legally as directors, and never assumed to so act, even though they had been formally elected, but never notified of such election).

Mont.—McConnell v. Combination Min. & Mill. Co. 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194, affirmed on rehearing in 31 Mont. 563, 79 Pac. 248; Kleinschmidt v. American Min. Co. — Mont. —, 139 Pac. 785.

N. Y.—Young v. Equitable Life Assur. Soc. 49 Misc. 347, 99 N. Y. Supp. 446, affirmed in 116 App. Div. 911, 101 N. Y. Supp. 1150; Jacobson v. Brooklyn Lumber Co. 184 N. Y. 152, 76 N. E. 1075; Barr v. New York, L. E. & W. R. Co. 96 N. Y. 444; Hand v. Atlantic Nat. Bank, 55 How. Pr. 231; Frothingham v. Broadway & S. Ave. R. Co. 9 N. Y. Civ. Proc. Rep. 304; Brewster v. Hatch, 4 N. Y. S. R. 617; Hanna v. Lyon, 179 N. Y. 107, 71 N. E. 778; Corning v. Barrett, 22 Misc. 241, 48 N. Y. Supp. 1013, and O'Connor v. Virginia Pass. & Power Co. 184 N. Y. 46, 76 N. E. 1082 (but plaintiff must show that the guilty parties are still in office, specially if the time for an annual election has passed since the wrongs are alleged to have been committed); Roth v. Robertson, 64 Misc. 343, 118 N. Y. Supp. 351; McCoy v. Gas Engine & Power Co. 135 App. Div. 771, 119 N. Y. Supp. 684 (but it must be alleged that the directors who are still in office are guilty of wrong); Lawrence v. Weber, 65 Misc. 603, 120 N. Y. Supp. 289, modified in 137 App. Div. 907, 122 N. Y. Supp. 1134; Robinson v. Smith, 3 Paige, 222, 24 Am. Dec. 212, 3 Mor. Min. Rep. 443; Brinker-

v. Chicago Junction R. & Union Stockyards Co. 49 N. J. Eq. 217, 23 Atl. 287.

A bona fide and regular sale under circumstances such as those detailed in the complaint passes a valid title to the property, and the transaction cannot be overturned.

Schuler v. Woodward, 169 Fed. 1012; Wetmore v. St. Paul & P. R. Co. 5 Dill. 531, Fed. Cas. No. 17,469; Van Alstyne v. Houston & T. C. R. Co. 56 Tex. 373; Landis v. West Pennsylvania R. Co. 133 Pa. 579, 19 Atl. 556; Vatable v. New York, L. E. & W. R. Co. 96 N. Y. 49; Cutter v. Iowa Water Co. 128 Fed. 505; Armour v. E. Bement's Sons, 62 C. C. A. 142, 123 Fed. 56; Keane v. Moffy, 217 Pa. 240, 66 Atl. 319; Schore-

stene v. Iselin, 69 Hun, 250, 23 N. Y. Supp. 557.

Where laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry.

Johnston v. Standard Min. Co. 148 U. S. 360, 37 L. ed. 480, 13 Sup. Ct. Rep. 585, 17 Mor. Min. Rep. 554.

Whenever the question has arisen on the pleadings, and has been presented on demurrer, the plaintiff's laches bars him from relief.

Cutter v. Iowa Water Co. 128 Fed. 505; Moss v. Geddes, 28 Misc. 291, 59 N. Y. Supp. 867; Wetmore v. St. Paul R. Co. 5

hoff v. Bostwick, 88 N. Y. 52 (this case was up on second and third appeals in 99 N. Y. 185, 1 N. E. 663, and 105 N. Y. 567, 12 N. E. 58, respectively, in each of which the point here discussed was assumed); Sage v. Culver, 147 N. Y. 241, 41 N. E. 513, affirming 71 Hun, 42, 24 N. Y. Supp. 514; Kelsey v. Sargent, 40 Hun, 150.

Or.—North v. Union Sav. & L. Asso. 59 Or. 483, 117 Pac. 822.

Pa.—Commonwealth Title Ins. & T. Co. v. Seltzer, 227 Pa. 410, 136 Am. St. Rep. 396, 76 Atl. 77; Treat v. Pennsylvania Mut. L. Ins. Co. 203 Pa. 21, 52 Atl. 60; Langolf v. Seiberlitch, 2 Para. Sel. Eq. Cas. 64 (members of a religious corporation have the same standing as stockholders); Watts's Appeal, 78 Pa. 370, 8 Mor. Min. Rep. 222.

R. I.—Hodges v. New England Screw Co. 1 R. I. 312, 53 Am. Dec. 624 (it is not clear that this case was on behalf of the corporation, but it seems to have been considered so); Eaton v. Robinson, 18 R. I. 306, 27 Atl. 595.

S. C.—Sigwald v. City Bank, 82 S. C. 382, 64 S. E. 398 (the corporation was in the hands of a receiver, but he was one of the guilty parties and no demand upon him was necessary); Stahn v. Catawba Mills, 53 S. C. 519, 31 S. E. 498.

Tex. Falfurrias Immigration Co. v. Spielhagen, — Tex. Civ. App. —, 129 S. W. 164; Joy v. Ft. Worth Compress Co. 24 Tex. Civ. App. 94, 58 S. W. 173.

Wash.—Williams v. Erie Mountain Consol. Min. Co. 47 Wash. 360, 91 Pac. 1091.

Wis.—Donnelly v. Sampson, 135 Wis. 368, 115 N. W. 1089; Luther v. C. J. Luther Co. 118 Wis. 112, 99 Am. St. Rep. 977, 94 N. W. 69; Simon v. Weaver, 143 Wis. 330, 127 N. W. 950.

And so demand and refusal are not necessary—

—where it is shown that there is in fact no governing body to which an application for redress can be made. Sheridan Brick Works v. Marion Trust Co. 157 Ind. 292, 87 Am. St. Rep. 207, 61 N. E. 666; Tennessee Mountain Petroleum & Min. Co. v. Ayers, — Tenn. —, 43 S. W. 744; Thompson v. J. L.R.A. (N.S.)

Stanley, 20 N. Y. Supp. 317; Duquesne Gold Min. Co. v. Glaser, 46 Colo. 186, 103 Pac. 299; Finney v. Bennett, 27 Gratt. 365; Crumlish v. Shenandoah Valley R. Co. 28 W. Va. 623;

—where there are no corporate officers, and usurpers have assumed to act as such, to the injury of the corporation. Sheehy v. Barry, — Conn. —, 89 Atl. 259;

—where the action complained of was taken against the protest of the minority stockholders, who are complainants. Forrester v. Boston & M. Consol. Copper & S. Min. Co. 21 Mont. 544, 55 Pac. 229, rehearing denied in 21 Mont. 565, 55 Pac. 353;

—where the directors have remained quiescent while usurpers have seized their offices, wasted the corporate property, and are about to appropriate its assets to their own use, making immediate action imperative, and rendering probable the futility of applying for redress to the officers. Sheehy v. Barry, supra;

—where the allegation is made that the officers and directors are seeking by collusive suits and other unlawful methods to control the corporate property in their individual interests, and are trying to wreck the corporation, the suit having been brought by stockholders and creditors, for the appointment of a receiver to protect the corporation. Excelsior Pebble Phosphate Co. v. Brown, 20 C. C. A. 428, 42 U. S. App. 55, 74 Fed. 321;

—where the suit is against one director, and all the directors join in with him making the defense a common cause. Kleinschmidt v. American Min. Co. — Mont. —, 139 Pac. 785;

—where the controlling interest in the corporation, a railway company, was purchased by another railway company, which latter company then secured the election of its own officers and employees, who owned no stock in their own right, to the office of trustees in the servient company, which board of trustees then executed an illegal traffic agreement whereby there was a complete surrender of the franchises and property of the servient company to the domi-

Dill. 531, Fed. Cas. No. 17,469; Thornton v. Wabash R. Co. 81 N. Y. 462; Patterson v. Hewitt, 195 U. S. 309, 49 L. ed. 214, 25 Sup. Ct. Rep. 35; Hall v. Nash, 33 Colo. 500, 81 Pac. 249; Great West Min. Co. v. Woodmas of Alston Min. Co. 14 Colo. 90, 23 Pac. 908.

A foreign corporation may rely on the statute of limitation.

25 Cyc. 1243; Sidway v. Missouri Land & Live Stock Co. 187 Mo. 649, 86 S. W. 150; St. Paul v. Chicago, M. & St. P. R. Co. 45 Minn. 387, 48 N. W. 17.

Cunningham, J., delivered the opinion of the court:

This action was commenced March 25, 1909, by the appellants as minority stock-

holder company, and the suit was by bill in equity by stockholders of the servient company to annul the contract. Earle v. Seattle, L. S. & E. R. Co. 56 Fed. 909;

—where a demand would of necessity be fruitless, since the suit was by a stockholder to restrain the control of the corporation by a rival corporation which had secured control of the governing bodies by acquiring a majority of the stock of the complainant's corporation. George v. Central R. & Bkg. Co. 101 Ala. 607, 14 So. 752;

—where the offending directors either own or control the majority of the stock of the corporation. Beckett v. Planters' Compress & Bonded Warehouse Co. — Miss. —, 65 So. 275;

—where the allegations are that a demand would be useless because the management is under the control of the hostile directors who are the real defendants. Moyle v. Landers, — Cal. —, 21 Pac. 1133, rehearing in 83 Cal. 579, 23 Pac. 798; Polhemus v. Polhemus, 114 App. Div. 781, 100 N. Y. Supp. 263; Re Swofford Bros. Dry Goods Co. 180 Fed. 549;

—where it is substantially alleged in the complaint, and facts sustaining the allegation admitted in the answer, that any demand would be useless, and the suit is to set aside a sale of corporate property consummated by the directors, on the ground of fraud. Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024;

—where the corporate management is under the control of those against whom the suit must be brought. Miller v. Murray, 17 Colo. 408, 30 Pac. 46; Von Arnim v. American Tube Works, 188 Mass. 515, 74 N. E. 680;

—where the corporate right claimed is sought to be enforced against one who, with his partisans, controls the management of the corporation through ownership of a majority of the stock. Knoop v. Bohmrich, 49 N. J. Eq. 82, 23 Atl. 118, affirmed in 50 N. J. Eq. 485, 27 Atl. 636;

—where the corporation is insolvent, the suit brought for the rescission of an unlawful contract, and the directors are under the control of the parties with whom the 51 L.R.A. (N.S.)

holders in the Black Warrior Copper Company Amalgamated, a domestic corporation, against the said Black Warrior Copper Company Amalgamated, certain named members of its board of directors, certain of its stockholders, certain named persons comprising a reorganization board, the Warrior Copper Company, a foreign corporation, organized by said reorganization board, the incorporators of the foreign corporation, Meredith Hanna, and the Fidelity Trust Company, a corporation, as trustee for certain purposes.

The purpose of the action is to have declared void transfers of all the property of the defendant Black Warrior Copper Company Amalgamated to the Warrior Copper Company, because such transfers are in

contract was made, making it apparent that the corporation itself could not act. Currier v. New York, W. S. & B. R. Co. 35 Hun, 355;

—where it is alleged that a conspiracy on the part of a majority of the directors with others exists, and that by means of the conspiracy the parties thereto are attempting through judicial sale on an unauthorized judgment note to fraudulently obtain title to the corporate property, and that the transactions became known to the complainant only a few days before the time for redemption expired. Young v. Alhambra Min. Co. 71 Fed. 810;

—where officers of a local benefit society refused to take steps to procure the payment of a certificate by the general organization, but threatened to pay it out of the local treasury, and the suit, by a member of the local organization, was to restrain the threatened payment. Kern v. Arbeiter Unterstuetzungs Verein, 139 Mich. 233, 102 N. W. 746;

—where the suit is to enjoin the illegal consolidation of the corporation with another, with the consent of the directors and a majority of the stockholders, but without notice to, and to the injury of, the minority. Nathan v. Tompkins, 82 Ala. 437, 2 So. 747;

—where the action is to protect the rights of the shareholders themselves against the acts of the officers. Meyers v. Scott, 50 Hun, 603, 20 N. Y. S. R. 35, 2 N. Y. Supp. 753;

—where the facts alleged give rise to a reasonably certain inference that a demand would have been refused if made. Loftus v. Farmers' Shipping Asso. 8 S. D. 201, 65 N. W. 1067; Landis v. Sea Isle City Hotel Co. — N. J. Eq. —, 31 Atl. 755;

—where the suit is to recover property rights belonging to the corporation which have been lost through the fraudulent conduct of the directors who are still in office. Hannerty v. Standard Theater Co. 109 Mo. 297, 19 S. W. 82;

—where the officers and directors have wronged the corporation in favor of another corporation of which they are also officers,

fraud of the rights of the plaintiffs as stockholders of the Black Warrior Copper Company Amalgamated, a corporation, and in fraud of the rights of the holders of bonds issued by said corporation.

The defendant Warrior Copper Company defends alone. The other defendants make no appearance in the action. The said defendant demurred to the complaint upon the grounds that the facts stated do not constitute a cause of action, and because the court has no jurisdiction over a foreign corporation in this kind of action, because the matters and things alleged are shown to pertain to the internal affairs of this corporation, because the alleged cause of action is barred by laches and the statute of limitations, and because the intervenor's com-

plaint does not show capacity to sue, in the absence of a showing that the Black Warrior Copper Company Amalgamated and its managing board were requested to sue the cause of action. The court by a general order sustained the demurrers without a more specific designation of any particular grounds, and, the plaintiff and intervenor electing to stand upon their complaints, judgment was rendered for the defendants, and, from which judgment, this appeal is prosecuted.

Appellant James A. Fleming, the original plaintiff, and L. E. Hewins as executor intervenor, only appeal, and assign error separately upon the orders of the court sustaining the demurrers general and special, viz.: Whether the complaint is sufficient to state

and are preparing to transfer corporate property to the other corporation without consideration and without the consent of the stockholders. *Boaz v. Sterlingworth R. Supply Co.* 68 App. Div. 1, 73 N. Y. Supp. 1039;

—where two of the four directors are in a conspiracy to defraud the corporation, and the other two also oppose the assertion of its rights. *Gerry v. Bismarck Bank*, 19 Mont. 191, 47 Pac. 810;

—where the relief sought is against a majority of the directors. *Appleton v. American Malting Co.* 65 N. J. Eq. 375, 54 Atl. 454;

—where the suit is to set aside a fraudulent assignment of corporate property, and the corporate authorities are implicated in the fraud. *Walter v. F. E. McAlister Co.* 21 Misc. 747, 27 N. Y. Civ. Proc. Rep. 33, 48 N. Y. Supp. 26;

—where the demand would necessarily have been an idle formality, and hostility to the plaintiff on the part of all the directors had been indicated by their refusal to reconsider the resolution directing the alleged wrongful action. *Lewisohn v. Anaconda Copper Min. Co.* 23 Misc. 31, 50 N. Y. Supp. 263, reversed on another question in 29 App. Div. 552, 51 N. Y. Supp. 1089;

—where the corporate authorities have participated in an *ultra vires* agreement to consolidate with another company, and the suit is to set aside the agreement. *Davis v. Congregation Beth Tephila Israel*, 40 App. Div. 424, 57 N. Y. Supp. 1015;

—where the suit is by stockholders for the cancellation of corporate contracts, on the ground of fraud, with a rival corporation which controls the other through its directors. *Loewenstein v. Diamond Soda Water Mfg. Co.* 94 App. Div. 383, 88 N. Y. Supp. 313;

—where all stockholders present voted to divide the funds of a benevolent corporation among the members, and the action was by a member not present at the meeting, to compel a restoration of the fund, and the trustees defended on the ground that what they did was legal. *Ashton v.* 51 L.R.A. (N.S.)

Dashaway Asso. 84 Cal. 61, 7 L.R.A. 809, 22 Pac. 660, 23 Pac. 1091;

—where there was a demand made upon the president, who was the head and about all there was of the corporation. *Chicago v. Cameron*, 120 Ill. 447, 11 N. E. 899;

—where it is both alleged in the bill and admitted in the answer that a demand would have been disregarded. *Green v. Hedenberg*, 159 Ill. 489, 50 Am. St. Rep. 178, 42 N. E. 851;

—where the suit is to cancel stock which the corporation treats as valid. *Stebbins v. Perry County*, 167 Ill. 567, 47 N. E. 1048;

—where the wrong complained of is not only detrimental to the corporation, but is also a wrong directly against the stockholder. *Eldred v. Ripley*, 97 Ill. App. 503;

—where the suit is against the president of the corporation for the possession of certain iron pipe and for an accounting, it being alleged that "the corporation was organized for the purpose of constructing a system of waterworks and had purchased a quantity of iron pipe; that the corporation had abandoned its purpose, forfeited its right, ceased entirely to hold directors' meetings, and the directors had abandoned their offices; that the iron pipe had greatly advanced in price and the president was selling the same far below the market price, at a profit to himself." *Tevis v. Hammer-smith*, 31 Ind. App. 281, 66 N. E. 79, 912, affirmed in 161 Ind. 74, 67 N. E. 672, second appeal in 170 Ind. 286, 84 N. E. 337 (but this point not involved);

—where the suit is for the appointment of a receiver, the corporation is insolvent, and the wrongdoing and fraud of the officers constitute the ground of the action. *Supreme Sitting, O. I. H. v. Baker*, 134 Ind. 293, 20 L.R.A. 210, 33 N. E. 1128;

—where the suit is to enforce a contract between two corporations, the personnel of whose boards of directors is identical. *Pittsburg, C. C. & St. L. R. Co. v. Dodd*, 115 Ky. 176, 72 S. W. 822, petition for modification in 115 Ky. 220, 74 S. W. 1096;

—where the stockholder acts on behalf of the company to save its property in an emergency created by the inertia of the

a cause of action; whether the plaintiff and intervener appellants are barred by laches and by the statute of limitations; and whether the complaints show equity.

In the most general manner we will observe that the plaintiffs show their rights as stockholders, and Fleming's additional interest as a bondholder, in the amalgamated corporation. The complaint then shows that the defendants, in furtherance of a conspiracy, and by the use of the courts and officers of the law, did, upon the face of the transaction, divest, on the 29th day of June, 1906, the amalgamated corporation of all its property, and thereby caused the stock and bonds of the plaintiff and others similarly situated to become wholly worthless. The complaint shows that at the time of the

transaction complained of the amalgamated company was possessed of personal property consisting of its capital stock, then in the treasury undisposed of, and salable, of the reasonable value of \$60,000; also fuel oil worth \$2,500; also a stock of merchandise of great value; also timber and copper ready for market; also \$19,849.75 cash on hand,—and this property, with other real property owned by the company, in the aggregate, was of a reasonable value of \$2,000,000, and the company was indebted in the sum of about \$15,000. In furtherance of the said conspiracy, the money and personal property were dissipated, and the real property was allowed to be sold under execution to satisfy the small indebtedness, and about the time of the sale of the real

officials, and neither the directors nor other stockholders object to the proceeding, the only objection coming from the party against whom the suit is directed. *Starr v. Shepard*, 145 Mich. 303, 108 N. W. 709;

—where the bill sets out acts of the directors that are *ultra vires*, and breaches of trust that are frauds upon the stockholders, and that are beyond the power of the corporation and its directors to affirm, sanction, or make good. *Heath v. Erie R. Co.* 8 Blatchf. 347, Fed. Cas. No. 6,308;

—where the body of stockholders by a large majority vote ordered the directors to convey for a merely nominal sum all its property, worth \$50,000, leaving it nothing but its name, and the directors had carried out the order, and the suit was by a minority stockholder, on behalf of the corporation, to annul the proceedings. *Tillis v. Brown*, 154 Ala. 403, 45 So. 589;

—where those charged with fraud in their own interest control a majority of the stock, and show conclusively that they would have immediately suppressed any suit for relief brought by the directors as a corporate action, even though the plaintiffs at the time of filing the complaint constitute a majority of the board. *Mason v. Carrothers*, 105 Me. 392, 74 Atl. 1030;

—where the board of directors commenced the suit against some of the members of the board, and the personnel of the board was changed, and the suit dismissed by the new board in collusion with the defendants, and as part of a scheme to defraud the corporation. The stockholders could secure the vacation of the order dismissing the suit and proceed with the case, instead of instituting a new suit if they chose that course. *National Power & Paper Co. v. Rossman*, 122 Minn. 355, 142 N. W. 818;

—where the bill is not to redress the wrongs committed by directors or officers of the corporation, but simply to have a non-going corporation, one that has utterly failed of the object and purpose for which it was formed, which owes no debts, dissolved and the assets distributed according 51 L.R.A.(N.S.)

to law. *Minona Portland Cement Co. v. Reese*, 167 Ala. 485, 52 So. 523.

In the following cases it was held that the facts did not bring the case within the exception, hence demand and refusal were necessary:

The fact that the corporation had dissolved at the time suit was brought, the cause of action having arisen before dissolution, will not relieve from the necessity of demand and refusal before bringing suit. *Dillon v. Lee*, 110 Iowa, 156, 81 N. W. 245.

And where but one of the directors has participated in the alleged fraud, the others presumably remaining loyal to the interests of the corporation, a demand and refusal are necessary before the stockholders can maintain the action. *Ibid.*

And the fact that five of the seven directors who took part in the fraudulent transactions of which complaint is made are yet directors is not sufficient to avoid the necessity of demand and refusal as required by Supreme Court equity rule No. 94, *infra*. *Church v. Citizens' Street R. Co.* 78 Fed. 526.

And the fact that the majority of stockholders are hostile to plaintiff's cause of action, while sufficient to avoid the necessity of appealing to the stockholders' meeting for redress, is not sufficient to enable a stockholder to sue in the corporate right without a previous demand upon the directors. *Decatur Mineral & Land Co. v. Palm*, 113 Ala. 531, 59 Am. St. Rep. 140, 21 So. 315.

The fact that the corporation has been enjoined by injunction from bringing any action for the relief sought by the stockholder is no excuse for his not asking it to act before bringing his action, but on the contrary the injunction is binding upon the stockholders as well as upon the corporation. *Smith v. Bulkley*, 18 Colo. App. 227, 70 Pac. 958.

The fact that the manager, who is alleged to have committed the fraudulent act complained of, and who is made a defendant, owns a majority of the stock and can elect a majority of the board, is not sufficient

property under execution, the amalgamated company was disincorporated in order to prevent a redemption of the property from the sale, and the defendants organized the Warrior Copper Company, and appointed trustees to and they did purchase the property at the sale, and conveyed the property to the said Warrior Copper Company.

The complaints show that the parties defendant had at all times complete control of the affairs of the amalgamated company, that they were hostile to the plaintiff and to the intervener, and were acting upon a preconceived plan to accomplish the very results complained of, and for plaintiff and the intervener to demand that the Black Warrior Copper Company Amalgamated commence and prosecute this action would

be a futile thing, which the law does not require. Nothing but a refusal could be reasonably expected to result from such demand.

The defendant Warrior Copper Company has submitted itself to the jurisdiction of the court for all purposes of this action, and it cannot complain if the court exercise that jurisdiction.

The property incidentally involved is within the jurisdiction of the court, and a decree of the court might affect the title to the property involved; therefore the court had jurisdiction to determine the matters, although the defendant Warrior Copper Company is a foreign corporation. This corporation is engaged in its business in Arizona, and is estopped to deny its right

to avoid the necessity of a demand upon the board before bringing suit, where it appears that the members of the board now in office were elected by an unanimous vote, including the votes of the complaining stockholders, for such fact is not sufficient to overcome the presumption that the directors will honestly do their duty. *Allen v. Wilson*, 28 Fed. 677.

The court will not assume that a demand upon the directors was useless simply from the fact that the principal defendant was president of the corporation and owned a large majority of the stock. *Law v. Fuller*, 217 Pa. 439, 66 Atl. 754.

A stockholder cannot maintain an action in behalf of the corporation in the Federal courts, if the directors have instituted suit in a state court having jurisdiction for substantially the same relief. *Memphis v. Dean*, 8 Wall. 64, 19 L. ed. 326.

Pleadings.

That demand upon and refusal by the board of directors are a necessary precedent condition to the stockholder's right of action, where such right is derivative through the corporation, unless there is a sufficient excuse, is shown by the cases, *supra*, to be a universal rule. It logically follows that the pleadings must disclose the fact that the condition exists, otherwise no cause of action is set out, and the decisions support this proposition. There is, however, considerable variation in the different jurisdictions as to the particularity required in the pleading, and as to the sufficiency of the complaint, and the cases upon this question very often reveal the court's conception of the questions discussed, *supra*, what constitutes a demand and refusal, and other matters of detail. The Federal courts, by virtue of equity rules, quoted *infra*, have set the highest standard possible. The opinion in *Hawes v. Oakland* (*Hawes v. Contra Costa Water Co.*) 104 U. S. 540, 26 L. ed. 827, shows that the underlying purpose of the rule was to discourage the practice of resorting to the Federal courts where resort thereto is not absolutely necessary. 51 L.R.A. (N.S.)

Equity rule No. 94 of the Supreme Court of the United States quoted in *Foot v. Cunnard Min. Co.* 5 McCrary, 251, 17 Fed. 47, and in other cases, reads as follows: "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

The Supreme Court has now embodied rule 94 into rule 27, with the addition of the following phrase, "or the reasons for not making such effort." See rule 27, quoted in *Toledo Traction, Light, & P. Co. v. Smith*, 205 Fed. 661.

Rule No. 94 was adopted upon the announcement of the decision in *Hawes v. Oakland*, *supra*, and it has been applied in practically every Federal case decided since its adoption. For this reason decisions of Federal courts upon the question considered in this note may not have the weight with state courts that they would otherwise have. In *Miller v. Murray*, 17 Colo. 408, 30 Pac. 46, the court, in holding that this rule is not binding on state courts, said: "It is worthy of note in passing that the subsequent decisions of the United States court upon this question are of little value in the state courts, for the reason that all such decisions must necessarily have been founded upon this rule, although, in some of the cases, mention of the rule is not to be found in the opinion." And in *Church v. Citizens' Street R. Co.* 78 Fed. 526 (see same case, *supra*, for holding), the court said: "Applying the general principles of equity jurisprudence, and following the current of

to so engage in business, in order to defeat the jurisdiction of the state courts when dealing with its property within that jurisdiction.

The facts and circumstances charged as amounting to fraud briefly summarized are as follows: The amalgamated company in December, 1903, was possessed of property of the aggregate value of \$2,000,000, and owed but a trifling amount of indebtedness, outside of the debenture bonds. Subsequent to December, 1903, the defendants permitted a judgment for \$14,000, and another judgment of \$1,100, to be recovered against the amalgamated company, at the time having cash on hand in the sum of \$19,849.75, and other valuable, salable personal property. The directors procured the issuance

of executions on the two judgments, and a levy of the executions on the property of the company at a time when the company's treasury contained 12,000 shares of the capital stock of the company, worth on the market and readily salable for the sum of \$60,000, and permitted, on March 25, 1905, the sheriff to sell property of said corporation of the value of \$1,000,000 for a nominal sum of \$1,203.25, and other property worth nearly \$1,000,000, under execution issued on January 31, 1905, for the sum of \$4,877.77. When all the property of the corporation had been either sold by the sheriff or dissipated by defendants, on May 24, 1905, they commenced a proceeding, through a stockholder having full notice of the facts mentioned, to dissolve the

authority in the state courts on the subject, the court would be clearly of opinion that that would be a sufficient excuse. But the language of the rule in question, and the interpretation that has been given by the court which promulgated the rule, make it obvious that it was the purpose to introduce a more stringent rule in the national courts than the rule which is applied on the same subject in the state courts, and that such an excuse as is offered here does not satisfy the rule."

But the pleadings in a case brought originally in a state court, but later transferred to a Federal court, are not necessarily tested by that rule, since it applies only to cases brought originally in the Federal courts. *Earle v. Seattle*, L. S. & E. R. Co. 56 Fed. 909.

A suit in behalf of the corporation cannot be maintained by a stockholder unless the pleadings show that the board of directors have refused to take proper measures to remedy the matters of which complaint is made.

U. S.—*Hawes v. Oakland* supra; *Newby v. Oregon C. R. Co.* 1 Sawy. 63, Fed. Cas. No. 10,145; *Dannmeyer v. Coleman*, 8 Sawy. 51, 11 Fed. 97, 5 Mor. Min. Rep. 474; *Foot v. Cunard Min. Co.* 5 McCrary, 251, 17 Fed. 46; *Earle v. Seattle*, L. S. & E. R. Co. supra; *Weidenfeld v. Allegheny & K. R. Co.* 47 Fed. 11; *Swope v. Villard*, 61 Fed. 417; *Macon, D. & S. R. Co. v. Shailer*, 72 C. C. A. 631, 141 Fed. 685; *Worth Mfg. Co. v. Bingham*, 54 C. C. A. 119, 116 Fed. 785; *Holton v. Wallace*, 27 C. C. A. 71, 39 U. S. App. 326, 77 Fed. 61, affirming 66 Fed. 409; *Dickinson v. Consolidated Traction Co.* 114 Fed. 232; *Bimber v. Calivada Colonization Co.* 110 Fed. 58; *Continental & Commercial Trust & Sav. Bank v. Allis-Chalmers Co.* 200 Fed. 600 (general allegations of fraud on the part of the directors still in control will not dispense with this rule); *Smith v. Chase & B. Piano Mfg. Co.* 197 Fed. 466; *Gage v. Riverside Trust Co.* 156 Fed. 1002; *Poor v. Iowa C. R. Co.* 155 Fed. 226.

Ala.—*Johns v. McLester*, 137 Ala. 283, 97 Am. St. Rep. 27, 34 So. 174; *Mack v. 51 L.R.A.(N.S.)*

De Bardeleben Coal & I. Co. 90 Ala. 396, 9 L.R.A. 560, 8 So. 150.

Colo.—*Beshoar v. Chappell*, 6 Colo. App. 323, 40 Pac. 244.

Conn.—*Allen v. Curtis*, 26 Conn. 456.

Ga.—*Ware v. Bazemore*, 58 Ga. 316.

Kan.—*Fry v. Rush*, 63 Kan. 429, 65 Pac. 701; *Home Min. Co. v. McKibben*, 60 Kan. 387, 56 Pac. 756.

Ky.—*Shawhan v. Zinn*, 79 Ky. 300.

Mich.—*Talbot v. Scripps*, 31 Mich. 268.

Minn.—*Hodgson v. Duluth, H. & D. R. Co.* 46 Minn. 454, 49 N. W. 197.

N. Y.—*Vanderbilt v. Garrison*, 5 Duer, 689, 3 Abb. Pr. 361; *House v. Cooper*, 16 How. Pr. 292; *Flynn v. Brooklyn City R. Co.* 9 App. Div. 269, 75 N. Y. S. R. 955, 41 N. Y. Supp. 566, affirmed in 158 N. Y. 493, 53 N. E. 520; *Polhemus v. Polhemus*, 108 App. Div. 535, 95 N. Y. Supp. 325, reversed in 114 App. Div. 781, 100 N. Y. Supp. 263 (sustaining the rule, but applying an exception); *Greaves v. Gouge*, 60 N. Y. 154; *Kolb v. Mortimer*, 135 App. Div. 542, 120 N. Y. Supp. 543.

N. C.—*Moore v. Silver Valley Min. Co.* 104 N. C. 534, 10 S. E. 679; *Coble v. Beall*, 130 N. C. 533, 41 S. E. 793.

Pa.—*Wolf v. Pennsylvania R. Co.* 195 Pa. 91, 45 Atl. 936; *McCloskey v. Snowden*, 212 Pa. 249, 108 Am. St. Rep. 867, 61 Atl. 796; *Holton v. New Castle Northern R. Co.* 138 Pa. 111, 20 Atl. 937; *Holton v. New Castle Northern R. Co.* 8 Pa. Co. Ct. 430.

S. C.—*Latimer v. Richmond & D. R. Co.* 39 S. C. 44, 17 S. E. 258.

Va.—*Virginia Pass. & Power Co. v. Fisher*, 104 Va. 121, 51 S. E. 198; *Mount v. Radford Trust Co.* 93 Va. 427, 25 S. E. 244.

W. Va.—*Rathbone v. Parkersburg Gas Co.* 31 W. Va. 798, 8 S. E. 570.

But, of course, where no demand upon or refusal by the board of directors is a necessary prerequisite to the suit (see cases above cited), there need be no allegation of such demand and refusal, but the facts from which the court can judge of the sufficiency of the excuse must be set out. The following are cases where, upon this ground, it was held that there need be no allegation of demand upon and refusal by the

said amalgamated corporation. On June 24, 1905, by consent of defendants, such dissolution proceedings culminated in a judgment of the court disincorporating said amalgamated company upon the grounds and for the reason "the said corporation has disposed of all its corporate property, real, personal, and mixed, said property having been sold at execution sale, and that there is not at this time assets or property out of which money may be or could be secured for the purpose of exercising an equity of redemption." One of the members of said reorganization committee bid for, and bought, all the real property of the amalgamated company, so sold by the sheriff, and on November 18, 1905, demanded of,

and on February 7, 1906, the sheriff made, his deed to the member of said committee, as trustee, conveying all the property of said amalgamated company to such party as trustee for said committee. In due time conveyances were made by the members of the said committee to the defendant the Warrior Copper Company. The result of these transactions was upon their face to divest the amalgamated company of all its assets for the inadequate consideration of \$6,081.02. It further appears that, in pursuance of the said conspiracy, the plaintiff Fleming was ousted from the office of director and president of the amalgamated company, because he was a large stockholder of said corporation, and a holder of substantially all the issued bonds. While

board of directors: *Tazewell County v. Farmers' Loan & T. Co.* 12 Fed. 752; *De Neufville v. New York & N. R. Co.* 26 C. C. A. 306, 51 U. S. App. 374, 81 Fed. 10; *Rogers v. Nashville, C. & St. L. R. Co.* 33 C. C. A. 517, 62 U. S. App. 49, 697, 91 Fed. 299; *Eldred v. American Palace Car Co.* 99 Fed. 168; *Berwind v. Canadian P. R. Co.* 98 Fed. 158; *Weir v. Bay State Gas Co.* 91 Fed. 940; *Harrison v. Thomas*, 50 C. C. A. 98, 112 Fed. 22; *Bigelow v. Calumet & H. Min. Co.* 155 Fed. 869, reversed on other points in 167 Fed. 704, which reversal was affirmed in 94 C. C. A. 13, 167 Fed. 721; *Bell v. Montgomery Light Co.* 103 Ala. 275, 15 So. 569; *Montgomery Traction Co. v. Harmon*, 140 Ala. 505, 37 So. 371; *Connors v. Connors Bros. Co.* 110 Me. 428, 86 Atl. 843; *Brown v. Buffalo, N. Y. & E. R. Co.* 27 Hun, 342; *Weber v. Wallerstein*, 111 App. Div. 693, 97 N. Y. Supp. 846.

A complaint is not sufficient —

—where it simply alleges that there has been a refusal to bring the particular action instituted by the plaintiff, for the directors have a right to choose between remedies equally effective. *Newby v. Oregon C. R. Co.* 1 Sawy. 63, Fed. Cas. No. 10,145;

—under Supreme Court rule No. 94, supra, which alleges that before bringing suit to set aside a lease, complainants applied to and requested said corporation to take such action as would lead to the annulling of said lease, and stated the grounds on which such lease was claimed to be void, especially alleging that the lease was invalid for the want of approval of the shareholders, and that they were advised by the officers of the corporation that no action could be taken in the premises with a view to such result, and that the company wholly refused and neglected to take action for such purpose, or to recognize complainants as having any right to interfere in the matter of said leasing, or to call upon the corporation to take any action thereon. *McHenry v. New York, P. & O. R. Co.* 22 Fed. 130;

—under Supreme Court rule No. 94, supra, in a suit to enjoin the transfer of part of the stock of the corporation to another 51 L.R.A. (N.S.)

corporation, which simply alleges that the directors of the one corporation are also directors of the other, and that it would have been useless for plaintiff to demand that they bring suit, and that plaintiff would have made such demand had he not known it would be refused. *Squair v. Look-out Mountain Co.* 42 Fed. 729, following *Hawes v. Oakland (Hawes v. Contra Costa Water Co.)* 104 U. S. 450, 26 L. ed. 827;

—where the only allegation was that complainants offered to assume the expenses and conduct the litigation. *Warren v. Para Rubber Shoe Co.* 166 Mass. 97, 44 N. E. 112;

—where the allegation was that plaintiff demanded of his corporation as a stockholder, his share of the proceeds flowing from the use of that part of the road leased, when the action was to set aside the lease, since such a demand was not equivalent to a demand on the corporation to repudiate the lease. *Flynn v. Brooklyn City R. Co.* 9 App. Div. 269, 41 N. Y. Supp. 566, affirmed in 158 N. Y. 493, 53 N. E. 250;

—where it was averred that complainants "repeatedly protested" against the wrongs of which complaint was made, without even alleging that the protest was made to the directors. *Boyd v. Sims*, 87 Tenn. 771, 11 S. W. 948;

—where it is alleged that request was made to the directors to prosecute the action, without showing that the request was made to them as a board, and not as individuals. *Latimer v. Richmond & D. R. Co.* 39 S. C. 44, 17 S. F. 258 (the decision is not based upon this holding, as the court expressly says);

—where the averment was that, as the lessee is the owner of a majority of the shares of the lessor, the former elects and controls the action of the officers of the latter, who have therefore allowed themselves to be kept in absolute ignorance of its business, the suit being by a stockholder of the lessor company against the lessee, alleging false and erroneous accounts by the lessee to the lessor. *Wolf v. Pennsylvania R. Co.* 195 Pa. 91, 45 Atl. 936;

—where there are only vague and general

holding those offices, he was in the position to protect the amalgamated company and its stockholders.

These facts show an injury to the intervener by reason of a loss of the property upon which the sole value of his stock depends. The circumstances or facts charged, which show fraud, consist of the alleged conspiracy entered into by the defendants, having for its object the very purpose of causing the stock of the amalgamated company to become worthless. The internal affairs were purposely so managed that the company became involved in debt, and, to force the creditors to resort to the real estate, the personal property of the company was sacrificed and dissipated. The judgments were rendered against the company, and the defendants, charged with the management of its affairs, procured executions to be issued and placed in the hands of the sheriff, and caused the sheriff to levy on all the property of the company, and sell the same; the defendants bought the property at the sale for a nominal sum, then procured a judgment of dissolution against the company to prevent a redemption of the property. These are certainly facts which

show in what the fraud consists, and how the transaction has been affected by the fraud. *Cochise County v. Copper Queen Consol. Min. Co.* 8 Ariz. 221, 71 Pac. 946.

Appellee contends that the claims of Fleming are stale, and ought not be enforced for that reason. We may concede this contention as applicable to the rights of Fleming; but the rights of the intervener estate are controlled by a very different state of facts. On April 26, 1900, E. B. Knox became a stockholder of the amalgamated company, owning 500 shares of stock until his death, during the year 1909, when the stock passed to the executor of his estate, L. E. Hewins, the intervener. The complaint of intervener, Hewins, avers that at the time of the several transactions complained of, and up to the time of his death, said E. B. Knox was insane, and had no knowledge of the transactions complained of, and that intervener, Hewins, had no notice or knowledge of any of the facts concerning such several transactions until after the commencement of this action.

Actions for relief on the grounds of fraud or mistake must be commenced within one year after the cause of action shall have

averments of the directors' complicity in the wrongs of which complaint is made. *Ziegler v. Lake Street Elev. R. Co.* 22 C. C. A. 465, 46 U. S. App. 242, 76 Fed. 662, affirming 69 Fed. 176;

—where it is simply alleged that the wrongdoer is in control of a majority of the stock. *Virginia Pass. & Power Co. v. Fisher*, 104 Va. 121, 51 S. E. 198;

—where it was simply alleged that all the directors were selected because of their friendship for defendant, and that plaintiffs feared that if notice were given of the intended suit, it would be dangerous to their rights, without setting out the facts upon which such fear could rationally be based. *Ide v. Bascomb*, 18 Colo. App. 421, 72 Pac. 62;

—where the complainant was seeking an accounting by defendants of their official conduct in the management of the corporation, and other equitable relief, and failed to allege that defendants were directors. *Brown v. Utopia Land Co.* 118 App. Div. 364, 103 N. Y. Supp. 50;

—where it merely alleges that the defendant has elected and controls the board of directors, for his control of the board does not necessarily follow from the fact that he elected them. *Bowne v. Smith*, 44 Misc. 575, 90 N. Y. Supp. 204;

—where the complaint contains an allegation that a demand was made, but that the directors have neglected to comply therewith, without alleging how long the neglect continued, for such neglect may not be equivalent to a refusal. *Leslie v. Lorillard*, 31 Hun, 305;

—where there is a general charge of 51 L.R.A. (N.S.)

fraud on the part of the directors still in control of the corporation, but no tangible facts sustaining the general averment. *Smith v. Chasac & B. Piano Mfg. Co.* 197 Fed. 466;

—where it simply alleges that "plaintiff has endeavored unsuccessfully, by application to the company, to secure relief and protection from the wrongs and against the dangers mentioned," without setting out the facts upon which the allegation is based, for it is merely a legal conclusion. *Vogeler v. Punch*, 205 Mo. 558, 103 S. W. 1001;

—where it fails to state that plaintiffs do not control a majority of the stock. *Brandt v. McIntosh*, 47 Mont. 70, 130 Pac. 413;

—where it shows that the corporation has eleven directors, only five of whom voted for the payment of the alleged illegal dividends, and there is no allegation of demand upon and refusal by the board. *Herrick v. Dempster*, 73 N. J. Eq. 145, 75 Atl. 810;

—where it shows only a mere notice addressed to the president and attorney of the corporation, notifying them to bring suit, and but inferentially indicating the parties against whom they were required to bring the action. *Pellio v. Bulls Head Coal Co.* 231 Pa. 167, 80 Atl. 71;

—where it simply alleges that a demand upon the corporation to sue would be useless, without setting out the facts that show the truth of the allegation. *State ex rel. Fisher v. U. S. Grant University*, 115 Tenn. 238, 90 S. W. 294.

accrued, and not afterward; provided, the cause of action in such case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake. Paragraph 2949, Rev. Stat. Ariz. 1901, as amended by act No. 16 of the Session Laws 1903.

"If a person entitled to bring any action . . . be at the time the cause of action accrues . . . 2. Of unsound mind; . . . the time of such disability shall not be deemed a portion of the time limited for the commencement of the action. . . ." Rev. Stat. Ariz. 1901, § 2970.

The complaint avers that the deceased was of unsound mind at the time of the several transactions constituting the fraud, and the disability continued until his death, in the year 1909. The intervener became executor of the estate in 1909. The original action was commenced March 25, 1909. By the provisions of § 2970, supra, the statute never commenced to run against the deceased. The complaint avers that the executor did not discover the facts constituting the fraud until after this action was commenced, when the complaint in intervention was filed. The complaint is not subject to

a demurrer presenting the statute of limitations. On its face the cause of action is not barred.

Equity will, under circumstances especially revolting to a sense of justice, refuse relief where the remedy invoked is not barred by the statute of limitations; but in such case the complaining party is not wholly free from fault, and the rule of laches is applied operating in the nature of an estoppel. No such rule can justly be applicable to the facts of this case. A court of equity is equally bound with a court of law by the statute of limitations.

The complaint of the intervener is not subject to the vices contended for, and the court erred in sustaining the several demurrers of the defendant.

The judgment is reversed, and the cause remanded, with instructions to the Superior Court of Gila County to overrule the demurrers, and proceed with the cause according to law.

Franklin, Ch. J., and Ross, J., concur.

Petition for rehearing denied, November 17, 1913.

The following are cases in which the complaint was held to be sufficient:

It has been held that an allegation that the complainants requested the corporation to bring suit, which it neglected to do, is a sufficient allegation to authorize the suit by the stockholders. *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 7 L.R.A. 605, 16 Am. St. Rep. 81, 7 So. 108.

And an averment that one of the plaintiffs demanded of the president and officers of the corporation that the property be restored to it, and that the business be placed upon its former footing, was held to be sufficient in *Becker v. Gulf City Street R. & Real Estate Co.* 80 Tex. 475, 15 S. W. 1094, where the stockholders brought suit against the corporation, its officers, and another corporation with which it had been consolidated, asking for a receiver and a recovery on their own behalf as stockholders, so that the court really held that even this averment was unnecessary.

An allegation that the corporate officers have refused to perform their duties, or one which recites facts showing that it is unreasonable to expect that they will perform the duty, because concerned in the wrong complained of and hostile to all efforts to redress it, is sufficient. *Northern Trust Co. v. Snyder*, 113 Wis. 516, 90 Am. St. Rep. 867, 89 N. W. 460.

Where the suit was against the corporation and a majority stockholder therein, to compel him to pay back to the corporation salary that he had illegally obtained, an allegation that "the plaintiff has demanded of said Christy that he should pay back into said corporation the said back 51 L.R.A.(N.S.)

pay and salary, . . . which he refused to do," was, in *Blair v. Telegram Newspaper Co.* 172 Mass. 201, 51 N. E. 1080, construed so as to show that the plaintiff had taken all practicable steps to induce the corporation to bring suit.

In a suit where breach of duty on the part of the directors is alleged, an allegation that "said corporation, being wholly under the influence and control of said directors, the defendants herein, declines and refuses to institute any suit or proceeding against said defendants," was, in *Albers v. Merchants' Exch.* 45 Mo. App. 206, held to be tantamount to an allegation that the corporation had refused to act.

In *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513, a demurrer on the ground of failure to allege demand and refusal was overruled, since in the complaint: "(1) It is alleged in substance that the defendants, as officers and trustees of the defendant railroad, took from themselves, as trustees and officers of another railroad, a lease of the latter, which they practically owned and managed, to the defendant corporation at an exorbitant rent, which arrangement has the effect to unlawfully deplete funds and earnings of the defendant corporation, and to injure the plaintiffs as stockholders therein. (2) It is also averred in substance that the defendants, as officers and trustees of the defendant railroad, have taken from its treasury large sums of money and paid the same to themselves as individuals, on account of alleged loans or advances made by them to the corporation of which the plaintiffs are stockholders. That they have concealed the origin and nature of this debt from the

plaintiffs, and have made false statements in regard to the same."

A complaint is sufficient if it states:

(1) A cause of action which the corporation itself could maintain; (2) the facts which entitle the plaintiff to maintain the action in place of the corporation, i. e., that he is a stockholder therein and that the corporation has either refused or unreasonably failed to bring the action. *Kavanaugh v. Commonwealth Trust Co.* 181 N. Y. 121, 73 N. E. 562.

A complaint is sufficient where it is alleged that a letter was addressed to one who had been elected president of the company, and that he replied that he had resigned two years before, but it is shown that there never had been a meeting of the stockholders after his election, and it further appears that the action is directed against two men who are still directors, charging them with fraud. *Averill v. Barber*, 2 Silv. Sup. Ct. 40, 6 N. Y. Supp. 255.

Proof of a request and refusal in any mode, provided it be a legal request to the corporation, it was held in *Hazard v. Durant*, 11 R. I. 195, can be made, where suit was to charge an officer of the corporation with corporate funds which he was alleged to have appropriated, under an allegation as follows: "And your orator had well hoped that the said defendant corporation, the Credit Mobilier of America, would protect the rights and interests of its stockholders in the premises, and by proper proceedings at law or in equity compel the said defendant, Thomas C. Durant, to account for said moneys wrongfully and fraudulently converted to his own use, and withheld from said company as aforesaid, and that he would account for any pay over the same. And that said corporation would compel the said Durant to transfer all stock, bonds, moneys, and other rights and interests aforesaid, procured with and by the proper moneys of said corporation, to the same and to its stockholders. But now so it is, may it please your Honors, that the said defendants, though requested so to do, have wholly neglected and refused to comply with these reasonable expectations and request of your orator."

And it has been held that an allegation setting forth that complainant demanded of the corporation "that it institute the suit set forth in your orator's bill of complaint" against its codefendant, but that the corporation has refused and neglected to bring such suit, is a sufficient compliance with equity rule No. 94. *Edwards v. Mercantile Trust Co.* 124 Fed. 381.

A complaint by stockholders of a railroad company to enjoin the corporation from complying with a state statute relating to rates, containing an allegation that they had demanded of the corporate officers that they refuse to comply with the statute, and commence suits to enjoin its enforcement, but that the corporation and its officers had positively refused to do so, not because they considered that the rates were just, or that 51 L.R.A.(N.S.)

they would not be confiscatory, not because of the severity of the penalties provided for the violation of the statute, to the ruinous consequences of which they would not subject themselves, and which no action by themselves, their stockholders, or directors could avoid, is sufficient under equity rule, No. 94, supra. *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Perkins v. Northern P. R. Co.* 155 Fed. 445, affirmed without mention of this point in 184 Fed. 765, and order modified without this point being raised in 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

Under the Revised Statute of March 26, 1881, § 3515, which provides that the defendant may demur to a petition when upon its face it appears "that the plaintiff has not legal capacity to sue," the objection that the complaining stockholder does not allege previous demand upon the corporation cannot be raised for the first time in the appellate court, for if it is not raised by demurrer, there is a waiver thereof, and the petition will be held to be sufficient. *Bulkley v. Big Muddy Iron Co.* 77 Mo. 105.

Where there are but four directors, two of whom signed the demand, and it was then served upon the other two, one of whom was the defendant, and at the time secretary, the service is sufficient, since under § 3531 of Iowa Code, service upon the secretary, of an original notice, is binding upon the corporation. *The Telegraph v. Lee*, 125 Iowa, 17, 98 N. W. 364.

J. W. M.

NEW YORK COURT OF APPEALS.

CONTINENTAL SECURITIES COMPANY
et al., Respts.,
v.

AUGUST BELMONT et al., Impleaded, etc.,
Appts.

(206 N. Y. 7, 99 N. E. 138.)

Corporation — wrongful exchange of property — stockholder's action for accounting — offer to return.

1. Stockholders of a corporation are not, in order to maintain an action for an accounting against the corporation and strangers to whom corporate stock is alleged to have been fraudulently issued in exchange for securities belonging to such persons, bound to offer to return the securities so received.

Note. — *Necessity of applying to body of stockholders as a condition of right of stockholder to sue on behalf of the corporation.*

In the note to *Fleming v. Warrior Copper Co.* ante, 99, the general principles underlying this subject were stated as well as the general rule as to necessity of applying to

Pleading — negating acquiescence in fraud.

2. Stockholders of a corporation suing the corporation and strangers to whom stock is alleged to have been fraudulently issued for an accounting are not bound to negative in the pleadings acquiescence by their predecessors in title in the fraud.

Corporation — suit by stockholders — refusal of directors to proceed.

3. Absence of response within the time specified by the directors of a corporation to a notification by stockholders that, if they do not institute a proceeding to recover stock alleged to have been fraudulently issued by the corporation, the stockholders will do so, is sufficient to justify the stockholders' suit, and it is not necessary to show notice to the body of stockholders collectively, and refusal by them to act.

the corporate authorities. It was there shown that there must be a demand upon and a refusal by the board of directors unless such facts are proved as would, in the opinion of the court, make such demand useless. Having made a demand upon and having been refused by the board of directors, is it necessary to make a similar demand upon the body of the stockholders?

The cases cited, *infra*, appear to justify the statement that the holding in *CONTINENTAL SECURITIES CO. v. BELMONT*, and the distinction there made between causes of action based upon acts that can and those that cannot be ratified, is sound common-law doctrine as shown by the early English decisions; that the decisions of the Supreme Court of the United States and the rule there adopted are not inconsistent with that doctrine, and that some state courts have made the distinction, but others have not done so, probably because it was not pointed out, the distinction being unnecessary in the cases upon which they relied. Whether or not the latter would consider themselves bound by the doctrine of *stare decisis* if the distinction were to be pointed out is a question for their future consideration.

The English doctrine appears to be:—

(1) Courts will not interfere in the management of a corporation in any case so long as the acts complained of are within the power of the corporation and are the result of the honest judgment of the corporation, acting through its officers.

(2) Where the acts complained of are within the power of the corporation, but are so injurious to the corporation, and through it to at least part of the stockholders, that it is apparent that the corporation has not exercised an honest judgment in the matter, then the court will interfere, but only as a last resort; i. e., after both the board of directors and the body of stockholders have been given a chance to rectify the wrongful acts.

(3) Where the corporation has no legal power or authority to commit the acts complained of, then any injured stockholder may sue; but he should obtain permission

Same — ratification of fraudulent act — binding effect.

4. An act of stockholders of a corporation which attempts to ratify a fraud or misapplication of the funds of the corporation by the directors is binding by way of estoppel only on such stockholders as vote in favor of the approval.

(June 11, 1912.)

A PPEAL by defendants from an order of the Appellate Division of the Supreme Court, Second Department, affirming an order of a Special Term for Nassau County denying their motion for judgment upon the pleadings in an action brought to require them to account to plaintiffs for stock al-

from the board of directors to use the corporate name, and if refused permission he may proceed without applying to the stockholders.

It will appear, *infra*, that in all cases where these rules require an appeal to the body of stockholders before bringing suit, an exception thereto is made where it appears that such an appeal would be useless, etc. (for same exception to the general rule as to appealing to board of directors, see note to *Fleming v. Warrior Copper Co.* ante, 99), so that these general rules are not absolute. Thus exception is recognized by all the courts, and the cases upholding it are considered incidentally. In jurisdictions which observe the distinction between acts that are and those that are not capable of ratification, this exception becomes important only when the acts of which complaint is made are capable of ratification; for, in the other class of cases, there need be no appeal to the stockholders.

The reasoning upon which the distinction is made is sound, for, in the second class of cases, stated at the beginning of the note, if the stockholders in meeting assembled should ratify the acts complained of, it would probably legalize them, bring the case within class one, *supra*, and thus defeat the proposed suit by the stockholder. If they should reverse the board of directors, a suit by the stockholder would become unnecessary. If they refused relief, ratifying the actions complained of, and it yet appeared that the grossest injustice resulted to the complaining minority, probably to the undisclosed advantage of the majority, there the court would permit the suit by the complaining minority, whether one or many. But in the third class of cases the stockholders in meeting assembled have no power to ratify the acts complained of, and their reversal of the board would be merely perfunctory, and to require it would be simply red tape; and any attempt to approve the action of the board would be ineffectual. In this class of cases it is necessary to first apply to the board of directors in order to exhaust all means of obtaining an action in the corporate name; but

leged to have been fraudulently and illegally issued. Affirmed.

The facts are stated in the opinion.

Mr. Charles H. Tuttle, with Messrs. Davies, Auerbach, Cornell, & Barry, and Nicoll, Anable, Lindsay, & Fuller, for appellants:

A stockholder must show with particularity adequate and sincere efforts to induce action by the board of directors and the board's refusal to act; or, in the alternative, an adequate excuse for not making such efforts.

Kavanaugh v. Commonwealth Trust Co. 181 N. Y. 121, 73 N. E. 562; Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 461, 26 L. ed. 827, 832; Law v. Fuller, 217 Pa. 439, 66 Atl. 754; Quincy

v. Steel, 120 U. S. 241, 247, 30 L. ed. 624, 626, 7 Sup. Ct. Rep. 520; Doherty v. Mercantile Trust Co. 184 Mass. 593, 69 N. E. 335; Johns v. McLester, 137 Ala. 290, 97 Am. St. Rep. 27, 34 So. 174; Swope v. Villard, 61 Fed. 421; O'Connor v. Virginia Pass. & Power Co. 184 N. Y. 46, 76 N. E. 1082; Fry v. Rush, 63 Kan. 429, 65 Pac. 701; Corning v. Barrett, 22 Misc. 241, 48 N. Y. Supp. 1013; Bowne v. Smith, 44 Misc. 575, 90 N. Y. Supp. 204; Decatur Mineral Land Co. v. Palm, 113 Ala. 531, 59 Am. St. Rep. 140, 21 So. 315; Virginia Pass. & Power Co. v. Fisher, 104 Va. 121, 51 S. E. 198; Steiner v. Parsons, 103 Ala. 215, 13 So. 771; Ziegler v. Lake Street Elev. R. Co. 22 C. C. A. 465, 46 U. S. App. 242, 76 Fed. 662; Wolf v. Pennsylvania R.

the same reason does not exist for requiring an appeal to the body of stockholders, for even that body could obtain corporate action only through the board of directors. Hence, no such appeal is required.

The holding in *CONTINENTAL SECURITIES Co. v. BELMONT* is in harmony with the rule adopted by the English courts. The court refers to *Foss v. Harbottle*, 2 Hare, 461, as explained by *Bagshaw v. Eastern Union R. Co.* 7 Hare, 114, 6 Eng. R. & C. Cas. 152, 18 L. J. Ch. N. S. 193, 13 Jur. 602, and no comment on those cases is needed. The substance of the holding is that where the acts of which complaint is made are not capable of being ratified by the body of stockholders, there need be no appeal to that body as a condition precedent to the stockholder's right of action, and the question of the reasonableness of such an appeal is immaterial. But where the "subject-matter of the stockholder's complaint is for any reason within the immediate control, direction, or power of confirmation of the body of stockholders, it should be brought to the attention of such stockholders for action, before an action is commenced by a stockholder, unless it clearly appears by the complaint that such application is useless."

The position of the English courts is made still plainer by *Gregory v. Patchett*, 33 Beav. 595, where it was held that "in matters strictly relating to the internal management of a company this court, though it should come to the conclusion that the course adopted is not warranted by the terms of the instrument, will not interfere, even though the minority should have summoned a meeting of all the shareholders, and the majority should have persisted in the course complained of. But if the measures adopted are plainly beyond the powers of the company, and are inconsistent with the objects for which the company was constituted, then the court will, at the instance of the minority, interpose to prevent the performance of the act complained of, and it will do so whether an appeal has or has not been made by the minority to the shareholders generally."

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In *Atwool v. Merryweather*, L. R. 5 Eq. 464, note, it was apparent that the majority of the stockholders were supporting the bill, and it was held that it would be idle to require formal action granting permission to sue.

Foss v. Harbottle was cited with approval and followed in *Mozley v. Alston*, 1 Phill. Ch. 790, 4 Eng. Ry. & C. Cas. 636, 16 L. J. Ch. N. S. 217, 11 Jur. 315; *Lord v. Copper Miners' Co.* 2 Phill. Ch. 740, 1 Hall & Tw. 85, 18 L. J. Ch. N. S. 65, 12 Jur. 1059, also in *Gray v. Lewis*, 43 L. J. Ch. N. S. 281, L. R. 8 Ch. 1036, 29 L. T. N. S. 12, 21 Week. Rep. 923, where the court uses language which seems to go beyond the holding in *Foss v. Harbottle* and *Gregory v. Patchett*, supra, in that the court appears to hold that the consent of stockholders in meeting assembled must be sought even where the acts complained of are not capable of ratification; but in view of some references in the decision and some circumstances, it seems quite clear that the court did not intend to adopt that as a general rule, although the case is sometimes cited to that proposition.

Equity rule No. 94 of the United States Supreme Court, as amended and embodied in present rule No. 27, is quoted in full in the note to *Fleming v. Warrior Copper Co.* ante, 99, with some discussion as to the effect it has had upon later decisions. It should be here noted that it is not a rule of action, but a rule of pleading, and that the words, "if necessary," used in this connection, limit the requirement of the rule to cases where the court decides that an application to the stockholders is necessary. The rule is therefore not determinative of the question here under consideration.

Hawes v. Oakland (*Hawes v. Contra Costa Water Co.*) 104 U. S. 450, 26 L. ed. 827, is a leading case upon this question. The court said: "But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show, to the satisfaction

Co. 195 Pa. 91, 45 Atl. 936; Moore v. Silver Valley Min. Co. 104 N. C. 534, 10 S. E. 679; Squair v. Lookout Mountain Co. 42 Fed. 729; Boyd v. Sims, 87 Tenn. 771, 11 S. W. 948; Alexander v. Searcy, 81 Ga. 536, 12 Am. St. Rep. 337, 8 S. E. 630; Wenzel v. Palmetto Brewing Co. 48 S. C. 60, 26 S. E. 1.

The complaint fails to allege that the plaintiffs revealed the facts to the other stockholders; that the plaintiffs had appealed for action to the body of the corporation (the stockholders); or that such an appeal would have been futile, or could not have been made in time.

Bill v. Western U. Teleg. Co. 16 Fed. 14; Thomp. Corp. § 4499; Clark & M. Priv. Corp. § 543; Purdy's Beach, Priv. Corp.

§ 573; 10 Cyc. 977; 26 Am. & Eng. Enc. Law, 2d ed. 981; Foss v. Harbottle, 2 Hare, 461; Gray v. Lewis, L. R. 8 Ch. 1050, 43 L. J. Ch. N. S. 281, 29 L. T. N. S. 12, 21 Week. Rep. 923; Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 26 L. ed. 827; Dannmeyer v. Coleman, 8 Sawy. 51, 11 Fed. 97, 5 Mor. Min. Rep. 474; Pellio v. Bulls Head Coal Co. 231 Pa. 157, 80 Atl. 71; Brewer v. Boston Theatre, 104 Mass. 378; Tuscaloosa Mfg. Co. v. Cox, 68 Ala. 71; Rathbone v. Parkersburg Gas Co. 31 W. Va. 798, 8 S. E. 570; Virginia Pass. & Power Co. v. Fisher, 104 Va. 121, 51 S. E. 198; Fry v. Rush, 63 Kan. 429, 65 Pac. 701; Law v. Fuller, 217 Pa. 439, 66 Atl. 754; Horst v. Traudt, 43 Colo. 445, 96 Pac. 259.

of the court, that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it." But it is quite evident that the court was referring to *intra vires* cases. For not only do the circumstances show that fact, but the court said: "There is no allegation of fraud or of acts *ultra vires*, nor of destruction of property, or of irremediable injury of any kind." And it is likewise evident that the court intended the decision to be in harmony with the English decisions, since it thoroughly reviewed them. However, the court did not feel called upon to make the distinction here under discussion, and for that reason the holding seems to have been misconstrued by some state courts, and the adoption of equity rule No. 94 by that court seems to have further confused some of the state courts. In a few cases the distinction has been made, and the rule here enunciated seems to have been applied in some cases without an inquiry as to whether or not the acts complained of could have been ratified.

Hawes v. Oakland, *supra*, was followed at practically the same time in Huntington v. Palmer, 104 U. S. 482, 26 L. ed. 833, and Greenwood v. Union Freight R. Co. 105 U. S. 13, 26 L. ed. 961, which decisions make it absolutely certain that it was not intended to rule that there must be an appeal to the stockholders regardless of the subject-matter of the complaint. In the Huntington Case the suit was to set aside taxation of the corporation alleged to be illegal, which the board of directors had refused to resist. The court, in holding that

the stockholder could not maintain the suit, said: "There is not, as in Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401, any averment that these taxes are so burdensome as to be destructive of the corporation itself; nor that there was any fraud on the part of the directors, nor anything to show that their decision not to resist the taxes is unwise, or opposed to the best judgment they could exercise in the matter. There is no averment of any effort to invoke the control of the body of the stockholders, or any reason why it was not done. Nor is it made to appear that a single stockholder was consulted by the complainant, or has any wish to contest the payment of these taxes with the state authorities." But in the Greenwood Case a state legislature had repealed the charter of a street railway company, the directors had refused to resist, and no appeal had been made to the body of stockholders; the complaining stockholders alleged that the legislation was unconstitutional as impairing the obligation of contracts, and claimed the right to maintain the suit on behalf of the corporation; it was held that they had such right; the court said: "This whole subject was fully considered in the recent opinion of the court in Hawes v. Oakland, *supra*, in the decision of which we had the benefit of the able argument of counsel in this case, which was argued before that was decided. We refer to that opinion for the principles which must govern this branch of the present case. It is sufficient to say that this bill presents so strong a case of the total destruction of the corporate existence, and of the annihilation of all corporate powers under act of 1872, that we think complainant as a stockholder comes within the rule laid down in that opinion, and which authorizes a shareholder to maintain a suit to prevent such a disaster, where the corporation peremptorily refuses to move in the matter."

And it was held in Doctor v. Harrington, 196 U. S. 579, 49 L. ed. 606, 25 Sup. Ct. Rep. 355, and in Delaware & H. Co. v. Albany & S. R. Co. 213 U. S. 435, 53 L. ed. 862, 29 Sup. Ct. Rep. 540, that where the majority of the stock of the corporation

The complaint fails to state a cause of action because it does not allege that plaintiff's predecessors in title had not acquiesced in the acts complained of, or that the stock had been purchased in good faith, and not for mere vexatious purposes.

Pollitz v. Gould, 202 N. Y. 11, 38 L.R.A. (N.S.) 988, 94 N. E. 1088, Ann. Cas. 1912D, 1098; Appleton v. American Malting Co. 65 N. J. Eq. 375, 54 Atl. 454; Trimble v. American Sugar Ref. Co. 61 N. J. Eq. 340, 48 Atl. 912; Ithaca Gaslight Co. v. Treman, 93 N. Y. 660; Kingman v. Rome, W. & O. R. Co. 30 Hun, 73; Belden v. Burke, 147 N. Y. 542, 42 N. E. 261; Dimpfell v. Ohio & M. R. Co. 110 U. S. 209, 28 L. ed. 121, 3 Sup.

Ct. Rep. 573; Moore v. Silver Valley Min. Co. 104 N. C. 534, 10 S. E. 679; 4 Thomp. Corp. p. 3409; Parsons v. Hayes, 14 Abb. N. C. 419; Drake v. New York Suburban Water Co. 26 App. Div. 499, 50 N. Y. Supp. 826; Kent v. Quicksilver Min. Co. 78 N. Y. 159, 4 Mor. Min. Rep. 47; Re Syracuse, C. & N. Y. R. Co. 91 N. Y. 1; Marbury v. Stone, 17 App. Div. 352, 45 N. Y. Supp. 184, affirmed in 160 N. Y. 701, 57 N. E. 1116.

Messrs. J. Aspinwall Hodge, Stephen M. Yeaman, and Alexander Holtzoff, for respondents:

The pleadings fully and sufficiently allege facts which entitle the plaintiffs to act

was owned or controlled by the defendant directors, making an appeal to the stockholders futile, there need be no such appeal. Here the exception noted supra was sustained, but there was no need for making the distinction here under consideration.

In Kessler v. Ensley Land Co. 123 Fed. 546, on demurrer, and in 129 Fed. 397, on amended complaint, there is an excellent discussion of the distinction, but in rather an indirect way, and it is there said, by way of argument, that "an honest and disinterested governing body or majority of stockholders, if rescission would not be advantageous or would be harmful to the corporation, might ratify actual fraud practised on it by an officer or director," the act complained of being within the charter powers of the corporation. Final hearing of the case is reported in 141 Fed. 130, which was affirmed in 79 C. C. A. 534, 148 Fed. 1019, where the court said: "The matters complained of in the bill were *intra vires* the Ensley Land Company, and as the record shows that a majority of the directors and stockholders, at the time of bringing the suit, were not interested adversely to the company, the right of the complainants, as stockholders, to bring and maintain this suit, is doubtful." And the court then shows that they had no such right for the reason that, under the facts, the company itself had no such right of action; hence, the point here considered was left undecided. Writ of certiorari was denied in 205 U. S. 541, 51 L. ed. 921, 27 Sup. Ct. Rep. 788.

On this point the court in Brewer v. Boston Theatre, 104 Mass. 387, said: "Whether there must be an effort to move the corporate body to the redress of its own injuries; and, to that end, an attempt to procure a meeting and vote of the stockholders; or whether an application to the present board of officers by whom the corporate affairs are managed, and a refusal by them to allow proceedings in its name and behalf, would be sufficient,—does not seem to have been determined by any clear concurrence of decision. It may depend somewhat upon the character of the corporate organization, and the extent of powers confided to its officers for the time being. Where the stockholders retain no control of

the corporate business, except by means of an annual election of officers, those officers, during their terms of service, represent the corporation for all purposes; and a refusal by them to take proper action for the protection of its interests, or to allow the use of the corporate name for that purpose, ought to be sufficient to justify a proceeding in behalf of the individual stockholders, making the corporation a party defendant."

The court, in Albers v. Merchants' Exchange, 45 Mo. App. 206, seems to have recognized the distinction here made, *i. e.*, that an appeal to the stockholders is not necessary where the breach of duty by the directors is incapable of ratification by the body of stockholders, but refused to apply the principle on the ground that the amount of the financial loss to the complaining stockholder occasioned by the breach was too insignificant, and that he was the only stockholder, out of the three thousand, willing to complain by suit; but the court may have had reference to the rule that the stockholder may sue in his own name and on his behalf, since the expression used is "may have relief in equity." This rule, of course, is not within the scope of this note.

In Rathbone v. Parkersburg Gas Co. 31 W. Va. 798, 8 S. E. 570, it was held that, "in order to confer upon a shareholder the right to sue, in a case in which the primary right is in the corporation, he must not only show that the directors are in default or wrongfully refuse to sue, but he must show that a majority of the shareholders have been appealed to, and that they are also guilty of misconduct, or wrongfully and wilfully refuse to act in the matter," where the corporation is solvent, the act complained of *intra vires*, and the suit will admit of delay. Here the distinction seems to have been made, but the case did not require a decision as to acts not capable of ratification.

And the Rathbone Case was cited and followed in Deveny v. Hart Coal Co. 63 W. Va. 650, 60 S. E. 789, and Ward v. Hotel Randolph Co. 65 W. Va. 721, 63 S. E. 613.

In Beckett v. Planters' Compress & Bonded Warehouse Co. — Miss. —, 65 So. 275, the court said: "Should the directors,

in a representative capacity, and to bring this suit on behalf of the defendant corporation.

Kavanaugh v. Commonwealth Trust Co. 103 App. Div. 95, 92 N. Y. Supp. 543.

Any demand upon the stockholders to institute an action would be useless, since the stockholders have no such power.

McCullough v. Moss, 5 Denio, 567; 3 Cook, Corp. § 740, pp. 2467-2469; *Denver & R. G. R. Co. v. Alling*, 99 U. S. 403, 25 L. ed. 438; *Beveridge v. New York Elev. R. Co.* 112 N. Y. 1, 2 L.R.A. 648, 19 N. E. 489; *Conro v. Port Henry Iron Co.* 12 Barb. 27; *Gillette v. Noyes*, 92 App. Div. 313, 86 N. Y. Supp. 1062; *Charleston Boot & Shoe*

Co. v. Dunsmore, 60 N. H. 85; *Re La Solidarite Mut. Ben. Asso.* 68 Cal. 392, 9 Pac. 453; *Pullman's Palace Car Co. v. Missouri P. R. Co.* 115 U. S. 587, 597, 29 L. ed. 499, 502, 6 Sup. Ct. Rep. 194; *Dana v. Bank of United States*, 5 Watts & S. 223.

A demand on the board of directors is a sufficient prerequisite to a suit by a stockholder in behalf of the corporation, and the stockholder need not appeal to the general body of shareholders before instituting his action.

Greaves v. Gouge, 69 N. Y. 154; *Flynn v. Brooklyn City R. Co.* 9 App. Div. 269, 41 N. Y. Supp. 566, affirmed in 158 N. Y. 493, 53 N. E. 520; *Wilkie v. Rochester &*

when requested, decline to institute the suit, an appeal, if practicable, should be made to the stockholders themselves to take such action as they may deem proper and have the power to do." But it was held that, under the circumstances of the case,—the directors owned or controlled a majority of the stock,—no appeal to either the directors or to the stockholders was necessary, but the language quoted appears to recognize the distinction.

And the language used in the *Hawes Case*, supra, was quoted with approval in *Virginia Pass. & Power Co. v. Fisher*, 104 Va. 121, 51 S. E. 198, where it was held that an averment that the alleged wrongdoer was in control of a majority of the stock was sufficient to avoid the necessity of demanding action by the stockholders, but not sufficient to avoid a demand on the directors.

The above quotation from *Hawes v. Oakland* is also found in *Dannmeyer v. Coleman*, 8 Sawy. 51, 11 Fed. 97, 5 Mor. Min. Rep. 474, where there was no demand even upon the directors.

And in *Bill v. Western U. Teleg. Co.* 16 Fed. 14, a bill was dismissed because of a failure to aver that "any effort has been made by the complainant to secure such action on the part of the stockholders as, upon his theory of the transaction, they ought to take," and there were no circumstances alleged that dispensed with this requirement.

In *Miller v. Murray*, 17 Colo. 408, 30 Pac. 46, where plaintiff and those willing to co-operate with him owned a clear majority of the stock, and nearly two years had elapsed after plaintiff had knowledge of the alleged fraud before he brought suit, during all of which time the property was being developed and made more valuable by innocent shareholders of another company, it was held that plaintiff could not maintain the suit without alleging and proving that he had either made an honest but futile effort to obtain redress at a meeting of the shareholders, or had a valid excuse for not making such effort.

Miller v. Murray, supra, was cited and followed in *Horst v. Traudt*, 43 Colo. 445, 96 Pac. 259.
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In *Schoening v. Schwenk*, 112 Iowa, 733, 84 N. W. 916, the court said: "It is doubtful, under the authorities, whether any proceeding by way of securing redress inside the corporation is necessary where it is plain that it would be futile. In this case there was no stockholders' meeting, and to call one required a majority vote of the board of directors (seven out of nine of them being defendants in this case), or a written application to the secretary by holders of two thirds of the stock. The defendants would hardly be expected to call a meeting of the stockholders to declare illegal acts which they had already done, and a sufficient proportion of the stock was held by defendants to make it impossible to get the necessary written application without their consent. Under these circumstances, we hardly think it incumbent upon plaintiffs to make application to either the board of directors or a stockholders' meeting."

In *North v. Union Sav. & L. Asso.* 59 Or. 483, 117 Pac. 822, the court said: "As a general rule a stockholder in a corporation is not allowed to sue to prevent misappropriation of corporate securities without first requesting the board of directors, and, in case of their refusal to act, then stockholders to proceed against the wrongdoers in the name of the corporation;" and cites *Hawes v. Oakland* (*Hawes v. Contra Costa Water Co.*) 104 U. S. 450, 26 L. ed. 827; *Brewer v. Boston Theatre*, 104 Mass. 378; and *Foss v. Harbottle*, 2 Hare, 461.

Shaw v. Staigt, 107 Minn. 152, 20 L.R.A. (N.S.) 1077, 119 N. W. 951, is a case where those in charge of the corporation fraudulently issued stock to some of their number for fictitious fishing locations, and the suit was brought by other stockholders; demand upon and refusal by the board of directors was shown, and it was held that there need be no farther demand upon the body of the stockholders; two points, however, make the case of little value here: (1) The court strongly intimates but does not definitely hold that demand even upon the directors would have been excused; (2) the court held that "here the injury complained of, and consequently the right of action, accrued to the stockholders, and not

State Line R. Co. 12 Hun, 242; Robinson v. Smith, 3 Paige, 222; Sheridan v. Sheridan Electric Light Co. 38 Hun, 396; Lowenstein v. Diamond Soda Water Mfg. Co. 94 App. Div. 383, 88 N. Y. Supp. 313; McCrea v. McClenahan, 114 App. Div. 70, 99 N. Y. Supp. 689; Dudley v. Armenia Ins. Co. 115

App. Div. 380, 100 N. Y. Supp. 818; Averill v. Barber, 2 Silv. Sup. Ct. 40, 6 N. Y. Supp. 255; Memphis & C. R. Co. v. Woods, 88 Ala. 630, 7 L.R.A. 605, 16 Am. St. Rep. 81, 7 So. 108; The Telegraph v. Lee, 125 Iowa, 17, 98 N. W. 364; Atchison, T. & S. F. R. Co. v. Sumner County, 51 Kan. 617,

to the corporation as such." If the facts justified this holding the case would not be within the scope of the present note, but it is impossible to avoid the conclusion that the right of action was a derivative one, since the injury to the bona fide stockholders was caused solely by injuring the corporation.

But in Dunphy v. Traveller Newspaper Asso. 146 Mass. 495, 16 N. E. 426, the court, in dealing with a case involving subject-matter apparently within the authority of the corporation, said: "And so, if they deem themselves aggrieved as shareholders by the dealings of others with it, or by the acts of its managers, they are bound to seek their remedy through corporate channels, first, by application to the officers in charge, and, failing there, secondly, to the corporation itself, at a meeting of its members. If they can obtain justice at the hands of neither, the courts are open for their relief;" but goes on to say: "Even when their acts are *ultra vires*, or otherwise illegal, a complaining member must first seek his remedy within the corporation. The only exception to the rule that a stockholder must apply to the directors, and also, if need be, to the corporation, for redress of a wrong done it, before he can sue in a court of equity, for himself and in behalf of other stockholders, is when it appears that such application would be unavailing to protect his rights. Brewer v. Boston Theatre, 104 Mass. 378; Allen v. Wilson, 28 Fed. 677; Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 26 L. ed. 827; Detroit v. Dean, 106 U. S. 537, 27 L. ed. 300, 1 Sup. Ct. Rep. 500; Dimpfell v. Ohio & M. R. Co. 110 U. S. 209, 28 L. ed. 121, 3 Sup. Ct. Rep. 573; Foss v. Harbottle, 2 Hare, 461. That may happen when the directors themselves are the wrongdoers, or are in fraudulent combination with them, or when the corporation is controlled by them, or when it is necessary that action should be taken too speedily to leave time for a corporate meeting of stockholders."

In Johns v. McLester, 137 Ala. 283, 97 Am. St. Rep. 27, 34 So. 174, the court said: "It is thoroughly well settled in this state that before a minority stockholder, or any number of them, can maintain a bill of this sort, he or they must make demand upon the managing officers or governing board of the corporation to correct the wrongs complained of, by legal proceedings or otherwise, and, meeting with failure or refusal, he or they must next seek redress through the stockholders as a body. And such demand or request must be clearly averred in the bill. Of course, this demand

is not required when it is made clearly to appear that it would be refused, or that the litigation following would necessarily be under the control of persons opposed to its success, or when the persons constituting the governing board or a majority of them are the wrongdoers or under their control, and any effort to obtain redress through the stockholders would be unavailing for want of time or other cause. Of course, the excuse for not making the demand upon the governing board, or, if made upon that body, then the excuse for not seeking redress through the stockholders, must be clearly and distinctly averred in the bill. Montgomery Light Co. v. Lahey, 121 Ala. 131, 25 So. 1006, and authorities there cited."

In Montgomery Light Co. v. Lahey, supra, a bill alleging demand upon and refusal by the directors was dismissed on the ground that no allegation was contained therein of any effort to obtain relief from the body of stockholders, and no sufficient excuse for not doing so was alleged.

And this seems to be the rule in Alabama, without regard to the nature of the subject-matter of the suit. Louisville & N. P. Co. v. Neal, 128 Ala. 149, 29 So. 865; Bell v. Montgomery Light Co. 103 Ala. 275, 15 So. 569; Hagood v. Smith, 162 Ala. 512, 50 So. 374 (here there was a sufficient demand upon and refusal by the directors); Howze v. Harrison, 165 Ala. 150, 51 So. 614; Decatur Mineral Land Co. v. Palm, 113 Ala. 531, 59 Am. St. Rep. 140, 21 So. 315 (but it was here shown that a majority of stockholders were necessarily hostile to the suit, hence no demand upon them was necessary).

Under Montana Rev. Code, § 3835, which gives the majority of stockholders the power to control the election of directors, and § 3838, which enables stockholders to remove objectionable directors, it must be alleged and proved that complainants are minority stockholders. Brandt v. McIntosh, 47 Mont. 70, 130 Pac. 413.

The question of pleading, so far as it has been considered by the courts, has been incidentally discussed in citing the cases, supra. No doubt it is governed by the same principles that underlie the cases on the subject of demand upon the board of directors (see note to Fleming v. Warrior Copper Co. ante, 99); that is, if a demand upon the stockholders is necessary, it ought to be alleged, and if it is not necessary, that fact should appear in the pleadings, not as a general statement, but by means of particular facts from which the court may determine the necessity thereof.

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33 Pac. 312; Home Min. Co. v. McKibben, 60 Kan. 387, 56 Pac. 756; Shawhan v. Zinn, 79 Ky. 300; Wells v. Dane, 101 Me. 67, 63 Atl. 324; Talbot v. Scripps, 31 Mich. 268; Exter v. Sawyer, 146 Mo. 324, 47 S. W. 951; Hazard v. Durant, 11 R. I. 195; Whitney v. Hazzard, 18 S. D. 490, 101 N. W. 346; Loftus v. Farmers' Shipping Assn. S. S. D. 201, 65 N. W. 1076; People's Invest. Co. v. Crawford, — Tex. Civ. App. —, 45 S. W. 738; Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448; Mount v. Radford Trust Co. 93 Va. 427, 25 S. E. 244; 3 Pom. Eq. Jur. § 1095; 3 Cook, Corp. § 740; Thomp. Corp. § 4554.

It is not necessary to allege in the complaint that neither the respondents nor their predecessors in title ever acquiesced in the transaction complained of.

Zebley v. Farmers' Loan & T. Co. 139 N. Y. 461, 34 N. E. 1067; *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513; *Grant v. Pratt*, 87 App. Div. 490, 84 N. Y. Supp. 983; *Wheeler v. Millar*, 90 N. Y. 353; *Meyer v. Lathrop*, 73 N. Y. 315; *Williams v. Tilt*, 36 N. Y. 319.

Chase, J., delivered the opinion of the court:

This is a representative action derived from the Interborough Rapid Transit Company. It is brought in behalf of the plaintiffs and all others similarly interested, as stockholders of said company, against the directors of said company and said company to require said individual defendants to account to said company for fifteen thousand shares of its capital stock, alleged to have been issued fraudulently and illegally, and without any valid or adequate consideration therefor, but upon an alleged consideration that was a pretense and subterfuge and intended to cover a gift or bonus to the defendants Belmont and Lutten, and their nominees, and also to require said individual defendants to account for the dividends which have been paid on said stock. It is alleged that by reason of the facts set forth in the complaint the defendant corporation has suffered damage to an amount exceeding \$4,500,000. Each of the defendants answered the complaint, and, after the answers were interposed, a motion was made for judgment upon the pleadings, dismissing the complaint pursuant to § 547 of the Code of Civil Procedure, which motion was denied. An appeal was taken therefrom to the appellate division, where the order denying said motion was unanimously affirmed. Leave was granted by the appellate division to the defendants, other than the defendant company, to appeal to this court, and the following questions were certified:

"(1) Does the complaint state a cause of action?

"(2) Was the motion of the defendants for judgment against the plaintiffs on the pleadings rightfully denied?"

As the opinion will not discuss the complaint generally, but only in connection with the objections that are made to it by the appellants in this court, it is unnecessary to state its provisions except as required in considering such objections.

It appears from the complaint that each of the plaintiffs purchased his stock subsequently to the transactions complained of in the complaint. This court in the recent case of *Pollitz v. Gould*, 202 N. Y. 11, 38 L.R.A.(N.S.) 988, 94 N. E. 1088, Ann. Cas. 1912D, 1098, has definitely determined that a stockholder may bring an action in behalf of the corporation for the benefit of himself and all other stockholders to set aside as fraudulent an improper transaction consummated at the expense of the corporation before he acquired his stock.

It is alleged that the 15,000 shares of stock were issued pursuant to a resolution unanimously adopted by the directors of said company, of which the following is a copy, viz.: "Resolved that this company do purchase of August Belmont & Company one thousand nine hundred and seventy-five (1,975) shares of the capital stock of the Pelham Park Railroad Company of the par value of twenty-five dollars (\$25) per share; one thousand nine hundred and thirty-five (1,935) shares of the capital stock of the City Island Railroad Company of the par value of twenty-five dollars (\$25) per share; and twenty-seven thousand five hundred dollars (\$27,500) in the first mortgage bonds of the Pelham Park Railroad Company, for the sum of one million five hundred thousand dollars (\$1,500,000) to be paid by the issue and delivery of fifteen thousand (15,000) shares of the par value of one hundred dollars (\$100) each in the full-paid nonassessable capital stock of this company, to such persons and in such amounts as the said August Belmont & Company may direct; which said sum is also to cover full compensation to the said August Belmont & Company for their services in procuring the assignment of the contract between John B. McDonald and the city of New York aforesaid, the sale to this company of the stock of the Rapid Transit Subway Construction Company, and the subscriptions to the remainder of the capital stock of this company." It is further alleged that the statement in said resolution in substance that said 15,000 shares of stock was to be issued and delivered in part to cover full compensation for certain alleged services

rendered by the defendants Belmont and Luttgen was a pretense and subterfuge designed and intended to cover up the real transaction which was (except as to the actual cost of said stock and bonds of said railroad companies, namely, \$32,185.97) a gift or bonus to said defendants Belmont and Luttgen and their nominees of said stock in the defendant company.

The appellants assert that the complaint is fatally defective because it does not offer to return the stock and bonds described in said resolution. The action is not brought for a rescission of the contract with August Belmont & Company, but for an accounting. The plaintiffs are not in possession of said stocks and bonds, and as individual stockholders are unable, through no fault of theirs, to return them. The plaintiffs do not bring this action because their rights have been directly violated or because the cause of action is theirs, or because they are entitled to the relief sought. They are permitted to sue in this manner simply in order to set in motion the judicial machinery of the court. *Pom. Eq. Jur.* § 1095. The court in the action can preserve and adjust the equities of the parties to it. *Thomp. Corp.* 2d ed. § 4568; *2 Mechem, Corp.* § 1179; *Kley v. Healy*, 127 N. Y. 555, 28 N. E. 593, s. c. 149 N. Y. 346, 44 N. E. 150; *Pritz v. Jones*, 117 App. Div. 643, 102 N. Y. Supp. 549; *Heckscher v. Edenborn*, 203 N. Y. 210, 96 N. E. 441. The actual value of said stocks and bonds can be found in the action, and, if equity requires it, the defendant corporation can be directed to return such stocks and bonds to said August Belmont & Company.

It was not necessary for the plaintiffs to allege in the complaint that their predecessors in title did not assent to or acquiesce in the alleged fraudulent issue of said 15,000 shares of stock. It is not necessary to negative such assent or acquiescence in a fraud, unless it is otherwise to be presumed from the delay in bringing the action, or generally from the allegations of the complaint. If it exists, it is a matter of defense. *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513; *Pollitz v. Gould*, supra. If the rule were otherwise, the objection to the complaint would not avail the defendants in this case because the allegations of the complaint amount to a negative of any assent by the plaintiffs or their predecessors in title to the transactions alleged in the complaint.

It is also claimed by the appellants that it does not appear from the complaint that the defendant corporation and its board of directors were requested to bring suit to recover said 15,000 shares of stock or the

value thereof, or that said corporation or said board of directors neglected or refused to bring such action. It appears from the complaint that on the 12th day of March, 1910, the plaintiff corporation, then being the owner of the stock now owned by the two plaintiffs, delivered to the defendant corporation and to its officers and directors a written communication directed to said defendant corporation and its president and directors, calling attention to the fact of the issue and delivery of said 15,000 shares of capital stock for a grossly inadequate and illegal consideration, and requesting and demanding that suit be brought in behalf of the corporation and in good faith prosecuted against the incorporators of said company and members of its board of directors during the year 1902 and said firm of August Belmont & Company to recover the damages suffered by reason of the action of the said incorporators and directors.

Said written communication also stated and provided as follows: "We hereby offer to properly indemnify the Interborough Rapid Transit Company against any damage or costs it may sustain as a result of bringing and prosecuting such suit. A copy of this letter is mailed to each director of the Interborough Rapid Transit Company. Unless within ten days from date you advise us that the request and demand herein will be complied with we shall conclude that you refuse." Thereafter the plaintiffs waited until May 4, 1910, when, no action having been commenced and no response having been made to said written communication, this action was commenced.

Upon the facts so alleged the plaintiffs treated the defendant corporation and its board of directors as having refused and neglected to bring such action, and the allegations relating thereto are sufficient to sustain the complaint. *Kavanaugh v. Commonwealth Trust Co.* 103 App. Div. 95, 92 N. Y. Supp. 543.

On this appeal as on the motion at the special term and on the hearing of the appeal in the appellate division, the allegations of the complaint are taken as true.

It is conceded that an action in equity cannot be maintained by the plaintiffs as individual stockholders for themselves and all others similarly interested, unless it is necessary because of the neglect and refusal of the corporate body to act.

It is necessary, therefore, in an action by the plaintiffs to set forth two things: First, a cause of action in favor of the corporation with the same detail of facts as would be proper in case the corporation itself had brought the action; second, the facts which entitle the plaintiff to maintain

the action in place of the corporation. *Kavanaugh v. Commonwealth Trust Co.* 181 N. Y. 121, 73 N. E. 562; *O'Connor v. Virginia Pass. & Power Co.* 184 N. Y. 46, 76 N. E. 1082. It is not seriously contended that the complaint does not state a good cause of action in favor of the defendant corporation. It is insisted by the defendants that it was necessary for the plaintiffs, in addition to alleging a demand upon the defendant corporation and its board of directors, to bring the action, and their neglect and refusal to do so, to allege that they had given notice of the alleged fraud to the body of stockholders of the defendant corporation, and had demanded of said stockholders that some action be taken by them to redress the wrong, and that such body of stockholders had neglected and refused to take any action relating thereto. The cause of action belongs to the corporate body, and not to the plaintiffs and other stockholders individually, nor to the body of stockholders collectively.

The board of directors represents the corporate body. It is provided by statute in this state that the affairs of every corporation shall be managed by its board of directors. General corporation law (Consol. Laws 1909, chap. 23), § 34. The directors are not ordinary agents in the immediate control of the stockholders. The directors hold their office charged with the duty to act for the corporation according to their best judgment; and in so doing they cannot be controlled in the reasonable exercise and performance of such duty. The corporation is the owner of the property, but the directors, in the performance of their duty, possess it and act in every way as if they owned it. *People ex rel. Manice v. Powell*, 201 N. Y. 194, 94 N. E. 634. They are trustees clothed with the power of controlling the property and managing the affairs of a corporation without let or hindrance. As to third persons, they are its agents, but as to the corporation itself equity holds them liable as trustees. 2 Pom. Eq. Jur. §§ 1061, 1073, 1088, 1097; *People ex rel. Manice v. Power*, *supra*.

The claim of the appellants that the body of stockholders has some immediate or direct authority to act for the corporation or to control the board of directors in the matters set forth in the complaint is based upon an erroneous conception of the duties and powers of the body of stockholders in this state.

As a general rule, stockholders cannot act in relation to the ordinary business of a corporation. The body of stockholders have certain authority conferred by statute which must be exercised to enable the corporation to act in specific cases, but except

for certain authority conferred by statute, which is mainly permissive or confirmatory, such as consenting to the mortgage, lease, or sale of real property of the corporation, they have no express power given by statute. They are not by any statute in this state given general power of initiative in corporate affairs. Any action by them relating to the details of the corporate business is necessarily in the form of an assent, request, or recommendation. Recommendations by a body of stockholders can only be enforced through the board of directors, and indirectly by the authority of the stockholders to change the personnel of the directors at a meeting for the election of directors. Such action may or may not result in securing adequate corporate action with reference to illegal or fraudulent acts. For reasons wholly apart from the matter in dispute, the stockholders may not desire to change a majority of the persons comprising its board of directors. Some of the reasons why the power vested in stockholders to elect directors is inadequate as a remedy for specific fraudulent acts are stated by Cook in his work on Corporations, § 740, in which he says: "There has been considerable discussion as to whether the stockholder, in addition to his request to the corporate officers to institute the suit, should not also be required to attempt to induce the stockholders in meeting assembled to take action by directing the directors to bring suit, or by refusing to re-elect them at the next election. The fact, however, that the stockholders in meeting assembled cannot control the discretion of the directors in bringing such a suit, that the remedy of refusing to re-elect them involves delay, and involves the assumption that a minority of the stockholders can by the election control such a suit, that irreparable injury or the vesting of great financial interests may occur in the meantime, and that laches may arise as a bar to the stockholder's suit, have settled the rule that the stockholder's request to the corporate directors to institute the suit is sufficient. He need not also apply to a stockholders' meeting." Although it is said that the authority of stockholders in the management of business corporations is exhausted when they elect the directors (*Thomp. Corp.* 2d ed. § 1178), nevertheless it is generally recognized that certain acts of boards of directors that are legal, but voidable, can be ratified and confirmed by a majority of the body of stockholders as the ultimate parties in interest, and thus make them binding upon the corporation. *Morawetz, Corp.* 2d ed. §§ 625, 626. Such recognized authority in stockholders to ratify and confirm the acts of boards of directors

is confined to acts voidable by reason of irregularities in the make-up of the board or otherwise, or by reason of the directors or some of them being personally interested in the subject-matter of the contract or act, or for some other similar reason which makes the action of the directors voidable. No such authority exists in case of an act of the board of directors which is prohibited by law or which is against public policy. *Kent v. Quicksilver Min. Co.* 78 N. Y. 159, 4 Mor. Min. Rep. 47.

In any case where action is taken by stockholders confirming and ratifying a fraud and misapplication of the funds of the corporation by the directors or others the action is binding only by way of estoppel upon such stockholders as vote in favor of such approval. *Morawetz, Corp.* 2d ed. § 625. The distinction between acts that can and those that cannot be confirmed and ratified is shown in the report of two frequently cited English decisions, namely, *Foss v. Harbottle*, 2 Hare, 461, and *Bagshaw v. Eastern Union R. Co.* 7 Hare, 114. The former of these cases was limited to the approval of a legal but voidable act. In the *Bagshaw* Case, where the directors of a corporation had misapplied or were about to misapply certain moneys of the corporation, the court says: "No majority of the shareholders, however large, could sanction the misapplication of this portion of the capital. A single dissenting voice would frustrate the wishes of the majority. Indeed, in strictness, even unanimity would not make the act lawful. This appears to me to take it out of the case of *Foss v. Harbottle*, to which I was referred. That case does not, I apprehend, upon this point, go further than this: That if the act, though it be the act of the directors only, be one which a general meeting of the company could sanction, a bill by some of the shareholders on behalf of themselves and others, to impeach that act, cannot be sustained, because a general meeting of the company might immediately confirm and give validity to the act of which the bill complains."

It is the governing body or bodies of a corporation with power to enforce a remedy to whom complaining stockholders must go with their demand for relief. The governing body of corporations in this state, as we have seen, is the board of directors. A complaining stockholder must go to such board for relief before he can bring an action, unless it clearly appears by the complaint that such application is useless. If the subject-matter of the stockholder's complaint is for any reason within the immediate control, direction, or power of confirmation of the body of stockholders, it 51 L.R.A. (N.S.)

should be brought to the attention of such stockholders for action, before an action is commenced by a stockholder, unless it clearly appears by the complaint that such application is useless. The decision reported in *Hawes v. Oakland* (*Hawes v. Contra Costa Water Co.*) 104 U. S. 450, 26 L. ed. 827, and other similar decisions in the Federal and state courts, are not in conflict with the decision about to be rendered herein. In such cases, as in this case, it is asserted that an application to the body of stockholders is unnecessary when it is unreasonable to require it. If the body of stockholders has no adequate power or authority to remedy the wrong asserted by the individual stockholders, it is unreasonable and unnecessary to require an application to it to redress the wrong before bringing a representative action. See opinion of Carr, J., in the appellate division herein, 150 App. Div. 298, 134 N. Y. Supp. 635. See also *Delaware & H. Co. v. Albany & S. R. Co.* 213 U. S. 435, 53 L. ed. 862, 29 Sup. Ct. Rep. 540. In this case, where the plaintiff alleges fraud and a substantial misappropriation of 15,000 shares of the stock of the corporation through a nominal purchase of property and the payment of a pretended claim for services, application to the body of stockholders was not necessary.

It is claimed by the respondents that the complaint discloses such a state of facts as would dispense with the necessity of making any demand either upon the corporation, its board of directors, or the body of stockholders before bringing an action to recover for the company the value of the 15,000 shares of stock alleged to have been illegally and fraudulently issued to the individual defendants.

We have not considered the allegations of the complaint with reference to such claim of the respondents.

The order should be affirmed, with costs, and each of the questions certified answered in the affirmative.

Cullen, Ch. J., and Gray, Haight, Vann, Werner, and Willard Bartlett, JJ., concur.

PENNSYLVANIA SUPREME COURT.

WILLIAM J. KELLY, Appt.,

v.

GEORGE W. THOMAS et al.

(234 Pa. 419, 83 Atl. 307.)

Corporation — suit by stockholders — necessity of demand.

1. A stockholder of a corporation cannot, without demand on the corporation and

its directors, maintain an action against directors who are alleged to have fraudulently failed to enforce contracts in favor of the corporation and to protect its property, if defendants are minority directors, and no collusion with the majority is shown. Parties — corporation — suit by stockholder.

2. The corporation is a necessary party to a suit by a stockholder to hold directors liable for refusal to enforce contracts in its favor and to protect its property.

Judgment — fraud — attack.

3. The question of the proper service of process on a corporation and the excessiveness of a judgment against it in a foreign court cannot be inquired into upon averments that the suit was kept secret from complainant, a stockholder in the corporation, by service upon an officer of the corporation, who was in the employ of plain-

tiff, and that the claim adjudicated was wrongfully and fraudulently excessive.

Court — jurisdiction of foreign corporation.

4. Courts of one state have no jurisdiction of a suit by a stockholder of a foreign corporation which does not transact its business within that state, against its directors, because of their failure to enforce contracts in its favor and to protect its property, since those are matters of internal management.

Pleading — multifariousness.

5. A bill by a stockholder of a corporation is multifarious which seeks to recover on behalf of the corporation against its directors for fraudulent management of its affairs, against another corporation to recover profits made by it on business which should have come to the former, and by such stockholder individually against the direc-

Note. — Necessity of making corporation a party to a suit by a stockholder in its behalf.

As to necessity of demand upon and refusal by the board of directors or the body of stockholders as a condition precedent to stockholder's right to sue in behalf of the corporation, see notes to Fleming v. Warrior Copper Co. ante, 99, and Continental Securities Co. v. Belmont, ante, 112, respectively.

In KELLY v. THOMAS, the court points out the fact that in a suit by a stockholder on behalf of the corporation the latter is a necessary party to the suit for the reasons that (1) the rights of plaintiff are dependent on establishing its rights; (2) defendant has the right to a decree that will conclude it from any further action; (3) the corporation itself is entitled to notice so as to be able to take care of its own rights. The rule that the corporation must be made a party seems to be universally adopted.

While it is the practice in the United States to make the corporation a defendant, it seems to be the practice of the English courts to bring it in as a plaintiff.

The practice in the English courts is for the complaining stockholder to obtain permission to use the corporate name as plaintiff, and this seems to be the form of the action even when it is not necessary to obtain permission; but in Silber Light Co. v. Silber, 48 L. J. Ch. N. S. 385, L. R. 12 Ch. Div. 717, 40 L. T. N. S. 96, 27 Week. Rep. 427, where the stockholders had passed a resolution forbidding the use of the corporate name in a suit against the directors for misappropriation of corporate funds, it was held that the corporate name would be stricken off as plaintiff, and added as a defendant.

And in Duckett v. Gover, 46 L. J. Ch. N. S. 407, L. R. 6 Ch. Div. 82, 25 Week. Rep. 554, where, by mistake, the corporation was made defendant, the complaint was amended by making it a plaintiff instead, in the absence of need of getting its consent. 51 L.R.A.(N.S.)

And there are many English decisions where this custom was followed without discussion of the point.

In the following cases it was held that wherever the suit is in behalf of the corporation, the rights of the complaining stockholder being derivative, the corporation must be made a party defendant:

U. S.—Davenport v. Dows, 18 Wall. 626, 21 L. ed. 938; Taylor v. Holmes, 14 Fed. 498, affirmed in 127 U. S. 489, 32 L. ed. 179, 8 Sup. Ct. Rep. 1192; Putnam v. Ruch, 54 Fed. 216, reaffirmed in 56 Fed. 416; Holton v. Wallace, 66 Fed. 409, affirmed in 27 C. C. A. 71, 39 U. S. App. 326, 77 Fed. 61; Kelly v. Mississippi River Coaling Co. 175 Fed. 482; Lawrence v. Southern P. Co. 180 Fed. 822, appeal dismissed, not on merits in 228 U. S. 137, 57 L. ed. 768, 33 Sup. Ct. Rep. 497.

Ark.—Red Bud Realty Co. v. South, 96 Ark. 281, 131 S. W. 340.

Colo.—Byers v. Rollins, 13 Colo. 22, 21 Pac. 894.

Conn.—Allen v. Curtis, 26 Conn. 456.

Ill.—Chicago v. Cameron, 120 Ill. 447, 11 N. E. 899.

Iowa.—Reed v. Hollingsworth, — Iowa, —, 135 N. W. 37.

Kan.—Ryan v. Leavenworth, A. & N. W. R. Co. 21 Kan. 365.

Ky.—Shawhan v. Zinn, 79 Ky. 300; Jones v. Johnson, 10 Bush, 649.

Me.—Hersey v. Veazie, 24 Me. 9, 41 Am. Dec. 364.

Mass.—Brewer v. Boston Theatre, 104 Mass. 378.

Mich.—McMillan v. Miller, — Mich. —, 143 N. W. 631.

Mont.—McConnell v. Combination Min. & Mill. Co. 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194, affirmed on rehearing in 31 Mont. 563, 79 Pac. 248; Kleinschmidt v. American Min. Co. — Mont. —, 139 Pac. 785.

N. Y.—Robinson v. Smith, 3 Paige, 222, 24 Am. Dec. 212; Cunningham v. Pell, 5 Paige, 607; Hand v. Atlantic Nat. Bank, 55 How. Pr. 231; Corning v. Barrett, 22 Misc. 241, 48 N. Y. Supp. 1013.

tors of the two corporations to recover for depreciation in the value of the stock of the former.

(January 2, 1912.)

A PPEAL by plaintiff from a decree of the Court of Common Pleas, No. 4, for Allegheny County, dismissing a bill filed to hold defendants liable for alleged fraudulent failure to enforce contracts in favor of a corporation of which plaintiff was a stockholder, and to protect its property. Affirmed.

The bill was filed against two corporations and the directors of one of them individually. Only part of the defendants appeared and they demurred to the bill. As an excuse for failure to demand that the defendant directors bring the suit, the bill alleged that they were themselves charged with the misfeasance set out in the bill, and that therefore demand would have been useless.

Swearingen, the presiding justice in the lower court, stated the facts as follows:

"The important averments are these: The complainant is the owner of 48 per cent of the capital stock of the Mississippi River Coaling Company, and C. Jutte & Company is the owner of 41 per cent thereof, less four shares assigned to several persons to qualify them as directors. August 13, 1904, the complainant and C. Jutte & Company entered into a written contract, whereby they agreed that a corporation should be formed under the laws of Louisiana, with a capital stock of \$100,000, for which the complainant and his associates were to subscribe, and the object of which was to build docks at the mouth of Lake Borgue canal, in order to handle and store coal for the purpose of coaling steamers, supplying bunker coal, and loading cargo or bunker coal for export; that complainant was to transfer to said corporation a lease of cer-

tain property for its purposes; that C. Jutte & Company was to loan the corporation \$40,000 upon its notes, to be secured by the stock, as soon as the complainant had obtained a contract for C. Jutte & Company to supply the Elder-Dempster Steamship Company with coal, and had produced reasonable assurance in writing that C. Jutte & Company was to obtain like contracts from other lines; that the dock company was to handle no coal except that of C. Jutte & Company and all contracts were to be made in the latter's name, and that the compensation of the dock company was to be all in excess of \$2.85 per net ton, but it was not required to handle coal at a compensation of less than 30 cents per ton. Pursuant to said contract, a corporation of the state of Louisiana was formed and was named Mississippi River Coaling Company, with a capital stock of \$100,000, which was subscribed by complainant and his associates. It was organized with a board of five directors. Complainant turned over to said corporation the lease, as he was required to do, for which he received \$99,600 of said stock. He transferred to C. Jutte & Company \$52,000 of said stock, obtained a contract with Elder-Dempster Steamship Company and assurances from other companies, and in all respects fulfilled his obligations under the contract. C. Jutte & Company loaned the sum of \$40,000 to the dock company and received the notes therefor and the collateral; and the coal tipples and docks were erected. Said George W. Thomas became president of the said dock company, his son, Albert G. Thomas, secretary and treasurer, and J. W. Friend a director. Complainant was also a director. Said George W. Thomas and James W. Friend were also controlling officers and directors in, and the principal owners of, the stock of C. Jutte & Company.

"It was averred that the defendants, who controlled both corporations and had a large

Okla.—Starr v. Heald, 28 Okla. 792, 116 Pac. 188.

Pa.—KELLY v. THOMAS; Langolf v. Seiberlitch, 2 Pars. Sel. Eq. Cas. 64 (but the objection that the corporation has not been made a party must be raised by plea or demurrer if all of its directors are defendants).

Tenn.—Black v. Huggins, 2 Tenn. Ch. 780.

Wis.—Elmergreen v. Weimer, 138 Wis. 112, 119 N. W. 836.

And the fact that the corporation is made a party defendant in practically all the cases without the question having been raised shows that this is the universal practice in the United States. For a list of such cases, see the notes to Fleming v. Warrior Copper Co. ante, 99, and Continental Securities Co. v. Belmont, ante, 112. 51 L.R.A. (N.S.)

There are a number of cases sustaining the general proposition that where the court is able to do complete equity among the parties before it, there is no necessity of joining the corporation in the suit (see Toledo Traction, Light, & P. Co. v. Smith, 205 Fed. 643, and cases cited therein); but it is difficult to conceive of a case where that could be done where the stockholder is suing in the corporate right, for the corporation would necessarily be affected by any decision in the case, as the benefit to the complainants must necessarily flow through the corporation. So, the very conditions stated in the holdings take such cases out of the scope of this note.

J. W. M.

interest in C. Jutte & Company, fraudulently failed to enforce said contract in favor of the dock company and against C. Jutte & Company, and fraudulently violated the same for the benefit of C. Jutte & Company; that, instead of selling coal through the dock company, C. Jutte & Company sold coal directly to said steamship companies, and deprived the dock company of the large profits it would have made; that C. Jutte & Company neglected to obtain other large and valuable contracts for the benefit of the dock company; and that said officers and directors permitted the coal tippie of the dock company to become out of repair and allowed washes to occur under its foundations, which could have been prevented at small expense. It was also averred that on January 31, 1907, C. Jutte & Company brought suit against said dock company in the United States circuit court for the eastern district of Louisiana, and service was had upon Albert G. Thomas, its secretary and treasurer, who was employed by and interested in C. Jutte & Company, said suit having been kept secret from the complainant; that on July 5, 1907, judgment was rendered in favor of C. Jutte & Company and against said Mississippi River Coaling Company in the sum of \$70,489.95, with interest on \$65,163.89 from January 1, 1907; and that the said claim was 'wrongfully and fraudulently excessive,' and was 'inflated and so made excessive as one of the means of depriving the coaling company of its property.' Execution was afterwards issued on said judgment and the property of the dock company was sold to officers and directors of C. Jutte & Company for the sum of \$18,000; it being of the value of at least \$125,000. The complainant finally averred that his stock in the dock company, which was worth \$50,000, had been rendered worthless by reason of said acts of the officers and directors and controlling stockholders therein. . . .

"The bill shows that whilst the original contract was between the complainant and C. Jutte & Company, one of the covenants was that a corporation was to be formed, and thereafter the dealings of C. Jutte & Company were to be with that corporation, that such corporation was formed, and that both the complainant and C. Jutte & Company have performed their initial obligations to it. In fact, there is no averment in the bill that any covenant with C. Jutte & Company made with the complainant personally has been broken. Nor is there any averment that any of the defendants violated any contract made with him directly, or committed any breach of duty which they owed to him as an individual. On the contrary, the averments are that C. Jutte & 51 L.R.A. (N.S.)

Company subsequently broke the covenants it made with the Mississippi River Coaling Company,—covenants found in the original contracts, it is true, but none the less made with the dock company,—and that some of the defendants disregarded their duty to the dock company, not to the plaintiff, arising out of their fiduciary relations to it. It is charged that C. Jutte & Company, by some of the defendants, did not sell coal through the dock company; that it allowed the property of the dock company to depreciate; that it failed to secure other valuable contracts for the dock company. . . . Finally, complainant alleged that the defendant caused an excessive judgment to be entered against the dock company and its property to be sold."

Further facts appear in the opinion.

Messrs. Ernest Dale Owen, William M. Galbraith, and Oliver K. Eaton for appellant.

Messrs. Robert J. Dodds, William M. Robinson, and Reed, Smith, Shaw, & Beal, for appellees:

The gravamen of the bill of complaint, so far as respects this demurrant, concerns entirely the internal affairs of a foreign corporation, and therefore this court will take no jurisdiction of the cause.

Madden v. Penn Electric Light Co. 181 Pa. 617, 38 L.R.A. 638, 37 Atl. 817; McCloskey v. Snowden, 212 Pa. 249, 108 Am. St. Rep. 867, 61 Atl. 796.

Plaintiff had no personal right of action. McMullen v. Ritchie, 64 Fed. 253; Wolf v. Pennsylvania R. Co. 195 Pa. 91, 45 Atl. 936.

The presence of the Mississippi River Coaling Company is indispensable to the maintenance of the action, and it not appearing that said corporation is within the jurisdiction of this court or subject to its process, it will not entertain jurisdiction of the cause.

Eldred v. American Palace-Car Co. 45 C. C. A. 1, 105 Fed. 455, 44 C. C. A. 554, 105 Fed. 457; Willoughby v. Chicago Junction R. & Union Stockyards Co. 50 N. J. Eq. 656, 25 Atl. 277; 3 Pom. Eq. Jur. § 1095.

The bill of complaint is vague and uncertain, and, so far as it recites facts, shows no equity.

Wolf v. Pennsylvania R. Co. supra.

Moschzisker, J., delivered the opinion of the court:

The material facts in this case fully appear in the opinion of the court below, published in connection herewith. The plaintiff alleged that the defendants, as officers of the Mississippi River Coaling Company (referred to by the court below as the

"dock company"), had refused to enforce certain contracts against another corporation known as C. Jutte & Company, in which they were interested as stockholders and officers; that they had neglected to secure other valuable contracts for the coaling company; that they had failed to keep the property of said company in repair, and had permitted it to be sold for an inadequate price under a judgment secured by C. Jutte & Company through fraudulent collusion with them. These facts, if established, would constitute breaches of the defendants' duties to the coaling company, for which they would be directly liable to that corporation—not to its stockholders.

The plaintiff avers in his bill that "no demand has been made upon the officers and directors of the Mississippi River Coaling Company to bring or conduct this suit, for the reason that the same is brought against them, charging them with the misfeasance herein set out, and that such demand would therefore have been useless." It appears, however, that of the seven officers and directors of the coaling company only three are named as defendants in this proceeding, and the appellant expressly admits that he has no case against Albert G. Thomas, one of the three. He does not aver in detail specific acts done by any of the defendants showing fraudulent collusion, but contents himself with general allegations of fraud based upon the averment "that the principal and controlling officers and directors of said coaling company, especially G. W. Thomas and J. F. Friend, and not including your orator, were also the controlling officers and directors, and the principal owners of the stock of the said C. Jutte & Company, and had a larger and greater interest in said C. Jutte & Company than they had in said coaling company."

In *Wolf v. Pennsylvania R. Co.* 195 Pa. 91, 95, 45 Atl. 936, 937, the plaintiff charged collusion on the part of the directors of a corporation, and we said: "The averments of collusion relied on by plaintiff are that, as the lessee is the owner of a majority of the shares of the lessor, the former elects and controls the action of the officers of the latter. . . . The defect of this charge is that it does not rest on any acts averred, but on an inference that, by reason of the circumstances of their election, the directors will violate their duty and commit a breach of trust. There is, however, no presumption that officers will commit a breach of trust. The charge should rest on some act, affirmative or permissive, manifestly in violation of duty, and manifestly the result of fraud, and not of erroneous judgment." Fraud is largely a conclusion of law, and all our cases agree that

general allegations which do not set forth the particular circumstances are not sufficient. Where it satisfactorily appears that a demand upon the officers of a corporation would be useless, such a course need not be pursued; but here the plaintiff has not made it plain from facts stated that a majority of the board of directors of the corporation in question had been, or probably would have been, faithless to their trust, hence he has not shown a right to maintain the suit in his individual capacity. We have held: "The right of an individual stockholder to act for the corporation is exceptional and only arises on a clear showing of special circumstances, among which inability or unwillingness of the corporation itself, demand upon the regular corporate management, and refusal to act, are imperative requisites. And the refusal by the corporate management must appear affirmatively to be a disregard of duty, and not an error of judgment; a nonperformance of a manifest official obligation, amounting to a breach of trust. . . . There must be averred and proved an actual application to the directors, and a refusal by them to bring suit or to allow plaintiff to do so in the corporate name; and, where misconduct of the directors themselves is alleged, the bill must show an effort to secure plaintiff's rights through meetings of the corporation." *Wolf v. Pennsylvania R. Co.* 195 Pa. 91, 94, 45 Atl. 936; *McCloskey v. Snowden*, 212 Pa. 249, 108 Am. St. Rep. 867, 61 Atl. 796. A shareholder has no distinct and individual title to the moneys and property of a corporation. *Bidwell v. Pittsburgh, O. & E. L. Pass. R. Co.* 114 Pa. 535, 541, 6 Atl. 729. In *McMullen v. Ritchie* (C. C.) 64 Fed. 253, 262, Mr. Justice Lurton, then a United States circuit judge, stated: "The injury done by the defendants, if any, was done to the corporation. . . . The wrong, if actionable, was one to be remedied by an action by the corporation, or by a shareholder for the benefit of the corporation upon the refusal of the corporation to sue. A stockholder cannot maintain a suit for the indirect injury done him as an indirect result of an injury to the corporation. This is too obvious to need elaboration." These words are applicable to the present case.

While the Mississippi River Coaling Company was named as a defendant, it was never served, and did not appear. The learned court below rightly decided that the presence of this corporation as a party to the record was indispensable to the maintenance of the action. The rights of the plaintiff depended upon those of the coaling company, and the latter was not before the court. Not only was its presence necessary to the plaintiff, but the defendants were en-

titled thereto so that the corporation might be concluded by any decree entered against them, and the company itself was entitled to notice in order that its interest and the rights of its creditors might be protected. See quotations from standard text-books upon this point in *Willoughby v. Chicago Junction R. & Union Stockyards Co.* 50 N. J. Eq. 656, 25 Atl. 277, 280, 281, and *Eldred v. American Palace-Car Co.* 44 C. C. A. 554, 105 Fed. 457, 458. There is nothing upon the record to show that it was impossible to secure service upon the individual defendants in the domicile of the foreign corporation. They were officers of that company, and, in the absence of any averment to the contrary, it is but reasonable to assume that they could have been served in the state in which that corporation had its being and transacted its business.

It appears from the bill that the dealings between Jutte & Company and the coaling company were adjudicated in an action at law brought by the former against the latter in the year 1907, in the United States circuit court for the eastern district of Louisiana, and that a judgment for a considerable sum was secured against the coaling company. The plaintiff sought to have the court below inquire into and practically set aside that judgment as fraudulent, upon the general averment that the suit was "kept wholly secret from your orator;" that the service was upon the secretary and treasurer of the coaling company, who was the son of one of the other defendants and in the employ of Jutte & Company; that the claim adjudicated was "wrongfully and fraudulently excessive;" that Jutte & Company "had no proper legal cause of action against the said Mississippi River Coaling Company;" that the proceedings were "wrongful, fraudulent, and oppressive, and the judgment in said suit was procured by deceit upon the court . . . and was part of the general wrongful and fraudulent scheme and design of the defendants . . . for the purpose of preventing your orator from getting the benefit to which he was entitled as a stockholder of the said . . . coaling company." Had it been proper for the court below to review this judgment, it was not called upon to do so under these general averments. We are convinced that no error was committed in determining that "it would be highly improper . . . under the averments of this bill to undertake to ascertain whether or not the dock company was properly served with process, and whether or not the judgment of that court was excessive in amount."

In the eyes of the law as laid down in this state the gravamen of the bill, so far as respects the demurrants, concerns the

management of the internal affairs of a foreign corporation. As to this, we have said: "A Pennsylvania resident has no right to call upon the courts of his own state to protect him from the consequences of a voluntary membership in a foreign corporation. By the very act of membership he intrusted his money to the management of a corporation owing its existence to and governed by the laws of another state. . . . Without doubt, courts of equity in Pennsylvania have . . . jurisdiction to enjoin unlawful acts by such corporations; . . . but they have no jurisdiction as to their internal management. What constitutes internal management is well defined by Stone, J., in *North State Copper & G. Min. Co. v. Field*, 64 Md. 151, 20 Atl. 1039: 'Where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting, or through its agents, the board of directors, then such action is the management of the internal affairs of the corporation; and, in case of a foreign corporation, our courts will not take jurisdiction.'" *Madden v. Penn Electric Light Co.* 181 Pa. 617, 621, 622, 38 L.R.A. 638, 37 Atl. 817, 818. This was said in a case where the business and tangible property of the foreign corporation were within our own state, and where stockholders charged the corporate management with conduct "which depreciated and rendered valueless their stock," and it was repeated under like circumstances in *McCloskey v. Snowden*, *supra*. The present corporation has no property, and does not conduct its business in this state.

We have examined *Sloan v. Clarkson*, 105 Md. 171, 66 Atl. 18; *Miller v. Quincy*, 179 N. Y. 294, 72 N. E. 116; *Babcock v. Farwell*, 245 Ill. 14, 137 Am. St. Rep. 284, 91 N. E. 683, 19 Ann. Cas. 74; *State ex rel. Watkins v. North American Land & Timber Co.* 106 La. 621, 87 Am. St. Rep. 309, 31 So. 172; *Beale, Foreign Corp.* §§ 309-312; 3 *Clark & M. Priv. Corp.* § 865, and the other cases cited by the appellants, and, while some of these do not entirely agree with the Pennsylvania doctrine, it is to be noted that in each instance where other jurisdictions have taken a more liberal view than our own in reference to granting relief involving an inquiry into the management of the internal affairs of a foreign corporation the business and property of the corporation affected were within the jurisdiction of the court. In view of the circumstances of the present case, we do not feel that a departure from our own rule would be justifiable; but in a case free from

the peculiar difficulties of this one, where the foreign corporation was served and all the parties or property directly involved was within the jurisdiction of the court, if the actual exercise of visitatorial powers is not requisite to the relief, the rule as to noninterference should be restricted and not carried further than is absolutely required by universal fixed rules of law; for, where possible, we should prevent its use as a cloak to cover apparent fraudulent conduct on the part of officers of foreign corporations to the prejudice of Pennsylvania stockholders.

For the reasons already stated, the court could have done naught else than dismiss the plaintiff's case; but, in addition, the demurrer raised the point that the bill was multifarious, and this also was well taken; for in effect it seeks to maintain, first, an action by the plaintiff as a stockholder of the coaling company on behalf of that company to recover against certain of its directors and one of its stockholders for losses growing out of an alleged fraudulent and collusive management of its affairs; next, an action of the same character against C. Jutte & Company to recover profits made by that concern on coal sold which should have been disposed of through the coaling company; lastly, an action by the plaintiff individually against the directors of the coaling company and C. Jutte & Company to recover for the depreciation in the value of his stock in the former company.

The assignments of error are overruled, and the decree of the court below is affirmed, at the cost of the appellant.

GEORGIA SUPREME COURT.

S. D. CASSIDY, Plff. in Err.,

v.

C. M. WILEY, Ordinary.

(141 Ga. 331, 80 S. E. 1046.)

Intoxicating Liquor — misuse of license — effect.

1. Where a person operating a place of business under a license authorizing the sale by retail of drinks in imitation of or intended as a substitute for beer, ale, wine, whisky, or other alcoholic, spirituous, or malt liquors, under Civ. Code 1910, § 1765,

Headnotes by LUMPKIN, J.

Note. — There appears to be no other case on the exact point decided in the above case as to the refusal of a license to sell "soft" drinks because of the unlawful sale of intoxicating liquors.

In general as to the power to prohibit or regulate the sale of "soft" drinks, see note 51 L.R.A. (N.S.)

was convicted of unlawfully keeping on hand at his place of business alcoholic, spirituous, malt, and intoxicating liquors, under Penal Code 1910, § 426, and it was conceded that the place of business so referred to was that where he conducted business under the license above mentioned, *ipso facto*, under Civil Code 1910, § 1769, he became disqualified from holding another similar license.

Same — refusal of license.

2. Under such circumstances, there was no breach of duty on the part of the ordinary in refusing to issue to such person a new license to conduct the same business, and there was no error on the part of the superior court in refusing to compel him to do so by writ of mandamus.

Constitutional law — refusal of liquor license — deprivation of rights.

3. The provision of Civil Code 1910, § 1769, in regard to disqualifying one who has violated the prohibition law under color of his license to sell what is commonly called "near beer" from holding another license to conduct that business, as applied to one who has been convicted of keeping spirituous, malt, and intoxicating liquors at his place of business, is not in conflict with the 14th Amendment of the Constitution of the United States, as depriving the applicant for the license of liberty or property without due process of law, nor is it violative of the clause of the state Constitution containing a similar provision.

(February 18, 1914.)

ERROR to the Superior Court for Bibb County to review a judgment denying a writ of mandamus to compel the issuance to petitioner of a license to sell a substitute for beer. Affirmed.

Statement by Lumpkin, J.:

S. D. Cassidy filed a petition for mandamus against C. M. Wiley, ordinary of Bibb county, to compel the respondent to issue to him a license to conduct the business of selling a commodity in imitation of or intended as a substitute for beer, under Civil Code 1910, §§ 1763, 1765. The court granted a rule nisi, and upon the final hearing the case was submitted to the judge upon an agreed statement of facts, which was in substance as follows: On November 11, 1913, the plaintiff applied to the ordinary for a license for that year to engage in the sale of a commodity in imitation of or intended as a substitute for beer. The ordinary asked the plaintiff if he had been con-

to Tolliver v. Blizzard, 34 L.R.A. (N.S.) 890.

As to power of municipality to regulate the sale of nonintoxicating alcoholic beverages, see note to State v. Dannenburg, 26 L.R.A. (N.S.) 890.

victed for a violation of the prohibition law since its passage in 1908, and the plaintiff admitted that he was so convicted in June, 1911. Thereupon the ordinary refused to issue to him a license, on the ground that § 1769 of the Code prohibited the plaintiff from obtaining a license. In the year 1911 the plaintiff was engaged in the business of the sale of a beverage or drink in imitation of or intended as a substitute for beer, under a license by the state; this license being granted to him on January 3, 1911, as a retailer of "near beer." On July 3, 1911, the plaintiff was convicted on an indictment charging him with a misdemeanor, in that on the 5th day of May, 1911, in Bibb county, Georgia, he did then and there unlawfully keep on hand at his place of business alcoholic, spirituous, malt, and intoxicating liquors. The unlawful keeping on hand, for which the plaintiff was convicted, occurred during the year 1911 at the plaintiff's place of business, where he held the "near beer" license above referred to, and while he was operating his place of business under that license. In addition to the agreed statement of facts, an affidavit of the petitioner was introduced, which in substance was as follows: In June, 1911, he was engaged in the business of the sale of a commodity or a beverage in imitation of or a substitute for beer, and was operating a place of business in the city of Macon, under and by virtue of a license issued to him by the ordinary of the county of Bibb and a license issued to him by the mayor and council of the city of Macon. While thus engaged he kept on hand at his place of business certain intoxicating beverages; but they were not kept by him under color of the license granted to him for the sale of a commodity or a beverage in imitation of or substitute for beer, but they were kept at his place of business in violation of law. The court denied the mandamus absolute, and the petitioner excepted.

Mr. Jesse Harris for plaintiff in error.

Messrs. Feagin & Hancock, for defendant in error:

The penalty imposed by § 1769 of the Code is not a part of the tax act, or a part of an act for the purpose of raising revenue.

Burch v. Savannah, 42 Ga. 598; Cassidy v. Macon, 133 Ga. 690, 66 S. E. 941; Campbell v. Thomasville, 6 Ga. App. 228, 64 S. E. 815; Fincher v. Collum, 2 Ga. App. 740, 59 S. E. 22.

Section 1769 of the Code violates none of the Amendments of the Constitution of the United States.

Black, Intoxicating Liquors, p. 36; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 51 L.R.A.(N.S.)

923, 5 Sup. Ct. Rep. 357; New York v. Miln, 11 Pet. 102, 9 L. ed. 648.

Before petitioner would be entitled to the mandamus, his legal right to the performance of the particular act of which performance is sought to be compelled must be clear and complete.

26 Cyc. pp. 151, 156, 160-162, 193; Wood v. Board of Education, 137 Ga. 808, 74 S. E. 540.

A regulation requiring an applicant for a "near beer" license to be of good character is a reasonable and valid regulation.

Campbell v. Thomasville, 6 Ga. App. 212, 64 S. E. 815.

Lumpkin, J., delivered the opinion of the court:

The present case arises under an application for a mandamus absolute to compel the ordinary to issue a license authorizing the petitioner to sell what is commonly known as "near beer." It has been held by this court several times that, in order to entitle one to the writ of mandamus, it must appear that he has a clear legal right to have a particular act performed, the doing of which he seeks to have enforced. Adkins v. Bennett, 138 Ga. 118 (1), 74 S. E. 838.

Civil Code 1910, § 1769, reads as follows: "Any person who shall sell, or furnish, keep, or give away, under color of the license herein required, any liquor, drink, or beverage prohibited by law, shall, in addition to any penalty which he may otherwise be liable to, forfeit said license and be forever disqualified from holding any such license or being in the employment of any person holding such license; and any person holding such license who shall knowingly employ any person so disqualified shall forfeit his license and be in like manner disqualified." In Cassidy v. Howard, 140 Ga. 844, 80 S. E. 1, it was held that, in an equitable proceeding to abate and enjoin a "blind tiger" under the provisions of Civil Code 1910, §§ 5335 et seq., on the hearing of the application for an interlocutory injunction, the defendant could not be adjudged to be disqualified from doing business under a "near beer" license held by him, from ever doing business under any such a license, and from being employed by another engaged in business under such a license, and that, in such a proceeding, he could not be enjoined from so doing. It was said in the opinion that the expression, "in addition to any penalty which he may otherwise be liable to," he shall forfeit his license, etc., was inapplicable to the equitable proceeding provided by the statute for the abatement of a "blind tiger," but constituted an additional penalty upon such person, if con-

victed of a violation of the general prohibition law. This decision, however, did not hold that the indictment for a violation of the prohibition law must allege, and the evidence prove, that the violation was under color of the license held by the defendant, and that the judge in trying the criminal case had to include in his sentence a declaration of disqualification. The law does not so provide, but expressly declares that, in addition to any penalty to which he may otherwise be liable, he shall forfeit his license, and be forever disqualified from holding any such license. The language of this act makes it self-operative. By the Penal Code 1910, § 426, the sale, bartering, giving away to induce trade, or keeping or furnishing, or manufacturing, or keeping on hand at a place or business of any alcoholic, spirituous, malt, or intoxicating liquors, is declared to be a misdemeanor. For a violation of this law, an offender is subject to fine or imprisonment, or both. If a person holding a "near beer" license, under color of it, violates the law just mentioned, and is convicted of such violation, he is subject to fine or imprisonment; but, in addition, the Civil Code 1910, § 1769, declares him to be disqualified from thereafter engaging in that character of business. *Ipsa facto* upon conviction he becomes disqualified, and it requires no judgment of disqualification to make him so. It is the law, not a judgment announcing it, which works the disqualification. It is suggested that he should be indicted for violating the prohibition law "under color of the license," and should be tried and convicted therefor, and sentenced accordingly. The difficulty about this suggestion is that there is no such distinct criminal offense as violating the prohibition law under color of a license. Section 426 of the Penal Code creates no such offense different from any other violation of the law, and § 1769 of the Civil Code does not undertake to create a new criminal offense, but simply to provide for a disqualification arising from a conviction under the other law. If an indictment should undertake to describe a different offense from that provided in the statute, either it might be demurrable, or the superadded words might be surplusage. But no new offense can be created by the courts by tacking a civil statute onto a criminal one.

There are two classes of forfeitures, disqualifications, or the like. In one class they are made a part of the penal statute, enter into the trial of the criminal case, and are declared as a part of the sentence pronounced by the court in that case. In the other they do not form any part of the trial or sentence in the criminal case; but the forfeiture or disqualification is de-

clared by the statute itself upon the happening of some event, such as a conviction under the penal law, or a judgment imposing the usual penalty under that law. Under the first class of statutes mentioned, a judgment of forfeiture or disqualification is necessary. Under the latter, no judgment declaring a forfeiture is essential; but from the existence of certain facts the law declares a certain result. Both classes of statutes have been recognized as legal in this state. In *Newman v. State*, 101 Ga. 537, 28 S. E. 1005, the statute under consideration declared that, "if any vendor of intoxicating liquors shall be convicted of the violation of any law controlling or regulating the liquor traffic, it shall be a part of the sentence that his license shall be forfeited, and that he shall be disqualified from selling any form of intoxicating liquors for the term of one year from the date of the sentence in his own name or right as agent or otherwise, and, if he shall sell, or become in any way interested in the sale of, such liquors after his license has been revoked, he shall be guilty of a misdemeanor." Here the revocation of the license and disqualification were distinctly made a part of the sentence to be imposed by the trial judge, and it only became a misdemeanor for the defendant to sell liquor after such a revocation was made. It was accordingly held that, as the judgment must follow the pleadings, the indictment or presentment should charge that the defendant was a licensed dealer. On the other hand, in *Sprayberry v. Atlanta*, 87 Ga. 120, 13 S. E. 197, a municipal ordinance, enacted under charter authority, provided that "the conviction in a state court of any person licensed to retail spirituous or malt liquors, for the violation of the state statute in relation to the sale of ardent spirits to a minor or a person already intoxicated, or the conviction of a retailer before the recorder's court for the violation of any of the provisions of this ordinance, shall work an immediate revocation of the license of such person; and for any further exercise of the privilege granted by such license he shall be punished as one retailing without license." Evidently it was not necessary, under an indictment in the state court or the summons in the recorder's court, for a judgment of forfeiture of the municipal license to be declared. There was no provision of law for any such declaration. But, upon a judgment of conviction, the law itself provided for the forfeiture. In delivering the opinion, Mr. Justice Simmons said (87 Ga. 124): "And we think they can also impose a condition that, upon his conviction of a violation of a state law or of a city ordinance regulating the sale of

liquors, his license shall be *ipso facto* revoked." In *Cassidy v. Macon*, 133 Ga. 689, 66 S. E. 941, the ordinance involved provided that the conviction of the holder of a "near beer" license of a violation of the municipal ordinance prohibiting the having or keeping of intoxicating liquors in the city for the purpose of illegal sale should work an immediate cancellation, revocation, and forfeiture of such license. There was no provision in the ordinance requiring the recorder to declare a forfeiture, and it appears from the record on file that the judgment of the recorder did not contain any such declaration. A resolution was introduced before the municipal council to declare a revocation and cancellation of the license, and the person to whom it had been granted filed an equitable petition to enjoin the municipality from interfering with his business. If it had been necessary to have a judgment of forfeiture, the introduction before the municipal council of an *ex parte* resolution would not have answered. This court gave it no effect in considering the case, but upheld the ordinance providing for a revocation or forfeiture *ipso facto* upon conviction. The difference in views of some of the judges who presided in that case will be mentioned later.

There are other laws providing for certain disqualifications besides those in regard to the sale of liquor or "near beer." The Constitution declares that "no person who, after the adoption of this Constitution, being a resident of this state, shall have been convicted of fighting a duel in this state, or convicted of sending or accepting a challenge, or convicted of aiding or abetting such duel, shall hold office in this state, unless he shall have been pardoned; and every such person shall also be subject to such punishment as may be prescribed by law." Civil Code 1910, § 6407. Here is a provision for the imposition of the ordinary punishment under the penal law, and also for a disqualification arising from a conviction; but it would hardly be contended that the constitutional disqualification would be of no force unless the judge, in pronouncing sentence, saw fit to incorporate in it such a provision. By the Civil Code 1910, § 35, it is declared that certain classes of persons shall not be permitted to vote. One of these classes includes "those who shall have been convicted in any court of competent jurisdiction of treason against the state, of embezzlement of public funds, malfeasance in office, bribery, or larceny, or of any crime involving moral turpitude, punishable by the laws of this state with imprisonment in the penitentiary, unless such person shall have been pardoned." Here is a disqualification resulting by stat-

ute from the fact of conviction. But no judge ever thought of including in every sentence pronounced upon a person so convicted that he should be disqualified from voting, nor will it be contended that the disqualification would be inoperative because it was not declared by the judge.

In the statute now under consideration there is no hint of any requirement that either the indictment or accusation or sentence should include any provision in regard to disqualification. Indeed, there is nothing in express terms said about any conviction, but only as to the perpetration of certain acts. But, in view of the expression that under such circumstances the person, "in addition to any penalty which he may otherwise be liable to," shall forfeit his license, and be disqualified from holding another, this court, in *Cassidy v. Howard*, 140 Ga. 844, 80 S. E. 1, referred to the forfeiture and disqualification as something resulting, in addition to the imposition of the usual penalties, from a conviction. While the expression was used in the opinion that it was an additional penalty to be imposed upon such person if convicted, this did not mean that it must be imposed by the judge, but by the law. To hold otherwise would require this court to construct by implication a new and additional crime, or element of a crime, not contained in the penal statute, and to authorize the introduction, on the trial of one prosecuted under the Penal Code, of a new issue in addition to the one provided by the penal statute itself, and to do this by the construction of a distinct and separate civil statute. This court has no authority to do any such thing. The real point determined in the *Cassidy* Case was that the statutory provision in regard to abating or enjoining a "blind tiger" did not include the right to declare a forfeiture of the license or a disqualification to hold one.

Without undertaking to give an exact definition of the expression, "under color of the license herein required," it is plain that the conduct of the petitioner for the writ of mandamus, which brought about his conviction, was under color of his license within the meaning of the statute. It was admitted in the agreed statement of facts that the petitioner was, in 1911, engaged in the business of selling a beverage or drink in imitation of or intended as a substitute for beer, under a license granted by the state for that purpose, and that he was convicted in the city court of Macon of unlawfully keeping on hand at his place of business alcoholic, spirituous, malt, and intoxicating liquors; and it was further admitted that this unlawful keeping occurred at the place of business for the operation

of which he held a license, and while he was conducting business under such license. His only authority or color of authority for conducting business at that place, so far as the record shows, was by virtue of his "near beer" licenses. While doing such under such license, he violated the statute by virtue of which the license was obtained, did an act which was prohibited by it, and was convicted for that act under a statute which made it penal. To hold that this was not within the terms of the act in regard to the forfeiture of the license and the disqualification to obtain another, on the theory that the act was not done under color of his license, would be simply juggling with words. The petitioner made an affidavit that, while the facts above mentioned were true, he did not keep the liquors at his place of business under color of his license, but in violation of the law. A witness may sometimes aid a court in ascertaining the facts, or may render their ascertainment difficult. But the law cannot be changed by affidavit.

If the law provides a disqualification for one applying for a license of this character, and its terms are applicable to the present plaintiff in error, it follows as a matter of course that he had no right to compel the ordinary to grant to him such a license, and that there was no error in refusing to grant a mandamus absolute to compel that officer to do so.

3. The provision of the act of 1908 (Acts Extra Sess. 1908, p. 1112) which is codified in the Civil Code 1910, § 1769, was attacked as unconstitutional. It was contended that it was violative of the 14th Amendment of the Constitution of the United States, "in that it deprived your relator of the right to earn a livelihood, which is contrary to the Constitution of the United States and the Amendments thereof;" and also that the refusal of the ordinary to issue the license was in violation of article 1, § 3, of the Constitution of the state, which likewise declares that no person shall be deprived of life, liberty, or property, except by due process of law, "in that it deprives your relator of the right to earn a livelihood in a legitimate occupation." The Supreme Court of the United States has expressly declared that the 14th Amendment—broad and comprehensive as it is—was not designed to interfere with the police powers of the states. *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357. And the same tribunal (referring to the powers possessed by the states, and those which had been delegated to the Federal government) has said that "all those powers which relate to merely municipal legislation, or what may, perhaps, more

properly be called internal police, are not thus surrendered or restrained, and that consequently, in relation to these, the authority of the state is complete, unqualified, and exclusive." *New York v. Miln*, 11 Pet. 102, 139, 9 L. ed. 648, 662; *Black, Intoxicating Liquors*, § 27. In *Stone v. Mississippi*, 101 U. S. 814, 820, 25 L. ed. 1079, 1080, Mr. Chief Justice Waite said: "The contracts which the Constitution protects are those that relate to property rights, not governmental." If the license involved were one to sell spirituous or malt liquors, it would be settled by repeated adjudications that such a license would constitute neither a contract nor a property right in the licensee as against the licensor, but a mere permit to do what would otherwise be an offense against the general law, and that it might be revoked or denied without violating the above-mentioned provision of the Constitution of the United States or that of the state. *Ison v. Griffin*, 98 Ga. 623, 25 S. E. 611; *Plumb v. Christie*, 103 Ga. 686, 42 L.R.A. 181, 30 S. E. 759; *Black, Intoxicating Liquors*, § 34; 1 *Woollen & T. Intoxicating Liquors*, § 124.

It is contended, however, that the license to sell a beverage, drink, or liquor in imitation of or intended as a substitute for beer, ale, wine, whisky, or alcoholic, spirituous, or malt liquors, for which provision is made in the Civil Code 1910, § 1765, should not be analogized to a license to sell intoxicating liquors, and that traffic in such drinks should not be subject to police regulation like the sale of spirituous or malt liquors, but should rather be classified with the ordinary vocations of life which advance human happiness, or with trade and commerce which do not produce, or have a tendency to produce, immorality, suffering, or loss. But, if one desires to do the business of selling imitations of or substitutes for liquor, he must not be surprised if the law deems it necessary to cast certain safeguards around that business. These drinks have come to be designated by the colloquial term "near beer." In *Campbell v. Thomasville*, 6 Ga. App. 212, 64 S. E. 815, it was held that "the selling of 'near beer' is a business which, from its very nature, admits of strict regulation under the police power. It stands legitimately in a different class from the business of selling drugs, soda water, and similar liquids. Regulations may be upheld as applied to this occupation which would be arbitrary and unreasonable if there were an attempt to apply them to other businesses." In the opinion *Powell, J.*, said (6 Ga. App. 228): "The very name 'near beer' is as suggestive to the guardian of the police power of a necessity for close oversight, regulation,

and control as it is to the drinking classes of possibilities which they may hope to find in the beverage. Its very name, so to speak, is a transcript of its character. A liquor that is 'near beer,' looks like beer, smells like beer, tastes somewhat like beer, capable of cheering, though not of inebriating, well deserves the attention of those whose duty it is to protect the health, peace, and good order of the community. The argument that, since 'near beer' is not an intoxicating liquor, dealers in it should stand on the same footing as dealers in soda water and other similar beverages, well comports with the zeal and partizanship which is to be expected of counsel in the case; but we would stultify ourselves if we did not recognize an essential distinction and a well-marked difference between the two classes." In *Cassidy v. Macon*, 133 Ga. 689, 66 S. E. 941, this court recognized that the temptations to which persons engaged in selling "near beer" may be subjected to violate the prohibition law, and the peculiar facilities which such a business afforded to unscrupulous persons engaged therein for such violation, with injurious consequences to the peace, good order, and security of the community, furnished a proper basis for police regulation of the business. Mr. Justice Atkinson and the writer of the present opinion dissented in that case. They did not dissent to the view above expressed in regard to what is called "near beer," but to going further and holding that a separate license held by the same person for the sale of "soft drinks," such as soda water and the like, fell within the same category, and that such license could also be revoked, because under his "near beer" license the holder of both violated the law. There may also have been some doubt as to the extent of the charter power there involved. The right to exercise police control over the sale of what is commonly known as "near beer" was also recognized in *Manor v. Bainbridge*, 136 Ga. 777, 71 S. E. 1101.

While, at the time of the passage of the act of 1908, an extensive change was being made in the method of dealing with the penitentiary convicts, and the obtaining of revenue in connection therewith was an important consideration in the passage of that act, it cannot be denied that it recognized the nature of the business which was being licensed, and made police regulations and restrictions in regard to it. The act has since been codified in the Code of 1910 in §§ 1763 et seq., and that Code has been adopted by the legislature. In it the provision now under consideration appears in § 1769. If there was ever any question as to whether that section might have been objectionable as a part of the original act, 51 L.R.A. (N.S.)

It has now been adopted as a part of the Code. *Central of Georgia R. Co. v. State*, 104 Ga. 831, 42 L.R.A. 518, 31 S. E. 531. In *Carswell v. Wright*, 133 Ga. 714, 66 S. E. 905, the provision under consideration, which constituted the 8th section of the act, was not held to be unconstitutional; but it was merely said that, even if it were unconstitutional, that would not destroy the entire act.

It has been said that "the 14th Amendment forbids the states to make or enforce any law which shall 'abridge the privileges or immunities of citizens of the United States.' But the right to sell intoxicating liquors is not one of the privileges or immunities here contemplated." *Black, Intoxicating Liquors*, § 36. And likewise we do not think that the right to sell things in imitation of or intended as a substitute for spirituous or malt liquors, in a state which prohibits the sale of intoxicating liquors, is one of the privileges or immunities of citizens of the United States which cannot be dealt with or abridged under the police power of the state.

Judgment affirmed.

All the Justices concur.

LOUISIANA SUPREME COURT.

STATE OF LOUISIANA

v.

SAM GEORGE, Appt.

(— La. —, 63 So. 866.)

Indictment — sale of liquor — disjunctive — duplicity.

Where an indictment follows the words of a statute, and charges one with illegally selling "spirituous or intoxicating" liquors, the use of the disjunctive "or" does not make the indictment bad for duplicity, as the lawmaking power has the right to make the sale of "spirituous" and "intoxicating" drinks one crime, chargeable in one indictment.

(December 15, 1913.)

Headnote by BREAUX, Ch. J.

Note. — *Indictment: use of disjunctive "or" in charging kind or quality of liquor sold.*

General rule.

"An indictment or information must not charge a party disjunctively or alternatively in such manner as to leave it uncertain what is relied on as the accusation against him." 22 Cyc. 296.

It is a general rule that where a statute makes it an offense to do this or that or the

A PPEAL by defendant from a judgment of the Judicial District Court for the Parish of Caddo convicting him of unlawfully retailing spirituous or intoxicating liquors without a license. Affirmed.

The facts are stated in the opinion.

Messrs. Stewart & Crane, for appellant:

An indictment or information must not charge a party, disjunctively or alternatively, in such manner as to leave it uncertain what is relied on as to the accusation against him, and it is fatally defective for uncertainty when it alleges an unlawful sale of "spirituous or intoxicating liquor."

State v. Sullivan, 125 La. 560, 51 So. 588; Thompson v. State, 37 Ark. 408; Grantham v. State, 89 Ga. 121, 14 S. E. 892; Smith v. State, 19 Conn. 493; Locke

v. Com. 23 Ky. L. Rep. 740, 63 S. W. 795; Raubold v. Com. 111 Ky. 433, 63 S. W. 781; 2 Bishop, New Crim. Proc. 2d ed. 1913, pp. 463, 464; 23 Cyc. 217, ¶ 93.

Mr. G. A. Gondran, with Messrs. R. G. Pleasant, Attorney General, and W. A. Mabry, for the State:

An indictment or information which charges that accused sold spirituous or intoxicating liquors is not defective for uncertainty by reason of the use of the word "or" instead of the word "and."

Cost v. State, 96 Ala. 60, 11 So. 435; Mitchell v. State, 141 Ala. 90, 37 So. 407; 2 McClain, Crim. Law, § 1273; Thomas v. Com. 90 Va. 92, 17 S. E. 789.

It is not error to charge the offense of selling spirituous liquors, wines, etc., in the

other, mentioning several things disjunctively, the whole may be charged conjunctively in a single count, as constituting but a single offense; in which case there can be but one conviction and one punishment, as for one offense. See Clifford v. State; Thompson v. State; and Wong Sing v. Independence, —, infra.

It is not the purpose of this note to deal with the question of the use of the conjunctive form of allegation. Accordingly, cases like State v. Nations, 75 Mo. 53, holding it proper to use the conjunctive when the statute uses the disjunctive, are excluded, as such cases, it would seem, are not necessarily authority for the proposition that the use of the disjunctive would be improper, as a broad view of the cases cited in this note apparently leads to the conclusion that the court might logically hold either form of allegation proper.

As a general rule, the exceptions to which will be stated later, the use of the disjunctive "or" in charging kind or quality of liquor sold is not permissible. This is on the ground that its use renders the indictment uncertain; and on this point the court in Clifford v. State, 29 Wis. 327, said: "And the reason of the rule which condemns this uncertainty of pleading is obvious. The accused is entitled to know certainly with what offense he is charged, and especially is he entitled to have the offense so charged that upon acquittal or conviction he may plead the same in bar of a subsequent prosecution for the same offense, and establish his plea by production of the former record. Upon such rambling, disjunctive, and ambiguous statement, charging that the defendant committed one offense or another, but none with certainty, the record would establish nothing whatever in his favor. If separately so charged, at the choice of the prosecution, the statute under consideration creates several distinct offenses as the vending, dealing in, or giving away with unlawful intent, of any spirituous or ardent liquors or drinks, or the vending, dealing in, or giving away with like intent, of any intoxicating liquors or drinks; and should the defendant in a case like the present be

subsequently complained against for the commission of any one of these six several offenses, stated by itself, or of all of them, each being separately stated in different courts or complaints, or the whole alleged conjunctively, and any one or all of them should be the identical offense or offenses of which he was formerly convicted, it would, nevertheless, be impossible for him to protect himself by pleading and producing the first record. It is not so, however, where the several acts specified in the statute are charged conjunctively, or the word 'and' instead of 'or' is used; for, in that case, all are regarded as constituting but one offense, and the conviction or acquittal is a complete bar to any subsequent prosecution for all or either, whether separately or otherwise pleaded and alleged."

So, a complaint or indictment alleging an unlawful sale of "spirituous or intoxicating liquor" was bad for uncertainty, even after a plea of *nolo contendere*. Com. v. Grey, 2 Gray, 501, 61 Am. Dec. 476.

And a complaint charging in the alternative that defendant sold "wines, spirituous liquor, or other intoxicating beverage, was bad for like reason, the terms "wines," "spirituous liquor," and "other intoxicating beverage," not being of the same import. Smith v. State, 19 Conn. 493. The court thought that rule followed by them in this case might savor of unnecessary exactness, and excite the regret of those laboring to suppress intemperance, but considered that if they should, "in this comparatively unimportant case," break in upon established principles, such innovation might carry them far afield in administering criminal law.

And the same was true of a complaint charging defendant with "selling, or suffering to be sold, ale, wine, rum, or other strong or malt liquors, or mixed liquors a part of which was ale, rum, wine, or other strong or malt liquor." State v. Colwell, 3 R. I. 284.

So, too, an information for selling "beer or ale" was bad. Rex v. North, 6 Dowl. & R. 143, 28 Revised Rep. 538.

And likewise with a charge that defend-

disjunctive instead of the conjunctive, by using the word "or" in lieu of "and" in describing the various kinds of liquors and drinks charged to have been sold in the indictment.

Cunningham v. State, 5 W. Va. 508; Morgan v. Com. 7 Gratt. 592.

Breaux, Ch. J., delivered the opinion of the court:

An information was filed against the accused, in which he is charged with having unlawfully retailed spirituous or intoxicating liquors without previously obtaining a license. Defendant filed a motion to quash, in which he alleged that the information was defective for uncertainty and duplicity, as it contained an alternative

description of liquor. The court overruled the motion for reasons averred in the bill of particulars. A bill of objection was taken to the court's ruling. The alternative description of liquor is the ground upon which defendant rests his defense. The failure to charge the acts cumulatively, the contention is, renders the indictment defective.

There are decisions in other jurisdictions pertinent to the question of an alternative description of liquor; they are cited and commented upon by learned counsel for the accused, and, in a measure, sustain the contention. Under different laws and precedents it may well be that the conclusion is entirely proper. Even with us, it mig be

ant sold "whisky or brandy." Thompson v. State, 37 Ark. 408.

And an indictment which charged disjunctively that the accused sold a quantity of "spirituous, malt, or intoxicating liquor" was bad on special demurrer. Grantham v. State, 89 Ga. 121, 14 S. E. 892.

But the use of the disjunctive "or" in charging the unlawful selling of different kinds of intoxicating liquors was held proper in Morgan v. Com. 7 Gratt. 592; Thomas v. Com. 90 Va. 92, 17 S. E. 788; Cunningham v. State, 5 W. Va. 508. In Morgan's Case, the indictment was for unlawfully selling "rum, wine, brandy, or other spirituous liquors," while in the Thomas Case, it was for a like selling of "intoxicating liquors, wine, ardent spirits, spirituous or malt liquors, or mixtures thereof." The latter case rests upon the former, which contains no opinion by the appellate court, so that it is difficult to say wherein these cases are distinguishable from other cases cited in this note to the contrary, if, indeed, they are distinguishable at all.

The Cunningham Case also follows Morgan's Case.

In Lewis v. Com. 90 Va. 843, 20 S. E. 777, the indictment charged defendant with selling "wine, ardent spirits, malt liquors, or a mixture thereof," but no objection was raised to the sufficiency of the charge, and the question was not discussed by the court. No attempt, however, has been made to gather all the cases of this kind, where the point is assumed without discussion.

A complaint charging a sale of beer, "a fermented or malt liquor," is not bad for duplicity. State v. Nerbovig, 33 Minn. 480, 24 N. W. 321.

And an indictment substantially in the language of a statute regulating the sale and giving away of spirituous, vinous, or malt liquors was sustained in Mays v. Com. 3 Ky. L. Rep. 250 (abstract).

—synonymous words.

An important exception to the general rule against the use of the disjunctive is where the word "or" in a statute is used

in the sense of "to wit," that is, explaining what precedes, and making it signify the same thing. When this is the case, an indictment or complaint adopting the language of the statute is well framed. So it may be stated as a well-established rule that the use of the disjunctive "or" to connect synonymous words relating to the kind or quality of liquor sold does not render an indictment defective. Com. v. Grey, supra; Clifford v. State, 29 Wis. 327; State v. Boncher, 59 Wis. 477, 18 N. W. 335; Wong Sing v. Independence, infra; Figueroa v. State, — Tex. Crim. Rep. —, 159 S. W. 1188.

So, "malt liquor" and "beer" being in effect synonymous under statute, a complaint averring that defendant sold "malt liquor or beer" was not bad. Figueroa v. State, supra.

And the use of "or" in an indictment charging the sale of "intoxicating or malt liquors," to explain the kind of intoxicating liquors sold, to wit, malt as distinguished from ardent or spirituous liquors, is permissible. State v. Boncher, 59 Wis. 477, 18 N. W. 335.

But "spirituous" and "intoxicating" are not synonymous, and a charge in the disjunctive, that defendant sold "spirituous or intoxicating liquors," is uncertain. Clifford v. State, 29 Wis. 327.

If, however, the words "intoxicating" and "spirituous" should be used synonymously, a charge in the disjunctive would be good. But in Com. v. Grey, supra, the court distinguished between the two terms, saying: "All spirituous liquor is intoxicating; yet all intoxicating liquor is not spirituous. In common parlance, spirituous liquor means distilled liquor. . . . Fermented liquor, though intoxicating, is not spirituous."

And an information charging an unlawful sale of "spirituous and malt liquors, or spirituous or malt liquors," is bad for uncertainty and duplicity. Wong Sing v. Independence, 47 Or. 231, 83 Pac. 387. The court said: "There is a marked distinction between spirituous and malt liquors. The former is obtained by distillation, the latter by fermenting an infusion of malt.

different if this were the first time that the question is before this court for decision.

At the outset, before taking up the view taken in our jurisprudence, we will state that, according to some of the lexicographers, the difference in meaning between intoxicating and spirituous is slight. The latter is defined as containing intoxicating beverage as well as the former. It may not be quite as expressive as "intoxicants;" it none the less indicates in one sense a drink which, by excessive use, will intoxicate.

We take up for discussion, first, the function of "or" between the alleged two alternatives of the charge. "Or," referring to the words following it, does not connect a substitute to the phrase preceding, requiring that the one or the other should be used, but not both parts of the sentence as used in this instance. It is here used as a conjunction; it makes two words co-ordinate one to the other as equivalents.

In the concrete, one is generally considered as effective as the other in the popular language of those who indulge in strong drinks. It is the popular sense of the words. Words of a law are generally

to be understood in their general and popular sense. Civ. Code 14, "General and Popular Use." Civ. Code 1946.

In one of the notes to Sedgw. Stat. & Const. Law, 2d ed. p. 371, these words are convertible in meaning in a criminal statute. Others have taken a different view. The only purpose is to state that the interpretation is different in this state, and that the view is sustained by precedent. Thus, it has been held, where "or" is used as expressive of the whole meaning of the act charged, and not as expressive of an entirely different meaning, the information is not bad. Thus, charging that the defendant forged a check or bill of exchange, both meaning the same thing, and the latter intended as explaining, is not bad for duplicity. *State v. Maas*, 37 La. Ann. 292; *Brown v. Com.* 8 Mass. 59; 1 Bishop, *Crim. Proc.* old ed. § 590.

Bishop (1913 ed.) is cited by learned counsel as sustaining their view. In some respects it expresses a different view in the last edition of his work; it does not take from the force of the decisions and from the earlier decisions in which reference is made from the text of Bishop. The fore-

The qualifying words 'spirituous' and 'malt' are therefore not synonymous terms, and the employment of either cannot be understood as implying the use of the other, so as to permit the disjunctive 'or,' as used in the phrase 'spirituous or malt liquors' set out in the complaint, to be construed as 'to wit,' such as spirituous liquor or whisky, malt liquor or beer, vinous liquor or wine, etc. The specific charge that Wong Sing sold 'spirituous and malt liquors,' assuming that these kind of beverages were blended so as to be embraced in a single transaction, is rendered uncertain by the subsequent statement in the complaint that he sold either 'spirituous or malt liquors'. . . . The pleading in the case at bar violates the provisions of the statute, which requires that the accusation must be direct and certain as to the crime charged, . . . and that it must charge but one crime, and in one form only."

"Ale," "beer," and "wine" are not synonymous, and a charge in the disjunctive, of the selling of such liquors, is uncertain. *Clifford v. State*, supra.

State v. Wilson, — La. —, 63 So. 868, rests upon the opinion in *STATE v. GEORGE*.

—negative averments.

It would seem that in pleading a negative averment in a criminal complaint, the connective "or" is properly used. See *State v. Carver*, 12 R. I. 285, a case not otherwise in point in this note.

Unnecessary or immaterial averments.

It would seem that the use of the dis-

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junctive "or" in an indictment, to connect superfluous matter as to the kind or quality of liquor sold with that which precedes, will not vitiate the indictment. That which is immaterial may be rejected as surplusage. No cases have been found on this phase of the question that are in point in this note, but see *Joyce on Intoxicating Liquors*, p. 693, and *Joyce on Indictments*, § 260. See also cases under "Synonymous words."

—effect of statute authorizing alternative averments.

Where statutes have been enacted, expressly or in effect, authorizing alternative or disjunctive allegations in certain cases, indictments in the statutory form are sufficient. So, in the following cases, indictments alleging that defendant sold "spirituous, vinous, or malt liquors" were good: *Cost v. State*, 96 Ala. 60, 11 So. 435; *Mitchell v. State*, 141 Ala. 90, 37 So. 407; *Brantley v. State*, 91 Ala. 47, 8 So. 816; *Smith v. Warrior*, 99 Ala. 481, 12 So. 418; *Powell v. State*, 69 Ala. 10.

It is the rule, however, in such cases, that each alternative must charge an indictable offense, or the indictment is bad *in toto*. *Raisler v. State*, 55 Ala. 64; *Allred v. State*, 89 Ala. 112, 8 So. 56; *Couch v. State*, 6 Ala. App. 43, 60 So. 539.

Thus, in *Allred v. State*, 89 Ala. 112, 8 So. 56, the indictment charged defendant with selling "spirituous, vinous, or malt liquors, or intoxicating bitters," where selling "intoxicating bitters" was not an offense against the law, so the indictment was bad as a whole under the above rule.

W. W. A.

going is the contemporaneous and long-continued interpretation. It is almost trite to quote the Latin maxim, *Contemporanea expositio est fortissima in lege*.

In other jurisdictions it has been held directly that the word "or" for "and" is not fatal for uncertainty. *Thomas v. Com.* 90 Va. 92, 17 S. E. 789; *Mitchell v. State*, 141 Ala. 90, 37 So. 407; *Cost v. State*, 96 Ala. 60, 11 So. 435; 2 McClain, Crim. Law, § 1273. Again we quote: "It is not error to charge the offense of selling spirituous liquors in the disjunctive instead of the conjunctive, by using the word 'or' in lieu of 'and' in describing the various kinds of liquors and drinks charged to have been sold in the indictment." *Cunningham v. State*, 5 W. Va. 508. The defense was not embarrassed by uncertainty. *Joyce, Indictments*, § 259; *State v. Van Doran*, 109 N. C. 864, 14 S. E. 32. Moreover, the information is written in the words of the statute; it furnishes every information necessary for the defense. It is sufficient to follow the words of the statute. There are several decisions in which that view is expressed. *State v. Benjamin*, 7 La. Ann. 47.

In conclusion, the lawmaking power has the authority to make the sale of intoxicating and spirituous drinks one crime, chargeable in one count. This it has done, and it devolves upon us to interpret the statute as written.

For reasons stated, the sentence and judgment are affirmed.

MINNESOTA SUPREME COURT.

PATRICK R. HOWLEY, Respt.,
v.

HUGH R. SCOTT et al., Appts.

(123 Minn. 159, 143 N. W. 257.)

Tax — sale — title — failure to perform official duty.

1. Plaintiff, a nonresident owner of real estate in this state, omitted through inad-

Headnotes by BUNN, J.

Note. — *Liability of taxing officer to individual for nonfeasance, misfeasance, or malfeasance.*

I. In general, 137.

II. Assessing officers.

a. General rule, 138.

b. As affected by motive, 141.

c. As dependent upon jurisdiction, 141.

d. Statutory protection, 144.

III. Collecting officers.

a. Protection by warrant.

1. In general, 146.

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vertence and forgetfulness to pay the taxes on his property for the last half of the year 1901. The property was sold for this unpaid tax in 1903, the time for redemption expired, and in an action to determine adverse claims it was adjudged that the certificate holder was the owner of the land free from any claim of defendant, the present plaintiff. The county auditor did not, at any time after such tax sale, place on the tax list furnished the county treasurer the words "Sold for taxes" opposite the description of plaintiff's land, nor did the county treasurer write or stamp said words on the receipts for taxes paid by plaintiff after such sale and before the time to redeem expired. Had the words "Sold for taxes" been written or stamped on such receipts, plaintiff would have redeemed from such sale. Plaintiff had no notice of such sale, or of the action to determine adverse claims, until after the judgment therein was entered. The complaint alleges in substance the foregoing facts, and demands of defendants, the county auditor and treasurer, judgment for the value of the property. It is held:

The facts pleaded show a failure by the county auditor to perform a duty imposed upon him by Rev. Laws 1905, § 875.

Officer — neglect of duty — liability.

2. A public officer is liable for the failure or neglect to perform a duty imposed upon him by statute, when such a duty is a ministerial one, when the person injured is one to whom performance was due, and when the failure to perform is the proximate cause of the injury sustained. The duty imposed by Rev. Laws 1905, § 875, on the auditor, and the duty imposed by Rev. Laws 1905, § 881, on the treasurer, are ministerial duties, and plaintiff was one to whom performance of such duties was due.

Proximate cause — tax sale — officer's negligence.

3. Though plaintiff was negligent originally in failing to pay the tax, the failure of the auditor to place the words "Sold for taxes" on the list furnished the treasurer was the proximate cause of plaintiff's loss. Assuming that the treasurer failed to perform a duty imposed on him by statute, such failure was a proximate cause of plaintiff's loss.

Tax — receipt — absence of indorsement — liability.

4. Whether the treasurer, in failing to

III.—continued.

2. Illegality disclosed by warrant, 147.

3. Where assessors acted without jurisdiction, 147.

4. Assessment under unconstitutional statute, 147.

b. Illegal or improper acts or omissions subsequent to warrant, 148.

c. Statutory protection, 150.

I. In general.

In passing upon the question of a taxing

write or stamp the words "Sold for taxes" on the tax receipts furnished plaintiff, failed to perform a statutory duty, if the lists furnished him by the auditor did not show the land had been "Sold for taxes," is not decided.

Pleading — sufficiency of complaint.

5. The complaint states a cause of action, at least as against the defendant auditor, and the joint demurrer of both defendants was properly overruled.

(October 10, 1913.)

A PPEAL by defendants from an order of the District Court for Hennepin County overruling their joint demurrer to the complaint in an action brought to recover damages for loss of title to plaintiff's prop-

erty, alleged to have been caused by defendants' negligent failure to notify plaintiff of the sale of the property for taxes. Affirmed. The facts are stated in the opinion. Mr. R. S. Wigglin, for appellants: Plaintiff himself was guilty of contributory negligence in failing to pay his taxes, knowing, as he did, that the second half had not been paid, and this contributory negligence was the proximate cause of his loss. Breisch v. Coxe, 81 Pa. 346; Mechem, Pub. Off. 680; Lick v. Madden, 36 Cal. 208, 95 Am. Dec. 175; Grove Dist. Twp. v. Bowman, 55 Iowa, 129, 7 N. W. 492; Boardman v. Hayne, 29 Iowa, 339; Easton v. Doolittle, 100 Iowa, 374, 69 N. W. 672; Rising v. Dickinson, 18 N. D. 478, 23 L.R.A. (N.S.)

officer's civil liability to an individual who has suffered either in person or property by reason of the officer's nonfeasance, misfeasance, or malfeasance, the courts have consistently endeavored to apply the general principles that have always been applied to public officers in general. In order to do so they have been obliged to consider the nature and character of the act or omission of which complaint is made, and determine whether the officer was obliged to act in a capacity judicial, quasi judicial, or merely ministerial. By reference to note to Austin v. Vrooman, 14 L.R.A. 138, and Thompson v. Jackson, 27 L.R.A. 92, it will be seen that, as to the liability of judicial officers performing duties of a judicial nature within the scope of their authority, the general rule of nonliability is clear and unquestioned, but that the question of jurisdiction is a troublesome one in applying the rule. The same difficulty appears in an aggravated form when the rule is to be applied to taxing officers, who are classed as quasi judicial, ministerial, executive, and in one or two cases as legislative officers. The liability of officers illustrative of these different classes has been considered in several notes. See Index to L.R.A. Notes, title, "Officers," §§ 38-42.

The question as to the right of the purchaser at an invalid tax sale, in the absence of statute, to be reimbursed by the taxing authority for the purchase price, or for taxes subsequently paid by him, was considered in the note to Lissio v. Natchitoches Parish, 31 L.R.A. (N.S.) 1141, and the same question with reference to the failure of the purchaser's title on account of irregularity in the procedure was considered in the note to Foster v. Malberg, 41 L.R.A. (N.S.) 967.

Cases in which the question raised by this note has been passed upon involve either assessing officers or collecting officers within the broad meaning of those terms. The assessing officers are usually classed as quasi judicial, and the collecting officers (sheriffs, treasurers, or other officers when acting as collectors of taxes are included) are usually treated the same as officers

executing a mandate or process issued by a court. There are some cases like *Howley v. Scott*, where purely ministerial duties are involved, that might not be capable of classification either as assessing or collecting officers were those terms used in their strictest sense; hence, those terms are here used in the broader sense, so as to include such cases.

II. Assessing officers.

a. General rule.

Since the assessment of taxes is a quasi judicial act, those who are charged with the duty of making the assessment are not liable at common law for mere errors or mistakes of judgment to private persons injured, even though the assessment is excessive, if the assessment is within their jurisdiction. This rule has been applied:

—where the averment was that the assessor "wilfully and against law" assessed plaintiff's property at too large a sum, since such language does not imply that he acted maliciously, or with intent to wrong or injure the owner. *Ballerino v. Mason*, 83 Cal. 447, 23 Pac. 530.

—even though the taxpayer had furnished the assessor with a sworn statement of the amount of his taxable property, if the assessor, believing the statement to be erroneous, and that the taxpayer owned property not included therein, had assessed him with a higher valuation, or included more property in the assessment than was listed in the statement. *Parkinson v. Parker*, 48 Iowa, 667.

—where the county treasurer is by law charged with the duty of assessing omitted property, and he had assessed property after having decided that it was omitted, even though, as a matter of fact, the property assessed had not been omitted, and the owner thereof, after having paid the taxes, brought his action against the county treasurer, alleging that he acted in the matter unlawfully, wilfully, maliciously, oppressively, and tortiously. *Stevens v. Carroll*, 130 Iowa, 463, 104 N. W. 433. See cases cited

127, 138 Am. St. Rep. 779, 121 N. W. 616, 20 Ann. Cas. 424; Menasha Wooden Ware Co. v. Harmon, 128 Wis. 177, 107 N. W. 299; State v. Ruth, 9 S. D. 84, 68 N. W. 189.

Mr. John F. Byers, for respondent:

Failure to notify plaintiff of his danger of losing his land was the result of a failure of both defendants to perform a statutory duty. Scott's failure was not the sole, but was a strong, factor in the result.

Teal v. American Min. Co. 84 Minn. 320, 87 N. W. 837.

The liability of officers for violation of a statutory ministerial duty is beyond question.

Henly v. Lyme Regis, 5 Bing. 107, 6 L. J. C. P. 222, 30 Revised Rep. 542; Amy v.

infra, II. b, on question of corrupt or malicious motives.

—where there should have been an allowance of \$1,500 in the valuation as property exempt under the statute, and the record did not disclose the fact that such an allowance had been made, it being alleged that the excessive valuation was made by the assessors wilfully, maliciously, and corruptly. Weaver v. Devendorf, 3 Denio, 117. See cases cited infra, II. b, as to effect of corrupt motive.

—even where the statute makes it the duty of the assessor to call upon each taxpayer in the county in person, or by deputy, and to obtain from him a correct list and valuation of all his taxable property, and the assessor had not done so. Daugherty v. Bazell, 123 Ky. 424, 96 S. W. 576, 13 Ann. Cas. 677.

—under a statute which makes it the duty of the selectmen to assess a poll tax upon each inhabitant of the district, and provides that the tax warrant issued upon such adjustment shall be valid unless the taxable shall appear before the selectmen and tender to them an oath in writing, sworn and subscribed before some magistrate, that he had taken up a residence elsewhere, even though it should appear later that they had assessed a nonresident of the district. Smith v. Bradley, 20 N. H. 117. As to jurisdiction to decide the question of residence, generally, see cases cited infra, II. c.

—where the land had been assessed to a nonresident owner instead of to the occupant, as the statute directed, but plaintiff by agent had encouraged the mistake, so as to be estopped from raising the point upon suit by him for trespass against the assessors. Hilton v. Fonda, 86 N. Y. 339.

—where it was alleged that the election of the collector to whom they gave the warrant was illegal; that the assessment was irregular, and that the invoice or tax duplicate furnished to the collector was not sworn to by the assessor. Odiorne v. Rand, 59 N. H. 504.

—where nothing more is alleged than errors of judgment, unintentional mistakes. 51 L.R.A. (N.S.)

The Supervisors (Amy v. Barkholder) 11 Wall. 136, 20 L. ed. 101; State v. Ruth, 9 S. D. 84, 68 N. W. 189; Anderson v. Settergren, 100 Minn. 294, 111 N. W. 279.

The neglect of plaintiff to pay his taxes in 1902 was not concurrent with the negligence of defendants nor subsequent thereto, but was so long and so far antecedent as to be in any view of the case too remote to be considered as a contributing cause of the injury.

Shearm. & Redf. Neg. 6th ed. §§ 99, 100.

Bunn, J., delivered the opinion of the court:

This is an appeal by defendants from an order overruling their joint demurrer to the complaint. The facts alleged in the

irregularities, or illegalities in the assessment. Edes v. Boardman, 58 N. H. 580; Odiorne v. Rand, 59 N. H. 504; McDaniel v. Tebbetts, 60 N. H. 497; Barton v. Shaw, 63 N. H. 122.

—where the selectmen, acting as assessors, doomed to quadruple valuation the plaintiff's property upon her refusal to turn in a list of her taxable property, and it was alleged that they acted illegally. Fawcett v. Dole, 67 N. H. 168, 29 Atl. 693.

—where the taxpayer fails to return to the assessors a list of his taxable property, as he is required to do by statute, and they make the assessment, adding the penalty prescribed by statute, so long as they have any reliable information as to the amount of the property upon which they assess the taxpayer. Taylor v. Moore, 63 Vt. 60, 21 Atl. 919.

—where the assessors were compelled to decide whether or not the property was exempted from taxation by a statute. Barlyte v. Shepherd, 35 N. Y. 238. See cases cited infra as to conflict among the decisions as to whether or not the principle is applicable to the particular fact here stated.

—where the assessors had assessed bank accounts at par value instead of market value. Williams v. Weaver, 75 N. Y. 30.

—even though but two out of three members of the board signed the warrant. Thomas v. Clapp, 20 Barb. 165.

—even though the assessors illegally added 5 per cent additional to the entire amount of the list, to pay the tax collector, while he was entitled to only part thereof, and did not include all the taxable inhabitants upon the tax list. Easton v. Calendar, 11 Wend. 90.

—where plaintiff had some dogs in his possession which he had sold at the time of the assessment, of which fact he had informed the assessor, and later had notified the assessor that the dogs had been delivered to the purchaser, and were not in taxable's possession, but the assessor placed them upon the tax list as belonging to him. Hopkins v. Leach, 125 App. Div. 294, 109 N. Y. Supp. 713.

pleading attacked by the demurrer are as follows:

Defendant Scott was the auditor of Hennepin county from January 1, 1901, to December 31, 1910. Defendant Hanke was the treasurer of the county from December 20, 1904, to the time the action was commenced. Plaintiff, since 1889, has resided in the state of Washington, and has owned a lot in Minneapolis until divested of his title as hereinafter set forth. From 1893 to 1908 it was the custom of plaintiff to write to the treasurer of Hennepin county each year for a statement of the taxes on said lot for the preceding year, to receive such a statement, to forward the money to pay such taxes, and to receive a receipt for such payment. In the year 1902 plaintiff

received from the treasurer a statement showing one half of the taxes for 1901, instead of the whole tax, as had heretofore been the custom. He paid this half tax, but "through mistake and oversight failed to pay the other half thereof, and thereafter wholly forgot about said tax." In May, 1903, the land was sold at a tax sale for the unpaid 1901 tax, and was "bid in by the state." There being no redemption from this sale, the land was sold in 1906 at the forfeited sale to Hicks & Company for the sum of \$16.31. Thereafter Hicks & Company caused notice of expiration of redemption to be served by publication, and after the time for redemption expired brought an action against plaintiff. The summons was served by publication, and judgment by

—where plaintiff was assessed on the ground that he harbored a dog within the meaning of a statute making anyone who harbors a dog liable to taxation thereon, and it was alleged that the assessors erred in deciding that question. *Robinson v. Rowland*, 26 Hun, 501.

—where the selectmen, acting as assessors, had illegally refused to take the taxable's disclosure of the amount of his taxable property, and assessed him according to their own judgment, it appearing that he had later waived the right to make the disclosure by making an appointment with them as to time and place of making the same under oath, and had failed to keep his appointment. *Cooley v. Aiken*, 15 Vt. 322.

—where the listers of property for taxing purposes had made the assessment, and after hearing the taxable had refused to change the same, and filed the same with the clerk of the court, an appeal from their decision to the selectmen of the town had been taken by the taxable, and during the pendency of the appeal the majority of the listers had gone to the clerk's office and marked the particular assessments vacated, the selectmen were not liable to the taxable for treating the illegal vacation of the assessment as void, and restoring the assessment to its original form without notice to the taxable. *Fuller v. Gould*, 20 Vt. 643.

—where land was assessed that had been sold by the taxable and possession given to the purchaser, the assessor simply depending upon the last five-year assessment, supplemented by a list of transfers of real estate furnished by the county clerk. *Wilson v. Marsh*, 34 Vt. 352.

And in *Macklot v. Davenport*, 17 Iowa, 379, there are statements made by way of argument which support this proposition.

An assessor who omits taxable property from the assessment list, through mistake or error of judgment, is not liable in damages to a taxpayer who has been assessed at a higher rate because of such omission. *Dillingham v. Snow*, 5 Mass. 547.

An assessor who refuses to assess a small piece of swamp land to a nonresident of the 51 L.R.A. (N.S.)

township who claims to own the same under an unrecorded contract to buy, believing that the claim of ownership is not bona fide, is not liable to the alleged owner on the ground that the refusal prevented the owner from having the free use of a toll bridge, the taxpayers of the township in which the land was located being exempt from payment of tolls, since the act required the exercise of the quasi judicial function of the office. *Meade v. Haines*, 81 Mich. 261, 45 N. W. 836.

In *Muscatine Western R. Co. v. Horton*, 38 Iowa, 33, it was held that the trustees of a municipality, whose duty it was under the law to issue a tax certificate as evidence of a tax upon its inhabitants, to be given as a gratuity to a railroad company under a contract to build its road through agreed points, the tax having been voted by the electors, were not liable to the railroad company for damages arising out of their refusal to issue the certificate, where they, acting in good faith, had refused the certificate, believing the statute to be unconstitutional, and that the railroad company had not complied with its part of the contract, although they were mistaken on both points.

In *Com. v. Kenneday*, 118 Ky. 618, 82 S. W. 237, 4 Ann. Cas. 940, where the taxes were levied by a fiscal court composed of the magistrates of the county, it was held that the individual members of the court or board were not liable for an erroneous assessment which resulted in injury to the plaintiff, for the reason that the act of levying the assessment was a quasi legislative act, thus sustaining the principle above stated on a different ground. The court said: "The magistrates of a county, when assembled as a fiscal court, do not act as conservators of the peace, or in the performance of any judicial function appertaining to the office of justice of the peace. They are by statute *ex officio* members of the fiscal court, the duties there performed by them are statutory, extra duties, quasi legislative in character, and not such as are required of them as judicial officers; therefore, for error or mistake in the perform-

default entered, adjudging that Hicks & Company was the owner in fee of the land as against any claim of plaintiff. This judgment was entered and docketed in December, 1907. The value of the land at this date was \$500. Plaintiff never had any notice of the delinquency of the taxes, of either of the tax sales, of the action, or of the rendition of judgment therein, until October, 1908.

Defendant Scott, who had, as auditor, made the tax sales before mentioned, did not at any time during any of the years following place opposite the description of the property upon the tax lists he was required by law to make out and deliver to the treasurer the words "Sold for taxes," as he was required to do by Rev. Laws 1905, § 875.

ance of these legislative duties, they nor the sureties in their official bonds are liable in an action for damages."

In a proceeding to determine the constitutionality of a statute giving the right of appeal from the board of assessors as constituted by the statute direct to the supreme court of the state, it was held in *State v. Atchison, T. & S. F. R. Co.* 6 Kan. 500, 7 Am. Rep. 575, that the power to assess property is a legislative power, and not in any sense judicial. This case is not within the scope of this note, but it gives some support to the theory of the court in *Com. v. Kenneday, supra*.

b. As affected by motive.

An exception to the above-stated rule is recognized and applied by the great weight of authority. The exception is that if the assessor, although performing a quasi judicial act within his authority, makes an unlawful or excessive assessment maliciously or corruptly, he is liable to the individual injured thereby. The exception has been supported:

—where the assessor unlawfully changed plaintiff's valuation by increasing it after the list of assessments had been filed in the county clerk's office. *Bristol Mfg. Co. v. Gridley*, 27 Conn. 221, 71 Am. Dec. 56. And it was here held that plaintiff need not show actual malice, but that legal malice would be inferred from the commission of the illegal act. Second appeal in 28 Conn. 201.

—even though the taxpayer had failed to appear before the board of equalization to have the valuation of his property reduced after it had been assessed excessively by the assessor. *Parkinson v. Parker*, 48 Iowa, 657.

—where they knowingly and maliciously increased the acreage assessed to the taxpayer over and above that which is contained in his sworn statement. *Stearns v. Miller*, 25 Vt. 20.

—where they wilfully and knowingly set in the taxable list land that had been sold

The payments of taxes for the years 1904, 1905, 1906, and 1907 were made by plaintiff to defendant Hanke as treasurer upon statements of such taxes made by said defendant, and plaintiff received a number of receipts from said defendant. Said defendant did not place or cause to be placed upon said tax statements or upon any of said tax receipts so issued by him to plaintiff, the words "Sold for taxes," as by Rev. Laws 1905, § 881, he is required to do.

If defendants had not failed and neglected to do and perform their said statutory duties, and plaintiff had been informed by them in the manner required by said statutes or in any manner, plaintiff could and would have paid the said taxes for which said land was so sold, and could and would

by the taxable and possession given to the purchaser. *Wilson v. Marsh*, 34 Vt. 352.

And see *Ballerino v. Mason*, 83 Cal. 447, 23 Pac. 530, where the holding implies that the assessor would be liable if he acted maliciously or with intent to injure the owner of the assessed property.

In *Clinton School Dist.'s Appeal*, 56 Pa. 316, which was a petition to enjoin the collection of a tax, the court said: "If, in the exercise of an honest judgment upon the claim, the exemption was refused, a court of equity could not revise the judgment of the board by injunction. If, on the other hand, exemption was wantonly and maliciously refused, they had their remedy against the directors personally."

But, contrary to this, a few courts have held that the motive of the assessor in making an excessive assessment is immaterial; that is, because of the quasi judicial nature of the duty, the assessor is protected against suit by individuals not only for errors and mistakes of judgment, but for excessive assessments made from wilful, malicious, and corrupt motives. *Stewart v. Case*, 53 Minn. 62, 39 Am. St. Rep. 575, 54 N. W. 938; *Weaver v. Devendorf*, 3 Denio, 117; *Steele v. Dunham*, 26 Wis. 393.

Since fixing valuations of property by assessors is a judicial act, a taxpayer who is injured by the undervaluation of the neighboring property, due to wilful, malicious, and corrupt motives of the assessors, cannot maintain an action of trespass against them. *Youmans v. Simmons*, 7 Hun, 466.

c. As dependent upon jurisdiction.

It is a general rule that an officer, not a judge of a higher court, is liable for acts in excess of his jurisdiction. 29 Cyc. 1441.

So, if the assessors of taxes have no jurisdiction to make the assessment of which complaint is made, they are personally liable to the party injured.

Conn.—*Thames Mfg. Co. v. Lathrop*, 7 Conn. 550.

Me.—*Huse v. Merriam*, 2 Me. 375; *Moshier v. Robie*, 11 Me. 137; *Herriman v. Stow-*

have redeemed it at the aforesaid tax sale. By the neglect and failure of said defendants to perform their said official duties plaintiff has been damaged in the sum of \$500. Judgment is asked for said sum, with interest from December 19, 1907.

1. The facts pleaded, if true, show that the auditor, if not the treasurer, failed to perform a duty imposed upon him by statute. Rev. Laws, 1905, § 875, provides that the auditor shall make out the tax lists to correspond with the assessment books in reference to ownership and description of property, and that "opposite each description which has been sold for taxes, and which is subject to redemption, and not redeemed, shall be placed the words 'Sold for taxes.'" By § 878, the auditor is required

to deliver these lists to the county treasurer on or before the first Monday in January in each year. These lists constitute the authority for the treasurer to receive and collect the taxes therein levied.

By § 881, the treasurer, upon the payment of any tax, is required to give to the person paying a receipt therefor. It is provided that "if land has been sold for taxes either to a purchaser or to the state, and the time for redemption from such sale has not expired, the receipt for such taxes shall have written or stamped across the face, 'Sold for taxes.'"

These provisions can have no other object than to give the property owner, who had failed or neglected for any reason to pay his taxes for any year, notice, before the

ers, 43 Me. 497; *Allen v. Archer*, 49 Me. 346; *Ware v. Percival*, 61 Me. 391, 14 Am. Rep. 565.

Mass.—*Agry v. Young*, 11 Mass. 220; *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *Libby v. Burnham*, 15 Mass. 144.

Mich.—*Clark v. Axford*, 5 Mich. 182 (a supervisor acting in the capacity of an assessor).

Nev.—*Ford v. McGregor*, 20 Nev. 446, 23 Pac. 508.

N. H.—*Adams v. Mack*, 3 N. H. 493; *Henry v. Sargeant*, 13 N. H. 321, 40 Am. Dec. 146 (a board of selectmen acting as assessors).

N. Y.—*Mygatt v. Washburn*, 15 N. Y. 316; *Barhyte v. Shepherd*, 35 N. Y. 238; *Clark v. Norton*, 49 N. Y. 243; *Westfall v. Preston*, 49 N. Y. 349; *Bell v. Pierce*, 51 N. Y. 12, affirming 48 Barb. 51; *Bellinger v. Gray*, 51 N. Y. 610; *Dorwin v. Strickland*, 57 N. Y. 492; *Jewell v. Van Steenburgh*, 58 N. Y. 85; *Dorn v. Backer*, 61 N. Y. 261; *Williams v. Weaver*, 75 N. Y. 30; *Hilton v. Fonda*, 86 N. Y. 339; *New York Milk Products Co. v. Damon*, 57 App. Div. 261, 68 N. Y. Supp. 183, affirmed without opinion in 172 N. Y. 661, 65 N. E. 1119; *Prosser v. Secor*, 5 Barb. 607; *Vail v. Owen*, 19 Barb. 22; *Vose v. Willard*, 47 Barb. 320; *Bailey v. Buell*, 59 Barb. 158; *Sexton v. Pepper*, 28 Hun, 31 (but if the tax is voluntarily paid, it cannot be recovered from the assessor); *Suydam v. Keys*, 13 Johns. 444; *Palmer v. Lawrence*, 6 Lans. 282; *Baley v. Wortsman*, 2 N. Y. S. R. 246; *Foster v. VanWyck*, 2 Abb. App. Dec. 167, 41 How. Pr. 493; *Wade v. Matheson*, 4 Lans. 158; *Lapolt v. Maltby*, 10 Misc. 330, 31 N. Y. Supp. 686; *Dubois v. Parcels*, 118 N. Y. Supp. 615.

Utah.—*Taylor v. Robertson*, 16 Utah, 330, 52 Pac. 1.

Vt.—*Drew v. Davis*, 10 Vt. 506, 33 Am. Dec. 213 (the taxes were assessed for an object beyond the jurisdiction of the assessors as conferred by statute); *Henry v. Edson*, 2 Vt. 499.

Where property exempt.

There is some conflict among the New 51 L.R.A.(N.S.)

York decisions as to the applicability of this general principle to a case where the property assessed is by statute especially exempt from taxation. The following cases held that it applied in such cases; hence, that the assessors were personally liable for the result of an assessment of such property: *Prosser v. Secor*, 5 Barb. 607; *Lapolt v. Maltby*, 10 Misc. 330, 31 N. Y. Supp. 686. But these cases may be considered as overruled by a great number of later cases, among which are the following: *Vail v. Owen*, 19 Barb. 22; *Bell v. Pierce*, 48 Barb. 51, affirmed in 51 N. Y. 12; *Foster v. VanWyck*, 2 Abb. App. Dec. 167, 41 How. Pr. 493; *Brown v. Smith*, 24 Barb. 419; *Barhyte v. Shepherd*, 35 N. Y. 238; *Dubois v. Parcels*, 118 N. Y. Supp. 615, in all of which cases it was held that the assessing officers were not liable in such case, since the question decided was one within their jurisdiction.

Determining residence.

Where the assessing officers have no jurisdiction of either the person or property of the one upon whom they make an assessment, that is, where he resides in another district, they are usually held liable for the result of the assessment, even though deciding the question of residence is a part of their duty, and appears to require the exercise of judgment. *Mygatt v. Washburn*, 15 N. Y. 316; *Dorwin v. Strickland*, 57 N. Y. 492; *Bailey v. Buell*, 59 Barb. 158; *Hilton v. Fonda*, 86 N. Y. 339; *New York Milk Products v. Damon*, 57 App. Div. 261, 68 N. Y. Supp. 183, affirmed without opinion in 172 N. Y. 661, 65 N. E. 1119; *Wade v. Matheson*, 4 Lans. 158; *Dorn v. Backer*, 61 N. Y. 261; *Palmer v. Lawrence*, 6 Lans. 282; *Suydam v. Keys*, 13 Johns. 444; *Taylor v. Robertson*, 16 Utah, 330, 52 Pac. 1; *Henry v. Edson*, 2 Vt. 499.

In *Fairbanks v. Kittredge*, 24 Vt. 9, it was held that listers, whose duty it was to list property for the assessment as well as to make assessments, in determining which of two districts had the right to assess plaintiff's personal property, were acting in

right to redeem has been lost, that his property has been sold for such taxes. He may gain his information by an examination of the tax lists, but he is certain to acquire it from the receipt given for the payment of the taxes for any year subsequent to the sale and before the time to redeem expires. This is clearly an important notice to the landowner. He may, through illness, inadvertence, mistake, or even neglect, fail to pay all or some part of a certain year's taxes. As the complaint in the present case alleges, he may forget all about the fact that he had failed to pay. No notice of the delinquency or of the sale reaches him. Though he has not intended to let his property go, as evidenced by his regular payment of subsequent taxes, he loses it unless,

before the time to redeem expires, his attention is called to the fact that it had been "Sold for taxes." These statutory provisions, if followed by the auditor and treasurer, tell the delinquent taxpayer that he must redeem from the sale or lose his property. It is highly probable in the case of a nonresident owner that it is the only notice he has.

2. The liability of a public officer for the failure or neglect to perform a duty imposed upon him by statute is clear (1) when such duty is a ministerial one, (2) when the person injured is one to whom performance was due, and (3) when the failure to perform is the proximate cause of the injury sustained. *State v. Ruth*, 9 S. D. 84, 68 N. W. 189; *Amy v. The Super-*

a ministerial capacity, and not judicially, hence they were liable to the plaintiff if they listed his property in the wrong district, provided, that he suffered damage from such mistake. In this particular case, however, it was shown that no damage had been suffered by the plaintiff; hence the judgment of the lower court, nonsuiting the plaintiff, was affirmed.

But where the taxpayer was once a resident of the district, and the question was whether or not he had moved out for the purpose of avoiding the payment of any tax in any place, the question is within the jurisdiction of the assessors, and they are protected by the judicial character of the acts they are called upon to perform. *Davis v. Strong*, 31 Vt. 332.

Where lands should have been assessed to a tenant, but were assessed to the non-resident owner at his own request, the owner is estopped from urging the illegality of the assessment in that particular in an action of trespass brought by him against the assessors to recover the amount of the tax in damages. *Pease v. Whitney*, 8 Mass. 93.

Lack of notice.

Likewise, there is some difference of opinion among the New York courts as to whether or not the assessing officers acquire jurisdiction so as to be protected where they act without notice to the person taxed, he being affected adversely by their actions, when a statute requires notice to him in such case. *Jewell v. Van Steenburgh*, 58 N. Y. 85, may be accepted as settling the dispute in favor of the theory that in such case they do not acquire jurisdiction, and are therefore liable in trespass. *mpl'sensae* son injured, unless he has waived the right to notice by appearing before the assessing party and presenting his objection. The court reviews the early decisions in its opinion in the following language: "The court charged the jury that such omission rendered the tax void. The authorities are not entirely in harmony, and the precise question has not been definitely passed upon by this court. In *Randall v. Smith*, 51 L.R.A. (N.S.)

1 Denio, 214, the defect of notice with other irregularities were treated alike, and it was held that they did not render the trustees liable as trespassers. *Jewett, J.*, in delivering the opinion, comments upon *Alexander v. Hoyt*, 7 Wend. 89, in which it was held that the trustees were trespassers, because they copied the valuations from an unfinished town roll, upon the ground that this was a ministerial, and not a judicial, act, and cites *Easton v. Calendar*, 11 Wend. 91, as decisive of the question in favor of the trustees. There the irregularity complained of was in omitting to insert certain persons who were taxable in the roll, and in including the fees of the collector in the warrant; and the court held that, in determining who were taxable inhabitants, the trustees acted judicially and were not liable for an error in the exercise of it. With great respect, I do not think the question in that case was analogous to this, as will be shown hereafter. The general rule applicable to such cases was correctly stated, that when the officer had jurisdiction and errs in the exercise of it, his acts are not void, but voidable. The only difficulty is in determining when jurisdiction has been acquired. I do not find that *Randall v. Smith* has been regarded as authority, and it is not referred to in the subsequent cases. In *Wheeler v. Mills*, 40 Barb. 644, it was expressly decided that the omission to give the prescribed notice by assessors invalidated the tax and rendered a title to real estate obtained upon a tax sale void, upon the ground that notice was one of the things to be done by the assessors to obtain jurisdiction over the subject. In *Van Rensselaer v. Witbeck*, 7 N. Y. 517, which was trespass against the collector, it was decided that a substantial compliance with the terms of the statute, as to making and signing the certificate required to be attached to the assessment roll, was necessary to give the supervisors jurisdiction to impose a tax and issue a warrant for its collection. *Gardiner, J.*, in delivering the opinion, said: "Notice must be given; the taxpayers have a right to be heard and introduce evidence.

visors (*Amy v. Barkholder*) 11 Wall. 136. 20 L. ed. 101; *Anderson v. Settergren*, 100 Minn. 294, 111 N. W. 279.

The duties imposed by the statutes on the auditor and treasurer are plainly ministerial. It is equally clear that plaintiff is one to whom performance of the duty was due, as we have already stated. The only doubt is whether the failure to perform this duty was the proximate cause of plaintiff's loss of his land.

3. We must take as true the allegation of the complaint that plaintiff would have redeemed from the tax sale had he learned of it from a receipt stamped "Sold for taxes." After learning in October, 1908, of the sale and the judgment in the action to determine adverse claims, he might have

applied successfully to open the judgment and defend; but there is nothing in the complaint to indicate that the tax sale or the notice of expiration was not valid, and we must assume, as against a demurrer, that he would not have succeeded in saving his land, even if he had defended the action. It is undoubtedly true that the neglect or failure of the officer must appear to be the proximate, and not the remote, cause of the loss. Of course, if plaintiff had not forgotten to pay the last half tax for 1901, or if he had remembered later that he had not paid it, the loss would not have occurred. But the statutes, in our opinion, were enacted for the very purpose of protecting taxpayers who forget, or by accident or even negligence fail, to pay their

When this has been done and all objections disposed of, the assessors, or a majority of them, shall sign the roll, and attach the certificate in the form prescribed by § 26. The record is then, and not until then, complete.' The general rule laid down in *Westfall v. Preston*, 49 N. Y. 349, is confirmatory of the doctrine of all the cases since *Randall v. Smith*, viz.: 'A substantial compliance with the statute in the measures preliminary to the taxation of persons and property, in all matters which are of the substance of the procedure and designed for the protection of the taxpayer and the preservation of his rights, is a condition precedent to the legality and validity of the tax.' Without further citation of cases, it is quite manifest that the weight of authority is, that the omission to give the notice is a jurisdictional defect. As an original question, it seems to me clear that this must be so. When persons are to be divested of their property by statutory proceedings, the directions of the statute must be substantially pursued. *Sharpe v. Speir*, 4 Hill, 76. Trustees of school districts and assessors, in making assessments, must acquire jurisdiction of the person and subject-matter, or their proceedings are void. In performing duties of a judicial nature they are protected, but giving the notice to taxpayers is a ministerial, and not a judicial, act. They have no discretion or judgment to exercise. The mandate is positive, and must be obeyed. Is it jurisdictional in its character? It seems to me clear that it is. This is the only mode by which persons interested have an opportunity to be heard. It is in the nature of process to bring them into court, and it must precede the power of the trustees to act upon the subject. In the first instance, the assessors may exercise their own judgment as to who are taxable persons, and the kind and value of the property to be taxed; but this is preliminary to the final adjudication. Before that can be made, the persons proposed to be taxed are to have a hearing, and it cannot be made until an opportunity for such hearing is afforded. As well might a justice of the peace render judgment against 51 L.R.A. (N.S.)

a party, without the service of process. In the case of school trustees, so far as they make an original assessment or change an assessment, they must give the prescribed notice, and if they fail to do it they have no legal right and no jurisdiction to make it. The principle decided in *Easton v. Calendar*, supra, which was held decisive in *Randall v. Smith*, was correct. The irregularities in that case were held to relate to judicial acts. They were quite inferior to this defect, and it is unnecessary to criticize the application of the general rule to the facts of that case. Notice to the persons whose assessments were changed was necessary to confer jurisdiction. Without it the assessment against the plaintiff was void; and when there is a want of jurisdiction in imposing the tax, those directing its collection are liable as trespassers. *National Bank v. Elmira*, 53 N. Y. 49, and cases cited."

d. Statutory protection.

Under a statute which exempted assessors from all responsibility for the assessment of "any tax upon the inhabitants of any city, town, district, parish, or other religious society, when thereto required by the constituted authorities thereof, except only for their own integrity and fidelity," it has been held that assessors are nevertheless liable where they acted beyond their jurisdiction. Thus, the assessors of a religious society are not protected by the statute where their assessment was made upon one who was not at the time a member of the society. *Gage v. Currier*, 4 Pick. 399; *Inglee v. Bosworth*, 5 Pick. 498, 16 Am. Dec. 419. They are liable where they were not required by any "city, town, parish, or religious society," or district, within the meaning of the act, to make the assessment which proves to be illegal. They were directed by a school district to make the assessment, and the court held that a school district was not a district within the meaning of the statute. *Little v. Merrill*, 10 Pick. 543. And they were held liable where a person not a resident of the district was

taxes. To hold, because plaintiff was careless in omitting to pay the tax, that his negligence, and not that of defendants, was the proximate cause, would be to defeat the very object of the statutes. The negligence of the defendants was after plaintiff's negligence. Had they performed the duties imposed on them by the statutes, the injury would not have happened. The complaint shows no want of care on the part of plaintiff that was concurrent with or subsequent to defendants' failure to perform their duties. On the plainest principles of the law of proximate cause, it cannot be said that plaintiff's failure to pay the tax, or to remember that he had failed to pay it, was legally the proximate cause of his loss, or a contributing cause. The case is analogous

to one where plaintiff by his own negligence gets into a position of danger, and defendant, seeing his peril, fails to use ordinary care to avoid injuring him. The negligence of the defendant, in such a case, is the proximate cause, and plaintiff's negligence does not defeat a recovery. Had the auditor in this case stamped the words "Sold for taxes" on the list furnished the treasurer, and had the latter stamped the same words on the receipts furnished plaintiff, we must presume, taking as true the allegations of the complaint, that plaintiff would have redeemed from the sale. In other words, the loss would not have occurred, had the defendants performed their duty. It was a duty imposed by statute. We hold that the proximate cause of plain-

assessed, and the tax collected by distress, even though the assessors acted with perfect good faith. *Freeman v. Kenney*, 15 Pick. 44.

But it does protect them against the consequences of illegal assessments even though the errors or mistakes were made by themselves, and not by others, so long as they acted in good faith. *Ingraham v. Doggett*, 5 Pick. 451; *Little v. Greenleaf*, 7 Mass. 236.

But by reason of this statute, as revised, it has been held that the assessor is protected from a suit for damages by one who had been illegally assessed, he not being an inhabitant of the district. *Baker v. Allen*, 21 Pick. 382. The court said: "This statute, as construed by the court in the above cases, did not include taxes on school districts, nor protect assessors from their mistakes in assessing individuals who, by their residence or otherwise, were not liable to be assessed, because they were not, within the meaning of the statute, 'required' to assess such persons. But the Revised Statutes, chap. 7, § 44, in the revision of the 5th section of Stat. 1823, chap. 138, have varied the phraseology, and adopted more comprehensive language, so as to include school districts, with other corporations, and so as to protect assessors from liability for accidental errors in taxing those who are not liable to be taxed. It makes them 'responsible only for the want of integrity and fidelity on their own part.' While acting within their appropriate sphere, they have the same protection and immunities which judicial officers have." And this case was cited and followed in *Durant v. Eaton*, 98 Mass. 469.

But neither the statute referred to, *supra*, nor the revision involved in *Baker v. Allen*, *supra*, will protect assessors where they have assessed property and issued a warrant for the collection of a school district tax, if the school district is not legally established, even though the fact that the tax had been voted by the district was legally certified to them by one as acting clerk for the district. *Dickinson v. Billings*, 4 Gray, 42; *Blankinship v. Hadley*, 11 Gray, 51 L.R.A. (N.S.)

431; *Bassett v. Porter*, 4 Cush. 487; *Judd v. Thompson*, 125 Mass. 553; *Withington v. Eveleth*, 7 Pick. 106.

And the assessors are not protected by either statute where they, contrary to statute, carry over from one year an assessment supposed to have remained unpaid to a subsequent assessment for another year, not immediately succeeding the year in which the assessment was made. *Eames v. Johnson*, 4 Allen, 382.

An early statute in Maine provided "that the assessors of towns, plantations, parishes, and religious societies shall not hereafter be made responsible for the assessment of any tax which they are by law required to assess, but the liability, if any, shall rest solely with said towns, plantations, parishes, and religious societies; and the assessors shall be responsible only for their own personal faithfulness and integrity." Quoted from the court's opinion in *Trafton v. Alfred*, 15 Me. 260, which was an action of trespass against the corporation. This statute is also referred to as exempting assessors from liability, in *School Dist. v. Bailey*, 12 Me. 258, which was also an action against the corporation. In the same way and in the same kind of case this statute has been referred to in *Stickney v. Bangor*, 30 Me. 404, and in *Powers v. Sanford*, 39 Me. 187. But it has been held that this statute does not protect the assessors from the result of an assessment in case the assessors had no jurisdiction to make the same. *Mosher v. Robie*, 11 Me. 137; *Herriman v. Stowers*, 43 Me. 497; *Allen v. Archer*, 49 Me. 346; *Ware v. Percival*, 61 Me. 391, 14 Am. Rep. 565. But if they have jurisdiction of the subject-matter, but, acting in good faith, exceed their authority to assess under a statute, they are protected by this statute, it appearing that they were required by law to assess the property. *Patterson v. Creighton*, 42 Me. 367; *Rowe v. Friend*, 90 Me. 241, 38 Atl. 95.

Under a statute which refers to executions against the state, or any county or other civil corporation, which provides that, "if no property is found on which to levy,

tiff's loss was this failure of duty on the part of one or both of the defendants.

4. We have thus far assumed that the complaint alleges a failure of duty on the part of both the auditor and the treasurer. We do not, however, decide that it shows a failure of duty on the part of the treasurer. The difficulty here is as to the construction of § 881, which in terms makes it the absolute duty of the treasurer to write or stamp the words "Sold for taxes" on a tax receipt, while it does not seem that this ought to be his duty where the fact that the land had been "Sold for taxes" is not stated on the list furnished by the auditor, and is not ascertainable

from the treasurer's books. This feature of the case received no attention in the briefs, and we feel that we ought not to determine the question without argument, especially as it is not necessary to do so. Of course, the question arises only in case, as alleged in the complaint, the words "Sold for taxes" were not placed opposite the description of plaintiff's property on the list furnished the treasurer by the auditor.

5. We hold that the complaint states a cause of action at least as against defendant Scott, the former auditor, and it follows that the joint demurrer of both defendants was properly overruled.

Order affirmed.

or if the judgment creditor elect not to issue execution against such corporation, he is entitled to the amount of his judgment and costs, in the ordinary evidences of indebtedness issued by that corporation. And, if the debtor corporation issues no scrip or evidences of debt, a tax must be levied as early as practicable sufficient to pay off the judgment with interest and cost," and in another section provides that "a failure on the part of the officers of the corporation to comply with the requirements of the last section renders them personally responsible for the debt," a judgment creditor of a municipal corporation is not obliged to accept scrip or other evidences of indebtedness for his judgment, nor is he required to demand the issue thereof, but may demand that the taxing officers levy a special tax to pay his judgment, and upon their failure to do so, there being no legal obstacle in their way, he may at once proceed with a civil action against the officers individually for the amount of his claim. *Oswald v. Thedinga*, 17 Iowa, 13; *Porter v. Thomson*, 22 Iowa, 391.

III. Collecting officers.

a. Protection by warrant.

1. In general.

A tax collector has no authority to alter or change in any way the amount of tax assessed against an individual, by increasing or diminishing it; it is his plain duty to accept the duplicate given to him as correct, and collect the taxes from each individual accordingly, and when he has done so he is not liable to an individual in case the assessment against the individual proves to be excessive or erroneous. He is protected by his warrant if it is fair and regular upon its face. It has been so held in:

Ala.—*Lott v. Hubbard*, 44 Ala. 593.

Ark.—*Sanders v. Simmons*, 30 Ark. 274.

Conn.—*Waterbury v. Lockwood*, 4 Day, 257, 4 Am. Dec. 215.

Ind.—*Ewing v. Robeson*, 15 Ind. 26; *Noland v. Busby*, 28 Ind. 154.

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Iowa.—*Games v. Robb*, 8 Iowa, 193; *Hershey v. Fry*, 1 Iowa, 593; *Macklot v. Davenport*, 17 Iowa, 379 (not a direct holding, but a statement by way of argument).

Me.—*Caldwell v. Hawkins*, 40 Me. 526; *Nowell v. Tripp*, 61 Me. 426, 14 Am. Rep. 572; *Carville v. Additon*, 62 Me. 459.

Mass.—*Hays v. Drake*, 6 Gray, 387; *Eames v. Johnson*, 4 Allen, 382; *Upton v. Holden*, 5 Met. 360; *Rawson v. Spencer*, 113 Mass. 40; *Hubbard v. Garfield*, 102 Mass. 72; *Cone v. Forest*, 126 Mass. 97; *King v. Whitcomb*, 1 Met. 328; *Howard v. Proctor*, 7 Gray, 128.

Mich.—*Wall v. Trumbull*, 16 Mich. 228 (even though he may have had personal knowledge that the tax was illegal, if the warrant was regular and disclosed no illegality); *Bird v. Perkins*, 33 Mich. 28; *Wood v. Thomas*, 38 Mich. 686; *Moss v. Cummings*, 44 Mich. 359, 6 N. W. 843; *Byles v. Genung*, 52 Mich. 504, 18 N. W. 238; *Curtiss v. Witt*, 110 Mich. 131, 67 N. W. 1106; *Mogg v. Hall*, 83 Mich. 576, 47 N. W. 553; *Godkin v. Corliss*, 146 Mich. 507, 109 N. W. 855.

Miss.—*Newman v. Elam*, 30 Miss. 507.

Mo.—*Turner v. Franklin*, 29 Mo. 285; *Glasgow v. Rowse*, 43 Mo. 479; *St. Louis Bldg. & Sav. Asso. v. Lightner*, 47 Mo. 393; *St. Louis Mut. L. Ins. Co. v. Charles*, 47 Mo. 462; *Jefferson use of Pacific R. Co. v. Opel*, 49 Mo. 190; *Walden v. Dudley*, 49 Mo. 419; *North Missouri R. Co. v. Maguire*, 49 Mo. 482.

N. H.—*Clark v. Bragdon*, 37 N. H. 562.

N. Y.—*Sheldon v. Van Buskirk*, 2 N. Y. 473; *Chegaray v. Jenkins*, 5 N. Y. 376; *Woolsey v. Morris*, 96 N. Y. 311 (even though the levy was made under eight tax warrants, the taxes called for by three of them having been paid, and the collector knowing this fact, provided that he did no more than he would have been justified in doing under the five valid warrants); *Thomas v. Clapp*, 20 Barb. 165; *Patchin v. Ritter*, 27 Barb. 34; *Doolittle v. Doolittle*, 31 Barb. 312; *Baley v. Worstman*, 2 N. Y. S. R. 246; *Abbott v. Yost*, 2 Denio, 86; *Bank of Utica v. Utica*, 4 Paige, 399, 27 Am. Dec. 72; *Henderson v. Brown*, 1 Cai. Cas. 92, 2 Am. Dec. 164.

N. C.—*Gore v. Mastin*, 66 N. C. 371;

Mulford v. Sutton, 79 N. C. 276; Clifton v. Wynne, 80 N. C. 146.

Ohio.—Champaign County Bank v. Smith, 7 Ohio St. 42; Loomis v. Spencer, 1 Ohio St. 153; Thompson v. Kelly, 2 Ohio St. 647.

Pa.—McGregor v. Montgomery, 4 Pa. 237; Cunningham v. Mitchell, 67 Pa. 78.

R. I.—Peckham v. Bicknell, 11 R. I. 596.

Vt.—Goodwin v. Perkins, 39 Vt. 598;

Wheelock v. Archer, 26 Vt. 380; Hughes v. Kelley, 69 Vt. 443, 38 Atl. 91.

Wis.—Sprague v. Birchard, 1 Wis. 457, 60 Am. Dec. 393; McLean v. Cook, 23 Wis. 364 (approved in Stahl v. O'Malley, 39 Wis. 333. Also in Power v. Kindschi, 58 Wis. 539, 46 Am. Rep. 652, 17 N. W. 689).

But it has been held that even though the warrant and tax lists are regular upon the face thereof, if the assessment is illegal, the collector is liable in damages. And it was further held that a tax collector could not justify the taking of property, merely by showing a regular tax bill and warrant, but must show all the previous proceedings to have been legal. Collamer v. Drury, 16 Vt. 574; Downing v. Roberts, 21 Vt. 441.

2. *Illegality disclosed by warrant.*

But where the illegality of the assessment is manifest upon the face of the warrant, the officer executing it is liable in trespass to the party injured thereby. Atwell v. Zeluff, 26 Mich. 118; Hannibal & St. J. R. Co. v. Shacklett, 30 Mo. 550; State use of Hannibal & St. J. R. Co. v. Shacklett, 37 Mo. 280 (his liability extends to the sureties upon his bond); State ex rel. Rice v. Powell, 44 Mo. 436; Warrensburg ex rel. Colbern v. Miller, 77 Mo. 56; Clark v. Bragdon, 37 N. H. 562; Bellinger v. Gray, 51 N. Y. 610; Van Rensselaer v. Witbeck, 7 N. Y. 517; Wetmore v. Campbell, 2 Sandf. 341; Sprague v. Birchard, 1 Wis. 457, 60 Am. Dec. 393.

3. *Where assessors acted without jurisdiction.*

It has been held that the collector's warrant is no protection to him if the assessors or other body, in making the assessment and issuing the warrant, did not have jurisdiction in the matter. Hays v. Pacific Mail S. S. Co. 17 How. 596, 15 L. ed. 254; Thurston v. Martin, 5 Mason, 497, Fed. Cas. No. 14,018 (a nonresident of the jurisdiction had been assessed, and the assessors therefore had no jurisdiction either of his person or his property); Eames v. Johnson, 4 Allen, 382 (where the lack of jurisdiction was disclosed upon the face of the warrant); Johnson v. Dole, 4 N. H. 478 (where the school district for which the assessment was made had no legal existence); Cloutman v. Pike, 7 N. H. 209; Cavis v. Robertson, 9 N. H. 524; Suydam v. Keys, 13 Johns. 444 (where it happened that the person taxed was a nonresident); Champaign County Bank v. Smith, 7 Ohio St. 42; Waters v. Daines, 4 Vt. 601; Bates v. Hazeltine, 1 Vt. 81; Blood v. Sayre, 17 Vt. 51 L.R.A.(N.S.)

609; Sprague v. Birchard, 1 Wis. 457, 60 Am. Dec. 393 (but this rule is limited to cases where the officer executing the warrant has knowledge, by reason of the warrant, or in some other way, that the taxing power had no jurisdiction in the matter).

Where the sheriff or his deputy had arrested a person under a warrant from a tax collector directing the arrest upon refusal or failure to pay the taxes with interest, the tax collector is liable in damages to the person so arrested if no interest was legally collectable on the taxes, even though the city council had voted to instruct the collector to add interest to the unpaid taxes after a certain date, it appearing that the council had no authority to add the interest. Snow v. Weeks, 77 Me. 429, 1 Atl. 243. The court held that this was not a case where the tax collector would be protected by his warrant, for his warrant from the assessors did not direct him to collect the interest, but merely the principal.

It was held in Leachman v. Dougherty, 81 Ill. 324, that if the tax collector had actual knowledge of the illegality of the assessment and the consequent invalidity of his warrant, he was not protected thereby, but was liable to the individual from whom he forced payment of the tax thus illegally assessed.

Where the assessment is void and the money still remains in the collector's hands, it may be recovered from him in an action direct by the taxpayer. Tuttle v. Everett, 51 Miss. 27, 24 Am. Rep. 622.

Where an assessment for street improvements had been made, void for the reason that the council had no authority to make it, and the treasurer refused to accept payment of the legal taxes unless these illegal taxes were also paid, the taxable, having paid it all under protest, in order to save his property from tax sale, may recover from the treasurer the amount of the illegal tax. Stephan v. Daniels, 27 Ohio St. 527.

Where property exempt.

And it has been held that the tax collector is liable to the individual paying the tax under protest, where the property upon which the tax was assessed is by law exempt from taxation: State Bank v. Brackenridge, 7 Blackf. 395; State use of Hannibal & St. J. R. Co. v. Shacklett, 37 Mo. 280; St. Louis Bldg. & Sav. Assn. v. Lightner, 47 Mo. 393; *Contra*: Van Kleeck v. Woodruff, 41 How. Pr. 493, 2 Abb. App. Dec. 167.

4. *Assessment under unconstitutional statute.*

It is said in Macklot v. Davenport, 17 Iowa, 379, that a tax collector is not protected by his warrant where the assessment is made under an unconstitutional statute.

And in Glasgow v. Rowse, 43 Mo. 479, there is a strong intimation, but not a

holding, that if the statute under which the taxes were assessed is unconstitutional, the collector will not be exempt from suits by an individual after he has collected the tax by forcible means.

And in *Smith v. First Nat. Bank*, 17 Mich. 479, there is a holding, as regards the sheriff who collects a tax by virtue of a warrant issued to him by the auditor general of the state under a statute held to be unconstitutional, that the sheriff is liable to the person from whom he collected the tax. The holding in *Smith v. First Nat. Bank* is followed in *First Nat. Bank v. Watkins*, 21 Mich. 483; also followed as to a tax collector in *Mogg v. Hall*, 83 Mich. 576, 47 N. W. 553. In all three cases, however, a point is made of the fact that reference is made in the warrant to the statute so as to charge the officer with notice of the nature of the authority under which he was acting.

And in *Loomis v. Spencer*, 1 Ohio St. 153, the court said: "That a treasurer who seizes property to pay a tax assessed, without any color of law for its assessment, or under an unconstitutional law (which is the same as no law), is liable in trespass, seems to have been decided in *McCoy v. Chillicothe*, 3 Ohio, 370, 17 Am. Dec. 607, and impliedly admitted in *Raguet v. Wade*, 4 Ohio, 107, and we have no doubt that such is the law."

And in *Higgins v. Ausmuss*, 77 Mo. 351, it was held that a tax collector is not protected by his warrant in collecting a tax assessed for improvement, he having levied the same upon personal property, the statute under which he professed to act having been previously declared to be unconstitutional by the court of last resort of the state.

But in *Waiden v. Dudley*, 49 Mo. 419, where the claim was made that the legislature had no power to include farming land within corporate limits so as to subject it to corporate taxation, the action being against the tax collector for collecting the tax assessed thereon, the court refused to pass upon the question, holding that even if the contention were correct, the collector could not be held liable. The court said: "It is true that executive officers are bound to know the law, and are bound in some cases to know the limits of legislative authority. Thus, it has been sometimes held that they are responsible for the forcible collection of taxes from those who by charter are exempt from taxation, notwithstanding a subsequent illegal attempt by the legislature, to violate the charter in that regard. But these cases are not like the present one. The legislature had parted with its right to assess the specific tax, and the attempted resumption of that right was held to be an act altogether void, the matter for the time being having passed out of its jurisdiction. But in the case at bar the general jurisdiction is admitted. The collector finds the property placed by the legislature within corporation bounds which it had a right to

fix; he also finds the property assessed by competent authority; and what is he to do? Can he say that this legislative act was improper? that it was dictated by a wrong motive? that its object was to compel neighboring farmers to help pay corporation expenses? And coming to this conclusion, can he remit the tax? I think not. Before the property is exempt, several judicial questions must be decided; and it was the plaintiff's duty to object to the assessment, and, if the decision was against him, to review it by a direct proceeding in the city court of appeals. (*Lee v. Thomas*, 49 Mo. 112.) I do not intend to express any opinion upon the question sought to be raised, but only to say that it cannot come up in a suit against the collector."

b. Illegal or improper acts or omissions subsequent to warrant.

But where the tax collector seizes the property of the taxpayer illegally, or proceeds in an illegal manner, or not according to statute after seizure, he is liable as a trespasser. So collectors have been held liable:

—where a statute requires the collector, when he receives a surplus of money from a sale, to render to the owner an "account in writing" of the sale and charges, and he omits to do so, even though he offers to pay the owner the surplus. *Blanchard v. Dow*, 32 Me. 557; *Williamson v. Dow*, 32 Me. 559.

—where he sells upon his warrant a greater number of the chattels than is sufficient to pay the tax. *Williamson v. Dow*, supra.

—where he intentionally seizes and sells more goods than was necessary to pay the taxes, costs, and expenses. *Cone v. Forest*, 126 Mass. 97; *Denton v. Carroll*, 4 App. Div. 532, 40 N. Y. Supp. 19.

—where the tax collector, although furnishing to the owner of the property he has seized and sold, a statement according to the statute referred to in *Blanchard v. Dow*, supra, failed to turn over to the owner the surplus; that is, the statement was incorrect, in that it included illegal charges and charges of taxes that had already been paid, so that the balance offered by the collector was not as much as it should have been. *Carter v. Allen*, 59 Me. 296, 8 Am. Rep. 420.

—where the tax collector sells more of the chattels levied upon than is necessary to pay the delinquent tax and the cost and expenses. *Seekins v. Goodale*, 61 Me. 400, 14 Am. Rep. 568. But in such case the officer is a trespasser *ab initio* only as to the goods sold in excess of what should have been sold. The court referred to *Williamson v. Dow*, supra, and says that the holding in that case is not inconsistent with the one here under consideration.

—where he did not sell the distrained goods within the time for such sale, as required by statute. *Pierce v. Benjamin*, 14 Pick. 356, 25 Am. Dec. 396.

—where he seizes and sells the goods of one person for the tax of another; that is, where he sells the furniture of a room occupied by a boarder for a tax against the boarder, the furniture belonging to the owner of the house. *Denton v. Carroll*, supra.

—where the act of assembly provided for the collection of the tax by suit in the name of the corporation before any court of competent jurisdiction, and the collector summarily sold the real estate against which the taxes were levied, thus compelling the owner to purchase the property and pay under protest to prevent a cloud upon his title, it later appearing that the assessment was void. *Hays v. Hogan*, 5 Cal. 241.

—where he seizes and sells the property of a delinquent taxpayer after the time for doing so under the statute has expired. *Ray v. Horton*, 77 N. C. 334.

—where the collector took and sold the plaintiff's personal property in violation of a statute requiring such property to be advertised in the locality where it is sold. *Prince v. Thomas*, 11 Conn. 472.

—where he adjourns a sale scheduled at 10 o'clock A. M. indefinitely, and sells at 1 o'clock P. M. of the same day. *Buzzell v. Johnson*, 54 Vt. 90.

—where the tax collector had altered the tax bill after it came into his hands by inserting an item for street improvement, and levied the same against personal property, contrary to law. *Higgins v. Ausmuss*, 77 Mo. 351.

—where, by the charter of the corporation and the common law, it is necessary that the corporation proceed in the collection of delinquent taxes against each individual as if collecting a common debt, and that he recover the same in due course of law, but the collector proceeds summarily to levy upon the personal property of the delinquent taxpayer, even though an ordinance of the city, which it had no power to enact, directed such summary action. *Bergen v. Clarkson*, 6 N. J. L. 352.

A tax collector who demands excessive fees from one under arrest for nonpayment of taxes is liable in trespass at the suit of the party injured for this abuse of authority, even though the imprisonment was not prolonged a single instant by reason of the demand for illegal fees, and the prisoner did not resist or question the amount of the illegal charges. *Robbins v. Swift*, 86 Me. 197, 29 Atl. 981; *Foss v. Whitehouse*, 94 Me. 491, 48 Atl. 109.

In such case an action of assumpsit will also lie, but the plaintiff must choose between trespass and assumpsit, as he cannot maintain both actions. If the action is in assumpsit, the collector must refund not only the illegal part of the fees thus extorted, but he must refund all of the fees so collected. *Foss v. Whitehouse*, supra.

A tax collector who, knowing that there is personal property upon the land of the owner and mortgagor thereof out of which the land taxes could and should have been

made, makes a false return of *nulla bona*, thus establishing a lien for the taxes upon the land, is liable to the mortgagee, who is compelled to redeem the land from a tax sale in order to protect his interest. *Raynsford v. Phelps*, 43 Mich. 342, 38 Am. Rep. 189, 5 N. W. 403.

But, upon second appeal in 49 Mich. 315, 13 N. W. 606, it was held that the tax so assessed was void, and that because of this there was no such wrong done to the plaintiff by the false return as would give him a right of action, and that the collector was not estopped by the return from showing that the assessment was void.

In *Maguire v. State Sav. Asso.* 62 Mo. 344, where interest upon delinquent taxes was collected under duress, and not paid over to the corporate authorities, it appearing that no interest was collectable under the statute, it was held that the tax collector was liable to the taxpayer for the amount of this interest in an action for money had and received.

A county auditor who makes a false entry on the record to the effect that land previously sold for taxes has been redeemed is liable to the purchaser of the land, whose agent, relying upon such false entry, purchased for his principal, for the amount the purchaser is compelled to pay in order to redeem the land, with interest from the date of its payment, although personally the principal knew nothing about the entry, the whole transaction being consummated by the agent. *Perkins v. Evans*, 61 Iowa, 35, 15 N. W. 584.

Where road commissioners had been deprived of all authority to act as such by the operation of a grand jury's recommendation placing the county under the alternative road law, they are liable in a civil action for false imprisonment, to one imprisoned by virtue of their warrant issued thereafter, charging him with being a defaulter in working out his road tax. *Varner v. Thompson*, 3 Ga. App. 415, 60 S. E. 216. The court, while approving the questionable rule that a *de facto* judicial officer is not liable for the exercise of judicial functions "even though his acts be corrupt," points out that the defendants were not even *de facto* officers.

Even though a treasurer's sale of real estate for taxes was based upon a return which should not have been made, there being sufficient personal property out of which the taxes should have been made, a succeeding treasurer is justified in refusing to permit a redemption almost two years after the sale except on condition that the owner pay all the taxes for which the property was sold, as well as subsequent taxes paid by the purchaser, plus 40 per cent interest thereon, which is the condition required by statute for redemption of land from valid tax sale, so that he is not liable to the owner for the excess paid as interest over and above the legal rate after the owner has redeemed, making the full payment under protest. *Jones v. Duras*, 14 Neb. 40, 14 N. W. 537. This decision is based upon

two independent grounds; namely, that the defendant was not responsible for the acts of his predecessor in office, and that the payment was voluntary, inasmuch as the time for redemption could not expire until the purchaser had served the statutory notice upon the former owner, and in this case no such notice had been served.

Where interest coupons were made, upon their face and by the statute authorizing their issue, legal tender for taxes of all kinds, a collector cannot justify a seizure of property for delinquent taxes after tender of payment in coupons, under a later statute attempting to rescind or repeal the legal-tender provisions of the earlier statute, since such later statute is unconstitutional as impairing the obligation of contracts within the meaning of the restriction placed upon states by the Federal Constitution. *Poindexter v. Greenhow*, 114 U. S. 270, 27 L. ed. 185, 5 Sup. Ct. Rep. 903, 962 (an action in detinue for specific property seized by a collector); *Barry v. Edmunds*, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501 (action of trespass against collector. Case turned upon the question of jurisdiction, defendant's liability being unquestioned); *Chaffin v. Taylor*, 114 U. S. 309, 29 L. ed. 108, 5 Sup. Ct. Rep. 924, 962, second writ of error dismissed in 116 U. S. 567, 29 L. ed. 727, 6 Sup. Ct. Rep. 518 (trespass *de bonis asportatis*); *White v. Greenhow*, 114 U. S. 307, 29 L. ed. 199, 5 Sup. Ct. Rep. 923, 962 (decided upon authority of *Poindexter v. Greenhow*); *Willis v. Miller*, 29 Fed. 238 (trespass against the collector).

A tax collector who returns as unpaid taxes that were paid to him (the payment having been made by check which was accepted but not presented for payment, the bank becoming insolvent one month later), so that the taxpayer was compelled to pay the tax to the defendant's successor in office, is liable to the taxpayer for the amount of the tax. *Chouteau v. Rowse*, 56 Mo. 65.

The act of assembly of June 2, 1881, P. L. 45, gives to a lien creditor an action against the collector for making a wilful return of taxes without any necessity therefor; that is, if there is personal property upon the real estate sufficient to satisfy the tax, the collector is obliged to make the taxes out of such personal property; and in case there is no such personal property, and only in such case, is he to make a return so that the taxes become a lien upon the real estate. *Dowlin v. Harley*, 2 Pa. Co. Ct. 194.

But in *Ordway v. Ferrin*, 3 N. H. 69, it was held that, since "a mere nonfeasance cannot make a man a trespasser *ab initio*," a tax collector who seized personal property under his warrant for delinquent taxes was not liable in trespass to the owner by reason of the fact that he held the property a longer time than was allowed by the statute, not having sold the property. The court refused to decide whether or not he would have been liable had he sold the property.

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And *Ordway v. Ferrin* was cited and followed in *Souhegan Nail, Cotton, & Woolen Factory v. McConihe*, 7 N. H. 309, where the collector failed to sell on the day appointed, but readvertised and sold on a subsequent date.

Souhegan Nail, Cotton, & Woolen Factory v. McConihe, supra, was cited and followed in *Cavis v. Robertson*, 9 N. H. 524.

A tax collector who arrests a delinquent taxpayer on election day is not liable in trespass therefor, even though by statute the party arrested is privileged from arrest upon election day. *Woods v. Davis*, 34 N. H. 328.

A tax collector is not liable, either on the ground of fraud or negligence, for giving a receipt in full for the taxes against land upon receipt of a check therefor from the owner, to a purchaser of the land who purchased under the belief that the taxes were paid, induced by the receipt being exhibited to him, and who was compelled to pay the taxes, the check having proved worthless, and the taxes having been returned and made a lien upon the property. *Kahl v. Love*, 37 N. J. L. 5.

Where a tax collector, using his best judgment, guessed at the distance traveled in making a collection, and charged the same as mileage against the taxpayer from whom the collection had been made, it was held in *Weightman v. Jones*, 73 Vt. 353, 50 Atl. 1101, that, although 1 mile in excess of the actual mileage traveled was thus charged up against the taxpayer, the collector was not liable in an action under the statute for charging excessive fees.

Where land was properly assessed in the owner's name, the taxes paid by him to the collector, and a tax sale of the land resulted from the collector's failure to credit the payment upon the record, it was held in *Coleman v. Lytle*, 49 Tex. Civ. App. 42, 107 S. W. 562, that the owner could not recover from the collector for the expense of having the judgment set aside and the sale declared void, for the reason that this neglect was not the proximate cause of the injury.

The neglect was the direct cause of the "sale," but it was not the direct or proximate cause of the "injury." The city's act in bringing nonmaintainable suits was an intervening cause, hence the neglect was only the remote or indirect cause of the "injury."

c. Statutory protection.

Under a statute which provides that "no suit shall be maintained against any collector of taxes, elected by any town in this state, or appointed by the selectmen of any such town to that office, who shall have taken the oath of office prescribed by law, and given bond according to law, on the ground, or by reason, of any irregularity or illegality of the proceedings of the town, or of the selectmen, in his election or appointment, nor for any cause whatsoever, except such collector's own wrong or illegal conduct," it has been held that:

—this statute protects the collector against suit for damages because of any irregularity in the assessment. *Gordon v. Clifford*, 28 N. H. 402.

—if the collector has neglected or failed to take the oath of office, he is not protected by the statute; but one whose property was seized and sold for delinquent taxes can recover only nominal damages on this account if the taxes were legally assessed, unless he shows special damages caused by such neglect or failure on the part of the collector. *Cavis v. Robertson*, 9 N. H. 524.

—evidence of the fact that plaintiff, at the time the tax was levied, was a non-resident, is immaterial, since that fact would not make the collector liable. *Kinsley v. Hall*, 9 N. H. 180.

—this statute does not protect a tax collector from liability to the taxpayer in a suit for libel for an illegal, malicious, and unwarranted advertisement of the fact of delinquency. *Hutchins v. Page*, 75 N. H. 216, 31 L.R.A.(N.S.) 132, 72 Atl. 689.

J. W. M.

MISSISSIPPI SUPREME COURT.

CENTRAL TRUST COMPANY et al.,
Appts.,
v.

MERIDIAN LIGHT & RAILWAY COMPANY et al.

(— Miss. —, 63 So. 575.)

Mortgage — limitation of action — effect of provision accelerating time for payment of principal.

1. A provision in a bond that if any instalment of interest shall remain unpaid

Note. — Effect of acceleration provision in mortgage or note to start statute of limitations running.

The question here considered is covered in the notes accompanying *Hall v. Jamieson*, 12 L.R.A.(N.S.) 1190, and *Lovell v. Goss*, 22 L.R.A.(N.S.) 1110, and the present note is only supplementary to those.

As stated in the first note referred to, where a provision in a mortgage or note is merely optional, giving the mortgagee the option to treat a default as maturing the whole indebtedness, it is generally held that the statute does not commence running until the date of the maturity of the note, unless the option has been exercised.

And in a subsequent case, where a mortgage drawn for a term of ten years provided that in case default should be made in the payment of the principal sum intended to be secured, or in the payment of the interest or any part of the principal and interest, the mortgagee should have the right at any time thereafter to sell the premises in the manner prescribed by law, it was held that this merely gave the mort-

for ninety days after demand, the principal shall at once become due and payable, has the effect to set the statute of limitations running against the right to enforce the security from the time when a demand for the payment of interest due was refused, notwithstanding no request has been made by the bondholders for the foreclosure of the deed of trust, which contains a provision that, should a default continue for three months, the trustee, upon being requested to do so by a majority of the bondholders, shall proceed to sell.

Same — right of barred junior mortgagee to redeem.

2. A junior mortgagee has no right to redeem the property from a sale under a prior mortgage, when the debt secured by his mortgage is barred by the statute of limitations.

On Suggestion of Error.

Bond — secured by mortgage — conflict in provisions.

3. There is no conflict between a provision in a bond that if default is made in payment of interest, the bond shall at once become due and payable, and in the mortgage securing that and other bonds that, should default occur in payment of interest, taxes, or the amount due the sinking fund, and continue ninety days, the principal of the bonds shall, at the option of the trustee, to be expressed by written notice, become due and payable.

Pleading — demurrer — statute of limitations.

4. To raise the defense of the statute of limitations by demurrer, it must be specifically set up.

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gagee the option to foreclose, and that limitations did not begin to run against the principal from the date of the first default in the payment of interest, where the option was not exercised by the mortgagee. *Heburn v. Reynolds*, 73 Misc. 73, 132 N. Y. Supp. 460.

And on the theory that the right given on default was optional with the mortgagee, in the following cases, in which the mortgagees did not elect to declare the whole debt due, the statute of limitations was held not to start running from the date of default:

—where the mortgage and bond secured by it provided that in case of default in payment of interest, the principal should, after thirty days, become due and payable at the option of the mortgagee. *Quackenbush v. Mapes*, 123 App. Div. 242, 107 N. Y. Supp. 1047;

—where the mortgage securing notes empowered the mortgagee to declare the whole sum due on default. *Insurance Co. of N. A. v. Martin*, 151 Ind. 209, 51 N. E. 361; *Clause v. Columbia Sav. & L. Asso.* 16 Wyo. 450, 95 Pac. 54;

APPEAL by plaintiffs from a judgment of the Chancery Court for Lauderdale County in defendants' favor in a proceeding for the foreclosure of a deed of trust, and to redeem the property from sale under a prior one. Affirmed.

The facts are stated in the opinion.

Messrs. Eli H. Chandler, Hirsh, Dent, & Landau, and G. Q. Hall, Hall & Jacobson, for appellants:

The statute of limitations cannot be interposed as a defense to this suit.

The entire debt will not become due, unless the mortgagee elects in some way to treat the debt as due.

Belloc v. Davis, 38 Cal. 242; *Mason v. Luce*, 116 Cal. 232, 48 Pac. 72; *Blakeslee v. Hoit*, 116 Ill. App. 83; *Lowenstein v. Phelan*, 17 Neb. 429, 22 N. W. 561; *Watts v. Creighton*, 85 Iowa, 154, 52 N. W. 12; *Batey v. Walter*, — Tenn. —, 46 S. W. 1024; *First Nat. Bank v. Parker*, 28 Wash. 234, 92 Am. St. Rep. 828, 68 Pac. 756; *Keene Five Cents Sav. Bank v. Reid*, 59 C. C. A. 225, 123 Fed. 221; *First Nat. Bank v. Park*, 37 Colo. 303, 86 Pac. 106; *Jones, Mortg.* § 1183; *Ferst v. Larkin*, 68 Ga. 293; *Capehart v. Dettrick*, 91 N. C.

344; 25 Cyc. 1104; *Sherwood v. Wilkins*, 65 Ark. 312, 45 S. W. 989; *Core v. Smith*, 23 Okla. 909, 102 Pac. 114; *Swearingen v. Lahner*, 93 Iowa, 147, 26 L.R.A. 765, 57 Am. St. Rep. 261, 61 N. W. 431; *Noell v. Gainer*, 68 Mo. 649.

The complainants had the right to redeem, and were not affected by the foreclosure proceeding.

Meridian Gaslight Co. v. Central Trust Co. — *Miss.* —, 46 So. 415; 9 Enc. Pl. & Pr. 308; *Worthington v. Wilmot*, 59 *Miss.* 608; *Houston v. National Mut. Bldg. & L. Asso.* 80 *Miss.* 31, 92 Am. St. Rep. 565, 31 So. 540; *Coxe v. American Freehold & Land Mortg. Co.* 88 *Miss.* 88, 40 So. 739; *Noyes v. Hall*, 97 U. S. 34, 24 L. ed. 909; *Cram v. Cotrell*, 48 Neb. 646, 58 Am. St. Rep. 714, 67 N. W. 452; *Rodman v. Quick*, 211 Ill. 546, 71 N. E. 1087.

The time of payment may be extended by a parol agreement, so that there will be no default within the meaning of the deed.

Jones, Mortg. 4th ed. pp. 117, 118.

When the bonds, and the mortgage securing the same, are executed at the same time, and make reference to each other,

—where a trust deed given to secure several notes falling due at different times provided that, on failure to pay the notes as they become due, the principal sum secured might be declared due. *Sherwood v. Wilkins*, 65 Ark. 312, 45 S. W. 988;

—where a trust deed securing two notes provided that, upon failure to pay either note at maturity, they should both become due, "and at any time afterwards, or after both shall become due and remain unpaid, the said George Walter (the trustee) will sell said land," etc. *Batey v. Walter*, — Tenn. —, 46 S. W. 1024.

And where a note provided that, in case of default in the payment of interest "when due, and for sixty days thereafter, the principal sum . . . shall at once become absolutely due," and a trust deed securing the note stipulated that, in case of default in the payment of interest, the payee might declare the whole due, it was held that the statute of limitations did not start running from a default in the payment of interest, where the payee failed to exercise his option. *Blakeslee v. Hoit*, 116 Ill. App. 83.

And where a note provided that, on failure to pay instalments of interest, the holder might collect the principal and interest at once, and a trust deed securing it stipulated that, in case of failure to pay the interest, the whole of the principal "shall and may at once become due and payable," it was held that limitations did not begin to run against the note from the date of a default in the payment of interest, where the payee did not exercise his option. *First Nat. Bank v. Park*, 37 Colo. 303, 86 Pac. 106.

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And in *Weinberg v. Naher*, 51 Wash. 591, 22 L.R.A. (N.S.) 956, 99 Pac. 736, where a note provided that upon default in the payment of interest, the whole debt should become due at the option of the holder of the note, and the mortgage securing the note empowered the mortgagee to sell the property on default, there is a *dictum* that the whole debt does not become due on default in the payment of interest, in the absence of an exercise of the option by the mortgagee.

In *Fisher v. Spillman*, 85 Kan. 552, 118 Pac. 65, where a note provided that, in case of default in the payment of interest, the whole indebtedness should become due if the holder so elected, and the mortgage securing it provided that upon default the whole debt should immediately become due, the stipulation in the note was held to govern, and in the absence of an exercise of the option it was held that limitations would not begin to run from a default in the payment of interest, but from the maturity of the note. And to the same effect is *Kennedy v. Gibson*, 68 Kan. 612, 75 Pac. 1044.

Where the provision in question is absolute, as distinguished from optional, as stated in the note to *Hall v. Jameson*, it is held by some courts that the statute commences running from the happening of default.

And in *Green v. Frick*, 25 S. D. 342, 126 N. W. 579, it was held that a provision in a mortgage securing notes that, upon default in the payment of principal or interest, "then the whole sum, both principal and interest, shall at once become due and collectable," had the effect, upon default, of

they must be construed, as far as possible, as one instrument.

Ibid.

This defense of the statute of limitations could have been incorporated in the demurrer.

McNair v. Stanton, 57 Miss. 298; *Dan. Ch. Pl. & Pr.* §§ 559, 560.

A judgment on demurrer not excepted to is conclusive between the parties as to the points necessarily decided.

Richmond Hosiery Mills v. Western U. Tele. Co. 123 Ga. 216, 51 S. E. 290; *Sims v. Georgia R. & Electric Co.* 123 Ga. 643, 51 S. E. 573.

The mortgage and note should be construed together.

Consterdine v. Moore, 65 Neb. 291, 101 Am. St. Rep. 620, 91 N. W. 399, 96 N. W. 1021; *Swearingen v. Lahner*, 93 Iowa, 147, 26 L.R.A. 765, 57 Am. St. Rep. 261, 61 N. W. 431; *Schultz v. Plankinton Bank*, 141 Ill. 116, 33 Am. St. Rep. 290, 30 N. E. 346; 3 Cook, Corp. 6th ed. p. 2593; *Stanton v. Alabama & C. R. Co.* 2 Woods, 523, Fed. Cas. No. 13,297; *Morton v. New Orleans & S. R. Co.* 79 Ala. 590; *Low v. Blackford*, 31 C. C. A. 15, 58 U. S. App.

making the entire indebtedness due and collectable, and of starting limitations running from the date of default. The court said: "The decisions of the courts upon this question in the different states are somewhat in conflict, and the question is now presented for the first time in this court. Some courts have construed such clauses in a mortgage or contract as in the nature of a penalty inserted for the benefit of the creditor, giving him an option to declare the whole sum due, and holding that the statute does not commence to run against his debt until he has exercised the option, or elected to declare the whole indebtedness due upon default. Other courts have construed such a provision in a bond or mortgage as fixing a contingency upon the happening of which the whole debt should mature at a date earlier than that fixed in the note evidencing the indebtedness. We are inclined to the view that when the contract does not in terms make the maturing of the entire indebtedness optional with the payee, but does expressly provide that upon a default the entire sum should at once become due and collectable, such words should be given effect according to their plain import and the intent of the parties as expressed thereby. The decided cases which hold this view, it seems to us, are supported by the better reasoning. No doubt exists where the contract is clearly optional on the part of the creditor. But to hold that a contract is optional which, by its express terms, is plainly absolute, is unwarranted by any known rule governing the construction of contracts."

And there is a *dictum* in *Van Arsdale* 51 L.R.A. (N.S.)

737, 87 Fed. 392; *Security Trust & S. D. Co. v. New Jersey Paper Board & Wall Paper Mfg. Co.* 57 N. J. Eq. 603, 42 Atl. 746; *Moses v. Philadelphia Mortg. & T. Co.* 127 Ala. 433, 29 So. 463; *Central Trust Co. v. California & N. R. Co.* 110 Fed. 70, affirmed in 63 C. C. A. 220, 128 Fed. 882; *Grant v. Winona & S. W. R. Co.* 85 Minn. 422, 89 N. W. 60; *Caylus v. New York, K. & S. R. Co.* 10 Hun, 295, affirmed in 76 N. Y. 609; *Moline Plow Co. v. Webb*, 141 U. S. 616, 625, 35 L. ed. 879, 881, 12 Sup. Ct. Rep. 100; *Boley v. Lake Street Elev. R. Co.* 64 Ill. App. 305.

Messrs. Baskin & Willbourn and William H. Armbrrecht, for appellees:

The principal of the bonds matured by the express provisions thereof, on the 1st of September, 1899, and the debt was barred by the six years' statute of limitations long prior to the time of the filing of the original bill.

A junior mortgagee has no right to redeem after his debt has been paid, or after he has parted with his lien, or if his mortgage was without consideration.

Bigelow v. Stringfellow, 25 Fla. 366, 5 So. 816; *McHenry v. Cooper*, 27 Iowa, 137; *Boarman v. Catlett*, 13 Smedes & M. 149;

Osborne Brokerage Co. v. Martin, 81 Kan. 499, 106 Pac. 42, that a provision in a mortgage that the entire amount of the note secured shall at once become due in case of default in the payment of interest or taxes, though primarily for the benefit of the mortgagee, can be turned to the benefit of the mortgagor, and will start the statute of limitations running in his favor upon default.

And there is a *dictum* to the same effect in *First Nat. Bank v. Peck*, 8 Kan. 660, where a mortgage securing notes provided that upon default the whole sum should immediately become due and payable.

It has been held that a provision in a deed of trust securing notes payable on specified dates, that upon default in the payment of the debt or any part thereof, the whole should become due and payable, merely gives the mortgagee the right to foreclose and sell the property upon a default in payment, and to apply the amount realized to the payment of all the secured notes, and does not have the effect upon default of starting limitations running against the notes not then due. *Capehart v. Dettrick*, 91 N. C. 344.

In *Westcott v. Whiteside*, 63 Kan. 49, 64 Pac. 1032, where a mortgage securing bonds provided that upon default in the payment of interest or taxes, the whole sum secured by the mortgage should, at the option of the holder, at once become due, it was held that limitations began to run from the time it was declared to have become due by the holder in his petition in a former action to foreclose, and not from the date that action was commenced. J. T. W.

Farr v. Dudley, 21 N. H. 373; *Skinner v. Young*, 80 Iowa, 234, 45 N. W. 889; *Long v. Mellett*, 94 Iowa, 548, 63 N. W. 190.

The same result follows where the lien of the trust deed is lost by the provision of the statute which bars the lien when the debt is barred.

27 Cyc. 1813; *Hatfield v. Montgomery*, 2 Port. (Ala.) 58; *Byrd v. McDaniel*, 33 Ala. 18; *Perry v. Craig*, 3 Mo. 516; *Stoddard v. Denison*, 38 How. Pr. 296.

Where the debt is barred, the debt cannot be enforced either by foreclosure sale or by a bill to redeem from a sale under a prior mortgage.

Huntington v. Bobbitt, 46 Miss. 528; *Maddux v. Jones*, 51 Miss. 531; *Carpenter v. Plagge*, 192 Ill. 82, 61 N. E. 530; *Fitch v. Miller*, 200 Ill. 170, 65 N. E. 650; *Cassem v. Heustis*, 201 Ill. 208, 94 Am. St. Rep. 160, 66 N. E. 283; *Caraway v. Sly*, 122 Ill. App. 648; *Allen v. Allen*, 95 Cal. 184, 16 L.R.A. 646, 30 Pac. 213; *Wyckoff v. Devlin*, 12 Daly, 144; *Kulp v. Kulp*, 51 Kan. 341, 21 L.R.A. 550, 32 Pac. 1118; *Green v. Gaston*, 56 Miss. 751; *Mueller v. Light*, 92 Ark. 522, 31 L.R.A.(N.S.) 1013, 123 S. W. 646.

The appellees, as vendees of the purchaser at the sale under the first mortgage, have the right to invoke the statute of limitations.

Taylor v. Webb, 54 Miss. 36; *Carpentier v. Brennan*, 40 Cal. 221; *Hopkins v. Clyde*, 71 Ohio St. 141, 104 Am. St. Rep. 737, 72 N. E. 846, 1 Ann. Cas. 1000.

Where bonds themselves provide that the default in payment of interest shall render the bond due and payable, the bonds become due upon such default.

Griffin v. City Bank, 58 Ga. 584; *Dunton v. Sharpe*, 70 Miss. 850, 12 So. 800; *Northampton Nat. Bank v. Kidder*, 106 N. Y. 221, 60 Am. Rep. 443, 12 N. E. 577.

The statute of limitations, regardless of Loper's demand for the principal of the bonds, began to run in this case under the stipulation of the bonds upon the default in the payment of the interest, and its continuance for ninety days thereafter.

Snyder v. Miller, 71 Kan. 410, 69 L.R.A. 250, 114 Am. St. Rep. 489, 80 Pac. 970; 1 Pom. Eq. Jur. 2d ed. § 439; *Wheeler & W. Mfg. Co. v. Howard*, 28 Fed. 741; *First Nat. Bank v. Peck*, 8 Kan. 660; *Harrison Mach. Works v. Reigor*, 64 Tex. 89; *Ryan v. Caldwell*, 106 Ky. 543, 50 S. W. 966; *Noell v. Gaines*, 68 Mo. 649; *San Antonio Real Estate Bldg. & L. Asso. v. Stewart*, 94 Tex. 441, 86 Am. St. Rep. 864, 61 S. W. 386; *Pierce v. Shaw*, 51 Wis. 316, 8 N. W. 209; *Kelly v. Kershaw*, 5 Utah, 295, 14 Pac. 804; *Moore v. Sargent*, 51 L.R.A.(N.S.)

112 Ind. 484, 14 N. E. 466; *Kennedy v. Gibson*, 68 Kan. 612, 75 Pac. 1044.

In respect to the terms of the debt or interest or the time of its payment, if the note and mortgage contain conflicting provisions, the note or bonds will govern as being the principal obligation.

Kansas Loan & T. Co. v. Thayer, 9 Kan. App. 888, 58 Pac. 238; *New England Mortg. Secur. Co. v. Casebier*, 3 Kan. App. 741, 45 Pac. 452; *Fletcher v. Daugherty*, 13 Neb. 224, 13 N. W. 207; *Rothschild v. Rio Grande Western R. Co.* 84 Hun, 103, 32 N. Y. Supp. 37; *American Nat. Bank v. American Wood Paper Co.* 19 R. I. 149, 29 L.R.A. 103, 61 Am. St. Rep. 746, 32 Atl. 305; *Chambers v. Marks*, 93 Ala. 412, 9 So. 74; *Philadelphia & B. C. R. Co. v. Johnson*, 54 Pa. 127; *Buffalo Loan, Trust & S. D. Co. v. Medina Gas & E. L. Co.* 162 N. Y. 67, 56 N. E. 505.

The facts and circumstances show that the appellants are estopped to assert, as against these appellees, any right of redemption in this property.

Chase v. Chase, 20 R. I. 202, 37 Atl. 804; *Naddo v. Bardon*, 2 C. C. A. 335, 4 U. S. App. 642, 51 Fed. 493; *Burgess v. Hixon*, 75 Kan. 201, 88 Pac. 1076; *Evans v. Forstall*, 58 Miss. 30; *Sioux City v. Chicago & N. W. R. Co.* 129 Iowa, 694, 113 Am. St. Rep. 501, 106 N. W. 183; *Williamson v. Jones*, 39 W. Va. 231, 25 L.R.A. 222, 19 S. E. 436; *Pace v. Bartles*, 47 N. J. Eq. 170, 20 Atl. 352; *Kelly v. Hurt*, 74 Mo. 562; *Farr v. Semmler*, 24 S. D. 290, 123 N. W. 836; *Diamond v. Manheim*, 61 Minn. 178, 63 N. W. 495; *Marrow v. Brinkley*, 85 Va. 55, 6 S. E. 605; *Bainbridge v. Woodburn*, 52 Miss. 95; *Alabama & V. R. Co. v. Thomas*, 86 Miss. 27, 38 So. 770; *Sweatman v. Deadwood*, 9 S. D. 380, 69 N. W. 582; *Pom. Eq. Jur.* §§ 802-804; *Royal Bank v. Grand Junction R. & Depot Co.* 125 Mass. 494; *Boston & M. R. Co. v. Bartlett*, 10 Gray, 384; *Brown v. Buena Vista County*, 95 U. S. 157, 24 L. ed. 422.

Smith, Ch. J., delivered the opinion of the court:

On the 17th day of May, 1890, the Meridian Gaslight Company conveyed to the St. Louis Trust Company the property here in controversy, in trust to secure the payment of sixty first mortgage bonds executed by it. In 1901, default having been made in the payment of these bonds, this deed of trust was foreclosed by a bill in equity, and the property sold, at which sale A. C. Howze, trustee, became the purchaser, and the present owners of the property claim title through him by mesne conveyances. In 1893, the Meridian Gaslight Company executed a second deed of trust

to the Central Trust Company, to secure the payment of a second series of bonds, each for the sum of \$1,000, payable ten years after date, with interest at the rate of 6 per cent per annum, payable quarterly—“upon presentation and surrender of the interest coupons attached to said bonds, as they severally become due.” These bonds contained the following provision: “If default shall be made in the payment of any quarterly annual instalment of interest on this bond, and be demanded, and shall remain unpaid for ninety days after such demand, the principal of this bond shall at once become due and payable.” The mortgage stipulated, quoting from the brief of counsel for appellants, that “should the Meridian Gaslight Company make default in the principal or interest of said bond, and should such default continue for three months,” then said Central Trust Company, upon being requested to do so by the holder or holders of a majority of said bonds outstanding, “shall proceed to sell,” etc.” These bonds and the interest coupons attached thereto are payable at the office of the Central Trust Company in New York city. On the 1st day of June, 1899, appellant Loper, the owner of the bonds here sued on, presented to the Central Trust Company coupons numbered 24 attached thereto, and requested payment thereof, which request was refused, and thereafter, in the language of appellants’ bill, “the said Richard F. Loper has frequently demanded of said trustee the payment of the accrued interest evidenced by the successively maturing coupons on said bonds, and the payment of the principal sum evidenced by said bonds, the payment of which has always been similarly refused when so demanded, and that no part of said interest or said principal sum, so demanded, has been paid either by the said company or anyone else in its behalf, and that the same is now due, owing, and unpaid.” On the 26th day of June, 1906, Loper, together with the Central Trust Company, instituted this proceeding in the court below, praying that the deed of trust securing his bonds be foreclosed, and that he be permitted to redeem the property from the sale under the deed of trust executed to the St. Louis Trust Company. Neither Loper, the Central Trust Company, nor any holder of the bonds secured by the deed of trust to the Central Trust Company, were made parties to the suit by which the St. Louis Trust Company mortgage was foreclosed. From a decree dismissing appellants’ bill, this appeal is taken.

At the close of appellants’ testimony, the chancellor sustained an objection which 51 L.R.A. (N.S.)

had been made in proper form to the introduction of the bonds sued on, and excluded them from the evidence on the ground that their execution had not been proven. It is unnecessary for us to decide whether or not the chancellor erred in so doing, for the reason that this evidence was not excluded until complainants had rested their case, and on the pleading and evidence then presented, appellants were not entitled, as will presently appear, to the relief prayed for, even had the bonds not been excluded from the evidence.

One of the defenses relied upon by appellee is that the bonds sued on are barred by our six-year statute of limitations.

“The statute of limitations begins to run whenever the cause of action accrues. In other words, the time limited is to be computed from the day upon which the plaintiff might have commenced an action for the recovery of his demand.” *Johnson v. Pyles*, 11 Smedes & M. 189.

When the demand for the payment of the interest due on these bonds, made on the 1st day of June, 1899, was refused, the principal of the bonds, by reason of the provision hereof hereinbefore set out, became at once due and payable, and the owner had the right then, and always thereafter, to collect them, if necessary, by suit at law. The time within which a suit on the bonds can be commenced must therefore be computed from that date, and, since this suit was instituted more than six years after that date, the bar of the statute is complete. *Hemp v. Garland*, 4 Q. B. 519, 7 Jur. 302, 3 Gale & D. 402, 12 L. J. Q. B. N. S. 134; *Reeves v. Butcher*, [1891] 2 Q. B. 509, 60 L. J. Q. B. N. S. 619, 65 L. T. N. S. 329, 39 Week. Rep. 626; *First Nat. Bank v. Peck*, 8 Kan. 660; *Wheeler & W. Mfg. Co. v. Howard (C. C.)* 28 Fed. 741; *Snyder v. Miller*, 71 Kan. 410, 69 L.R.A. 250, 114 Am. St. Rep. 489, 80 Pac. 970; *Pierce v. Shaw*, 51 Wis. 316, 8 N. W. 207; *Ryan v. Caldwell*, 106 Ky. 543, 50 S. W. 966; *Harrison Mach. Works v. Reigor*, 64 Tex. 89; *San Antonio Real Estate, Bldg. & L. Asso. v. Stewart*, 94 Tex. 441, 86 Am. St. Rep. 864, 61 S. W. 386.

We have examined, but must decline to follow, the authorities to the contrary cited by counsel for appellants. It may be, and probably is, true, as stated in some of these cases, that this provision is primarily for the benefit of the bondholders, and is inserted in order to make the bonds more attractive to investors; but when the bonds contain no language which either expressly or by necessary implication so limits its benefits, it necessarily follows that it can be invoked by the

maker as well as the holder. To hold otherwise would be to make a contract for the parties different from the one they themselves have made.

There is no force in the argument, also advanced in some of these cases, that it would be inequitable to permit the maker of a bond containing such a provision to put the statute in operation by his own wrongful act,—i. e., by the breach of his contract to pay the interest at stated intervals,—for the reason that statutes of limitation are always put in operation by the wrongful acts of the parties invoking them. *San Antonio Real Estate, Bldg. & L. Asso. v. Stewart*, 94 Tex. 441, 86 Am. St. Rep. 864, 61 S. W. 386.

We do not understand counsel for appellants to deny, which of course they could not successfully do, that a junior mortgagee has no right to redeem the property covered by his mortgage from a sale under a prior mortgage when the debt secured by his mortgage is barred by the statute of limitations.

We have not overlooked the provision in appellants' deed of trust that it should be foreclosed by the trustee upon its being requested so to do, and that no such request was made of the trustee prior to the institution of this suit. That fact is wholly immaterial for the reason that the statute of limitations begins to run, not from the time a request of the trustee to foreclose a deed of trust is made, but from the time the debt secured thereby becomes due and payable.

Affirmed.

A suggestion of error having been filed, *Smith, Ch. J.*, on February 9, 1914, handed down the following response (— *Miss.* —, 64 So. 216):

We have re-examined, and must adhere to the views expressed in, our former opinion.

Appellants suggest, however, that we have failed to give effect to the following clause of the mortgage securing these bonds: "Should the party of the first part make default in the payment of any installment of interest, as herein provided, or fail to pay into the hands of the trustee the annual sinking fund of \$3,000, or fail to pay the taxes on said real estate and other property annually when due, and should such default continue for ninety days, then the whole of the principal of the bonds hereby secured and outstanding, together with all interest thereon accrued, shall, at the option of the trustee, to be expressed by written notice and declaration to the party of the first part (which notice and declaration may be given, if re-51 L.R.A.(N.S.)

quested, by the holder or holders of a majority of the outstanding bonds), become due and payable, anything herein or in the said bonds contained to the contrary notwithstanding."

Their contention is that there is a conflict between this and the clause contained in the notes, set out in our former opinion, providing that they shall become due and payable upon default in payment of interest, and that when such a conflict occurs, the clause in the deed of trust controls; that, since the trustee never exercised the option therein given him of declaring the bonds due, their maturity was not accelerated by the failure to pay the interest. It is unnecessary for us to decide whether or not appellants' contention is founded upon a correct conception of the law, for the reason that there is no conflict between the two clauses. The clause in the bonds affects only the particular bond in which it is written, and the failure to pay interest on one bond has no effect on the maturity of another bond; while the clause in the deed of trust affects all of the bonds, and confers power upon the trustee to declare all of them due upon the failure to pay the interest due on any one of them. Without this clause in the deed of trust, difficulties might have arisen in enforcing the security when default had been made in the payments of a part of the bonds only, thereby maturing those on which the default was made.

When the bill was filed in the court below it was demurred to by appellee. The demurrer was overruled, and on appeal to this court the decree of the court below was affirmed and the cause remanded. 46 So. 415. One of the grounds of this demurrer was "no equity on the face of the bill," which, according to appellants' contention, was sufficient to raise the defense of the statute of limitations, and therefore, by overruling the demurrer, the court decided that the bonds were not barred by a limitation, and consequently that defense was eliminated when the case was tried again after it was remanded. It is true that in equity the defense of the statute of limitations can be raised by demurrer when the facts establishing it appear on the face of the bill, but it cannot be done by a general demurrer; in order to be so availed of, the demurrer must specifically set up the statute as one of the grounds thereof. 6 Standard Enc. Proc. 931, and authorities there cited in note 80.

The general demurrer is good only when the pleading to which it is interposed "is so defective that judgment according to the law and the right of the case cannot be rendered on it." In other words, it reaches

only such defects in pleading as are never waived, and which can be availed of at any time and in any place. *Hawkins v. Mississippi & T. R. Co.* 35 Miss. 688; *Southern R. Co. v. Grace*, 95 Miss. 616, 49 So. 835.

Overruled.

MONTANA SUPREME COURT.

STATE OF MONTANA, Appt.,

v.

PETER HARPER, Resp't.

(48 Mont. 456, 138 Pac. 495.)

Commerce — transportation of woman for immoral purposes — power of state.

A state cannot forbid the importation, or aiding in the transportation, of a woman into the state for immoral purposes, since Congress has undertaken to legislate upon that subject.

(January 26, 1914.)

APPEAL by the State from a judgment of the District Court for Park County sustaining a demurrer to an information charging defendant with aiding a woman in obtaining transportation into the state for immoral purposes. Affirmed.

The facts are stated in the opinion.

Messrs. D. M. Kelly, Attorney General, and J. H. Alvord, Assistant Attorney General, for the State:

Cases holding that Congress has plenary power over the subject of interstate commerce, and that laws enacted by it are supreme (*M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; *Chicago, B. & Q. R. Co. v. Miller*, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155;

Smith v. Turner, 7 How. 287, 12 L. ed. 704), all recognize that the states have the power to enact laws for the preservation of the health, property, and morals of their citizens (*Smith v. Turner*, supra; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *Austin v. Tennessee*, 179 U. S. 373, 45 L. ed. 237, 21 Sup. Ct. Rep. 132; *Plumley v. Massachusetts*, 155 U. S. 473, 39 L. ed. 227, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600).

Sanner, J., delivered the opinion of the court:

By an information filed in the district court of Park county, the respondent, one Peter Harper, was accused of aiding a woman in obtaining transportation from Woodlake, Minnesota, to Livingston, Montana, for the purpose of concubinage, contrary to the provisions of § 1, chap. 1, Laws of the Twelfth Legislative Assembly (Laws 1911, p. 3). To this information the respondent demurred, principally upon the ground that the court was without jurisdiction. The demurrer was allowed, and, because the objection could not be avoided by another or amended information, the respondent was discharged. From the judgment thus entered, the state has appealed.

In ruling upon the demurrer the learned judge of the district court filed a memorandum which, omitting the formal parts, is as follows:

"The law under which this information is drawn was passed by the twelfth legislative assembly, and was approved by the governor on January 28, 1911, and, it will be observed, in § 1, assumes to prohibit the transportation of women and girls into this state from another state for immoral purposes, and to punish as a felony those who shall aid any such girl or woman in obtaining such transportation. Prior to the passage of this law the Congress of the United States had, on June 25, 1910, passed what is known as the Mann act (Fed. Stat. Anno.

Note. — *State legislation for prevention of immorality as interference with interstate commerce.*

STATE v. HARPER appears to be the only case directly passing upon the question whether a state statute enacted for the prevention of immorality is unconstitutional as an interference with interstate commerce. In *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550, a statute which required the owner or master of a vessel to give a bond of indemnity against liability for support of certain specified classes of passengers, among which were "lewd and debauched women," was held unconstitutional, partly on the ground that it was an unlawful in-

terference with commerce with other nations. A woman who was held in custody on failure to give bond, as belonging to the class named, was ordered discharged. It appears, however, that the statute went much beyond that necessary or appropriate as a police regulation, giving to the commissioner of immigration arbitrary powers, permitting extortion, and rewarding the commissioner by a per cent of the money collected. The court stated that it did not decide the constitutionality, in the absence of legislation by Congress, of a statute limited to provisions necessary and appropriate for the protection of the state.

R. E. H.

1912 Supp. 419), in the 2d section of which it is provided that any person who shall aid or assist in procuring any ticket or any form of transportation to be used by any girl or woman in interstate commerce, in going to any place for the purpose of prostitution or debauchery or for any immoral purpose, shall be deemed guilty of a felony.

"The contention of counsel for the defendant is that the transportation of persons from one state to another, whatever the purpose, is interstate commerce; that the provisions of § 8, clauses 3 and 18, of the Federal Constitution, which confer upon Congress the power to 'regulate commerce among the several states,' and 'to make all laws which shall be necessary and proper' for that purpose, are exclusive, at least when Congress has assumed to exercise its delegated powers; that, Congress having manifested its purpose in the Mann act to take possession of the subject of the transportation of girls and women from one state to another for immoral purposes, and to punish those who might engage in such traffic or seek to aid in the same, the entire matter must be left under Federal control, and that the act under which the information against the defendant was drawn is the result of an unwarranted assumption of power by the legislature; that the legislature having no legal right to legislate upon the matter, its attempted act could not confer upon the state courts any jurisdiction to punish an offender against the act. The state law and the Federal act embody substantially the same provisions, and it is clear that it was the intention of Congress to assume control of the subject so far as its power extends.

"The transportation of freight or passengers from one state to another, or through more than one state, is interstate commerce; and the regulation thereof by the states is forbidden by the Federal Constitution. Such commerce, whether carried on by individuals or corporations, is under the exclusive jurisdiction of Congress. *Indiana ex rel. Wolf v. Pullman Palace Car Co.* (C. C.) 11 Biss. 561, 16 Fed. 193.

"In *Second Employers' Liability Cases* (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875, the Supreme Court of the United States, referring to commerce clauses of the Constitution, says: They 'have been considered by this court so often and in such varied connections that some propositions bearing upon the extent and nature of this power have come to be so firmly settled as no longer to be open to dispute, among them being' (1) that 'the term "commerce" comprehends more than the mere exchange of

goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land.' It is therefore not open to argument but that the transportation of passengers from one state to another is embraced within the meaning of the words 'interstate commerce,' and that Congress has the authority to regulate such transportation.

"In the case of *Hoke v. United States*, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A. (N.S.) 900, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905, it is held: 'Congress, in the exercise of its power to regulate commerce, could lawfully enact the provisions of the white slave act of June 25, 1910 (36 Stat. at L. 825, chap. 395, U. S. Comp. Stat. Supp. 1911, p. 1343), making criminal the transportation of women or girls in interstate commerce for the purpose of prostitution or debauchery, or other immoral purposes, or the obtaining, aiding, or inducing of such transportation.'

"That the state law under consideration attempts to control a certain phase of interstate commerce is disclosed in the first three lines of the act in question, which declare: 'The importation of women and girls into this state, or the exportation of women and girls from this state for immoral purposes, is hereby prohibited.' We then have a state law and a Federal law, each dealing with the same subject, and are to inquire what effect one has upon the other. Are they of equal potency and effect; are they concurrent, or must one give way to the other?

"Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, says: 'If any one proposition could command the universal assent of mankind, we might expect it would be this,—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it by saying: "This Constitution, and the laws of the United States which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then,

though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the Constitution or laws of any state to the contrary notwithstanding." Further on in the same opinion, the court uses this language: 'This great principle is that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and can not be controlled by them.'

"In *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 503, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, the Supreme Court of the United States says: 'The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several states, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the states. It follows that any legislation of a state, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of Commerce, must give way before the supremacy of the national authority.'

"In *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087, the Supreme Court of the United States says: 'The adjudications of this court with respect to the power of the states over the general subject of commerce are divisible into three classes: First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive, and the states cannot interfere at all.'

"It will be admitted without argument that the statute in question does not fall within the third class of cases above mentioned, and that the state under its reserved police power has the right, at least in the absence of congressional legislation, to control the matter of bringing persons into the state, there to engage in immoral practices. In the case of *Hoke v. United States*, supra, the Supreme Court of the United States says: 'There is unquestionably a control in the states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the states, but there is a domain which the states cannot reach, and over which Congress alone has power; and if such power be exerted to control what the states cannot, it is an argument for, not against, its legality.' It must like-

wise now be conceded that the statute does not fall within the first class of cases above mentioned, for the reason that in *Hoke v. United States*, supra, the Supreme Court has held that the Mann act is a valid exercise of the power of Congress under the commerce clause of the Federal Constitution.

"Having, by the process of elimination, removed the act in question from the first and third classifications made by the Supreme Court in the *Covington & C. Bridge Co. Case*, it follows, of necessity, that it must come under the second class,—that is, that the power attempted to be exercised is one of those instances in which the state may act in the absence of legislation by Congress,—and it remains only to determine what effect the congressional act has upon the state act. This subject has been passed upon in a number of recent cases, all holding that in those instances in which the state has power to act in the absence of legislation by Congress, when Congress does, by its act, manifest a purpose to take possession of a subject within its power under the commerce clauses of the Constitution, all state policies, regulations, and laws upon the subject are superseded by the congressional act. *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; *Chicago, B. & Q. R. Co. v. Miller*, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; *Northern P. R. Co. v. Washington*, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160. The same holding has been made by the supreme court of Montana in the recent case of *Melzner v. Northern P. R. Co.* 46 Mont. 277, 127 Pac. 1003.

"Counsel for the state, however, insists that both of these acts remain in effect, and the jurisdiction over the offense named is concurrent in the Federal and state courts; that the United States and the state being different sovereignties, the same act may be an offense against both. This might be true in some instances, but here we are confronted with the fact that, so far as the regulation of interstate commerce is concerned, the states have expressly surrendered the entire subject to the general government, and that, when the general government sees fit to exercise the powers delegated and surrendered to it by the states, the state is precluded from saying that the subject, or any matter connected therewith, is under the concurrent control of the two sovereignties. The case of *State v. Northern P. R. Co.* 36 Mont. 582, 15 L.R.A.(N.S.) 134, 93 Pac. 945, 13 Ann. Cas. 144, appears to be an answer to these contentions of counsel. In that case the state sought to punish as a crime the

violation of what is known as the sixteen hour law, and, while a conviction was sustained on the ground that the Federal law covering the same matter had not become effective at the time of this prosecution, the court, in effect, holds that, as soon as the Federal law should become effective, prosecutions under the state law could no longer be maintained, thus applying to criminal prosecutions the same rules which have been announced in the civil cases above cited."

This disposition of the matter as presented to the district court is complete. The attorney general, however, contends before us that the position of the district court is untenable, because the state statute in question is not an attempt to directly regulate interstate commerce, since it does not impose any restriction, tax, burden, condition, or prohibition upon the carriers, or upon the freedom of individuals moving from state to state; and therefore, being a reasonable exercise of the reserved police power, it is not open to attack as an interference with interstate commerce. In other words, the statute addresses itself only to citizens of this state upon a matter within the range of its police powers. The argument has some plausibility and might command respect, were it not for the direct answer to be found in *Hoke v. United States*, cited above. The Mann act also addresses itself to the citizens of this state in common with the citizens of all the other states, and it is leveled not merely at the person who transports, but also at the person "who shall cause to be transported or aid or assist in obtaining" interstate transportation for, "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." The state statute provides that "whoever shall . . . aid any such woman or girl in obtaining transportation to . . . this state for the purpose of prostitution or concubinage, or for any other immoral purpose, shall be deemed guilty of a felony," etc. The only difference in these provisions is that, where the Mann act uses the word "debauchery," the state statute says "concubinage;" but this difference is not essential. *Athanasaw et al. v. United States*, 227 U. S. 326, 57 L. ed. 528, 33 Sup. Ct. Rep. 285, Ann. Cas. 1913E, 911. Now, if, as is the case, the very provision of the Mann act above referred to has been authoritatively construed to be a direct regulation of interstate commerce, how can it be said that the like provision of the state statute is not of the same character?

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The assertion that the state statute imposes no restriction, condition, or prohibition upon the freedom of individuals in moving from state to state would seem to carry its own answer. When the statute says that importation into or exportation from this state, of women and girls for immoral purposes, is unlawful, it characterizes not merely the act of the person who furthers the importation or exportation, but also the act of the person imported or exported; and the unlawful character of the act of the person imported or exported is not affected by the circumstance that the penalties of the law are not visited upon her. A person is not at liberty to do an unlawful thing. In the absence of both the Federal and state statutes, persons would be at liberty to come into and go out of this state without regard to sex or purpose. Freedom of movement implies the right to receive assistance when such assistance may be had. To deny to A the right to assist B is to deny to B the right to be assisted, and so restrict the movements of B. In the case of women and girls who come and go for immoral purposes, this is the laudable purpose of both the state and Federal enactments. "If the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to, and the enslavement in prostitution and debauchery of, women, and, more insistently, of girls." *Hoke v. United States*, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905. While the transportation of persons is a branch of legitimate commerce, to knowingly transport or aid in the transportation of women and girls for immoral purposes is a proceeding which the best sense of all the world will condemn, and which, as a menace to its own welfare, any state may prohibit under its police power. Such legislation is doubtless effective so long as Congress remains silent on the subject. *Morgan's L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; *Cooley v. Post Wardens*, 12 How. 299, 318, 13 L. ed. 996, 1004; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087.

The fallacy of appellant's position here is that, if a state statute is an exercise of the police power, it may be enforced, al-

though it be a direct regulation of interstate commerce in a respect covered by Federal legislation. "The line of distinction between that which constitutes an interference with commerce, and that which is a mere police regulation, is sometimes exceedingly dim and shadowy, and it is not to be wondered at that learned jurists differ when endeavoring to classify the cases which arise. It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions, if it should be deemed advisable; and that to whatever extent the ground shall be covered by those directions, the exercise of state power is excluded." Cooley, Const. Lim. 7th ed. 856.

Of certain quarantine regulations of the state of Louisiana it was remarked by the Supreme Court of the United States: "While it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, even where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail." Morgan's L. & T. R. & S. S. Co. v. Board of Health, supra.

The provision before us declares that, under certain circumstances, women and girls are not legitimate subjects of commerce. No one will dispute it, but the controlling power to make that declaration rests with Congress; otherwise the power vested in Congress to regulate interstate commerce may be circumscribed by the ability of the state to determine what shall or what shall not be regulated. "The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated." License Cases; Peirce v. New Hampshire, 5 How. 597, 600, 12 L. ed. 298, 299.

The foregoing is, of course, intended to apply only to those portions of the first section of chapter 1, Laws of 1911, which relate to transportation into this state from without, and must not be taken as an intimation against the validity of any other provision of that section, or of any other section of that act.

The judgment is affirmed.

Brantly, Ch. J., and Holloway, J., concur.
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NEBRASKA SUPREME COURT.

H. W. HORTON, Doing Business as Western Supply Company, et al.,
v.

TABITHA HOME et al., Impleaded, etc.,
Appts.

(— Neb. —, 145 N. W. 1023.)

Mechanics' lien — trust property.

1. A trust for the benefit of the public attaches to property secured by a corporation organized for charitable and religious purposes, to furnish a home for the aged and infirm, and a home for indigent orphans to be given a common school education to fit them to become nurses and attendants on orphan homes and similar institutions, and property so secured and used is not subject to mechanics' liens without an order of the district court of the proper county authorizing the same, nor can the property of such a corporation be sold on execution where such sale would defeat the trust and destroy the public purpose for which the property was donated or secured.

Same — contract by trustees.

2. The trustees elected to manage the affairs of such a corporation cannot enter into a valid contract by which its property may become subject to mechanics' liens, without first having obtained an order of the district court for that purpose.

Charity — dealing with trustees — notice of powers.

3. All persons dealing with the trustees of such a corporation must, at their peril, take notice of the powers granted by its articles of incorporation.

Mechanics' lien — charity — permitting use of material.

4. The failure of the trustees to object to the use of material furnished at the order of other persons, in remodeling the building situated upon such property, will not have the effect of creating a mechanics' lien thereon.

(Letton and Rose, JJ., dissent.)

(March 13, 1914.)

Headnotes by BARNES, J.

Note. — Mechanics' lien on property of charitable or religious institution.

HORTON v. TABITHA HOME finds no support in the few cases found to discuss this question.

The view is taken in Oregon and Pennsylvania, that, there being no reason, religious, moral, or civil, why a church should not be subject to a mechanics' lien, a church edifice is a "building" within the meaning of the mechanics' lien law. Harrisburg Lumber Co. v. Washburn, 29 Or. 150, 44 Pac. 390; Presbyterian Church v. Allison, 10 Pa. 413. But a graveyard belonging to the church

A PPEAL by defendants from a judgment of the District Court for Lancaster County in favor of plaintiff and cross petitioners in an action brought to foreclose a mechanics' lien. Reversed.

The facts are stated in the opinion.

Messrs. F. A. Boehmer and H. C. Blitenbender, for appellants:

A mechanics' lien cannot be obtained against the property of any person, unless the improvements were made or material furnished under a contract with the owner, either expressed or implied.

O. O. Snyder & Co. v. Sparks, 73 Neb. 804, 103 N. W. 662; Rust-Owen Lumber Co. v. Holt, 60 Neb. 80, 83 Am. St. Rep. 512, 82 N. W. 112.

A person furnishing material to a tenant can acquire a lien only on the tenant's interest.

Moore v. Vaughn, 42 Neb. 697, 60 N. W. 914; Hoag v. Hay, 103 Iowa, 291, 72 N. W.

525; Occidental Bldg. & L. Asso. v. McGrew, 86 Neb. 694, 126 N. W. 382.

Nor can a tenant charge the property with a lien for improvements made by him without consent of the owner.

Cross v. Eyerley, 86 Neb. 516, 125 N. W. 1085.

Nor is the property liable for materials furnished to one not the agent of the owner.

H. C. Behrens Lumber Co. v. Lager, 26 S. D. 160, 128 N. W. 698, Ann. Cas. 1913A, 1128.

The decree is contrary to law, and is not sustained by the evidence.

Pratt v. Galloway, 1 Neb. (Unof.) 168, 95 N. W. 329; Holt v. Rust-Owen Lumber Co. 2 Neb. (Unof.) 170, 96 N. W. 613; Alling v. Woodard, 2 Neb. (Unof.) 235, 96 N. W. 127; Michigan Trust Co. v. Red Cloud, 69 Neb. 585, 96 N. W. 140, 98 N. W. 413; Waterman v. Stout, 38 Neb. 396, 56 N. W. 987; Henry & C. Co. v. Fisherick, 37 Neb. 207, 55 N. W. 643; Kimmel v.

is not included in the land which can be subjected to the lien. Beam v. First M. E. Church, 3 Clark (Pa.) 343.

It was recently held in Arkansas that an orphanage erected under a contract with the Catholic bishop, who held the title to the property in his individual name, was not exempt from a mechanics' lien as a public charity, although the bishop was morally and ecclesiastically bound to use the same for religious and charitable purposes. Morris v. Nowlin Lumber Co. 100 Ark. 253, 140 S. W. 1. This decision was rendered *per curiam* by a majority of the court on rehearing after a contrary opinion had been rendered. In the rehearing one judge adhered to the original opinion, and two judges distinguished, and two favored overruling, the earlier cases of Eureka Stone Co. v. First Christian Church, 86 Ark. 212, 126 Am. St. Rep. 1088, 110 S. W. 1042, holding without discussion that a church is a public charity, and that the church building is not subject to a mechanics' lien; and Grissom v. Hill, 17 Ark. 483, holding that where a deed of land for a church provides that the lot "is never to be sold, or to be used in any other way, only for a church," the trustees cannot, by a contract for the erection of a structure thereon, render the land subject to a mechanics' lien; and that where the land is sold under a lien, the grantor may sue in equity to set aside the sale, there being no forfeiture clause in the deed.

Trustees of church property have such a title as authorizes them to contract a debt for which the property may be subjected to a mechanics' lien without making the grantor a party defendant, where the deed conveyed the land to them and their successors in trust for the ministry and membership of the church subject to its discipline, and provided that if the property be sold, the proceeds are to be disposed of according to 51 L.R.A.(N.S.)

such discipline. Harrisburg Lumber Co. v. Washburn, 29 Or. 150, 44 Pac. 390.

A college building erected and maintained by a religious society is not a school building erected in accordance with public law, and, not being exempt, upon the ground of public necessity, from seizure or sale under execution, is subject to mechanics' lien. Ray County Sav. Bank v. Cramer, 54 Mo. App. 587.

A university established by subscription under statutory authority is not rendered immune to the remedies given by the mechanics' lien law, by a provision in the act establishing it, that the trustee shall not encumber the property by mortgage or otherwise, and shall not involve the institution in any debt which it has not the means of paying. University of Lewisburg v. Reber, 43 Pa. 305.

Attention is also directed to McLeod v. Central Normal School Asso. 152 Pa. 575, 25 Atl. 1109, holding that a normal school receiving recognition and aid from the state is not to be regarded as a quasi public corporation so as to relieve its property from mechanics' liens.

In each of the following cases involving mechanics' liens against church property, it appears not to have been contended that church property is not subject to liens, and the opinions proceed upon the assumption that it is: North Presby. Church v. Jevne, 32 Ill. 214, 83 Am. Dec. 261; Gortemiller v. Rosengarn, 103 Ind. 414, 2 N. E. 829; Keller v. Tracy, 11 Iowa, 530; Jones v. Mt. Zion, 30 La. Ann. 711; Hoekstra v. Chambers-Wylie Memorial Presby. Church, 51 Pa. Super. Ct. 405.

As to mechanics' lien on public property, see the notes to First Nat. Bank v. Malheur, 35 L.R.A. 141; National Fire Proofing Co. v. Huntington, 20 L.R.A.(N.S.) 261; and Hutchinson v. Krueger, 41 L.R.A.(N.S.) 315.

L. A. W.

Scott, 34 Neb. 493, 52 N. W. 471; Burt v. Baldwin, 8 Neb. 487, 1 N. W. 457.

Trust property, when used for church or charitable purposes, is exempt from taxation and levy under execution, and the same is not subject to mechanics' lien.

Omaha Medical College v. Rush, 22 Neb. 449, 35 N. W. 222; Re Spangler, 148 Iowa, 333, 127 N. W. 625; Thornton v. Franklin Square House, 200 Mass. 465, 22 L.R.A. (N.S.) 486, 86 N. E. 909; Academy of Sacred Heart v. Irely, 51 Neb. 755, 71 N. W. 752; Macy v. Oshkosh, 144 Wis. 238, 31 L.R.A. (N.S.) 787, 128 N. W. 899, 1136; Fordyce v. Woman's Christian Nat. Library Asso. 79 Ark. 550, 7 L.R.A. (N.S.) 485, 96 S. W. 155; McDonald v. Massachusetts General Hospital, 120 Mass. 435, 21 Am. Rep. 529; Benton v. City Hospital, 140 Mass. 17, 34 Am. Rep. 436, 1 N. E. 836; 2 Perry, Tr. 619, 719, 744; Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 33 L.R.A. (N.S.) 141, 78 Atl. 898; Girard v. Philadelphia, 7 Wall. 15, 19 L. ed. 56; 5 Am. & Eng. Enc. Law, 2d ed. 23; Zion Church v. Parker, 114 Iowa, 1, 86 N. W. 60; Grissom v. Hill, 17 Ark. 483.

All trust property must remain inviolate, and it cannot be sold or transferred by the trustees or other persons charged with the management of the trust property.

Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; Mayrhofer v. Board of Education, 89 Cal. 110, 23 Am. St. Rep. 451, 26 Pac. 646; Atascosa County v. Angus, 83 Tex. 202, 29 Am. St. Rep. 637, 18 S. W. 563; Stark v. Olsen, 44 Neb. 659, 63 N. W. 37; Livermore v. Maxwell, 87 Iowa, 705, 55 N. W. 37; Byron Reed Co. v. Klabunde, 76 Neb. 801, 108 N. W. 133; French v. Griswold College, 60 Iowa, 482, 15 N. W. 273; Downes v. Harper Hospital, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; Hoagland v. Lowe, 39 Neb. 398, 58 N. W. 197; Henry & C. Co. v. Fisherick, 37 Neb. 207, 55 N. E. 643; Waterman v. Stout, 38 Neb. 396, 56 N. W. 987; Cross v. Eyerley, 86 Neb. 516, 125 N. W. 1085; State v. Tabitha Home, 78 Neb. 651, 111 N. W. 586; Avery v. Baker, 27 Neb. 388, 20 Am. St. Rep. 672, 43 N. W. 174; Zion Church v. Parker, 114 Iowa, 1, 86 N. W. 60; Fordyce v. Woman's Christian Nat. Library Asso. 79 Ark. 550, 7 L.R.A. (N.S.) 485, 96 S. W. 155; Grissom v. Hill, 17 Ark. 483; Eastern Bkg. Co. v. Seeley, 59 Neb. 676, 81 N. W. 852; Clarke v. Omaha & S. W. R. Co. 5 Neb. 320; Koehler v. Dodge, 31 Neb. 329, 28 Am. St. Rep. 518, 47 N. W. 913; Robertson v. Buffalo County Nat. Bank, 40 Neb. 235, 58 N. W. 715; Thompson v. West, 59 Neb. 677, 49 L.R.A. 337, 82 N. W. 13; Broohouse v. Union Pub. Co. 2 L.R.A. (N.S.) 993, and note, 73 N. H. 51 L.R.A. (N.S.)

368, 111 Am. St. Rep. 623, 62 Atl. 219, 6 Ann. Cas. 675.

Messrs. E. C. Strode, M. V. Beghtol, and Jesse L. Root for appellee Horton.

Messrs. Field, Ricketts, & Ricketts, Mockett & Peterson, C. S. Polk, C. S. Allen, and Talbot & Allen for other appellees.

Barnes, J., delivered the opinion of the court:

This action was commenced by H. W. Horton in the district court for Lancaster county, for the foreclosure of a mechanics' lien against an incorporated charitable institution known as "Tabitha Home," situated near the city of Lincoln. The petition was in the usual form, for materials furnished Tabitha Home under an alleged contract. Certain other persons claiming mechanics' judgment, and mortgage liens were made parties defendant, and filed answers and cross petitions setting up their claims, aggregating \$22,280.32, exclusive of interest and costs. To the petition and cross petitions the Home answered, admitting that it is a corporation, that it is the owner of the property in controversy, and denying the unadmitted allegations of the petition and cross petitions. The minor children, inmates of the orphans' department of the Home, applied for and were given leave to file an answer and cross petition, which consisted of a general denial of the averments of the petition and all cross petitions. The names of said minors and orphans, some thirteen in number, are given with the averment that they are minors and orphans, inmates of and confined in said Tabitha Home, a charitable institution, and have an interest therein; "that the Home is a corporation under the laws of this state, existing as a charitable institution, the object and purpose of which is to maintain a home for orphans and aged people; that it became incorporated many years ago, and ever since said date has and is now maintained as an orphans' home; . . . that its property and funds be handled by a board of trustees whose duty it is to use said funds and property for the purposes and objects for which the Home was incorporated, and that such board of trustees has no other interest or rights in the property of this Home. The title to the property is held in trust by this corporation and its officers for the use and benefit of the inmates, in furtherance of the object for which the Home was created; that these answering minors have been inmates of the Home and were inmates thereof at the time when the alleged improvements were made, and that they are still inmates of the Home, and being cared for

in said institution; that no part of the material or labor described in these petitions and answers of the lien holders was necessary for the completion, maintenance, or furtherance of the trust for which the Home was incorporated, but if said material was in reality furnished, it was for a different purpose; that these orphans have a right and lien on all the funds and property of said institution until they arrive of age; and that the board of trustees could not use the funds or property of the Home for any other purpose. The minors pray that their interest may be protected and the property preserved for the original trust for which it was intended."

By leave of court an answer and cross petition were also filed by the aged inmates of the Home, in which it is alleged: "That Tabitha Home is a charitable institution duly incorporated, as appears from a copy of the articles attached to this cross petition as exhibit A; that the Home was organized and maintained as a charitable institution, . . . and . . . not . . . for profit; that the corporation has no capital and has no funds or income outside of the few contributions, and that it has no property except that in controversy; that all of these inmates who had any funds made a contract with said Home for their support, board, and lodging for the remainder of their lives, and that they paid their money to said Home for that purpose, . . . and before any of the alleged material was furnished or labor done, they entered said institution in pursuance of their contract and payment of their money, and that they were in said Home long before and at the time when it is claimed that these materials were furnished and this labor was done; that the alleged material was not furnished at the request of these inmates, nor for their use and benefit, nor was it necessary to maintain the institution for its original charitable purpose." Then follows a list of the aged inmates, nineteen in number, with the dates of their several entries, extending from November 21, 1887, to June 25, 1913, with the allegation "that they have each contributed all they had to the Home for their support, and that said sums of money so paid were accepted and are being retained by the Home under said contract for maintenance of these inmates; that they paid their money in good faith, and relied upon the charitable purposes of said Home and the articles of incorporation, believing the same to be true; that the Home was incorporated so that no one person might hold, own, or control its property or funds, and that the board of trustees and the officers have no right or interest in this property or funds

as individuals, and have no authority to use the funds for other purposes than to support the inmates, and that they have no right or interest as individuals in the property of this institution; that the corporation has elected these officers in order that someone might transact its business in a proper manner, and for no other purpose; that neither the officers nor trustees receive any compensation, and that the corporation has no capital, and is dependent for its support upon free contributions, and that it has no real estate except that in controversy; that the material described in the petition and cross petition herein was not furnished . . . under the direction or request of the board of trustees of said Home, nor was it necessary for the continuance of the trust for which the Home was incorporated and continued; that these inmates, by reason of these facts, have a lien upon the property of the Home for the fulfilment of their said contract, and that the board of trustees or officers could not make any contract to divest these inmates of their said right." The answer concluded with a "prayer for protection of their rights, preservation of the property, and, in the event that the real estate be sold, the money paid in by these inmates may be refunded to them." The articles of incorporation of Tabitha Home are attached to the cross petition, and show that they were filed for record April 4, 1890, and duly recorded in the proper records of Lancaster county; that the objects and business of the corporation are: "First. To erect and maintain an orphans' home for the benefit of the orphans of our land. Second. To erect and maintain a place where the sick and needy and feeble may be cared for. Third. To educate and train parties for the purpose of becoming deaconesses, nurses, and attendants on hospitals, orphan homes, or similar institutions. (4) The transaction of the business of the corporation shall be vested in five trustees to be elected by the members of the corporation, and who shall hold their office during the term of their natural life, except they may be removed for cause or by resignation. (5) The indebtedness of the corporation shall at no time exceed one half of the value of such property as may at the time be owned by it."

The answer of J. H. Humpe, trustee, and a mortgagee, consists of a general denial of the averments of the answers and cross petitions of the alleged mechanics' lien holders, admits that the defendant Tabitha Home is, and for many years has been, duly incorporated as a charitable institution under the laws of this state; that it is the owner of the land described in the petition

and cross petitions. It is alleged that for the purpose of securing the payment of certain described notes, amounting in all to the sum of \$10,250, issued by the corporation of Tabitha Home, said notes drawing interest as therein provided, and in pursuance of a resolution therefor duly adopted, directing the trustees so to do, they, on the 22d day of September, 1908, duly executed and delivered to said Humpe a trust deed upon the said real estate; that the notes are outstanding and unpaid, though some are not yet due, but that the said trustee has a lien on said property for the security of said notes, which he asks to have protected by the decree of the court.

The Woodmen Accident Association filed an answer and cross petition, setting up the execution of two promissory notes amounting to \$8,000, with 6 per cent annual interest, secured by mortgages on the premises involved, which were duly executed by leave of the district court, and the mortgages, duly recorded, constitute prior liens; that the debt was not yet due, and there was no default in the payment of interest. The decree found the mortgages to be the first and prior liens, but not subject to foreclosure. No objections having been made thereto, the mortgages need not be further noticed. Replies were filed to all the cross petitions and the issues fully formed.

A trial was had, which resulted in findings and a decree in favor of plaintiff and all the cross petitioners claiming mechanics' liens, and ordering a foreclosure thereof; that the liens of the several mechanics' lien holders constitute a second lien; that J. H. Humpe, trustee, has a third lien, and is not entitled to a foreclosure thereof; that H. Herpolsheimer Company has a fourth lien. A sale was ordered, and Tabitha Home, the aged inmates, and one Martin, as next friend in behalf of the orphan inmates, have appealed.

At the beginning of the trial it was stipulated that the material and labor furnished by the parties claiming the liens were as stated in the accounts attached to plaintiff's petition and the several cross petitions of the lien holders, and that the statements were filed and recorded as alleged, and the materials were furnished and used on the premises described, but that such stipulation would not be construed to mean that they were furnished by order of Tabitha Home or any of its officers. The stipulation is of considerable length, referring to each cross petition, and stating "that the balance due on the above amounts and items is the amount specified in the petition and in the answers and cross petitions of the respective parties, subject to the defenses tendered here by Tabitha Home as to

the legal rights of the parties incurring these expenses to obligate the Tabitha Home to pay for them."

The fact that the material and labor were furnished to remodel one of the buildings is not disputed, but it is contended that it was not furnished for the Home, nor under any contract with the corporation therefor. We find no cross appeal as against the Woodmen Accident Association, nor in favor of J. H. Humpe, trustee. This leaves for our consideration the contention against the mechanics' lien claims, and the Herpolsheimer Company judgment.

It is shown by the record that Tabitha Home is a charitable institution; that the title is in the corporation, with a board of trustees to manage its affairs, who are not vested with the title; that it has no fixed income, and is instituted, supported, and maintained alone by voluntary contributions and donations by the charitably inclined, and by contributions made by the church organization of the denomination in whose interest the Home was created, and by which it is managed, assisted by contributions from others, and is in no sense an organization created and maintained for profit. It has no capital stock, and it is shown that, in carrying out the corporate design, over 2,000 orphans and inmates have been taken care of since its organization; that the aged and infirm have contributed large sums of money, under a stipulation that they should be provided with care and a home during the remainder of their lives, their contributions ranging from \$50 to \$1,000, according to their ability to pay. It is clear that those inmates, should the decree of the district court be affirmed, will be deprived of the care and support toward which they have contributed, and will be thrown upon the charity of the public for their maintenance and support. There seems to be little, if any, doubt that, should the liens be enforced, the total indebtedness would swallow up the property, and the object of its creation and maintenance would be completely destroyed. On the other hand, should the decree be reversed, and the existence of the liens be denied, plaintiff and cross petitioners would probably lose what they have furnished for the improvement of the property. The importance of the case will therefore be well understood and appreciated.

It appears that Tabitha Home is an institution of charity. The real estate and funds provided for the building were contributed by generous people for the good of human beings who were not able to take care of themselves. It is a general charity. Its benefits are not limited to any class of people, and it appears that its doors are

open to all alike. It further appears that certain doctors practising their profession in the city of Lincoln thought it would be a good thing to have a hospital at this institution; that it would help them in their business, and would be of benefit generally. They proposed to the trustees of Tabitha Home to make a hospital there. The trustees of the Home appear to have been cautious and discreet persons, and made a plain arrangement with the doctors that if the hospital was established there, it should be done without expense to the Home. The doctors had an estimate made, and claimed that the improvement could be completed for \$6,000. The trustees then authorized them to go ahead and establish a hospital at their own expense and without charge to the Home. Thereupon, the doctors went ahead in a careless sort of way, and incurred an expense of over \$20,000, and now these claims are asserted as liens upon the property of the Home. The board of trustees of the Home, and especially the many old people who have put all of their worldly goods and money into the Home on the understanding that they were to have a place of refuge as long as they lived, and the many orphan children who are kept there, some of whom are being kept for a consideration paid by their friends, are all perfectly innocent in this matter; and if the liens in question are established, the inmates will lose everything they have in connection with the Home.

The first question presented and discussed is whether the contractors and materialmen have placed themselves in a position to have a lien upon this property, even if it is ordinary property, and is not protected by the statute. It is by all parties considered that they did not make their contracts with the owners of the property; and if they are held to have had a contract with the owners or trustees, it must be one implied from the conditions and circumstances under which they acted. The title of the property was in the Tabitha Home. The trustees of the Home had made their record plainly show that the property was not to be chargeable with these expenses. On a former occasion when the trustees desired to charge the property with an indebtedness, they applied to the courts for permission to do so, and this was a matter of public record. That this was a charitable institution was also a matter of public record and notoriety. This court has many times held that "a person furnishing material for an improvement on real estate must take notice of the interest and title in the premises of the person with whom he contracted as shown by the public record, as his lien for labor and material, aside from the improve-

ment itself, attaches only to such interest." *Waterman v. Stout*, 38 Neb. 396, 56 N. W. 987. The question then is whether the parties who furnished the materials, if they intended to charge the accounts against the Tabitha Home and establish a lien thereon, should not have taken notice from the public records showing that the title was in the Home, which was controlled by a board of trustees, and that the trustees, when they made certain improvements on the Home, had themselves applied to the courts for permission to do so. The records of the corporation showed as explicitly as it could be shown that the Tabitha Home was not undertaking to make this improvement, and was not chargeable with the bills. Therefore it cannot be said that the parties had the right to go ahead and assume that the property of this charity was to become chargeable with the bills for material and labor, without making more inquiry than the evidence shows they made. The trustees as a body, or individually, took no action in ordering the material which was used in making the improvement; and no separate or independent action of any one or more of the trustees could create an indebtedness which would eventually ripen into a lien upon the property held in trust by them. Trustees have no power beyond that created by the trust, and any person dealing with them in matters beyond their power does so at his peril. *Stark v. Olsen*, 44 Neb. 646, 659, 63 N. W. 37; *Livermore v. Maxwell*, 87 Iowa, 705, 55 N. W. 37; *Byron Reed Co. v. Klabunde*, 76 Neb. 801, 108 N. W. 133; *French v. Griswold College*, 60 Iowa, 482, 15 N. W. 273.

In *Fordyce v. Woman's Christian Nat. Library Asso.* 79 Ark. 561, 7 L.R.A.(N.S.) 490, 96 S. W. 159, it was said: "The immunity of the property of a charity from sale under execution rests on special grounds. The property of a corporation organized solely for charitable purposes is exclusively dedicated to public uses, as much so as the streets and alleys of a town or city; for this purpose the corporation is a mere trustee. *Benton v. City Hospital*, 140 Mass. 13, 18, 54 Am. Rep. 436, 1 N. E. 836. It is of primary importance to the public that the trust shall be perpetuated. The trustees of the corporation are usually unsalaried agents, devoting their time and labor to the use and benefit of the public. For their own wrongs and misdeeds they are personally answerable, just as are the physician and the attendants in a hospital. If the doctrine of *respondet superior* is applied to them, it follows that, along with their other powers, they possess an implied power to destroy, by a wilful violation of their duties, by collusion, or by negligence,

the public interests that they are selected to preserve." Further it was said: "A valid vested estate in trust (for charitable purposes) can never lapse or become forfeited by any misconduct in the trustee, or inability in the corporation to execute it, if such existed. Charity never fails; and it is the right, as well as the duty, of the sovereign, by its courts and public officers, as also by the legislature (if needed), to have the charities properly administered.' *Girard v. Philadelphia*, 7 Wall. 15, 19 L. ed. 56. 'With regard to the liability of charitable corporations or their trustees for the negligence of their agents or employees, there is some difference of opinion, but the decided weight of authority denies such liability; this on two grounds: First, that if this liability were admitted, the trust fund might be wholly destroyed and diverted from the purpose for which it was given, thus thwarting the donor's intent, as the result of negligence for which he was in no wise responsible; second, that since the trustees cannot divert the funds by their direct act from the purposes for which they were donated, such funds cannot be indirectly diverted by the tortious or negligent acts of the managers of the funds or their agents or employees.'"

It follows that in this case the board of trustees could not do by indirection what they could not do directly. *Avery v. Baker*, 27 Neb. 388, 20 Am. St. Rep. 672, 43 N. W. 174; *Grissom v. Hill*, 17 Ark. 483; *Fordyce v. Woman's Christian Nat. Library Asso.* supra; *Zion Church v. Parker*, 114 Iowa, 1, 86 N. W. 60.

Another question of importance is whether the property of the Home could be encumbered with a mortgage or otherwise, except under the direction of the court providing what the money realized on the encumbrance should be used for. At the common law no lien was allowed upon church property. The revenue of a religious corporation and any profits realized from this property could be appropriated by the creditors, but not the property itself. *Phillips, Mechanics' Liens*, 3d ed. § 185, after reciting this condition of the common law, says: "It is well worthy of consideration whether all who deal with it do not contract upon the credit of these resources [the revenues and profits derived therefrom] alone."

It appears that many cases have arisen in this country in which, in the absence of any statute on the subject, the courts have been divided upon the proposition as to whether any mechanics' lien could be established upon church property.

The property in question in the case at bar was owned by the Tabitha Home, a cor-

poration organized for the purpose of holding the title thereof. This corporation is not a religious society. A religious society, however, concluded to build a home. They solicited funds from the charitably inclined with which to construct it, and, of course, the religious society itself contributed towards the construction of the building. If we look to the form of the matter only, this was not the property of a religious society; if we look to the substance, however, it was the property of such society. If it can be held to be the property of a religious society, it comes directly within § 651 of the Revised Statutes of 1913, and if it does, then, in case it is desired to sell or exchange the property or encumber it by a mortgage or otherwise, the district court, upon petition and good cause shown, might authorize it to be done; and if that authority was granted, there would be included in the order a direction as to how the proceeds of the encumbrance should be appropriated or invested. Such order would require that the proceeds be appropriated and invested in accordance with the original terms upon which the real estate became invested or intrusted to such religious society. The lien holders, however, have cited some sections of the statute, which is a general one, and intended to cover other cases of organized societies besides religious societies, and which, of course, would not have any application to the case at bar. Their attempted application of those sections of the statute does not appear to be warranted by the Revised Statutes of 1913, where the various sections of the statute are arranged. Section 651, Rev. Stat. 1913, provides: "When any real estate shall have been or may hereafter be bequeathed, aliened, donated, or otherwise intrusted to any religious society in this state, or to any of the trustees or officers of any such society, and such society shall be desirous to sell, exchange, or encumber by mortgage or otherwise, any such real estate, it shall be lawful for the district court of the proper county, upon good cause shown upon petition of any such society, or some person authorized by them, to make an order authorizing the sale or encumbrance of any such real estate, and said court may include in such order directions how the proceeds of such sale or encumbrance shall be appropriated or invested: Provided, such order shall in no case be inconsistent with the original terms upon which such real estate became invested in or intrusted to such religious society." It appears beyond all question that the organization was for charitable purposes, and was under the jurisdiction and control of the Evangelical Lutheran church, and it is our view that it was within the

provisions of the statute above quoted. If this be true, no action was had of any kind, as directed by the statute, conferring authority upon the board of trustees, which could result in the creation of a lien or an encumbrance upon the property; and, as we view the record, no liens were created, for it was beyond the power of the board to do by indirection what they could not do directly.

While there is some conflict in the authorities, the great weight of the adjudicated cases favors the conclusions above expressed. It is to be regretted that the claimants, seeking to establish their liens, are denied that remedy; but, on the other hand, a decree establishing such liens, and an order of foreclosure, would divert the property from the charitable purposes to which it has been dedicated, and would completely destroy its object, with the result that the orphans and the aged and infirm inmates of the Home would be left without any means of support, and would be thrown upon the general public for suitable care and maintenance. As we view the authorities, this should not be done.

The judgment of the District Court, establishing the claimants' liens, and ordering a foreclosure and sale to satisfy the same, is reversed, and the cause is remanded to the District Court for such other and further proceedings in harmony with this opinion as may be desired.

Letton, J., dissenting:

I am unable to agree with the conclusion of fact announced in the opinion, and also with the legal principles stated as applying to the facts in evidence in the case. I therefore dissent.

Rose, J., dissents upon the same ground.

Hamer, J., concurring:

The corporation seems to have been organized as a charitable institution to maintain a home for orphans and aged people,—persons who are unable to provide for themselves. The purpose of the existence of the institution is not for profit. It has no property except that in controversy. The aged persons, for the benefit of whom the Home in part exists, appeared to have contributed all their means to establish and maintain it. This was done under a contract, so that the inmates should have a home that would shield them in their old age, infirmity, and feebleness.

It is provided in its articles of incorporation that the transaction of the business of the Home "shall be vested in five trustees, to be elected by the members of the corporation." These trustees have no

authority to bind the corporation and create a debt against it, unless they act within the purposes of the corporation as set forth in its articles. The thing proposed to be built, and for which it is claimed the indebtedness on mechanics' liens was incurred, was a hospital. I am unable to see how these people needed a hospital. Suppose that the trustees had undertaken to construct a flour mill, would they have had authority to do it? Could they engage in any sort of commercial venture? Could they do anything outside of that which the articles of incorporation would naturally include? The character of the occupation of the trustees was such that it demanded of the one who would do business with them a critical inspection of their powers.

The hospital was to be built without expense to the Home. The doctors who were going to build it so represented to the trustees. Therefore the mechanics' lien people can only look to the doctors. They certainly cannot look to the trustees, who never intended to incur an obligation against this charitable institution. If there is to be a loss, let those whose vigilance in getting business made the loss possible suffer for it. The helpless orphans and the feeble old people should not be turned out of their refuge because the doctors overestimated what they could do, or because they conceived the idea of building a hospital for a charitable institution which did not need it, and whose articles of incorporation did not contemplate it.

Section 153, chap. 16, Comp. Stat. 1911, contains a provision that all funds received by any such corporation (charity society) shall be used in the first instance, or shall be vested and the income thereof used (after paying the necessary expenses), "for the exclusive purpose set forth in the articles of association, and no portion thereof shall be used for any such purpose except within this state, and no portion of the funds of any such corporation shall be used or contributed towards the erection, completion, or furnishing of any building not owned or used by such corporation."

Section 154c of the same chapter provides that "the books, records, and files pertaining to any such home shall be subject to the inspection of the auditor of public accounts of this state, or any deputy or clerk authorized by him to inspect the same." It is further provided in the same section that, "in case of any diversion of the funds or other property acquired by any organization under this act, from the object and purposes of such home or homes, or funds therefor, the attorney general is hereby authorized to bring suit in any court having general jurisdiction in equity matters

in the state, to restrain and prevent any diversion of such funds or property, and to adjust any and all wrongs concerning the same."

It will be seen that the spirit of this legislation tends to prevent any diversion of the property from the charitable purpose intended. It seems to the writer that, if the trustees undertook to endanger the safety of the property by engaging in a contract which might encumber it with mechanics' liens in carrying out a purpose not contemplated by the articles of incorporation, such effort of the trustees would be beyond their jurisdiction, and forbidden by the general spirit of our laws towards charitable institutions.

Petition for rehearing denied.

NEW JERSEY COURT OF ERRORS AND APPEALS.

RE PROBATE OF ALLEGED WILL OF GEORGE S. BULLIVANT, Deceased.

(— N. J. —, 88 Atl. 1093.)

Will — interlineation — effect.

1. A testator, after he had subscribed his name to a will, desired to insert a bequest;

Headnotes by SWAYZE, J.

Note.— *Wills: interlineations or changes by testator after signing.*

- I. Introductory, 169.
- II. Changes during execution or upon the same occasion, 170.
- III. Changes after execution attempted to be published, 171.
- IV. Changes after execution not published.
 - a. In general, 173.
 - b. As revocation of the whole will.
 - (1) In general, 175.
 - (2) Cancellation of signatures, 176.
 - (3) Words of cancellation, 178.
 - c. Substitution of sheets, 179.
- V. Miscellaneous, 179.

I. Introductory.

Interlineations or changes by a testator after signing his will are sometimes made during its execution (as in *RE BULLIVANT*); sometimes, when made thereafter, there is a formal attempt to publish them, but most often they are made after the execution and without any formal publication. In this last most numerous class, the questions arise (1) whether the change amounts to an intent to revoke the will in whole or in part, and if so, what effect can be given to it; or (2) whether the change is simply of new matters. Theoretically any change

an interlineation to effectuate that intent was made, the will was then published, and the signature acknowledged in the presence of the witnesses, who thereupon subscribed their names as witnesses in the presence of the testator. Held, that the will with the interlineation was signed by the testator. Same — signature — adoption of sign.

2. A testator may adopt as his sign his own sign manual made at the foot of his will before its completion. His acknowledgment makes it his signature to the will as it stands.

(Gummere, Ch. J., and Garrison, J., dissent.)

(November 17, 1913.)

A PPEAL by contestants from a decree of the Prerogative Court affirming a decree of the Orphans' Court for Essex County admitting to probate the will of George S. Bullivant, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. Fort & Fort, for appellant:

The prerogative court erred in according any evidential value to the attestation clause.

Mundy v. Mundy, 15 N. J. Eq. 290; Allaire v. Allaire, 37 N. J. L. 312; Re Manners, 72 N. J. Eq. 854, 66 Atl. 583; Re Berdan, 65 N. J. Eq. 681, 55 Atl. 728; Lacey v. Dobbs, 63 N. J. Eq. 325, 55 L.R.A. 580, 92 Am. St. Rep. 667, 50 Atl. 497.

in a will which disposes of a testator's entire estate is a partial revocation, and actually the courts have generally been obliged to discuss most cases of unattested changes as partial revocations. It is from this point of view that the discussion is carried on in the note to Hartz v. Sobel, 38 L.R.A. (N.S.) 797, upon attempt to revoke portions of a will by burning, tearing, canceling, obliterating, or destroying; and that note should be read in connection with the present note.

"Testaments of personalty were, in England, until the reign of Victoria, left to the ecclesiastical courts, unaffected by legislation. Devises of lands were *sub temp.* Hen. VIII. required, by act of Parliament, to be in writing, but no formalities or attestation were prescribed." Lacey v. Dobbs, 63 N. J. Eq. 325, 55 L.R.A. 580, 92 Am. St. Rep. 667, 50 Atl. 497. It was provided by § 6 of the statute of frauds (29 Car. II.) that "no devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall . . . be revocable otherwise than by some other will or codicil in writing, declaring the same, or by burning, canceling, tearing, or obliterating the same by the testator himself, or in his presence and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, canceled, torn, or obliterated by the testator or by his direc-

There was no proof of declaration of the paper writing by the testator as his will.

Re *Manners*, 72 N. J. Eq. 854, 66 Atl. 583.

The paper writing was never signed by the testator as his will.

Re *McElwaine*, 18 N. J. Eq. 499; Re *Walker*, 110 Cal. 387, 30 L.R.A. 460, 52 Am. St. Rep. 104, 42 Pac. 815; *Lacey v. Dobbs*, 63 N. J. Eq. 325, 55 L.R.A. 580, 92 Am. St. Rep. 667, 50 Atl. 497; Re *Manners*, 72 N. J. Eq. 855, 66 Atl. 583; 2 Am. & Eng. Enc. Law, 265; *Schouler, Wills*, 432; *Jackson ex dem. Howard v. Holloway*, 7 Johns. 399; *Hesterberg v. Clark*, 166 Ill. 241, 57 Am. St. Rep. 135, 46 N. E. 734; *Glancy v. Glancy*, 17 Ohio St. 134.

Mr. Edwin A. Rayner for respondent.

tions in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the deviser, signed in the presence of three or four witnesses declaring the same, any former law or usage to the contrary notwithstanding." "This statute inherently prevailed, or was in substance enacted, in the American colonies and the states of the Union, many of whom extended its provisions to testaments of personalty." *Lacey v. Dobbs*, supra. The statute 1 Vict. chap. 26, hereafter referred to, introduced new provisions of a peculiar character.

It is not intended to discuss in this note the question of dependent relative revocation, which is considered generally in the note to *Strong's Appeal*, 6 L.R.A.(N.S.) 1107, and also in the note in 38 L.R.A.(N.S.) 802, in relation to attempt to revoke part of will.

For burden of explaining erasures or alterations appearing upon face of will, see the note to *Scott v. Thrall*, 17 L.R.A.(N.S.) 184.

For admissibility of declarations of testator on issue of his intention in destroying his will, see the note to *Managle v. Parker*, 24 L.R.A.(N.S.) 180.

For the question whether the testator may sign the will after the witnesses have signed, see the notes to *Brooks v. Woodson*, 14 L.R.A. 160, and *Re Horn*, 26 L.R.A.(N.S.) 1126.

It is not intended to go into the question of interlineations in holographic wills, where, under the statute, such wills do not require to be witnessed. For the subject of necessity of witnesses to holographic wills, see the note to *LaRue v. Lee*, 14 L.R.A.(N.S.) 968.

This note does not discuss the cases where the question is whether an addition below the testator's signature was made before or after the execution of the will, upon the theory that if the addition is a part of the original will, then the document was not signed at the end, but that if it was made after the execution of the will, it should be excluded from probate. See *Teed's Estate*, 225 Pa. 633, 133 Am. St. Rep. 896, 74 Atl. 51 L.R.A.(N.S.)

Swayze, J., delivered the opinion of the court:

We agree with the judge of the orphan's court that the evidence shows a publication of the will. The only legal question involved in the case is whether the will was signed by the testator as the statute requires. What happened was that the testator, after he had subscribed his name, desired to insert a bequest of an automobile. An interlineation to effectuate that intent was made, the will was then published, and the signature acknowledged in the presence of the witnesses, who thereupon subscribed their names as witnesses in the presence of the testator. The point made is that the testator never subscribed his name to the will as completed, and the question is

640; *Taylor's Estate*, 230 Pa. 346, 36 L.R.A.(N.S.) 66, 79 Atl. 632; *Baird's Estate*, 16 Pa. Co. Ct. 209. See also notes in 17 L.R.A.(N.S.) 353; 23 L.R.A.(N.S.) 515; and 30 L.R.A.(N.S.) 1173, as to when will is deemed to have been signed at the end.

II. Changes during execution or upon the same occasion.

In *RE BULLIVANT* the change was made after the testator had signed his will, but before he published it to the witnesses, and it was held that this was a sufficient signing under the statute.

In *Bateman v. Mariner*, 5 N. C. (1 Murph.) 176, where a will was signed and attested by one witness, and after immaterial changes, it was attested by another witness, and later published in the presence of both witnesses, it was held that the will was sufficiently attested, both as to real and personal estate. But this seems to have been on the ground that the changes were immaterial.

In *Grigg v. Williams*, 51 N. C. (6 Jones, L.) 518, it was held that the will was not invalidated where, after it had been signed and attested, the two witnesses still being present, the testator asked one of them to be an executor, whereupon the other witness inserted the name of such executor; thereafter, such executor, a third person, and the testator being present, the third person subscribed the will as a witness and the executor then erased his signature as witness, the other original witness not then being present. While it does not appear that any effect was given to the change, the court said: "The witness and the testator were both present, and the execution of the paper was *in fieri*, when the name of the additional executor was inserted at the instance of the testator, and with the knowledge and concurrence of the witness."

But in *Crane v. Marshal*, 1 Mart. N. S. 577, it was held that the will was void where a testator made alterations in it after it had been witnessed by some of the witnesses, and before it was witnessed by other witnesses.

whether his acknowledgment of his own sign manual amounts to a signing. The statute makes a distinction between the act of the testator and the act of the subscribing witnesses. Comp. Stat. 5867, pl. 24. He must sign; they must subscribe their names. Under the English statute before 1837, there had been several decisions as to the meaning of the word "sign." A mark, initials, a wrong or assumed name, an engraved die, were all held to suffice. 1 Jarman, Wills, Randolph & T's ed. 201 ff.; 1 Williams, Exrs. 6th Am. ed. 103. In short the construction put upon the word "signed" by the courts is the original meaning of a signum or sign, rather than the derivative meaning of a sign manual or handwriting. This construction harmonizes with the

change in the language of the statute when it came to the subscribing witnesses, who are required to subscribe their names. This signum must be the sign of the testator, as Chancellor Zabriskie held. *Re McElwaine*, 18 N. J. Eq. 499. The question, therefore, comes to this, Can a testator adopt as his sign his own sign manual made at the foot of the will before its completion? We see no reason why he may not do so as well as adopt a mark, an engraved signature, or a false name, as held in the cases cited by Jarman. The important thing is that the will should be complete at the time of publication and attestation. As Justice Gray said in *Chase v. Kittredge*, 11 Allen, 49, 64, 87 Am. Dec. 687: "A testator may alter his will as he pleases at any time before

English statute.

It was held in *Hindmarsh v. Charlton*, 8 H. L. Cas. 160, that the will was not sufficiently executed where it was signed in the presence of one witness, who then subscribed it, and on a later occasion, the same witness being present, the will was acknowledged to him and a second witness, the second witness then subscribing it, after which the first witness inserted the date in the will and completed his signature, which had been incomplete as to the form of one of the letters. The ground of the decision was that the completion by the first witness of his former signature was not a new subscription, and did not satisfy the statute (1 Vict. chap. 26, § 9), which required that a will to be valid "shall be signed at the foot, or end thereof, by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator."

The initials of the testator and the witnesses in the margin are sufficient signatures to an alteration under the English statute. *Re Blewitt*, L. R. 5 Prob. Div. 116, where, after a will had been duly attested, and apparently at the same time, two interlineations were made, and the testatrix then, in the presence of the subscribing witnesses, signed her initials in the margin of the will opposite the interlineations, and the witnesses added their initials. The statute (1 Vict. chap. 26, § 21) provided: "No obliteration, interlineation or other alteration made in any will after the execution thereof shall be valid . . . unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will, but the will with such alteration as part thereof shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration or at

the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will."

But the initials of the witnesses alone are not sufficient. *Shearn's Goods*, 43 L. T. N. S. 736, 29 Week. Rep. 445, 50 L. J. Prob. N. S. 15, 45 J. P. 308, where, immediately after the execution of the will, an interlineation was made and the witnesses put their initials opposite it, and it was held that the will must be admitted as originally written. Compare *Dewell's Goods*, 17 Jur. 1130, *infra*, III.

III. Changes after execution attempted to be published.

The attempts at publication are of such variety as to make any arrangement of the cases arbitrary.

Without new signatures.

Generally speaking, a republication of a will without any new signatures, after changes, is insufficient to give effect to the new matter, but the contrary was held in *Wright v. Wright*, 5 Ind. 389, where, at a later time than the execution of the will, the testator sent for the witnesses and in their presence an additional clause was interlined without any reattestation or signing, and it was held that the new clause was properly executed and attested.

And in 2 Eq. Cas. Abr. 770, the judges discussed, but did not, it seems, decide, the question whether the statute of frauds requiring written alterations of devises to be signed in the presence of witnesses had been obeyed where a testator, after his will had been made before four witnesses, had an interlineation made in it of a certain devise for life, and put his seal to it, and published it before three of the same witnesses.

But in *Hesterberg v. Clark*, 166 Ill. 241, 57 Am. St. Rep. 135, 46 N. E. 734, where, two days after the execution of the will, the testator sent for the witnesses and in their presence had interlined a legacy, there being no new signatures or re-signing, it

it is formally attested. He may write it out in full, and sign it, and it has no effect as a will until duly attested. It is unimportant whether it is or is not signed by the testator until it is produced to the witnesses. It is only important that it should be his will in writing and signed when they attest and subscribe it, and it is equally his will in writing whether signed in their presence or at some previous time." This opinion was cited by us on another point in *Lacey v. Dobbs*, 63 N. J. Eq. 325, 55 L.R.A. 580, 92 Am. St. Rep. 667, 50 Atl. 497, without any suggestion of disapproval. It may be conceded that under the circumstances of this case the will offered for probate was not signed by the testator within the meaning of the statute until he adopted

his own handwriting as his signature to the will by acknowledging it to be such in the presence of the witnesses. That acknowledgment made it his signature to the will as it stands. As we said in *Ludlow v. Ludlow*, 36 N. J. Eq. 597, at page 800, the statute of 1851 made the acknowledgment of the signature proof of signing. The opinion of Chancellor Zabriskie in the *McElwaine Case* is not to the contrary. There the signature had been made by another, the testatrix "did not, after her name was signed, touch the paper, or say that it was her signature, and there is no proof that, after her name was signed, she acknowledged or declared that it was her will." The ordinary in that case was dealing with a signature made by another, and he prop-

was held that the will must be admitted to probate as originally written, and the interlineation was of no effect. The court disapproved the case of *Wright v. Wright*, supra.

So, also, it was held that the changes were not properly executed, and that the will as originally executed was not invalidated, where—

—by the testator's direction certain legacies were reduced, the date changed, and the paper reacknowledged to the subscribing witnesses, but no new signatures were put upon it, the court observing that he did not see how a careful interlineation could be an obliteration within the statute. *Dixon's Appeal*, 55 Pa. 424;

—the testator took out some of the sheets of the will, tore them up, or they were destroyed, acknowledged new sheets to the witnesses, and they reacknowledged their signatures, touching them. *O'Neill v. Owen*, 17 Ont. Rep. 525 (where the contents of the original sheets were proven);

—an interlineation was made by a scrivener at the direction of the testator, and declared simply in the presence of one of the witnesses to the will, and the scrivener, but they did not attest it. *Wheeler v. Bent*, 7 Pick. 61.

The will was refused probate where the witnesses to it were father and son, and at the time of probate the son was dead, and it appeared upon the testimony of the father that subsequently to the execution of the will two erasures in it were made by him at the testator's instruction, and further that, after the erasures were made, the testator reacknowledged his will in the presence of the witness and of his deceased son, who was the other witness. The court considered that the presumptive proof of execution by the subscribing witness was destroyed by the further proof of the alterations by the subscribing witness, so that the witness had proved only the altered will, and that therefore there was only one witness to the will as originally executed. *Charles v. Huber*, 78 Pa. 448.

In *Derr v. Greenawalt*, 76 Pa. 239, where a will was executed with a blank for the

name of the residuary legatee, and this was afterward filled in at the testator's direction, and one of the subscribing witnesses testified to its being done, but the person who filled in the name was not able to remember the circumstances, and to say that he did it at the request of the testator, it was held that the residuary bequest must be stricken out of the will. It would seem that the statute did not require that the proof should be made by subscribing witnesses.

It may be noted that the will was admitted to probate as originally written in *Simrell's Estate*, 154 Pa. 604, 35 Am. St. Rep. 864, 26 Atl. 599, where a witness testified that after the execution of the will she had, at the testatrix' direction, made interlineations and erasures in it.

Marginal signatures—English statute.

Under § 21 of 1 Vict., quoted supra II., changes have been held properly executed where—

—there were interlineations, against each of which, on the margin, was the signature of the testator and of the witnesses. *Wingrove's Goods*, 15 Jur. 91;

—a testator, after the execution of his will, made an alteration therein, called in the witnesses who had attested the will, and put his initials opposite the change, and had them put their initials there also. *Hinds's Goods*, 16 Jur. 1161 (where later unattested erasures were disregarded);

—the testator made a change in the clause appointing his executors, which began near the foot of the second page, striking out the name of an executor which appeared on that page, and interlined the name of an additional executor on the top of the third page, and then on the second page in the margin opposite the beginning of the clause, he wrote his signature, which was followed by the word "witnesses" and by the signatures of the attesting witnesses all on that page. *Wilkinson's Goods*, L. R. 6 Prob. Div. 100, 29 Week. Rep. 896, 45 J. P. 716.

erly dwelt on the danger involved, and intimated that even that would suffice if done in the testator's presence and by his express direction. The danger dwelt upon by the ordinary in that case is, however, no greater than the danger of opening the door to parol testimony to prove that the sign manual of the testator duly acknowledged as his signature was not signed by him to the completed paper on which it is written. What Chancellor Zabriskie feared was the lack of any act by the testator; but in this case we have such an act. It would have been mere idle form for him to write his name again. He must, indeed, adopt by his acknowledgment the name already written as his sign to the then completed will; but that, also, he did. Later

Chancellor McGill in *Fritz v. Turner*, 46 N. J. Eq. 515, 22 Atl. 125, held that the signature was good, although the testator's hand was guided by the draughtsman, and it was a disputed question whether the testator could write at all. "The important question," he said, "is whether the testator had the purpose to write his name or make his mark upon the will as his signature to it, and whether, in fact, he did make such a physical effort to sign as resulted in a mark upon the paper by which the paper could be identified." While the decree was reversed (49 N. J. Eq. 343, 25 Atl. 963), it does not seem to have been on any ground that affected the chancellor's view on this point, for, if that had been the case, it would have been quite unnecessary for the

Miscellaneous attempts.

It was held that the execution of the changes was sufficient where, after a will had been attested by two witnesses, A and B, the testator made changes in it, and had it attested again by two witnesses, B and C, C being a legatee whose legacy had not been changed. *Malloy v. McNair*, 49 N. C. (4 Jones, L.) 297.

In *Dewell's Goods*, 17 Jur. 1130, it was held that the alterations were sufficiently made where a testator, after having made his will, made two interlineations, and the subscribing witnesses put their initials in the margin opposite thereto, and below the old attestation the testator had written an attestation clause of republication, etc., stating the changes and the date, which was signed by the witnesses, but not by the testator. The court does not refer to the fact that the testator thereafter executed a codicil.

The changes were held to be of no effect, and the will was admitted to probate as originally written—

—where the name of the sister of the testatrix had been written with an error as to her Christian name several times in the will, and this was changed to the correct name, and the testatrix summoned the witnesses and traced her signature with a dry pen, and the witnesses put their initials opposite the changes. *Martin's Goods*, 1 Rob. Eccl. Rep. 712;

—where the testator interlined words so as to include in a devise lands purchased since the making of the will, and indorsed on the will an instrument as to the alteration, and attested it in the presence of two witnesses, the law requiring three. *Jackson ex dem. Howard v. Holloway*, 7 Johns. 394;

—where the testator, a day or two after executing the will, told one of the witnesses that his signature and address were badly written, and the testator thereupon erased part of the signature of that witness, and had him rewrite part of it, with his address. *Coleman's Goods*, 2 Swabey & T. 314, 30 L. J. Prob. N. S. 170, 5 L. T. N. S. 119; 51 L.R.A.(N.S.)

—where a witness, by the direction of the testator, erased his own signature in order that he might not lose a legacy in the will, and later the testator had the other original witness trace his signature with a dry pen in the presence of an additional witness, who then signed his name as a witness. *Playne v. Scriven*, 7 Notes of Cases, 122.

The will was admitted to probate as originally written in *Re Penniman*, 20 Minn. 245, Gil. 220, 18 Am. Rep. 368, where Wm. A. Penniman sometime after the execution of his will made in it certain erasures and interlineations in his own handwriting, and then had two new witnesses sign a memorandum below the will stating that the erasures and interlineations were made by Wm. A. Penniman such a day, and were witnessed by them, it appearing that the number and character of the interlineations and erasures were not pointed out to the witnesses at the time of the attestation. The court considered that the witnessing was of the changes only; that there had been no sufficient attestation under the statute; that the will had not been properly re-executed, and that the erasures could not take effect, as they constituted dependent relative revocation.

In *Kirke v. Kirke*, 4 Russ. Ch. 435, 6 L. J. Ch. 143 (1828) where alterations reducing legacies charged on real estate were followed by a codicil not properly attested, embracing such changes, it was held that the will must stand as originally written.

For other cases of alterations embraced in subsequent invalid testamentary instruments, see the note to *Strong's Appeal*, 6 L.R.A.(N.S.) 1107.

IV. Changes after execution not published.

a. In general.

Most cases of changes and interlineations by testators occur after execution, without any attempt at republication of the changed will before witnesses. In jurisdictions where attestation by subscribing witnesses

court of errors and appeals to send the case back for further testimony; the undisputed facts would have been fatal to the validity of the will.

If we look to the analogies of the law, we are sustained in our view. A promissory note must be signed, and a deed must be sealed. If it could be said that these requirements were not complied with in cases where the instruments were altered, all the discussion in the books as to the distinction between material and immaterial alterations, and between alterations by a party and alterations by a stranger, would have been idle, since it would have sufficed to say that the document produced has never been signed or sealed. Has it ever been suggested that a promissory note

ceased to be such because altered by the maker after he had put his name thereto, or that a deed was not sealed because after the seal was affixed an alteration was made by the grantor? In these cases the instrument speaks from the time of delivery; a will becomes effective by acknowledgment of the signature and publication.

For these reasons, we think the will offered for probate was signed by the testator as the statute requires, and the decree is affirmed. The case, however, is a proper one for allowance of costs out of the estate.

Gummere, Ch. J., dissents.

Garrison, J., dissenting:

I think that the signing of his will by a

is requisite to a will, an unattested change by way of addition to the will cannot be made. But there are many cases which discuss the questions whether an unattested change may take effect (1) as a revocation of the entire will, or (2) as a partial revocation. In fact, there are few cases in the jurisdictions referred to upon the effect of unattested changes, which are not decided upon the basis of whether there has or has not been at least a partial revocation under the statute in force. These cases it seems all proceed on the principle that an unattested addition is without effect, and that the only way in which any effect can be given to the change is by way of revocation at least of part of the will, and if it cannot be given effect as a partial or total revocation, the will must stand as originally executed, if the original words can be recovered. There is in the note to Hartz v. Sobel, 38 L.R.A. (N.S.) 797, a full discussion of the cases upon attempt to revoke portions of a will by burning, tearing, canceling, obliterating, or destroying, and the reader will see that most of the cases involve additions as well as omissions, and substitutions as well as mere reductions.

Speaking, then, of wills which require attesting witnesses, unattested changes or interlineations in them amounting to substitutions or new matter cannot be given effect as new dispositions. Wolf v. Bollinger, 62 Ill. 368 (changing a devise from A to B); Doane v. Hadlock, 42 Me. 72 (insertion of a legacy); Eschbach v. Collins, 61 Md. 478, 48 Am. Rep. 123 (changing and enlarging devises); Thomas v. Thomas, 76 Minn. 237, 77 Am. St. Rep. 639, 79 N. W. 104 (substituting one beneficiary for another); Southworth v. Southworth, 173 Mo. 59, 73 S. W. 129; Gardiner v. Gardiner, 65 N. H. 230, 8 L.R.A. 383, 19 Atl. 651; McPherson v. Clark, 3 Bradf. 92 (substitution of devisees,—criticized, not for its result, but as considering a partial revocation admissible, in Lovell v. Quitman, 88 N. Y. 377, 42 Am. Rep. 254); Quinn v. Quinn, 1 Thomp. & C. 437 (substitution, etc.); Re Prescott, 4 Redf. 178; Dyer v. Erving, 2 Dem. 160; Re Wilcox, 46 N. Y. S. R. 877, 51 L.R.A. (N.S.)

20 N. Y. Supp. 131; Brundige v. Benton, 17 Ohio L. J. 243 (new legacies interlined); Pringle v. McPherson, 2 Brev. 279, 3 Am. Dec. 713 (changing a devise from one person to another); Re Knapen, 75 Vt. 146, 98 Am. St. Rep. 808, 53 Atl. 1003 (substitution of new residuary legatee for one who had died, and other changes); Smith v. Meriam, 25 Grant, Ch. (U. C.) 383 (under act of 1873).

Where, after the execution of a will in which a blank had been left for the name of the executor, the name of such executor was inserted, and a clause of no effect was erased from the will, it was held that the will would be admitted to probate as originally written. Southworth v. Southworth, 173 Mo. 59, 73 S. W. 129.

In Watson v. Hinson, 162 N. C. 72, 77 S. E. 1089, where the case went back for a new trial, the court said that where the name of an executor who had died was erased, and another substituted at the testator's direction, this had no effect on the will, although if the executor had been alive when the change was made, it would have had the effect of striking his name out of the will, but not of substituting the person written in in his place.

In Greer v. McCrackin, Peck. (Tenn.) 301, 14 Am. Dec. 755, it was held that an unattested change as to a devise was ineffectual, but that one as to a legacy was valid, the statute of Tennessee then in force not having changed the effect of the statute of frauds or of wills of personality.

In Ravenscroft v. Hunter, 2 Hagg. Eccl. Rep. 65 (1828) alterations subsequent to execution, it seems, relating to personal estate, were admitted to probate.

—English cases under 1 Vict.

The statute 1 Vict. chap. 26, § 21, as to interlineations, etc., is quoted *supra*.

Under the statute, unattested additions will be disregarded, and the will admitted as originally written if the original words can be recovered.

Locke v. James, 11 Mees. & W. 901 (change in annuity charged on real estate);

testator must, under our statute, be the signing of his written will. The statute calls it the "signature" of the testator, and, whether it be his sign, mark, signum, or sign manual, such testamentary act must take place in the order named in the statute,—be after the writing of the will. It is this "signature" that the testator may acknowledge to the witnesses in case it was not made in their presence; such acknowledgment is therefore a substitute in the alternative for the visual act of the witnessing of the making of the signature. If the witnesses have witnessed the signing by the testator, an acknowledgment is not authorized by the statute, and, if it were, would not advance the transaction beyond what such witnesses had in fact witnessed.

In fine the acknowledgment merely identifies the testator's signature as of the time when, had the witnesses seen him make it, they would have witnessed the act that is thus acknowledged solely because they did not so witness it. Whether witnessed or acknowledged, the testamentary act in question remains identically the same. The present case, therefore, by force of the testator's acknowledgment of his signature, stands precisely as if the witnesses had seen him make it, in which case they would have seen him sign his name to a paper that was not his will. Such a signing, whether it be witnessed or acknowledged, is not the statutory signing by the testator of his written will, for a will is not written until it is completed any more than it is before

Beavan's Goods, 2 Curt. Eccl. Rep. 369 (increasing legacy); Harris's Goods, 1 Swabey & T. 536 (change of executor); Cooper v. Bockett, 4 Moore, P. C. C. 419, 10 Jur. 931 (change of residuary beneficiaries, etc.); Rowley v. Merlin, 6 Jur. N. S. 1165 (devise in fee reduced to life estate with remainder to another); White's Goods, 6 Jur. N. S. 808; McCabe's Goods, L. R. 3 Prob. & Div. 94 (substitution of one residuary legatee for another); Greenwood's Goods [1892] P. 7, 61 L. J. Prob. N. S. 56, 66 L. T. N. S. 61 (substitution of one person as executor for another); Simmons v. Rudall, 15 Jur. 162, 1 Sim. N. S. 115 (substitutions of devisees, etc.); Brooke v. Kent, 3 Moore, P. C. C. 334 (reducing amounts of jointures chargeable by tenants for life); Brasier's Goods [1899] P. 36, 68 L. J. Prob. N. S. 6, 47 Week. Rep. 272, 79 L. T. N. S. 472 (additional devisees).

Reduction of gifts, etc.

So, the will has been admitted to probate as originally written where the change consisted in a reduction of the amount of a legacy. *Re Lang*, 9 Misc. 521, 30 N. Y. Supp. 388; *Wetmore v. Carryl*, 5 Redf. 544; *Jeffery v. Cancer Hospital*, 57 L. T. N. S. 600, 51 J. P. 503; *Rippin's Goods*, 3 Curt. Eccl. Rep. 121.

Prior to the statute 1 Vict. chap. 26, unattested alterations reducing certain legacies charged on real estate were disregarded as ineffectual attempts at substitutions. *Kirke v. Kirke*, 4 Russ. Ch. 435, 6 L. J. Ch. 143.

So, the change has been disregarded under the statute of frauds, where it consisted in striking out or reducing devisees. *Winsor v. Pratt*, 3 Brod. & B. 650 (prior to statute 1 Vict.).

But it may be noted here that in *Swinnton v. Bailey*, L. R. 4 App. Cas. 70, 43 L. J. Exch. N. S. 57, 39 L. T. N. S. 581, 27 Week. Rep. 293, it was held, as to a will executed and altered before the statute 1 Vict., that erasing from a clause of a devise in fee the words, "her heirs and assigns forever," was a valid revocation of 51 L.R.A.(N.S.)

all except the life estate, under the statute of frauds.

See also for other cases of alteration disregarded under the English statute, *Burgoyne v. Showler*, 1 Rob. Eccl. Rep. 5, 8 Jur. 814; *Williams v. Ashton*, 1 Johns. & H. 115, 3 L. T. N. S. 177.

It is usual in New York to meet with the general statement that unattested alterations will be disregarded. *Re Twombly*, 4 Month. L. Bull. (N. Y.) 24; *Dyer v. Erving*, 2 Dem. 160; *Re Wilcox*, 46 N. Y. S. R. 877, 20 N. Y. Supp. 131.

b. As revocation of the whole will.

(1) In general.

As appears from the note to *Hartz v. Sobel*, 38 L.R.A.(N.S.) 805, in case of a partial revocation the rest of the instrument will be admitted to probate, and where a *pro tanto* revocation is not allowable, the will as originally written will be probated.

The reader will notice in subdivision III. supra, that in a number of the cases it is held that the attempted change did not avoid the will.

"It is the general rule that alterations made after its execution upon the face of a will, for the purpose of amending its provisions, will not revoke the will as a whole." *Jersey v. Jersey*, 146 Mich. 660, 110 N. W. 54 (*obiter*).

So, reducing a legacy, if permissible, will not revoke the will (*Tudor v. Tudor*, 17 B. Mon. 383); nor an ineffectual interlineation of a legacy (*Doane v. Hadlock*, 42 Me. 72); nor immaterial interlineations made after execution (*Rowan's Estate*, 234 Pa. 584, 83 Atl. 429); nor a change in the date of the will made by the testator with no intention of revocation, but rather of sustaining the will (*Overall v. Overall*, Litt. Sel. Cas. (Ky.) 501); nor the addition of an unsigned memorandum at the foot of it (*Heise v. Heise*, 31 Pa. 246).

In *Wells v. Wells*, 4 T. B. Mon. 152, 16 Am. Dec. 150, it was held that striking out the name of one executor and inserting the name of another person as executor, in the

it is commenced. A will thus executed in the inverse order of the statute, *i. e.*, first signed, then reduced to writing, and such previous signature then acknowledged, is no more a compliance with the statute than if the witnesses had witnessed the testator write his name on a piece of blank paper, on which, over his name, his will was afterwards written. In fine, if a testator has not in fact signed his written will, no acknowledgment he can make can alter that fact or supply that deficiency, for it is only his signature he can acknowledge,—not his will,—and in the last analysis the fundamental error is that of construing the statute as if it authorized the testator to acknowledge his will, *i. e.*, to adopt as his will a writing that had not been signed by him. The proper construction of the stat-

ute stated in a single sentence is that the acknowledgment is a substitute for the circumstantial act of the witnesses, *i. e.*, their actual witnessing of the writing of his signature by the testator in case they have omitted so to do; but that it is not a substitute for the essential act of the testator, *i. e.*, the signing of his written will, which in no case can he omit to do. Being unable to adopt a construction of the statute that varies its plain terms, and which, by dispensing with the signing by the testator of his written will, dispenses with all of the safeguards thus thrown around this essential testamentary act, no course is open to me but to deny that the will in the present case was properly admitted to probate.

presence of one of the witnesses, but with no formal republication, does not vacate the will; but it does not appear whether any effect was given to the change.

In *Re Knapen*, 75 Vt. 140, 98 Am. St. Rep. 808, 53 Atl. 1003, it was held that "the interlineations of new and independent bequests are, of course, ineffectual. Neither do they invalidate the will."

Where the greater part of a will had been canceled and altered, it was admitted to probate as originally written. *Re Crawford*, 80 Misc. 615, 142 N. Y. Supp. 1032.

There are, however, a few cases in which it has been held that partial erasures, etc., effected a revocation of an entire will.

Thus, in *Bohanon v. Walcott*, 1 How. (Miss.) 336, 20 Am. Dec. 631, where the testator, wishing another person to write a new will for him, handed him his will of 1831, with changes and interlineations in it, and told him of other changes he desired, saying that he had done away with that will, and that if such person did not write a new will for him, he wished his older will of 1829 to stand, and no new will was made, it was held that he died intestate.

In *Law v. Law*, 83 Ala. 432, 3 So. 752, it was held error to exclude evidence tending to show that the testator, at the time of erasing the name of a legatee and afterward, declared his intention to be thereby to revoke the entire will.

In *Dammann v. Dammann*, — Md. —, 28 Atl. 408, it was held that the whole will must fail where the testator had, by erasures and marginal notes, removed a considerable portion of his will to such an extent that the remaining clauses, if standing alone, would be uncertain, unintelligible, and repugnant to the entire scheme of the will; and that the intent of the testator was to revoke the whole will and make a new one.

It may be noted that in *Home of the Aged v. Bantz*, 107 Md. 543, 60 Atl. 376, it was held where the testator struck out part of a clause disposing of a remainder after a life estate in the earlier part of the

clause, that this did not render the entire will void, but that the part stricken out would be eliminated from probate.

(2) Cancellation of signatures.

It is in general not intended to include cases where there has been a tearing, cutting, or burning of the will, though two or three cases of this kind are referred to.

The cases of canceled signatures, under the "canceling" and "obliterating" clause of the statutes, are often complicated by the circumstances in which the will was kept or found. This note presupposes that the cancellation has been made by the testator. Some of the cases on canceled signatures will be found *infra*, under "Words of Cancellation."

Cancellation of the testator's signature has been held to effect revocation of the will—

—where there was "a strong black line" drawn through the testator's signature. *Baptist Church v. Robbarts*, 2 Pa. St. 110;

—where there were three lines drawn through the signature in black ink. *Re Philip*, 46 N. Y. S. R. 356, 19 N. Y. Supp. 13;

—where the signature of the testator was crossed out by two lines and the name of the residuary legatee crossed out. *Clark's Will*, 1 Tucker, 445;

—where the testatrix, calling on persons present to witness that she destroyed her will, drew one line across her signature, and then a line through each of the two words thereof at an obtuse angle, the words of the statute being "burning, tearing, or obliterating." *Glass v. Scott*, 14 Colo. App. 377, 60 Pac. 186;

—where the testator's signature and his name in the attestation clause were each blackened by a considerable number of parallel and circular lines and cross marks in lead pencil, there being convincing evidence of his intent to revoke, and the words of the statute being "shall destroy or mutilate the same." *Woodfill v. Patton*, 76 Ind. 575, 40 Am. Rep. 269.

In *Doe ex dem. Crooks v. Cummings*, 6 U. C. Q. B. 305, where the testator's signature and the seal had been struck across with a pen and a new will drafted, it was found by the jury that the testator meant to die intestate, and it was held accordingly.

"The tearing out of the seal and of part of the signature of the testatrix, and the obliteration of the names signed to the will, are a cancelation of the will." *Re White*, 25 N. J. Eq. 502.

In England, where the words of the statute (1 Vict.) are limited to "burning, tearing, or otherwise destroying," the will has been admitted to probate where there are lines drawn through the testator's signature. *Benson v. Benson*, L. R. 2 Prob. & Div. 172, 40 L. J. Prob. N. S. 1, 23 L. T. N. S. 709, 19 Week. Rep. 190.

But probate was denied where it could not be told whether the paper had ever been witnessed. Thus, in *James's Goods*, 7 Jur. N. S. 52, the will only was admitted to probate where, besides the will, there was a paper purporting to be a codicil signed by the testator, but there was an obliteration in the place where the signatures of the witnesses would properly have appeared, and nothing could be read, or no information obtained as to signatures of witnesses.

And it was on account of the "tearing" that probate was refused in *Williams v. Tyley*, 5 Jur. N. S. 35, *Johns. V. C. (Eng.)* 530, 7 Week. Rep. 116, where the will consisted of five sheets, and the testator had signed each sheet and in the testimonium clause had stated that he had signed the other sheets, and thereafter he tore off his signature from the first four sheets and drew his pen through the signature on the fifth sheet at the end of the will, and there was other evidence of an intent to revoke.

It was held in *Gay v. Gay*, 60 Iowa, 415, 46 Am. Rep. 78, 14 N. W. 238, where a testator had drawn two scrolls lengthwise with a pen along the signature, but not in such a manner as to obliterate it or render it illegible, that the will was not revoked under the Iowa statute providing: "Section 1288. Wills can be revoked, in whole or in part, only by being canceled or destroyed by the act or direction of the testator, with the intention of so revoking them, or by the execution of subsequent wills. Section 1289. When done by cancelation, the revocation must be witnessed in the same manner as the making of a new will."

The will has been admitted on the ground of dependent relative revocation—

—where the testator's signatures to the will and three codicils were all struck through with pen and ink, on the theory that these acts were preliminary to the making of a new will, which he had not carried out. *De Bode's Goods*, 5 Notes of Cases, 189;

—where the testator's signature was struck through with pencil, and there were pencil changes made and new papers drafted, but not executed. *Applebee's Goods*, 1 Hagg. Eccl. Rep. 143; 51 L.R.A. (N.S.)

—where pencil lines were drawn through the signatures of the testator and the witnesses, and various pencil changes made, these being considered as a guide for a new will. *Re Raisbeck*, 52 Misc. 279, 102 N. Y. Supp. 987.

For the general subject of dependent relative revocation, see the note to *Strong's Appeal*, 6 L.R.A. (N.S.) 1107.

—signatures canceled and restored.

Where the signature of the testator has been canceled or erased and later restored or rewritten, the courts in general admit the will to probate.

This has been done where—

—the signature had been erased and a new one written below it. *King's Goods*, 2 Rob. Eccl. Rep. 403;

—the signature has been erased and a new one written over it. *Re Wood*, 2 Connoly, 144, 32 N. Y. S. R. 286, 11 N. Y. Supp. 157;

—the testator, when executing the will, signed at the foot of the attestation clause, but not above it, and the will had this signature partially erased with a knife and a new signature in pencil written above the attestation clause. *Sellards v. Kirby*, 82 Kan. 291, 28 L.R.A. (N.S.) 270, 136 Am. St. Rep. 110, 108 Pac. 73, 20 Ann. Cas. 214.

The same was done where the will was found with the signature of the testatrix erased first by drawing diagonal lines over it, and then by nearly erasing such lines and the name itself, and the signature was written again with different ink in the handwriting of the testatrix, the court considering that it did not appear that there was intent to revoke, and that the new signature indicated that there was not such intent. *Re Wood*, *supra*.

In this connection reference may be made to *Gale v. Freeman*, 153 Wis. 337, 141 N. W. 226, where part of the attestation clause was carried over the page and at the end of it was the signature of the testator properly attested, and this was the signature the witnesses witnessed, and it was held to be immaterial that on the first sheet, above the attestation clause in the ordinary place of signing, there was another signature partially obliterated, as to which the witnesses knew nothing, not having seen the first page.

In *Bethell v. Moore*, 19 N. C. (2 Dev. & B. L.) 311, a will properly executed with witnesses was found with perpendicular lines drawn through the original signature, and the signature then written over again with another seal. With the will were found three holographic codicils, which were good unattested under the law. The court held that while, if the will had been once revoked, not being in the testator's handwriting, it would not be reinstated by the codicils, although they evinced an intent to be codicils, upon the proof the testator had evidently intended to revoke his will entirely, and to make a new one in its place,

and, not having carried out that intention, the will must stand as originally executed. The court observed that the statute did not define what is such a cancellation or obliteration as shall amount conclusively to a revocation of a will.

(3) Words of cancelation.

Where the will requires attestation, an unattested memorandum of revocation upon the will without any acts of cancelation is nugatory. *Ladd's Will*, 60 Wis. 187, 50 Am. Rep. 355, 18 N. W. 734 (where the testatrix had indorsed on her will, "I revoke this will," and signed and dated it); *Howard v. Hunter*, 115 Ga. 357, 90 Am. St. Rep. 121, 41 S. E. 638 (where the testator had indorsed on his will, "This will is made void by one of more recent date," signing his name); *Gugel v. Vollmer*, 1 Dem. 484 (where the will consisted of six pages, four of which were marked across, as having been stricken out at some time after its execution, with a marginal note on each of the four pages, in the handwriting of the testator, "I pronounce this void," with the date).

In *Lewis v. Lewis*, 2 Watts & S. 455, it was held that the word "obsolete" written on the margin of the will in the testator's handwriting cannot be considered as a burning, canceling, obliterating, or destroying of the will.

In *Re Akers*, 74 App. Div. 461, 77 N. Y. Supp. 643, 11 N. Y. Anno. Cas. 242, the will was admitted to probate where (1) on the margin of the first page, the testator had written, "This will and codicil is revoked," with the date; (2) on the margin of the second page of the codicil (which had never been properly executed), the testator had written, "This codicil and will is revoked," dating and signing it, and (3) on the back of the first page of the codicil, the testator had written the word "revoked," with the date, and had signed it.

There is a contrary decision in *Warner v. Warner*, 37 Vt. 356, where, at the foot of a will dated in August, 1857, the testator had written, "This will is hereby canceled and annulled. In full this 15th day of March in the year 1859," and upon the outside of the will, had written, "Canceled, and is null and void. I. Warner," and it was held that this was a cancelation within the statute.

And where the statute had no requirement as to revocations of wills of personal estate, it was held that such a will was presently revoked by the following writing signed by the testator under the attestation: "Boston, Mass. June 25, 1829. It is my intention at some future time to alter the tenor of the above will; or rather to make another will; therefore be it known, if I should die before another will is made, I desire that the foregoing be considered as revoked and of no effect. C. Thorndike." *Brown v. Thorndike*, 15 Pick. 398. 51 L.R.A. (N.S.)

Explanatory words with cancelation of signature.

The will was held revoked where a testator had drawn a pen several times in different directions across his signature and those of the subscribing witnesses, and had written below: "In consequence of the death of my wife, it is become necessary to make another will." *Semmes v. Semmes*, 7 Harr. & J. 388.

In *Evans's Appeal*, 58 Pa. 238, it was held that a will and codicil were "destroyed" within the statute under the following circumstances: The testator had signed it twice, the second time after a memorandum at the end of it, and it was attested by witnesses; thereafter he made a codicil attested by witnesses; after his death the will was found with the second signature to the will crossed out, and the signature to the codicil crossed out, and the word "cancel" written below it in the testator's handwriting; the indorsement on the will of the word "will" was crossed out, and the word "cancel" was written under it in the testator's handwriting; and there were several tears in the paper as if it had been torn as folded.

In *Re Alger*, 38 Misc. 143, 77 N. Y. Supp. 166, it was held that two codicils were revoked where upon the first codicil the testator had drawn across all the provisions thereof, including the signature and the attestation clause, numerous cross marks in lead pencil, and had also written in two places in the attestation clause the words "canceled," and in another place the words "April 19, 1895," and the second codicil to the will contained several cross marks in lead pencil, which were only upon the first clause of the same, and below was a memorandum signed twice by the testator stating the cancelation of the codicil and the date and the reason for it. The court distinguished *Lovell v. Quitman*, 88 N. Y. 380, 42 Am. Rep. 254, as there the partial cancelation was unaccompanied by any memorandum of intention to revoke the entire instrument.

Where a codicil began on the same sheet of paper upon which the will ended, the instruments being tied together in one cover, and the signature to the codicil was crossed out in ink, with a memorandum alongside the canceled signature, "May 20, 1921, void U. V. D.," in the testator's handwriting, it was held that the codicil was revoked, and the will also was held revoked, the codicil modifying the will only slightly, and the testator having shortly before the date of the memorandum conveyed real estate which would have caused his will practically to effect the disinheritance of a child. *Re Brookman*, 11 Misc. 675, 33 N. Y. Supp. 575.

English statute.

The words of the English statute are "burning, tearing, or otherwise destroying;" it does not contain the word "canceling."

Under this statute partial or total cancellations have been held nugatory where—

—the testatrix had drawn a line through a legacy, and had written on the margin, "Erased by me," with her signature. *Lushington v. Onslow*, 12 Jur. 465;

—passages were stricken through with a pen, and in the margin the word "canceled" written with the initials of the testator. *Adamson's Goods*, L. R. 3 Prob. & Div. 253;

—a testator drew a pen through the lines of part of his will, leaving the words legible, and wrote on the back of it, "All these are revoked." *Cheese v. Lovejoy*, L. R. 2 Prob. Div. 251, 46 L. J. Prob. N. S. 66, 37 L. T. N. S. 294, 25 Week. Rep. 853;

—the attestation clause and the signatures of the witnesses were struck through with a pen, and the testator's signature partially scratched with a knife, and on the back the word "will" was partially erased, and there were words indicating an intention to revoke. *Godfrey's Goods*, 69 L. T. N. S. 22, 1 Reports, 484 (upon consent of the heir and next of kin).

In *Brewster's Goods*, 6 Jur. N. S. 56, 29 L. J. Prob. N. S. 69, it was held that the will must be admitted to probate where it was found after the death of the testator, with the words, "Canceled Wm. B.," written across each of his signatures, which had originally been on each page and also at the end, and below the signatures of the attesting witnesses he had written and signed a memorandum stating that the will was revoked and canceled, as the bequest had been made nugatory by certain matters which he stated, and further that he intended to make a new will and destroy this.

But in *Harris's Goods*, 3 Swabey & T. 485, 33 L. J. Prob. N. S. 181, 10 Jur. N. S. 684, 11 L. T. N. S. 276, it was held that the will was revoked, but not the codicil, where the will was written on six sheets and the codicil on the back of the last sheet, and the signature of the testator was cut off the first five sheets and a pen drawn through the signature on the last sheet at the end, and opposite there was written the word "canceled," with the initials of the testator and the date; there was evidence of an intent to revoke the will, but to preserve the codicil.

In *Re Gosling*, L. R. 11 Prob. Div. 79, 55 L. J. Prob. N. S. 27, 34 Week. Rep. 492, 50 J. P. 263, a codicil was held revoked where, with its signatures, it was obliterated with black lines, and there were at the foot the words: "We are witnesses to the erasure of the above," dated and duly signed and executed by the testator and two witnesses under the wills act.

It may be noted that in *Morton's Goods*, L. R. 12 Prob. Div. 141, 56 L. J. Prob. N. S. 96, 57 L. T. N. S. 501, 35 Week. Rep. 735, 51 J. P. 680, a will was held revoked on the ground that there had been "a lateral cutting out," where the signatures of the testatrix and the witnesses were scratched out as with a penknife, and there was a dated but unsigned memorandum at the foot in 51 L.R.A.(N.S.)

the testatrix' handwriting, declaring the will canceled for reasons stated.

c. Substitution of sheets.

Where the testator, after the execution of his will, took out several sheets and substituted others which he signed, but did not attest, and the old sheets could not be found, the whole will was denied probate. *Treloar v. Lean*, L. R. 14 Prob. Div. 49, 58 L. J. Prob. N. S. 39, 60 L. T. N. S. 512, 37 Week. Rep. 560.

So, the whole will was denied probate where, on its execution, the testator and the witnesses had signed all the five pages, and later he substituted new pages for the first and second pages, which he had destroyed, he and the witnesses signing each of the two new pages. The court considered that the new pages were so signed and substituted as to be of effect, if the rest of the will was of effect, but that the last three sheets had no effect by themselves, and were not able to render the two new sheets valid. *Leonard v. Leonard* [1902] P. 243, 71 L. J. Prob. N. S. 117, 87 L. T. N. S. 145, 18 Times L. R. 747.

In *Varnon v. Varnon*, 67 Mo. App. 534, the will was admitted to probate as originally written, where, under the testator's direction, one of the sheets of his will was taken out and another sheet substituted, and this was proved by the testimony of a single witness. The court stated that, under its statute, partial revocations were proper, but that when there is revocation made with reference to an alteration, then it depended upon the validity of the alteration.

See also *O'Neill v. Owen*, 17 Ont. Rep. 525, *supra*, III.

V. Miscellaneous.

In *Holman v. Riddle*, 8 Ohio St. 384, where, before the execution of a will, an erasure was made in it and a note of the erasure placed at the end of the attestation clause, and before the will was executed the erasure was canceled, so as to leave the words in the will as they had been originally written, it was held that the will would be properly admitted to probate as executed, although the note at the end of the attestation clause had been stricken out by someone after the execution of the will, as this was an immaterial change.

In *Safe Deposit & T. Co. v. Thom*, 117 Md. 154, 83 Atl. 45, where it appeared from the will that certain names and words had been somewhat rubbed, and that some of the letters making up these names had been relined or retraced with a lead pencil, the will was admitted to probate, the court considering that at most it was a case of indications for the drawing of a new will, and so of no effect under the doctrine of dependent relative revocation.

In *Stevens v. Stevens*, 6 Decm. 262, the will as originally executed was admitted to probate where, after the execution of her

will, the testatrix told the scrivener she wished to bequeath certain furniture, etc., in a certain manner, and he thereupon wrote the directions on a separate piece of paper, read it to the testatrix, and said he would paste it on the will when he reached home, which he did, cutting into the will for that purpose.

Where a will required no witnesses when written by the testator, it was held where a testator had made a holographic will with witnesses, and thereafter had made in his own handwriting changes, interlineations, and corrections, in the presence of a single witness, that the will as changed was properly admitted to probate. *Re Fuquet*, 11 Phila. 75.

In *Ex parte Ilchester*, 7 Ves. Jr. 348, 6 Revised Rep. 138, where a testator, after making his will, had added several unattested papers indicating or making a different appointment of guardianship of his children from that contained in the will, it was held that the will appointment would stand, and that it was not revoked by these other papers not executed in testamentary form or with testamentary requirements, the court referring to the statute of Charles II., as to testamentary guardians.

It may be noted that in *Re Stickney*, 41 Misc. 70, 83 N. Y. Supp. 650, the court, in stating that the will should be admitted to probate "with an express declaration enumerating each provision which is annulled by reason of a change made subsequent to its execution," no doubt, means that the will should be admitted to probate as originally written. B. B. B.

TENNESSEE SUPREME COURT.

JAMES W. DURHAM, Plff. in Err.,
v.
STATE OF TENNESSEE.

(— Tenn. —, 163 S. W. 447.)

Evidence — character — effect of presumption.

1. The offering by accused of evidence as to his good character for truth and veracity does not deprive him of the presumption that his character for peace and quietness is good.

Same — presumption of good character — effect as evidence.

2. The presumption of the good character for peace and quietness of one accused of murder cannot be considered as evidence in his favor, in addition to the presumption of innocence, to raise a reasonable doubt of guilt in the minds of the jury.

(November 29, 1913.)

Note. — For presumption as to good character of defendant in criminal case, see note to *People v. Lingley*, 46 L.R.A. (N.S.) 342. 51 L.R.A. (N.S.)

ERROR to the Circuit for Sumner County to review a judgment convicting defendant of murder in the second degree. Affirmed.

The facts are stated in the opinion.

Messrs. Ed T. Seay, Baskerville & Collier, and J. T. Durham for plaintiff in error.

Mr. William H. Swiggart, Jr., Assistant Attorney General, for the State.

Williams, J., delivered the opinion of the court:

Plaintiff in error, Durham, was tried and convicted of murder in the second degree. His defense was self-defense; and he has appealed and assigned numerous errors, one only of which will be treated and disposed of in this opinion.

The trial judge in his charge to the jury said: "Every defendant is entitled to the benefit of his good character when it is shown in proof. If the good character of the defendant, considered in connection with the other proof, creates a reasonable doubt of his guilt, you should acquit."

The defendant submitted the following request to charge, which was refused, and therefor error is assigned: "I further charge that the defendant is presumed to have a good character until the contrary is shown by competent evidence; and this good character stands as a witness for him and in his favor upon every issue in the case. The defendant is always entitled to the benefit of his good character, and the jury may look to this, with the other evidence, to see whether there is a reasonable doubt as to his guilt."

The defendant had offered no testimony to show his good character for peace and quietness; but he did testify in his own behalf, and offered evidence in support of himself as a witness to the effect that his character for truth and veracity was good.

It is insisted for the state that defendant thus put his character in evidence, and is not, on that account, entitled to the law's presumption of a good character, since a presumption is operative only in the absence of proof. In this there is a failure to distinguish between the good character of an accused (for peace and quietness) and the good character of an accused as a witness (for truth and veracity). *Powers v. State*, 117 Tenn. 363, 97 S. W. 815. The putting by a defendant of the latter to proof cannot have the effect of putting with it the former, against his intent and interest.

So that we are of opinion that there is nothing in this counter insistence of the state that embarrasses the defendant in his reliance upon the error assigned, the pur-

port of which is that there is a presumption of a good character in favor of an accused which, as would a fact, stands as a witness for him, to be looked to by the jury as having effect upon reasonable doubt of his guilt, even where he does not offer to set up a good character for peace and quietness.

The contention does not lack support of authority that is entitled to great consideration. The circuit court of appeals of the sixth circuit, in *Mullen v. United States*, 46 C. C. A. 22, 106 Fed. 892, in an opinion by Mr. Justice Day, then circuit judge, dealt with a like contention. There the trial judge refused a request to charge as follows: "You are charged that the law presumes the good character of the accused, and such presumption is to be considered as evidence in favor of the accused in considering the question of the guilt or innocence."

The court held that it was error to refuse this request, and said: "The comment of the judge in his charge and the several refusals to charge in the exceptions noted raise the question whether, in a criminal trial, in a court of the United States, where no testimony has been offered as to the previous good character of the accused, a presumption of such good character exists in favor of the accused, of which, upon a request to that effect, the jury should be instructed. The Supreme Court of the United States, dealing with the presumption of innocence in criminal trials, in the case of *Coffin v. United States*, 156 U. S. 432, 460, 39 L. ed. 481, 493, 15 Sup. Ct. Rep. 394, 405 (opinion by Mr. Justice White), said:

"The fact that the presumption of innocence is recognized as a presumption of law, and is characterized by the civilians as a *presumptio juris*, demonstrates that it is evidence in favor of the accused; for in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy."

"This reasoning applies to the presumption, if such exists, of good character of the accused, and should be given in the charge to the jury, where a specific request on that subject is made at the trial. Does such presumption exist? We fail to find any difference of opinion in the well-recognized text writers upon this subject. All assert that a presumption exists in favor of the accused, in the absence of testimony, that he had a good character previous to the time of the alleged commission of the offense in question. It is true that the government may not attack the character of the accused until he puts it in issue by affirmative testimony on his part. He is not

obliged to do this, but may, if he sees fit, rest upon the presumption raised by the law. . . .

"It is true that there are cases which hold that, where there is no testimony upon the subject, the court is not obliged to say anything to the jury, either one way or the other. But, if the presumption exists in favor of the accused, it cannot be available to him unless he can have an instruction advising the jury of this proposition of law. This presumption, to the extent to which it exists, though less important, is as much his right in a criminal trial as the presumption in favor of his innocence. It is in consonance with the general principle of law that a man is presumed to stand ordinarily well, and to have at least the average qualities of morality and good conduct."

In a learned opinion, Mr. Justice White, in *Coffin v. United States*, supra, as noted, undertook to demonstrate that the presumption of innocence is tantamount to evidence in favor of the accused, but further said: "The evolution of the principle of the presumption of innocence, and its resultant, the doctrine of reasonable doubt, . . . indicates the necessity of enforcing the one in order that the other may continue to exist. Whilst Rome and the Mediævalists taught that, wherever doubt existed in a criminal case, acquittal must follow, the expounders of the common law, in their devotion to human liberty and individual rights, traced this doctrine of doubt to its true origin,—the presumption of innocence,—and rested it upon this enduring basis."

The argument of appellant is that the presumption of a good character should, treated as a law-assumed fact, strengthen the presumption of innocence, and thereby strengthen that which is thus declared to be the result of the presumption of innocence,—the reasonable doubt.

We deem the error in this contention and in the authority relied on in its support to be in assuming that the presumption of good character may be conceived of as not incorporated in and as a part of the presumption of innocence, and that it may be resorted to as an independent probative element to reinforce the presumption of innocence, with like effect upon its resultant,—the doubt. When the law affords to an accused the presumption of innocence, that, in its inclusive nature, tends to produce the resultant doubt. Neither that presumption nor its resultant is to be strengthened by the other or included presumption, as such; but the production by defendant of proof of the fact of good character, in lieu of the presumption, may operate to increase the weight of the presumption of innocence,

and, therefore, the doubt. *Phelan v. State*, 114 Tenn. 483, 507, 88 S. W. 1040, and cases in accord.

But, when so produced, the proof is perforce in lieu of the presumption. If each be truly probative in nature, would this be the case?

At least two learned authors, in their treatises on the law of evidence, deny that the presumption of innocence (and, of course, the presumption of good character) is of probative force or is to be weighed as evidence, and criticize the opinion delivered by Mr. Justice White as follows: "The presumption . . . may, in a sense be called 'an instrument of proof' or something 'in the nature of evidence,' in that it determines from whom evidence shall come; or it may be called a substitute for evidence, in the sense that it counts at the outset for evidence enough to make a prima facie case; but it is not evidence in the true sense. It is not probative matter, which may be a basis of inference and weighed and compared with other matter of a probative nature." 1 Elliott, Ev. § 93; Thayer, Ev. 575; 3 Harvard L. Rev. 148-166.

We think it clear, under either view, if, indeed, the views are divergent and may not, on a true analysis of the opinion of Mr. Justice White, be harmonized, that the presumption of a good character may not be a basis of inference for the purpose of adding weight to the presumption of innocence or its logical resultant. One presumption may not supplement or augment another, where one is but a part of the other.

Several courts have had the point urged on us for error under review, and their opinions demonstrate the unsoundness of the decision in *Mullen v. United States*, supra, and the unfairness of its rule in application.

McKinstry, J., in *People v. Johnson*, 61 Cal. 142, said: "If, in the absence of evidence on the subject, the presumption of good character is to weigh as much in his [accused's] favor as affirmative proof of it, the necessity of proving good character would never arise; and the prosecution would frequently be in a worse case than if evidence of good character had been given—since the prosecution would be debarred from introducing evidence to overcome the presumption. When it is said that good character is to be presumed, it is only said that, in the absence of evidence, the jury should not attribute to defendant a general bad character with respect to the qualities involved in the alleged offense, nor give weight to his assumed bad character in determining the question whether the evidence established his guilt." 51 L.R.A. (N.S.)

In *Addison v. People*, 193 Ill. 405, 419, 62 N. E. 235, 239, in reference to a request to charge, submitted by defendant, "that the law not only presumes that the defendant is innocent until he is proven guilty beyond any reasonable doubt, but the law also presumes that the defendant has a good character . . . as a law-abiding, peaceable citizen until the contrary is shown by the evidence, and it is not necessary for the defendant to prove his reputation in that respect, . . . and that, without any proof on the subject, . . . [the jury] should take the good character of defendant into consideration in making up their verdict," the court, after reasoning as did the California court, further said: "Defendant did not choose to put his reputation in issue or prove that it was good, but sought by the instruction all the benefit of an affirmative finding of such fact without proof or an opportunity to combat the claim or prove the negative. If the instruction were the law, a defendant need never prove good reputation, but could take the benefit of proof which . . . he could not make." See also *People v. Bodine*, 1 Denio, 281, 315; *Danner v. State*, 54 Ala. 127, 25 Am. Rep. 662.

We therefore rule that the accused was not entitled to have the request charged.

By this it is not to be understood that there is no presumption of good character in favor of a defendant in a criminal prosecution as above outlined, and also in the sense that, in the absence of proof on the subject, the jury is not warranted in assuming that he is of bad character in respect of the particular trait or quality involved in the alleged crime, which, as seen above, is peace and quietness, in a prosecution for homicide. *Powers v. State*, 117 Tenn. 363, 97 S. W. 815; *People v. Bonier*, 103 Am. St. Rep. 897, annotation.

Other assignments of errors are disposed of in the judgment entered. Affirmed.

TEXAS SUPREME COURT.

MARY BERGER, Plff. in Err.,
v.

M. D. KIRBY, Admr., etc., of M. W. Kirby,
Deceased, et al.

(105 Tex. 611, 153 S. W. 1130.)

Evidence — common-law marriage — character of community and woman.

1. Upon the question of the existence *vel non* of a common-law marriage between a decedent and a woman claiming his property, evidence is admissible of the character of the community in which she lived and her

own character for virtue, to interpret the association of decedent with her.

Same — testimony as to marriage.

2. One claiming to be the common-law wife of a decedent cannot testify that she married him, as it is a mere conclusion, and has no tendency to prove a common-law marriage.

Witness — marriage — transaction with decedent.

3. One claiming the property of a decedent as his common-law wife is not competent to testify to the making of a contract of marriage with him.

Estoppel — recital in deed — buying peace.

4. A recital in a deed sought from one claiming as the widow of the deceased owner, to prevent litigation, that she was the

surviving wife of decedent, does not estop adverse claimants from contesting that fact.

(February 26, 1913.)

ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District to review a judgment in defendants' favor in an action to establish title to certain property which plaintiff claimed as widow of the deceased owner. Affirmed.

The facts are stated in the opinion.

Messrs. Parks, Patton, & Plowman, Etheridge & McCormick, and Thomas & Rhea, for plaintiff in error:

It was only necessary that the parties presently agreed to become then and thenceforth husband and wife.

Note. — Applicability of disqualification statute to testimony of alleged spouse to establish marriage in order to succeed to share of the decedent's property.

For cases upon the general question as to whether or not disqualification statutes apply to proceedings involving the succession or distribution of estates of decedents, see note appended to *Whitehead v. Kirk*, post, 187.

By the great weight of authority a person claiming to succeed to a share of a deceased person's estate on the ground that he or she is the surviving spouse is incompetent as a witness to establish the fact of marriage, where the marriage is disputed by those who would otherwise succeed to the estate.

The doctrine holding to be disqualified as a witness in her own favor a person seeking to succeed to the estate of a deceased person, on the claim of marriage, where the fact of marriage is in dispute, is asserted although the statutes of the different states vary more or less in their disqualifying provisions, and although there is a conflict among the states as to the applicability of the disqualifying statute to contests over the succession to the estates of decedents. In the note appended to *Whitehead v. Kirk*, post, 187, the different statutes are set out in substance.

Under a general exclusion statute a person claiming to be the wife of a deceased person was held incompetent as a witness to prove the celebration of her marriage with the deceased, as well as other facts attending their cohabitation, in *Redgrave v. Redgrave*, 38 Md. 93, and *Denison v. Denison*, 35 Md. 361; and in *Bowman v. Little*, 101 Md. 273, 61 Atl. 223, 657, 1084, the foregoing rule was also held to apply to evidence of the claimant generally, although, by the terms of the statute then in force, the disqualification is restricted to transactions had with or statements made by the intestate.

Compare with *Jones v. Jones*, 36 Md. 447, 11 Am. Rep. 505, holding that the dis- 51 L.R.A. (N.S.)

qualifying provision of the statute does not apply to persons seeking to succeed to the estate of a deceased person on the ground of heirship, where this fact is disputed by other persons who otherwise would concededly be entitled to the estate. It is held by the court that it is very clear that those persons do not come within either the letter or spirit of the exception which is alleged to exclude them; that the object of the act was to place the parties upon an equal footing, and to exclude the other party when one party to the contract was dead. The court said that there is no contract between the deceased and those claiming as his heirs which the latter are endeavoring to enforce against his estate; nor is the proceeding against his testatrix for the purpose of establishing a charge against her intestate or his estate, but it is a contest between his widow and the appellees, who claim to be next of kin and heirs at law of the intestate, as to the manner in which his estate shall be distributed, the widow claiming the whole and the alleged heirs one half.

Testimony of the alleged widow of the decedent as to her marriage with the decedent and as to verbal contracts, conversations, and transactions with him to establish such marriage, is excluded by a statute providing that no person having a direct legal interest in the result of any civil action or proceeding when the adverse party is a representative of a deceased person shall be permitted to testify to any transaction or conversation between the deceased person and the witness. *Sorensen v. Sorensen*, 56 Neb. 729, 77 N. W. 68.

Under the Illinois statute a person claiming to be the common-law wife of a decedent is not competent to testify to the fact of marriage and other facts as tending to show that the marriage relation existed between the deceased and herself, in order to establish herself as an heir of the decedent. *Laurence v. Laurence*, 164 Ill. 367, 45 N. E. 1071, overruling, upon this point, *Brown v. Brown*, 142 Ill. 409, 32 N. E. 500.

A woman claiming to be the lawful widow of a deceased person, whose claim in that re-

Simmons v. Simmons, — Tex. Civ. App. —, 39 S. W. 639; *Baker v. Ashe*, 80 Tex. 356, 16 S. W. 36; *San Antonio & A. P. R. Co. v. Robinson*, 73 Tex. 277, 11 S. W. 327; *International & G. N. R. Co. v. Welch*, 86 Tex. 204, 40 Am. St. Rep. 829, 24 S. W. 390; *Missouri, K. & T. R. Co. v. Rodgers*, 89 Tex. 675, 36 S. W. 243; *Houston, E. & W. T. R. Co. v. Greer*, 22 Tex. Civ. App. 5, 53 S. W. 58; *Missouri, K. & T. R. Co. v. Mills*, 27 Tex. Civ. App. 245, 65 S. W. 74; *Citizens R. Co. v. Sinclair*, 36 Tex. Civ. App. 266, 81 S. W. 329; *Yoakum v. Mettasch*, — Tex. Civ. App. —, 26 S. W. 129.

While inadequacy of consideration alone will not be a sufficient reason for setting

aside and canceling a deed, such inadequacy and the showing in connection therewith that the plaintiff was borne down by grief by reason of the death of her husband at the time of the execution of the deed will, in law, constitute good and valid grounds for setting aside and canceling such deed.

Varner v. Carson, 59 Tex. 303; *Allen v. Stephanes*, 18 Tex. 672; *Putnam v. Bromwell*, 73 Tex. 465, 11 S. W. 491; *McFaddin v. Vincent*, 21 Tex. 57; *Howard v. Howard*, 87 Ky. 616, 1 L.R.A. 611, 9 S. W. 411; *Mayer v. Swift*, 73 Tex. 370, 11 S. W. 378; *Moreland v. Atchison*, 19 Tex. 311.

It was immaterial to any issue as to whether the plaintiff was "classed as a

guard is denied by others having or asserting interest as heirs in his estate, is incompetent to testify to the fact of her marriage in a proceeding in which she seeks, as distributee, a portion or all of his personal property, unless her status as the widow of the decedent has been conceded or established by the decree of a court of competent jurisdiction. *Re Maher*, 210 Ill. 160, 71 N. E. 442.

In a partition proceeding one seeking to establish her marriage to the deceased owner of the land is not a competent witness against an heir of the decedent. *Crane v. Stafford*, 217 Ill. 28, 75 N. E. 424.

Where the cohabitation relied upon to establish the relation of husband and wife is not illicit, the alleged widow is a competent witness to the fact of her marriage, in a proceeding in the probate court by her to establish her rights in the property of the deceased as his wife, but where the main issue is the fact of marriage, the party who is attempting to enforce the rights based upon the existence of such relation is within the provision of the statute, and is disqualified as a witness. *Collard v. Burch*, 138 Mo. App. 98, 119 S. W. 1009.

And a woman is not a competent witness to prove her marriage to the deceased person or any conversations with him, or his treatment of her while they lived together as husband and wife, for the purpose of establishing the marriage relation, in order to entitle her to a wife's interest in the property. *Lyons v. Lyons*, 101 Mo. App. 494, 74 S. W. 467.

In a proceeding to establish her rights in the estate of the deceased person as his wife, the alleged wife is not a competent witness as to a verbal contract of marriage constituting a common-law marriage which she claims was entered into with the decedent. *Imboden v. St. Louis Union Trust Co.* 111 Mo. App. 220, 86 S. W. 263.

In *Green v. Green*, 126 Mo. 25, 28 S. W. 752, 1008, however, it is held that a woman claiming property as the wife of the deceased person is a competent witness to establish the marriage.

The statutory provision that, in an action or proceeding where the adverse party

sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, a party in interest or to the record shall not be permitted to testify in his own behalf as to any transaction had by him with, or any statement made to him by, any such deceased person, disqualifies as a witness in her own behalf a woman claiming the property of the decedent as his wife, where the fact of the marriage is the chief issue in the proceedings. *Nelson v. Carlson*, 48 Wash. 651, 94 Pac. 477; *Weatherall v. Weatherall*, 66 Wash. 344, 105 Pac. 822.

In a contest between the wife and children of decedent and his collateral heirs as to who is entitled to his estate, the heirs attacking the validity of the marriage of decedent and the legitimacy of the children on the ground that the marriage was forbidden by statute, the alleged wife is not a competent witness as to the fact of the marriage, or that she and decedent lived as husband and wife. *Hopkins v. Bowers*, 111 N. C. 175, 16 S. E. 1.

In a suit by the children and heirs of their deceased mother to recover her interest in community property the defendant, who is alleged to have been the husband of the decedent, is incompetent as a witness in his own behalf to deny the marriage. *Edelstein v. Brown*, 100 Tex. 403, 123 Am. St. Rep. 816, 100 S. W. 129.

In *Lorimer v. Lorimer*, 124 Mich. 631, 83 N. W. 609, it is held that a woman claiming to be the wife of decedent, and as such entitled to a wife's interest in his estate, is disqualified as a witness to establish the marriage contract, since this constitutes a claim against the estate within the meaning of the statute. The court reasons that if the claimant had presented a claim for services as housekeeper for the time she lived with the decedent, there would be no question but what she was incompetent as a witness in her own behalf, and it is said that the rule equally applies where, instead of seeking to enforce a claim for services based on a contract for hire, she seeks to obtain one half of the estate of the deceased upon the ground that she is

prostitute," and the court erred in holding it material to any issue in the case.

Ingersol v. McWillie, 87 Tex. 647, 30 S. W. 869; Missouri, K. & T. R. Co. v. Creason, 101 Tex. 335, 107 S. W. 527.

Specific acts tending to show prostitution were not admissible in evidence for the purpose of showing her general reputation as a common prostitute, or for any other purpose, and could only tend to prejudice the jury against the plaintiff.

Missouri, K. & T. R. Co. v. Creason, supra; Pefferling v. State, 40 Tex. 487; Dorsey v. State, 1 Tex. App. 33; Rogers v. State, 1 Tex. App. 187; Jenkins v. State, 1 Tex. App. 346; Mayo v. State, 7 Tex. App. 342; Lawson v. State, 17 Tex. App.

292; State v. Ogden, 39 Or. 195, 65 Pac. 449; Boddie v. State, 52 Ala. 395; Pleasant v. State, 15 Ark. 624; Rice v. State, 35 Fla. 236, 48 Am. St. Rep. 245, 17 So. 286; Camp v. State, 3 Ga. 417; State v. McDonough, 104 Iowa, 6, 73 N. W. 357; Wilson v. State, 16 Ind. 392; State v. Brown, 55 Kan. 766, 42 Pac. 363; Shartzer v. State, 63 Md. 149, 52 Am. Rep. 501; Com. v. Regan, 105 Mass. 593; People v. McLean, 71 Mich. 309, 15 Am. St. Rep. 263, 38 N. W. 917; State v. White, 35 Mo. 500; Myers v. State, 51 Neb. 517, 71 N. W. 33; State v. Campbell, 20 Nev. 122, 17 Pac. 620; State v. Forshner, 43 N. H. 89, 80 Am. Dec. 132; Territory v. Pino, 9

his wife by virtue of a contract of marriage.

Under the Iowa Code, a woman who claimed to be the common-law wife of the deceased person is incompetent as a witness to testify as to conversations with the deceased for the purpose of establishing the agreement, but such testimony is in part admissible as proof of her intent and the circumstances under which her relations with the decedent commenced. *Re Wittick*, — Iowa, —, 145 N. W. 913.

It has, however, been held that where the contest is between the parties claiming to be the distributees in an estate of an intestate, one of whom is the alleged widow of the decedent, she is competent to testify to the fact of her marriage with the decedent, since the estate of the decedent is not interested in the result of the controversy within the meaning of the statute. *Nolen v. Doss*, 133 Ala. 259, 31 So. 969.

And, in the administration of an estate of the intestate, a person claiming to be his wife is competent to testify in her own favor as to a marriage contracted between herself and the decedent, and the facts leading up thereto, since an application for letters of administration upon the estate of a deceased person is not a suit instituted by a personal representative of such deceased person, and hence does not come within the terms of a statute which declares that where any suit is instituted or defended by the personal representatives of a deceased person, the opposite party shall not be permitted to testify in his own favor against the deceased as to transactions or communications with him in his lifetime. *Buchanan v. Buchanan*, 103 Ga. 90, 29 S. E. 608.

In Pennsylvania there is an exception to the disqualification statute in effect making it inapplicable in issues and inquiries *devisavit vel non* and others, respecting the right of the deceased owner of property, between parties claiming such right by devolution on the death of the owner. Under this exception both parties claiming an estate under the same decedent, which has devolved upon them by descent or succession, are competent witnesses in the trial

of an issue to settle their respective rights. *Bowen v. Goranflo*, 73 Pa. 357. Under this exception, the alleged widow of a decedent is a competent witness to establish her marriage to the deceased, which is a matter of dispute, in a proceeding by the daughter of the witness to establish her claim to the decedent's estate as his daughter and heir. *Greenawalt v. McEnelley*, 85 Pa. 352; *Drinkhouse's Estate*, 151 Pa. 294, 24 Atl. 1083.

In a proceeding to set aside a will, the alleged wife of testator is competent to testify to transactions or communications with the decedent which are relied upon to establish a common-law marriage, and also to testify to her subsequent relations with decedent up to the time of his death, where she disclaims all interest in his property. *Shorten v. Judd*, 56 Kan. 43, 54 Am. St. Rep. 587, 42 Pac. 337.

In an ejectment action by the alleged son of the testator against persons claiming to be the latter's heirs, the testimony of the mother of the plaintiff is competent to establish her marriage with the decedent prior to the birth of the plaintiff, to establish the claim of plaintiff as a son and heir of decedent, since the witness is not a party to the action, and neither is she interested in the event of the suit within the meaning of the disqualifying statute, for any judgment entered therein would not operate as an estoppel either for or against her. *Eisenlord v. Clum*, 126 N. Y. 557, 12 L.R.A. 836, 27 N. E. 1024.

In *Stevens v. Joyal*, 48 Vt. 291, it is held that where the legality of a marriage with decedent in his lifetime is contested by his heirs on the ground that the alleged wife had another husband living at the time of the marriage from whom she had not been divorced, she is a competent witness as to the fact of her marriage with the decedent, and to other facts tending to show the validity thereof, where the only question at issue is the fact of this marriage, since there is involved merely the question as to the distribution of the estate, and the disqualifying statute has no application under such circumstances. A. G. S.

N. M. 598, 58 Pac. 393; *Dimmitt v. Robbins*, 74 Tex. 445, 12 S. W. 94.

The defendants in error, Smith, Thomas, Sewell, and those who claim under them, are estopped by deed to gainsay the covenanted fact, permeating their chain of title, that plaintiff in error was the wife of A. Berger, deceased.

Despain v. Wagner, 163 Ill. 598, 45 N. E. 129; *Orthwein v. Thomas*, 127 Ill. 554, 4 L.R.A. 434, 11 Am. St. Rep. 159, 21 N. E. 430; *Powers v. Minor*, 87 Tex. 83, 26 S. W. 1071; *Doty v. Barnard*, 92 Tex. 104, 47 S. W. 712; *Waco Bridge Co. v. Waco*, 85 Tex. 320, 20 S. W. 137; *Corzine v. Williams*, 85 Tex. 499, 22 S. W. 399; *Kimbro v. Hamilton*, 28 Tex. 561; *Hardy v. DeLeon*, 5 Tex. 211; *Thrower v. Wood*, 53 Ga. 458.

And this is true, although said deed may be, by reason of the fraud in obtaining it, inoperative.

Burns v. Goff, 79 Tex. 236, 14 S. W. 1009.

Under the confessed and established facts the deed of plaintiff to the defendant Smith was constructively fraudulent, and she was entitled as matter of law to a decree canceling the same.

Nabours v. McCord, 100 Tex. 456, 100 S. W. 1152, 101 Tex. 494, 109 S. W. 913, 111 S. W. 144.

Messrs. Ed Sewell and Barry Miller for defendants in error.

Brown, Ch. J., delivered the opinion of the court:

This suit was instituted by Mary Berger against James Smith, individually, and as administrator of the estate of A. Berger, deceased, and against M. D. Kirby, individually, and as administratrix of the estate of M. W. Kirby, deceased, and against a number of other persons not necessary to mention, as the case depends upon the right of plaintiff, as surviving wife of A. Berger, to the property of said estate. A. Berger was a widower (unless Mary Berger was his wife), and died in Dallas, Texas, leaving as his heirs a brother and some other relatives, whose names are unimportant. Decedent left a considerable estate, and owed some debts. There was a contest over the granting of letters of administration, Mary Berger claiming to be the surviving wife of deceased, but waived her right to administer; and letters were granted to James A. Smith.

To decide the issues of law upon which the case, as before this court, depends, does not require a full statement of the facts, but only those facts upon which

plaintiff rests her claim to have been the wife of A. Berger; for if there was material error in the charge of the court upon that question, or if there was error in excluding testimony offered to prove the marriage, the judgment should be reversed; otherwise it must be affirmed.

Mary Berger claimed that she had been servant to A. Berger; and, after his wife's death, he and plaintiff made an oral contract to be husband and wife, and that they lived together as husband and wife to the death of A. Berger. Upon the trial, plaintiff, being upon the witness stand, offered to testify, in substance, "that, four days after the death of A. Berger's first wife, she and A. Berger agreed to live together as man and wife, agreed to be man and wife, just as he and his former wife, Josie Ramirez Berger, had been, and thenceforth they were husband and wife until the day of the death of A. Berger." The objection made is not stated in the application; but the court excluded the evidence. There was much evidence on the various issues; but it is unnecessary to recite it here.

The judge charged the jury as follows: "A common-law marriage is valid in this state; and the issuance of a marriage license or marriage ceremony is not necessary to constitute a common-law marriage. A common-law marriage exists when a man and woman enter into an agreement to become husband and wife, and, in pursuance of such agreement, do live together and cohabit as husband and wife, and hold each other out to the public as husband and wife. Such agreement to become husband and wife may be express or implied. An express agreement is where the parties thereto expressly agree; and an implied agreement is where the parties with reference to the subject-matter is such as to induce the belief, in the minds of the contracting parties, that they intend to do that which their acts indicate they have done. If you believe from a preponderance of the evidence that the plaintiff, Mary Berger, and the deceased, A. Berger, agreed to become husband and wife, as is claimed by the plaintiff, and that, in pursuance of such agreement, they lived together and cohabited as husband and wife, you will find that the plaintiff was the wife of A. Berger, deceased. If you fail to find, under the preceding clause, that the plaintiff was the common-law wife of A. Berger, deceased, then you are instructed that you need proceed no further, but you will return your verdict for the defendants." The jury returned a verdict for the defendants.

Plaintiff's right to recover in this case depends primarily upon the truth of her claim to have been the wife of the deceased Berger. The best phase of the evidence for the plaintiff is that her marriage to the deceased was a question of fact to be decided by the jury; and, to be entitled to a reversal of the judgment, she must show material error in the charge of the court to the jury, or such error in admitting or excluding evidence upon that issue. The charge of the court gave a correct rule to govern the jury in deciding the issue of marriage. See *Grigsby v. Reib*, 105 Tex. 597, — L.R.A.(N.S.) —, 153 S. W. 1124, opinion filed at the same time as this. The jury returned a verdict for defendants; that is, that Mary Berger was not the wife of Berger.

We now look for error which probably produced an erroneous conclusion upon the facts. We repeat that the evidence was not conclusive of the marriage; and the verdict must stand, unless error be shown in admitting or excluding evidence.

The character of cohabitation between plaintiff in error and deceased was material; and the evidence which tended to show the character of the community in which she lived, and her own character for virtue, were relevant to interpret the visits of Berger and his association with the woman; and there was no error in admitting evidence of these facts.

There was no error in refusing to permit plaintiff to testify that, "about four days after the death of Berger's wife, she married Berger;" it was a conclusion. She did not claim to have been married under license. The proposed statement, if admitted, would not have tended to prove a common-law marriage.

The witness was not competent to prove the transaction between herself and the deceased in making a contract of marriage. Rev. Stat. art. 3690; *Edelstein v. Brown*, 100 Tex. 403, 123 Am. St. Rep. 816, 100 S. W. 129.

The deeds made by Mary Berger, as the surviving wife of the deceased, were manifestly sought and made to prevent litigation,—buying the peace of the adverse claimants. The recital that she was the surviving wife of Berger constitutes no estoppel under such state of facts. 16 Cyc. pp. 687, 688; *Cannon v. Stockmon*, 36 Cal. 535, 95 Am. Dec. 206. The charge of the court on the subject of common-law marriage was practically correct. *Grigsby v. Reib*, supra.

There is no error shown that requires a reversal of the judgment, which we affirm. 51 L.R.A.(N.S.)

MISSISSIPPI SUPREME COURT.

IMOGENE WHITEHEAD et al., Appts.,
v.

MRS. L. G. KIRK.

(— Miss. —, 61 So. 737.)

Witness — testamentary capacity — testimony of wife.

1. A wife cannot, for the purpose of showing the testamentary incapacity of her husband in a will contest, testify to acts committed by him in her presence, when they were alone, such as his habits of intoxication, his hearing voices and communication with spirits of the dead, his mutterings and outcries when asleep, delusions causing him to arm himself, insults to her and attempts to take her life, although similar acts and declarations occur in the presence of others.

Same — confession — admissibility.

2. A wife cannot testify as to confession of adultery made to her by her husband when they are alone, nor as to his charging her with infidelity under the same circumstances.

Same — evidence against decedent's estate — establishing testamentary incapacity.

3. A wife who, in the absence of a will,

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will inherit all her husband's property, is incompetent to testify as to his testamentary incapacity, under a statute providing that one cannot testify to establish against the estate of a deceased person a claim which originated during his lifetime.

(May 5, 1913.)

A PPEAL by defendants from a decree of the Chancery Court for Yazoo County, setting aside the will of W. J. Kirk, deceased. Reversed.

The facts are stated in the opinion.

Messrs. E. L. Brown, Barnett & Perrin, and Mayes & Mayes for appellants.

Messrs. Whitfield, McNeill, & Whitfield, for appellee:

Acts are not communications. The court

drew the distinction carefully between the competency of acts and of communications.

4 Wigmore, Ev. § 2337.

All the testimony of the wife as to acts, the knowledge of which came to her by her mere observation of the conduct of the husband, is competent.

Com. v. Sapp, 90 Ky. 580, 29 Am. St. Rep. 405, 14 S. W. 834; State v. Phelps, 2 Tyler (Vt.) 374; Babcock v. Booth, 2 Hill, 181, 38 Am. Dec. 578; Storms v. Storms, 3 Bush, 77; English v. Cropper, 8 Bush, 292; Elswick v. Com. 13 Bush, 155; Hoyt v. Davis, 21 Mo. App. 235; White v. Perry, 14 W. Va. 66; Dunlap v. Hearn, 37 Miss. 471; Stuhlmuller v. Ewing, 39 Miss. 447; Seitz v. Seitz, 170 Pa. 71, 32 Atl. 578; Meyer v. Meyer, 158 Mo. App. 299, 138 S. W. 70;

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I. Introductory.

It is not the purpose of this note to include the question where presented in cases involving the admissibility of the evidence of the alleged spouse of decedent for the purpose of establishing the marriage in order to succeed to a share in the estate of the decedent, where the fact of marriage is in dispute. For such cases, see note appended to *Berger v. Kirby*, ante, 182.

In considering the question of the application of statutes in effect disqualifying interested persons as witnesses where the representative of a deceased person is a party to the proceeding, it is, of course, necessary to examine the statute closely. Much of the apparent confusion and conflict among the decisions may be explained

or reconciled by a comparison of the statutes construed. While it is obviously impossible, within the scope of this note, to make a minute comparison of the different statutes, and classify the cases accordingly, an attempt has been made to render possible a comparison of the different statutes and cases applying them, by classifying the cases according to what is regarded, or has been treated by the courts, as the essential features of the statutes construed. This classification is not made with the idea that cases decided under statutes in one subdivision are not authority in the construction of statutes under a different subdivision, but is merely for the purpose of convenience in comparing the statutes. It is to be noted that there are variances in the language even of the statutes classified under the same general head.

In construing statutes in effect disqualifying as a witness in his own behalf one of the parties to a transaction when the other party thereto has deceased or is mentally incompetent, the courts are largely influenced by the general purpose of the statute to protect estates of decedents from fraudulent and fictitious claims, as well as the prevention of perjury. Accordingly these statutes are frequently held to be applicable only when the witness is interested in establishing a claim against or defeating the claim of an estate, and proceedings among the heirs or legatees affecting the distribution of the estate, including the probate of a will offered as that of the deceased, are held not to be within the purview of these statutes, and this generally without reference to the language of the statute, except, of course, when the language clearly indicates the intent to include within the disqualifying provision every character of proceeding, including proceedings relating to the testator's estate.

Where the language of the statute does not clearly include all proceedings relating to the testator's estate, the cases limiting the application of the statutes to proceedings to establish claims for or against the estate of deceased or mentally incompetent persons are not inconsistent; for in proceedings involving the succession to es-

Millspaugh v. Potter, 62 App. Div. 521, 71 N. Y. Supp. 134; Fleming v. Gemein, 168 Mich. 541, 39 L.R.A.(N.S.) 315, 134 N. W. 969; Hicks v. Hicks, 142 N. C. 231, 55 S. E. 106; Polson v. State, 137 Ind. 519, 35 N. E. 907; Yowell v. Vaughn, 85 Mo. App. 206; Wright v. Wright, 114 Iowa, 748, 55 L.R.A. 261, 87 N. W. 799; Shepherd v. Com. 119 Ky. 931, 85 S. W. 191; Sexton v. Sexton, 129 Iowa, 487, 2 L.R.A.(N.S.) 708, 105 N. W. 314.

All declarations of an abusive, vituperative, insulting, or profane character, all charges of infidelity, and all acts, such as running the children and the wife off the place, and threatening to kill her, all the violence, tumultuous and insane conduct,

tates, the purpose of the testimony of interested witnesses is not to reduce or destroy the estate, but merely to determine the manner of distribution. In effect these are proceedings *in rem* in which the estate as an entity is not interested, the persons in interest being those claiming to share in the distribution as heirs, devisees, legatees, or distributees; and since the effect of these proceedings is neither to increase nor diminish the estate, it cannot be said to be a party thereto. The persons interested in the distribution of the estate, whether as heirs, distributees, devisees, or legatees, act therein for their individual benefit, and cannot be said to represent the estate. The issue being directly or indirectly the distribution of the estate, the testimony of witnesses interested in such distribution as to some transaction or conversation with decedent generally can bear but indirectly upon this primary issue, for the purpose of the testimony is to establish some transaction or conversation with the decedent for what bearing it may have upon the primary issue, such as the mental competency of the decedent, or undue influence exercised upon him, or some claim of advancement, affecting merely the distribution of or succession to the estate, and it is not primarily to establish the right of succession. Where the purpose of the testimony is to establish a disputed right to succession, there is more reason for holding a witness to come within the disqualifying provision of the statute. Thus, where a woman claims the right of succession as the wife of decedent where the fact of her marriage is disputed, in many jurisdictions she is held to come within the disqualifying provision of the statute, to the extent, at least, of excluding her testimony to establish the existence of the marital relation, although this rule does not prevail in all jurisdictions. See note to *Berger v. Kirby*, ante, 182.

In view of the distinction between the probative effect of the testimony of a witness for the purpose of establishing a claim against or defeating the claim of an estate, and for the purpose of proving some collateral fact, having merely an indirect bear-

all the insane delusions with respect to the wife, and other matters affecting the wife, are such acts and such declarations as it would simply be a farce to call confidential.

Moeckel v. Heim, 134 Mo. 576, 36 S. W. 226; Hagerman v. Wigent, 108 Mich. 192, 65 N. W. 756; Caldwell v. State, 146 Ala. 141, 41 So. 473; Stack v. Portsmouth, 52 N. H. 221; Macon R. & Light Co. v. Mason, 123 Ga. 773, 51 S. E. 569, 18 Am. Neg. Rep. 355; Bigelow v. Sickles, 75 Wis. 427, 44 N. W. 761; Hutchinson v. Hutchinson, 16 Colo. 349, 26 Pac. 814; Brown v. Johnson, 101 Wis. 661, 77 N. W. 990; Ward v. Oliver, 129 Mich. 300, 88 N. W. 631; Sackman v. Thomas, 24 Wash. 660, 64 Pac. 819; Schouler, Husb. & W. 85; People v. Loper,

ing upon some issue affecting the succession to or distribution of an estate, the holding of many of the courts that, in the former case, the witness is disqualified, while he is not in the latter case, merely construes the particular statute according to the apparent object sought to be attained thereby.

II. Comparison of decisions as to whether or not statute is applicable.

a. Cases holding statute not applicable.

To illustrate in a general way the tendency of the courts in the majority of the states in this regard, cases are hereinafter cited according to the holding as to whether or not the statute is applicable to proceedings to probate a will or set aside a probated will, or other proceedings affecting the distribution of the estate of a deceased person. Only sufficient cases are referred to to illustrate the holding. It is not intended to show the particular application of the individual cases, nor to give more than a very general idea of the form of the disqualifying statute, for the cases are later referred to more at length with reference to the particular statutes applying, which are more fully set out. In the following cases the disqualifying statutes are held not to apply to contests affecting the probate of a will or succession to an estate, and hence not to exclude as witnesses in their own behalf devisees or legatees claiming under the will, or the heirs at law or next of kin of the testator:

Ala.—*Snider v. Burks*, 84 Ala. 53, 4 So. 225; *Kumpe v. Coons*, 63 Ala. 448, holding that legatees or devisees are not disqualified as witnesses in their own behalf, in a proceeding involving the validity of the will under which they claim, by a statutory provision disqualifying as witnesses persons testifying to transactions with or statements by a deceased person whose estate is interested in the result of the suit. *Henry v. Hall*, 106 Ala. 84, 54 Am. St. Rep. 22, 17 So. 187, holding that the disqualifying provision does not include parties interested in a will contest proceeding.

159 Cal. 6, 112 Pac. 720, Ann. Cas. 1912B, 1193; *Epstein v. Pennsylvania R. Co.* 143 Mo. App. 135, 122 S. W. 366; *State v. Middleham*, 62 Iowa, 150, 17 N. W. 446; *Lanham v. Lanham*, — Tex. Civ. App. —, 146 S. W. 635; *Erickson v. Ladies of Macca-bees*, 25 S. D. 183, 126 N. W. 259.

Mrs. Kirk's testimony was not incompetent because it was testimony to establish her own claim against the estate of a deceased person, which originated in the lifetime of the deceased person.

Covington v. Frank, 77 Miss. 606, 27 So. 1000; *Tucker v. Whitehead*, 59 Miss. 605; *Kelly v. Miller*, 39 Miss. 17; *Steen v. Kirkpatrick*, 84 Miss. 63, 36 So. 140.

The court has profoundly erred in holding that Mrs. Kirk testified to establish her

own claim against the estate of the deceased person.

Jamison v. Jamison, 92 Miss. 468, 46 So. 83, 945; *Sivley v. Roberts*, — Miss. —, 53 So. 595; *Tucker v. Whitehead*, 59 Miss. 594; *Mullins v. Cottrell*, 41 Miss. 291; *Covington v. Frank*, 77 Miss. 606, 27 So. 1000; *Steen v. Kirkpatrick*, 84 Miss. 63, 36 So. 140; *Kelly v. Miller*, 39 Miss. 17; *Shailer v. Bumstead*, 99 Mass. 112; *Garvin v. Williams*, 50 Mo. 206; *Foster v. Dickerson*, 64 Vt. 230, 24 Atl. 253; *Re Buckman*, 64 Vt. 313, 33 Am. St. Rep. 930, 24 Atl. 252.

The court erred in holding that the declarations and acts of Kirk, testified to by Mrs. Kirk, ought not to have been admitted, because they were privileged communications.

Ark.—*Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405, holding that neither devisees, legatees, nor heirs are disqualified as witnesses in their own behalf in any controversy over the will of a deceased person under whom they claim, by a statute prohibiting either party from testifying against the other as to transactions with or statements of the testator, in actions by or against his executor or administrator, where judgment may be rendered for or against him.

Del.—*Re Spiegelhalter*, 1 Penn. (Del.) 5, 39 Atl. 465, holding that parties to a proceeding to probate a will are not disqualified by a statute providing that in actions or proceedings by or against an executor, administrator, or guardian, in which judgment may be rendered for or against him, neither party shall be allowed to testify against the other as to any transaction with or statements by a deceased or incompetent person.

Fla.—*Hays v. Ernest*, 32 Fla. 18, 13 So. 451, holding that heirs at law, next of kin, devisees, or legatees are not disqualified as witnesses in their own behalf in proceedings to probate a will, by a statute excluding interested persons from testifying in regard to any transaction or communication by them with a party then deceased.

Ga.—*Harris v. Harris*, 53 Ga. 678; *Brown v. Carroll*, 36 Ga. 568, holding that interested parties are not disqualified as witnesses in their own behalf in a trial of an issue of *devisavit vel non*, by a statute providing that where a suit is instituted or defended by the personal representative of a deceased person, the opposite party shall not be permitted to testify in his own favor as to transactions or communications with the decedent.

Ky.—*Flood v. Pragoff*, 79 Ky. 607, holding that the Code provision that no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done by a person since deceased, does not disqualify as witnesses in proceedings to probate a will, the heirs of the testator, or devisees or legatees under his will.

Me.—*Nash v. Reed*, 46 Me. 168, holding 51 L.R.A. (N.S.)

that the heirs of the testator are not disqualified as witnesses in their own behalf in a proceeding to contest the probate of their ancestor's will, by a statute providing that no person shall be excluded as a witness in any civil suit or proceeding at law or in equity, including special proceedings by courts of probate, by reason of interest in the event thereof, except where, at the time of the trial, the party prosecuting or defending is an executor or administrator.

Md.—*Johnson v. Johnson*, 105 Md. 81, 121 Am. St. Rep. 570, 65 Atl. 918, holding that the widow of a decedent is not disqualified as a witness in her own behalf or in behalf of her children, in a proceeding involving the validity of a will, by a statutory provision disqualifying as witnesses in their own behalf as to transactions with or statements by the decedent, persons interested in the subject-matter of the controversy to which the representatives of a deceased person are parties. Nor are heirs disqualified as witnesses in their own favor in proceedings relative to the distribution of the estate of their ancestor. *Jones v. Jones*, 36 Md. 447, 11 Am. Rep. 505.

Mass.—*Shailer v. Bumstead*, 99 Mass. 112, holding that persons interested in or parties to a proceeding to probate a will are not disqualified by a statute prohibiting testimony by a party to a proceeding, where one of the original parties to the contract or cause of action in issue or on trial has deceased.

Mich.—*Brown v. Bell*, 58 Mich. 58, 24 N. W. 824; *Re Disbrow*, 58 Mich. 96, 24 N. W. 624; *Re Lambie*, 97 Mich. 49, 56 N. W. 223; *Re Lautenschlager*, 80 Mich. 285, 45 N. W. 147; *McHugh v. Fitzgerald*, 103 Mich. 21, 61 N. W. 354, holding that persons interested in the probate of a will are not disqualified as witnesses in their own favor, in a proceeding to probate a will, by a statute providing that when a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, an interested party shall not be permitted to testify to matters equally within the knowledge of the deceased.

Whitfield v. Whitfield, 44 Miss. 254; Dunlap v. Hearn, 37 Miss. 471; 1 Greenl. Ev. 8th ed. § 337; Stuhlmüller v. Ewing, 39 Miss. 447; Hagerman v. Wigent, 108 Mich. 192; Moeckel v. Heim, 134 Mo. 576, 36 S. W. 226; Bigelow v. Sickles, 75 Wis. 427, 44 N. W. 761; Sackman v. Thomas, 24 Wash. 660, 64 Pac. 819; Eddy v. Bosley, 34 Tex. Civ. App. 116, 78 S. W. 565; Ward v. Oliver, 129 Mich. 300, 88 N. W. 631; Hutchinson v. Hutchinson, 16 Colo. 349, 26 Pac. 814; Brown v. Johnson, 101 Wis. 661, 77 N. W. 900; Macon R. & Light Co. v. Mason, 123 Ga. 773, 51 S. E. 560, 18 Am. Neg. Rep. 355; Meyer v. Meyer, 158 Mo. App. 299, 138 S. W. 70; Millaugh v. Potter, 62 App. Div. 521, 71 N. Y. Supp. 134.

Mo.—Dickey v. Malechi, 6 Mo. 177, 34 Am. Dec. 130, holding that heirs at law are not disqualified by statute making incompetent as witnesses in their own behalf one of the original parties to the contract or cause of action, where the other party has since deceased. Garvin v. Williams, 50 Mo. 206, holding that beneficiaries under the will are not disqualified. To the same effect, see Gamache v. Gambs, 52 Mo. 287.

N. J.—Mackin v. Mackin, 37 N. J. Eq. 528, holding that the proponent of a will is not disqualified as a witness in his own behalf by a statutory provision that no party shall be sworn in any case where the opposite party sues or is sued in a representative capacity. Neither is an executor, although also the proponent of a will: nor is the beneficiary under the will disqualified as a witness in his own behalf. Grant v. Stamler, 68 N. J. Eq. 555, 59 Atl. 890.

Ohio.—Wolf v. Powner, 30 Ohio St. 472, holding that parties interested in the probate of a will are not disqualified where the statute expressly excepts from the operation of the general disqualifying clause heirs of the decedent and legatees claiming under his will in cases to contest the validity of or to set aside the will.

Pa.—Bowen v. Goranflo, 73 Pa. 357, holding that a person who is an executor and also a devisee under a will is a competent witness on the trial of a feigned issue to determine the validity of such will, where the disqualifying statute excepts from its operation issues and inquiries *devisavit vel non* and others respecting the right of such deceased owner between parties claiming such right by devolution upon the death of the owner.

R. I.—Hamilton v. Hamilton, 10 R. I. 540, holding that contestants of a will are not disqualified as witnesses in their own behalf by a statutory provision that where an executor or administrator is a party to the suit, the other party shall not be admitted to testify in his own favor.

Tenn.—Beadles v. Alexander, 9 Baxt. 606, holding that, in a proceeding to probate a will, legatees or devisees are not disqualified as witnesses in their own favor by a statute 51 L.R.A. (N.S.)

Messrs. Campbell & Campbell, also for appellee:

Mrs. Kirk does not come within the condemnation of the statute, for two reasons: First, because her claim did not originate in the lifetime of her husband, W. J. Kirk; second, because she is not proposing to testify in a suit seeking to establish her claim against the estate, but in a suit in which the controversy is over the estate of a deceased person.

Covington v. Frank, 77 Miss. 606, 27 So. 1000; Kelly v. Miller, 39 Miss. 17; Mullins v. Cottrell, 41 Miss. 291; Tucker v. Whitehead, 59 Miss. 594; Steen v. Kirkpatrick, 84 Miss. 63, 36 So. 140; Jamison v. Jamison, 92 Miss. 468, 46 So. 83, 945; Sivley v. Roberts, — Miss. —, 53 So. 595; 40 Cyc.

ute providing that, in actions or proceedings by or against executors, etc., in which judgment may be rendered for or against such personal representatives, neither party shall be allowed to testify against the other as to transactions with or statements by decedent.

Tex.—Simron v. Middleton, 51 Tex. Civ. App. 531, 12 S. W. 441, holding that a statutory provision that, in actions by or against executors, administrators, guardians, etc., in which judgment may be rendered for or against such representative, neither party shall be allowed to testify against the other as to any transaction with or statement by the deceased, including actions by or against the heirs or legal representatives, arising out of any transaction with the deceased, does not include proceedings for the probate of a will, and hence does not disqualify witnesses in such proceedings. By earlier cases, however, it is held that an interested witness is disqualified by this statute from giving testimony for the purpose of establishing a nuncupative will. See Texas cases, *infra*.

Utah.—Miller v. Livingstone, 31 Utah, 415, 88 Pac. 338, holding that in a proceeding to revoke the probate of a will, heirs at law are not disqualified as witnesses in their own favor by a statute disqualifying all parties to a civil action, suit, or proceeding, or any person directly interested in the event thereof, and any person from, through, or under whom such party or interested person derives his interest or title, when the adverse party claims or opposes, sues or defends, as executor, etc., as to any statement by or transaction with the decedent, or matter of fact whatever which must have been equally within the knowledge of both the witnesses and the deceased.

Vt.—Foster v. Dickerson, 64 Vt. 233, 24 Atl. 253, holding that in a proceeding to contest the validity of a will, the legatee therein is not disqualified by a statute disqualifying one party as a witness where the other party to the contract or cause of action has deceased. To the same effect are Re Buckman, 64 Vt. 313, 33 Am. St. Rep.

2266; *Kumpe v. Coons*, 63 Ala. 452; *Henry v. Hall*, 106 Ala. 84, 54 Am. St. Rep. 22, 17 So. 187; *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405; *Carmical v. Carmical*, 32 Ky. L. Rep. 171, 104 S. W. 1037; *Brown v. Bell*, 58 Mich. 58, 24 N. W. 824; *McHugh v. Fitzgerald*, 103 Mich. 21, 61 N. W. 354; *Re Lambie*, 97 Mich. 49, 56 N. W. 223; *Foster v. Dickerson*, 64 Vt. 238, 24 Atl. 253; *Re Miller*, 31 Utah, 415, 88 Pac. 338.

Cook, J., delivered the opinion of the court:

W. J. Kirk died on the 30th day of November, 1911, childless, leaving his widow, L. G. Kirk, appellee here, his sole heir at law. On the 25th day of February, 1909,

930, 24 Atl. 252; *Manley v. Staples*, 65 Vt. 370, 26 Atl. 630; *Re Mason*, 82 Vt. 160, 72 Atl. 329.

Va.—*Martz v. Martz*, 25 Gratt. 361, holding that devisees or legatees are not disqualified by a statute providing that when one of the original parties to a contract or other transaction which is the subject of investigation is dead the other party shall not be admitted to testify in his own favor.

Can.—*Re Farquharson*, 33 N. S. 261, holding that persons interested for or against the probate of a will are not disqualified as witnesses in their own favor in such a proceeding by a statute disqualifying as witnesses in their own favor persons having dealings, transactions, or agreements with a person since deceased, where the testimony relates to such dealings, transactions, or agreements.

b. Where disqualification applies only to parties or devisees or legatees.

In New Hampshire, the contestant of a will appealing from the probate thereof is held disqualified as a witness in his own behalf by a statute providing that neither party shall testify in any action when the adverse party is an executor or administrator (*Welch v. Adams*, 63 N. H. 344, 56 Am. Rep. 521, 1 Atl. 1); but, on the trial of an appeal from the probate of a will, neither the testator's heirs, nor the devisees or legatees under his will, are disqualified as witnesses in their own behalf, where they are not appellants, since in such cases they are not parties to the proceeding, although they are interested in the event thereof. *Wheeler v. Towns*, 43 N. H. 56.

In Nebraska it is held that heirs at law are not disqualified from testifying in a proceeding to probate a will by a statutory provision that no person having a direct legal interest in the result of a civil action or proceeding when the adverse party is the representative of a deceased person shall be permitted to testify to any transaction or conversation with the deceased (*McCoy v. Conrad*, 64 Neb. 150, 89 N. W. 665), but it seems that devisees or legatees are

the deceased made a will devising all of his property to his three sisters, who are the appellants in this case. When this will was offered for probate, Mrs. Kirk, the widow, filed a caveat, protesting against the probate of the will because same was not executed in the manner and form required by law, because at the date of the will testator was not of sound mind and body, and was not capable of making a will, and because the execution of the will was obtained by undue influence of the beneficiaries thereof. An issue *devisavit vel non* was made up, and a jury impaneled to try the issue returned a verdict in favor of the contestant.

At the trial, all of the grounds of contest seem to have been abandoned, save the one

disqualified as witnesses in their own behalf in such a proceeding at least prior to the probate of the will under which they claim. *Ibid*.

c. Where disqualification depends upon character of testimony.

In some jurisdictions, although the disqualification of the statute is held to include proceedings either to probate a will or to set aside a probated will, the disqualification is limited to the character of the testimony expressly referred to in the statute, and the witness is not held to be generally disqualified or incompetent in such cases; therefore it is really the evidence that is rendered incompetent. This distinction is of importance in considering the weight to be attached to any decision holding that a witness is either wholly or partially disqualified, or that the disqualifying statute does not include proceedings to probate a will. For while, of course, the broad statement in a case that a statute does not disqualify a witness in his own behalf in a proceeding to probate a will is entitled to some weight on this point, yet if, as a matter of fact, the testimony with reference to which the question was raised did not come within the scope and purview of the statute, the value of the decision as to the competency of a witness in a case where the testimony was of a character within the purview of the statute is considerably lessened. This may be illustrated by reference to *Johnson v. Johnson*, 105 Md. 81, 121 Am. St. Rep. 570, 63 Atl. 918, holding that a widow is not disqualified as a witness on the trial of a caveat to a will filed by her as next friend of her infant children, since she is not a party within the provision of the Maryland statute by which a person interested in the subject-matter of the controversy to which the representative of the deceased person is a party is disqualified as a witness, and which by amendment was limited to personal transactions with or statements made by the intestate. While the exact character of the testimony is not made to appear, it

involving the testamentary capacity of the testator. The testimony of Mrs. Kirk, the wife of testator, formed a very material part of the evidence to establish the insanity of her deceased husband, all of which was objected to by appellants, upon two grounds, *viz.*: First. Because the wife was incompetent to testify concerning the acts and words of her husband, done and said under the protection of confidential communication between husband and wife. Second. Because the testimony of the wife was to establish her own claim to the estate of the deceased, which originated during the lifetime of the deceased.

The testimony of Mrs. Kirk recited in full the most intimate relations between herself and her deceased husband from their

marriage to his death. She told about his habit of drinking and intoxication, his hearing of voices and communications with the spirits of the dead, his mutterings and outcries while asleep, the delusions which caused him to arm himself with guns and pistols, backed up by a bottle of whisky to supply courage, insults offered her, and attempts to take her life. True, it appears that he had been guilty of similar conduct at other times in the presence of others. His conduct and declarations in the presence of others it is competent for her to relate; but this does not authorize or permit her to testify about similar conduct and declarations made to her alone.

We think the major part of Mrs. Kirk's testimony comes under the condemnation

apparently related to the mental capacity of the testator as affected by his unfounded belief in the unchastity of the witness and the illegitimacy of their children, and the purpose of the testimony was apparently to show that this belief on the part of the testator was unfounded, and hence the testimony related to the chastity of the witness. It is clear that testimony of this character would be held admissible by an interested party in a proceeding to probate a will in New York state under a very similar statute, and which, however, is held to apply to proceedings to probate a will. Thus, the New York statute disqualifies a person interested from testifying in his own behalf concerning a personal transaction or communication between himself and a deceased person against the executor, administrator, or survivor of a deceased person, or a person deriving his title or interest from, through, or under the deceased person. This statute has been held to disqualify a legatee or devisee from testifying in his own behalf where the testimony relates to a transaction or communication with the deceased, but it is pointed out in the case of *Lane v. Lane*, 95 N. Y. 494, that the statute will not disqualify a witness if the testimony relates to a conversation between the deceased and another person, overheard by the witness, and in which he took no part. On this latter point, however, see other New York cases *infra*, IX. b.

In Iowa the proponent of a will who is also the devisee therein is held disqualified as a witness in favor of the will in a proceeding for its probate to which the heirs of the testator are parties, if the testimony relates to transactions with or communications of the deceased, by a statute providing that no party to an action or proceeding, or any person interested in the event thereof, shall be examined as a witness as to any personal transactions with or communications of the deceased person as against the executor, heir at law, or next of kin. *Sisters of Visitation v. Glass*, 45 Iowa, 154; *Re Rehards*, — Iowa, —, 143 N. W. 1106, holding that a son of the testator, claiming as beneficiary under his

will, is disqualified. *Ross v. Ross*, 140 Iowa, 51, 117 N. W. 1105, holding that the contestant of a will is disqualified.

In Kansas, the heirs of a deceased person are held disqualified as witnesses in their own behalf with reference to any personal communication with the testator by a statute providing that no party shall be allowed to testify in his own behalf in respect to any transaction or communication with the deceased person when the adverse party is executor, administrator, or next of kin, where they have acquired title immediately from the deceased (*Wehe v. Mood*, 68 Kan. 373, 75 Pac. 476); and the disqualification applies to an executor who is also a devisee (*Rich v. Bowker*, 25 Kan. 7).

In North Carolina any interested witness may testify if the testimony does not relate to a personal transaction or communication with the decedent, under a statute forbidding interested witnesses from being examined in regard to any transaction or communication with a deceased person where the testimony is against the party defending as executor, etc. *Umstead v. Bowling*, 150 N. C. 507, 64 S. E. 368; *Linebarger v. Linebarger*, 143 N. C. 229, 55 S. E. 709, 10 Ann. Cas. 596.

The West Virginia statute disqualifying an interested person from testifying in his own behalf in respect to any transaction or communication had personally with a deceased person has been held to disqualify heirs at law as witnesses in their own favor in proceedings in equity attacking a probated will. *Kerr v. Lunsford*, 31 W. Va. 659, 2 L.R.A. 668, 8 S. E. 493; *Freeman v. Freeman*, 71 W. Va. 303, 76 S. E. 657; *Bailey v. Bee*, — W. Va. —, 80 S. E. 454. It does not, however, disqualify a devisee and legatee who is also an heir of the testator, from testifying in a similar proceeding to the fact of the execution of the will, according to a statement in *Barker v. Hinton*, 62 W. Va. 639, 59 S. E. 614, 13 Ann. Cas. 1150.

In Wisconsin a statute providing that no party in interest shall be examined as a witness in reference to any transaction or

of the rule which prevents one spouse from testifying about the acts and words of the other, which acts or words were performed or uttered when they were alone, and were therefore to be deemed confidential. This rule has been relaxed in many jurisdictions, and many arguments are advanced to buttress the exception allowed. With these exceptions as weapons, able and distinguished counsel have laid siege to, assaulted, and pounded the rule, until it is a mere shadow of the original. We prefer to adhere to the old rule in all of its form and purity. We are unable to differentiate between acts and words—and cannot appreciate the distinction between words termed “verbal acts” and mere words used

in the confidential relations between husband and wife.

The confession of adultery, or the charge of infidelity, made in the privacy and under the confidence of the marriage confessional, are both protected. It will not do to say that because the husband, in a moment of contrition, or apprehension of ultimate detection, confesses to his adulterous relations with another woman, that this removes the ban of confidence, because the very act confessed tends to destroy the marital relations.

Again, because a husband, in a moment of jealous rage or drunken frenzy, confronts the virtuous wife with a cowardly and unfounded charge of infidelity, and because this deadliest of all insults is a thous-

communication with the deceased person is held to disqualify as a witness in his own behalf, as to the reading of the will to the testator before its execution by him, a legatee who is also the proponent of the will, and who took part and assisted in the execution of the will which it was sought to probate. *Goerke v. Goerke*, 80 Wis. 516, 50 N. W. 345. Also to disqualify an heir at law of the testator who is also a devisee or legatee in his will as to testimony regarding personal transactions or communications between himself and the testator. *Re Valentine*, 93 Wis. 45, 67 N. W. 12. This disqualification is also held to apply to a daughter of the testator. *Anderson v. Laugen*, 122 Wis. 57, 99 N. W. 437.

In Indiana a statute disqualifying as witnesses interested parties in suits by or against heirs or devisees, founded on a contract of or demand against the ancestor, to obtain title to or possession of property, includes actions to contest wills, and renders parties thereto incompetent to testify to matters occurring in the lifetime of the testator, except such facts and occurrences as are open to the observation of all of his friends and acquaintances, and are to be used as a basis for an opinion as to the mental competency of the decedent. *Hiatt v. McColley*, 171 Ind. 91, 85 N. E. 772. Compare with cases *infra*, V. a.

d. Distinction between proceedings affecting probate of will and proceedings between heirs relating to distribution.

In Illinois the statutory provision that no party to any civil action, suit, or proceeding, or person directly interested in the event of the suit, shall be allowed to testify therein in his own behalf when the adverse party sues or defends as executor, administrator, heir, or devisee, is held to apply to proceedings in chancery to set aside a probated will, and hence heirs at law, devisees, and legatees are disqualified as witnesses in their own behalf in such a proceeding (*Jones v. Abbott*, 235 Ill. 220, 85 N. E. 270; *Wickes v. Walden*, 228 Ill. 56, 81 N. E. 51 L.R.A. (N.S.)

798; *Baker v. Baker*, 202 Ill. 595, 67 N. E. 410; *Waugh v. Moan*, 200 Ill. 298, 65 N. E. 713); but it is held that, in adjusting their rights among themselves, those who are conceded to be heirs at law, or who have been adjudicated to be heirs at law of the decedent, are not disqualified as witnesses in their own behalf (*Re Maher*, 210 Ill. 160, 71 N. E. 438; *Laurence v. Laurence*, 164 Ill. 367, 45 N. E. 1071).

The Colorado statute is similar to the Illinois statute, and it is construed to disqualify heirs and devisees from testifying in their own behalf in a proceeding to probate a will. *Re Shapter*, 35 Colo. 578, 6 L.R.A. (N.S.) 575, 117 Am. St. Rep. 216, 85 Pac. 688.

e. Cases holding disqualification to be absolute.

WHITEHEAD v. KIRK holds that the wife of the deceased is disqualified as a witness in a proceeding to contest the will of her husband where the purpose of the testimony is to invalidate the will, in which event, if the testator had no other valid will, and hence died intestate, the wife would be entitled to receive his property. The disqualifying statute of this state provides that a person shall not testify as a witness to establish his own claim or defense against the estate of a deceased person, which originated in his lifetime.

Under the decision in the foregoing case the widow of the testator is held to be disqualified as a witness upon the question of the mental capacity of the testator. For other cases considering this particular question, see *infra*, IX. a, 1, 2.

III. Comparison of decisions with reference to form of statute; where party disqualified when opposite party is executor, etc.

The cases are in conflict as to the applicability of statutes which in general terms disqualify one party to the proceeding where the other party is the representative of the deceased person. In view of this conflict of decisions, attention is es-

and times worse than a blow, we do not think the wife can go upon the witness stand and detail before a jury the revolting and shocking brutality of her jealous or drunken spouse. By the policy of the law, as we understand it, the door of confidence is closed to all prying eyes and eager ears, never to be opened by the husband or wife in a court whose duty it is to uphold the rule founded upon the wisdom of time and experience.

When the husband and wife are alone, everything said and done is under the protection of the rule, and the declarations and conduct of both are presumed to be confidential. That similar acts occur and similar words are used in the presence of others raises no presumption that the pre-

sumably confidential declarations and conduct have been thereby released, and that those things said and done in privacy then become public property. Of course, many things are said and done by husband or wife, which, upon their face, bear no semblance of confidence; but ordinarily what a wife says to her husband alone is said because he is her husband, and because she can speak freely, undisturbed by the possibility that he will repeat what she says. For this reason, we think, when communication between husband and wife can be reasonably construed as confidential, the rule of public policy applies, and, no matter what may happen in particular cases, the courts will not permit a disclosure.

Change does not always denote progress,

pecially called to the cases included under subdivision IV., under the classification, "where party to contract or cause of action is excluded." The statutes construed by the cases included under the latter classification are very similar to the statutes construed under subdivision III., although in *Welch v. Adams*, 63 N. H. 344, 56 Am. Rep. 521, 1 Atl. 1, (included under subdivision II.), the Massachusetts and Missouri cases referred to under subdivision IV., are said to be based upon a statute materially different from the New Hampshire statute.

Cases holding interested witness disqualified.

Under the Illinois statute providing that no party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion or in his own behalf when any adverse party sues or defends as the executor, administrator, heir, or devisee of any deceased person, unless when called as a witness by such adverse party suing or defending, heirs are not competent witnesses in their own behalf in a suit to which they are parties to set aside the will of their ancestor. *Brace v. Black*, 125 Ill. 33, 17 N. E. 66; *Volbracht v. White*, 197 Ill. 298, 64 N. E. 324; *Waugh v. Moan*, 200 Ill. 298, 65 N. E. 713; *Wickes v. Walden*, 228 Ill. 56, 81 N. E. 798.

And under that statute, a daughter of the testator, who is a beneficiary under the will, is incompetent to testify in support of the will in a suit to set aside the probate, in which the adverse party sues as heir of the testator. *Jones v. Abbott*, 235 Ill. 220, 85 N. E. 279.

So, the nephew and niece of the testator, who were parties to the proceeding for the probate of the will, and were beneficiaries under it, and also trustees to carry into effect its provisions, were held not competent witnesses in support of the will, the opposite parties being heirs at law of the deceased. *Re Tobin*, 196 Ill. 484, 63 N. E. 1021.

51 L.R.A.(N.S.)

Wood v. Wood, 263 Ill. 285, 104 N. E. 1108, holds that by the terms of § 2 of *Hurd's Rev. Stat. 1913*, chap. 51, a person claiming as legatee under a will is not competent to testify in his own behalf in a proceeding contesting the probate of a will, that he was present at the time of the execution of the will, and that he dictated to the scrivener the form of a devise to himself, where the scrivener informed him that she did not know how to frame it, the question at issue being whether such devise was inserted in the will before or after the death of the testator.

In *Laurence v. Laurence*, 164 Ill. 367, 45 N. E. 1071, the court said that the rule to be deduced from the *Pigg Case*, *infra*, and other cases that had commented upon that case, was that "where, among those who are conceded the heirs, there arises a controversy as to the distribution of the estate among them, they may testify, as such testimony does not tend to reduce or impair the estate among them." And that language is quoted with apparent approval in *Re Maher*, 210 Ill. 160, 71 N. E. 438.

In *Pigg v. Carroll*, 89 Ill. 205, a suit for partition among the heirs at law, where the matter in dispute related to the value of advancements made by the ancestor, it was held that the parties were competent witnesses. The court said that the property involved belonged to the litigants, and it made no difference how they acquired the title to it, whether by purchase or descent; that there was no more reason for saying that they sued or defended as heirs than if the property had been acquired otherwise than by inheritance.

But in a suit for partition of land which the complainants' father, since deceased, had inherited jointly with his brother from his father, the uncle was held incompetent as a witness to prove that certain advances were made to the complainants' father by their grandfather. *Comer v. Comer*, 119 Ill. 170, 8 N. E. 796, distinguishing *Pigg v. Carroll*, *supra*, upon the ground that in that case the parties litigating held a title derived from the same identical source, and the litigation concerned property which con-

and modern departures from ancient rules of law in response to the exigencies of particular cases frequently obliterate the wisest and safest rules designed for the protection of society. Modern practices and advanced ideas look with complaisance upon the spectacle of husband and wife worshipping different Gods and voting in the same booth for different candidates and different governmental policies. We confess to a preference for the old-fashioned ideal of the oneness of man and wife, and at the risk of being classed as "standpatters" we adopt as a sound policy, applicable to the wife as to the husband, the sentiment expressed in these words: "Therefore shall a man leave his father and his mother, and shall cleave unto his wife; and they shall

be one flesh." True, this admonition is hoary with age; but we doubt that the cock-sureness of modern iconoclasm has succeeded in demonstrating the unwisdom of the common paternal ancestor of all mankind. The majority still believe in the doctrine, even though few obey it.

There is an irreconcilable conflict in the authorities upon the precise point involved in this case. In *Stein v. Bowman*, 13 Pet. 209, 10 L. ed. 129, it is said: "The rule which protects the domestic relations from exposure rests upon considerations connected with the peace of families. And it is conceived that this principle does not merely afford protection to the husband and wife, which they are at liberty to invoke or not, at their discretion; . . . but it

cededly belonged to the parties in suit; whereas, in the case at bar, the title that was in the ancestor of the complainants was disputed, and the minor heirs were endeavoring to maintain the right that was in him.

A legatee under a will in contest, being also the widow of the testator, is competent as a witness in her own behalf to testify in rebuttal, denying statements testified to have been made in the presence of the testator, where the statute expressly provides that where, in any action, suit, or proceeding, any witness not a party to the record, or not a party in interest, or not an agent of the deceased person, shall, in behalf of any party to such action, suit, or proceeding, testify to any conversation or admission by any adverse party or party in interest, occurring before the death or in the absence of such deceased person, such adverse party or party in interest may also testify to the same admission or conversation. *Judy v. Judy*, 261 Ill. 470, 104 N. E. 256.

The Colorado disqualifying statute is adopted from the Illinois statute, and in construing same the decisions of the Illinois courts have been followed; the Colorado court holding that under this statute heirs and devisees are incompetent to testify in a proceeding to probate a will, the court remarking that the same rule applies to a proceeding to probate a will as applies to a proceeding to set aside a probated will, it being the latter point which was involved in most of the Illinois cases. *Re Shapter*, 35 Colo. 578, 6 L.R.A.(N.S.) 575, 117 Am. St. Rep. 216, 85 Pac. 688.

Where the statute disqualifies as a witness interested parties in suits by or against heirs or devisees, founded on a contract with or demand against the ancestor to obtain title to or possession of property, etc., actions to contest wills are included and render the parties thereto incompetent to testify to matters occurring in the lifetime of the testator, except such facts and occurrences as were open to the observation of all his friends and acquaintances, and are to be used as a basis for an opinion

as to the mental competency of the testator. *Hiatt v. McColley*, 171 Ind. 91, 85 N. E. 772.

In *Wolfe v. Kable*, 107 Ind. 565, 8 N. E. 559, parties to a suit for partition were held incompetent to testify as to what their father said at the time certain conveyances were made, for the purpose of proving that they were gifts rather than advancements. The court declared generally that where the controversy is between heirs as to rights derived through contracts or transactions with the ancestor, none of the parties are competent to testify as to declarations made by him.

Cases holding interested witness competent.

In New Hampshire it is held that a statute providing that neither party shall testify in an action when the adverse party is an executor or administrator disqualifies as a witness in his own behalf the contestant of a will appealing from the probate thereof, since the reason which forbids the surviving party to testify as to matters of dispute, or transactions with the deceased, is equally applicable in the trial of an appeal from the probate of a will. And the same injustice that the statute seeks to prevent in other actions to which the executor is a party, by excluding the surviving party from testifying, will often be done in the trial of an appeal upon the probate of a will, if the contestant may testify to matters about which the testator, if living, might testify, and perhaps contradict or explain the testimony of the contestant. *Welch v. Adams*, 63 N. H. 344, 56 Am. Rep. 521, 1 Atl. 1. In this jurisdiction, however, it has been held in an appeal from the probate of a will, that the heirs of the testator and also devisees or legatees under his will, who are not appellants, are not disqualified as witnesses, since they are not parties to the proceeding, although interested in the event thereof. *Wheeler v. Towns*, 43 N. H. 56.

A statute providing that no party shall be sworn in any case where the opposite party sues or is sued in a representative capacity does not disqualify as a witness in

renders them incompetent to disclose facts in evidence in violation of the rule. And it is well that the principle does not rest on the discretion of the parties. If it did, in most instances, it would afford no substantial protection to persons uninstructed in their rights, and thrown off their guard and embarrassed by searching interrogatories. . . . Can the wife, under such circumstances, either voluntarily be permitted or by force of authority be compelled to state facts in evidence which render infamous the character of her husband? We think most clearly that she cannot be. Public policy and established principles forbid it."

In *State v. Jolly*, 20 N. C. 108 (3 Dev. & B. L. 110) 32 Am. Dec. 656, the court,

her own behalf the proponent of a will, although interested in the probate thereof as the widow of the testator. The fact that she has presented the will for judicial action, although it makes her in a certain sense a party to the proceedings, does not make her a party within the meaning of the statute, which, by its prohibitory limitation, aims to prevent persons making claims by proceedings at law or in equity against the estates of deceased persons from profiting in their suit by means of their own testimony as to transactions with or statements of the deceased, since the proceeding to probate a will is not a suit, but a judicial inquiry as to whether the instrument before the court is the last will and testament of the deceased. *Mackin v. Mackin*, 37 N. J. Eq. 528. Neither the testimony of the executor of a will nor that of the beneficiary thereunder in relation to testamentary capacity, in a proceeding for the probate of the will, is incompetent. *Grant v. Stanler*, 68 N. J. Eq. 555, 59 Atl. 890.

The statute providing that when the original party to the contract or cause of action is dead, or when an executor or administrator is a party to the suit, the other party may be called as a witness by his opponent, but shall not be admitted to testify upon his own offer, does not disqualify as witnesses in their own behalf the contestants of a will, since it is only when an executor is party as executor representing the estate that the statutory provision applies, and in a proceeding to contest a will the person nominated therein as executor is not a party to the proceeding in his capacity as executor. *Hamilton v. Hamilton*, 10 R. I. 540.

A statutory provision that no person shall be excused or excluded from being a witness in any civil suit or proceeding at law or in equity, including special proceedings before courts of probate, by reason of his interest in the event thereof, as a party or otherwise, except where, at the time of trial, the party prosecuting or defending is an executor or administrator, or is made a party as heir, does not disqualify as witnesses the heirs of the testator in a pro-

ceeding to contest the probate of his will. *Nash v. Reed*, 46 Me. 168.

in commenting upon what acts and conduct are within the privilege as verbal communications, said: "But it is not enough to throw protection over communications made in the spirit of confidence. The intimacy of the marriage union enables each to be a daily and almost constant witness of the conduct of the other; and thus in fact a confidence, reaching much farther than that of verbal communications, is forced upon each of the parties. What one may even desire to conceal from all human eyes and ears is thus almost unavoidably brought within the observation of the other. . . . The rule we deem a valuable one, and we view with apprehension any exception having a tendency, more or less direct, to promote cunning, or to generate distrust,

IV. Where party to contract or cause of action is excluded.

In a proceeding to probate a will a statute prohibiting testimony by a party to the proceeding where one of the original parties to the contract or cause of action in issue and on trial has deceased does not disqualify as witnesses persons interested in or parties to such proceeding. *Shailer v. Bumstead*, 99 Mass. 112.

In Missouri a statute making incompetent as a witness in his own behalf the original party to a contract or cause of action where the other party has since deceased is held not to apply to the heir at law of the decedent, since he is not a party to a proceeding to establish and probate a lost will in a sense to disqualify him as a witness, especially where his testimony is against his own interests. *Dickey v. Malechi*, 6 Mo. 177, 34 Am. Dec. 130. Neither does the statute operate to disqualify as witnesses to sustain a will beneficiaries therein. *Garvin v. Williams*, 50 Mo. 206; *Gamache v. Gambs*, 52 Mo. 287.

In a proceeding to contest the validity of a will a legatee therein is competent as a witness in favor of the will upon all the material issues in the case, since the statute disqualifying one party as a witness where the other party to the contract or cause of action in issue and on trial is dead does not apply to a proceeding of this character. *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253; *Re Buckman*, 64 Vt. 313, 33 Am. St. Rep. 930, 24 Atl. 252; *Manley v. Staples*, 65 Vt. 370, 26 Atl. 630; *Re Mason*, 82 Vt. 160, 72 Atl. 329.

And an interested witness may testify to the execution of the will, in contradiction of the testimony of the attesting witnesses. *Re Wheelock*, 76 Vt. 235, 56 Atl. 1013.

In *Foster v. Dickerson*, supra, it is said that the testatrix, by her legal representatives, is not a party to or in any way interested in a proceeding to probate her will. The controversy is between the living par-

where the best interests of society require that perfect frankness and confidence ought to prevail. If one exception be sanctioned, because, from the character of the criminal act imputed, the dissent of the witness from its commission must be presumed, others may follow, where the like presumption will be entertained, . . . and there will be danger of our having no rule capable of general and steady application. . . . Moreover, the rule is not founded exclusively upon an actual voluntary confidence reposed by one of the married pair in the other, but also upon the unavoidable confidence which the intimacy of the marriage state necessarily produces." See also *Owen v. State*, 78 Ala. 425, 56 Am. Rep. 40, 6 Am. Crim. Rep. 206; *Boykin v. Boykin*, 70

N. C. 262, 16 Am. Rep. 776; *Hanselman v. Dovel*, 102 Mich. 505, 47 Am. St. Rep. 557, 60 N. W. 978; *Brewer v. Ferguson*, 11 Humph. 568; *Wickes v. Walden*, 228 Ill. 56, 81 N. E. 798; *Hertrich v. Hertrich*, 114 Iowa, 643, 89 Am. St. Rep. 389, 87 N. W. 689; *Monroe v. Twistleton*, Peake N. P. Add. Cas. 219; *Doker v. Hasler*, Ryan & M. 198; *O'Connor v. Marjoribanks*, 5 Scott, N. R. 394, 4 Mann. & G. 435, 12 L. J. C. P. N. S. 161, 7 Jur. 834.

In *Schreffler v. Chase*, 245 Ill. 395, 137 Am. St. Rep. 330, 92 N. E. 272, a case treating testimony much like the testimony delivered by Mrs. Kirk in this case, it is held that the divorced husband was incompetent to testify to the conduct of the testa-

ties who, on the one side, are legatees under the will, represented by the proponents, and, on the other side, are the heirs at law of the testatrix. The former claim to take the estate under the will, and the latter under the statute regulating the descent of estates, insisting that the alleged will is a nullity, and the act of the testatrix in making the alleged will is the only subject-matter of the investigation. The proceeding is in the nature of a proceeding *in rem*, and establishes the relation of all the parties to the corpus of the estate. The gist of the action is not changed by the fact that the trial may indirectly involve a determination of the relations of the witness to the testatrix.

The statutory provision that when one of the original parties to a contract or other transaction which is the subject of investigation is dead, the other party shall not be admitted to testify in his own favor unless first called to testify on behalf of the party first named, does not disqualify as witnesses in their own behalf devisees or legatees, in a proceeding to probate the testator's will, since they are not parties to the transaction. *Martz v. Martz*, 25 Gratt. 361.

In the preceding case the court remarked that legatees or devisees may be said to be parties in interest under the will, but they cannot be said to be parties to the making of the will merely because it invests them with an interest. The testator is the only party to the execution of his will. He may have consulted others and been advised, and he may have employed a scrivener to write it, but if it is his will, it is his act alone.

And see *Wilkes v. Wilkes*, — Va. —, 80 S. E. 745, holding that since a will is solely the act of the testator, and its execution is not such a contract or transaction as comes within the purview of the disqualifying statute, the widow of a deceased testator is a competent witness to the fact of having stricken a certain clause from the testator's will at his request.

The statute disqualifying as witnesses in their own favor persons having dealings, 51 L.R.A. (N.S.)

transactions, and agreements with a person since deceased, does not disqualify as witnesses in their own behalf persons interested either for or against the probate of a will. *Re Farquharson*, 33 N. S. 261.

V. Where disqualification is limited to personal transactions or communications with decedent.

a. Cases holding statute inapplicable.

The cases are in conflict as to the rule applicable under statutes prohibiting interested witnesses from testifying as to personal transactions or communications with a deceased person whose executor, etc., is a party to the proceeding, or whose estate is interested in the result of the suit. The following cases hold that a proceeding to probate a will is not within the scope and meaning of disqualifying statutes in this form, and hence, in proceedings of this character, persons interested in the probate of a will, or in defeating its probate, are not disqualified as witnesses in their own favor.

Thus it has been held that a statute providing that, in an action by or against an executor, administrator, or guardian, in which judgment may be rendered for or against him, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate, or ward, unless called to testify by the opposite party, was intended to protect the estate of deceased persons from the attacks of persons who had or claimed to have had business transactions with the deceased, and who are seeking to establish claims against his estate, and it has no application to controversies between devisees themselves over a will, or between devisees or legatees and the heirs as to the distribution of the estate by will or otherwise, since in such case the corpus of the estate is in no manner affected; hence, under this statute, the testimony of an heir at law of a testator, who is contesting the latter's will, is competent in her own behalf. *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405.

trix, as observed by him from the time he married up to the time of the separation.

The other point relied upon for a reversal invokes a broader rule to exclude the testimony of Mrs. Kirk. It is insisted that she was incompetent to testify at all "to establish his [her] own or assigned claim . . . against the estate of a deceased person." Section 1917, Revised Code of 1906. This section of the Code has been the law of the state since 1857, or longer. The language of the various statutes embodying the rule varies somewhat, but they are all to the same effect. Many times this court has construed this statute, and it is difficult to entirely harmonize the decisions. Able counsel for appellants in their briefs collate and critically analyze all the cases.

We have examined the cases with care, and find ourselves unable to improve upon the work of counsel, and will therefore make use of their work by quoting liberally therefrom.

Before proceeding further, we now state the question, viz: Did Mrs. Kirk testify to establish her claim against the estate of deceased, which claim originated during the lifetime of deceased? To answer this question, we come now to a consideration of the decisions of this court:

Griffin v. Lower, 37 Miss. 458, was a suit by an administrator to recover on a note payable to him as such. Defendant offered to defend, by testifying about transactions with deceased in his lifetime, constituting

Probate of a will is not an action or proceeding by or against an executor in which a judgment or decree may be rendered for or against him as such executor, within a statute providing that, in actions or proceedings by or against executors, administrators, or guardians, in which judgment or decree may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, since to such a proceeding there are no parties, and in contemplation of law it is solely an inquiry as to the validity of a certain paper writing, whether it is or is not the last will and testament of the testator. *Re Spiegelhalter*, 1 Penn. (Del.) 5, 39 Atl. 465.

In Texas the doctrine is asserted that in a proceeding to establish a nuncupative will the persons claiming thereunder as devisees or legatees are disqualified from testifying to establish the will by the statutory provision that, in an action by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify by the opposite party, or called to testify by the court, since the heirs are parties to the proceeding, and the prohibition is not intended to protect an executor or administrator, although they are named, but it is intended to protect the parties beneficially interested . . . the heirs and creditors. *Lewis v. Aylott*, 45 Tex. 190.

The person named as executor by a nuncupative will is not a competent witness to establish same. *Watts v. Holland*, 56 Tex. 54.

So, the guardian of minor children of a deceased heir is disqualified from testifying in his own behalf, as a witness, in partition proceedings prosecuted by him against the other heirs, with reference to declarations of the ancestor, and the different heirs are also disqualified from giving tes-

timony in their own behalf. *Ellis v. Stewart*, — Tex. Civ. App. —, 24 S. W. 585.

According to this doctrine a proceeding to set aside the probate of a will is, in effect, an action by the heirs, arising out of a transaction with the testator; and hence a legatee is disqualified from testifying as to any statements made by the testator having a bearing on the validity of the will in controversy. *Brown v. Mitchell*, 75 Tex. 9, 12 S. W. 606.

While these earlier decisions indicate the inclination of the Texas court to apply the prohibitive provision of the disqualifying statute to proceedings to establish or probate wills as well as to ordinary civil suits, yet the later decisions, although not in express terms overruling the earlier ones, have considerably limited the doctrine asserted in them.

Thus, in *Simon v. Middleton*, 51 Tex. Civ. App. 531, 112 S. W. 441, it is held that a proceeding for the probate of a will is not an action by or against the heirs or legal representatives of a decedent, arising out of any transaction with such decedent, within the meaning of this language, following the provision heretofore referred to, disqualifying interested witnesses in actions by or against executors, administrators, or guardians, and hence, in a proceeding to probate a will, the contestant thereof, a daughter of the testator, is not disqualified as a witness in her own behalf to conversations with decedent tending to establish fraud and undue influence in procuring the will.

And it has been held that legatees and devisees are not included within the prohibitive provision of the statute, and are competent witnesses as to the declarations of the testator, in a contest between the legatees. *Schnable v. Henderson*, — Tex. Civ. App. —, 152 S. W. 231.

In a proceeding to probate a will, the widow of the testator, who is contesting the probate thereof, may testify to the amount of money and property owned and held by her at the time of her marriage to the deceased, and that she sold the property, and loaned the proceeds of the sale to the de-

the consideration for the note. Testimony excluded.

Kelly v. Miller, 39 Miss. 17, was a case in which an executor and devisee was admitted to testify in support of the will. The whole question was whether article 45, p. 434, Code 1857, which made void a devise to a subscribing witness, resulted in making such witness incompetent to testify in support of the will.

Lamar v. Williams, 39 Miss. 342, was a suit to recover damages for battery to a slave. Defendants offered to testify that the owner, since deceased, consented. Evidence excluded, and the court gave a broad meaning to the word "claim," and said that the statute intended to prohibit the "undue advantage" of allowing a living party to

"testify to matters which took place between him and the deceased, and which, resting entirely in the private transactions of the parties, could not be disproved or explained by reason of the death of the other party."

Witherspoon v. Blewett, 47 Miss. 570, contains a full and strong statement of the court's policy in construing the statute. It was said that "the interpretation put upon the statute is broader than its words, but was demanded by its reason and intentment."

Jacks v. Bridewell, 51 Miss. 887, contains a full and strong review and assertion of the policy and meaning of the statute. The statute extends to every assertion of right to any part of the estate left by a deceased

ceased. *McDonald v. McDonald*, — Tex. Civ. App. —, 150 S. W. 593.

In Tennessee a statutory provision that in actions or proceedings by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to transactions with or statements by the testator, intestate, or ward, unless called to testify by the opposite party, is held not to disqualify devisees or legatees from testifying in a proceeding to probate the will, as to declarations of the testator in his lifetime, since an issue of *devisavit vel non* is not an action by the executor in which judgment may be rendered for or against him, in the sense of this statute, but it is a contest by the devisees and legatees on the one side, and the heirs and distributees on the other. *Beadles v. Alexander*, 9 Baxt. 604.

The meaning of such a statute is that in a suit between the estate of a deceased person and a living party, the latter shall not be allowed to give his version of transactions or conversations of deceased, whose lips are closed; and in principle the provision does not apply to an issue to contest the will of a deceased person where both the devisee and heirs are still living and may testify for themselves. *Ibid.*

To the same effect is *Davis v. Davis*, 6 Lea, 543, as to a legatee.

In Florida it is held that a statute excluding interested persons from testifying in regard to any transaction or communication between them and a party at the time of the examination deceased does not exclude from testifying as witnesses to the probate of a will, the heirs at law, next of kin, or devisees of the testator, since a proceeding to establish or invalidate a will rests upon different ground from ordinary causes of action, and is in the nature of a proceeding *in rem*. The subject-matter of investigation is the act of the testator in executing the will, and the proceeding is directed to this, and the execution of the will is not a transaction or communication between the testator and the legatee or his

heirs at law or next of kin. *Hays v. Ernest*, 32 Fla. 18, 13 So. 451.

In Maryland by an early act, a person interested in the subject-matter of the controversy to which the representative of the deceased person was a party was disqualified as a witness therein. By the amendment of this provision in 1904, the exclusion was limited to personal transactions with or statements made by the intestate.

In *Johnson v. Johnson*, 105 Md. 81, 121 Am. St. Rep. 570, 65 Atl. 918, it was held that the widow of the testator was a competent witness for her children in the trial of a caveat filed by her in their behalf, since she was not a party to the case within the meaning of the statute. The nature of the testimony does not clearly appear.

And in a contest between the alleged widow and those claiming to be the heirs at law and next of kin of a deceased person, the heirs at law are competent witnesses to establish their relationship, since the contest is merely as to the manner in which the estate shall be distributed. *Jones v. Jones*, 36 Md. 447, 11 Am. Rep. 505.

In Nebraska the statutory provision that no person having a direct legal interest in the result of a civil action or proceeding when the adverse party is the representative of a deceased person shall be permitted to testify to any transaction or conversation had between the deceased person and the witness is held not to disqualify the conceded heirs at law of the testator in such proceeding. *McCoy v. Conrad*, 64 Neb. 150, 89 N. W. 605. The court said that the devisees or legatees would be incompetent in such a proceeding, as they would assail the estate with a view to appropriating it or a part of it.

So, persons who would take as heirs at law or next of kin of the testator in case of the latter's intestacy are not disqualified from testifying as to transactions and conversations with the deceased, in a contest over his alleged will. *Williams v. Miles*, 68 Neb. 463, 62 L.R.A. 383, 110 Am. St. Rep. 431, 94 N. W. 705, 4 Ann. Cas. 306, rehearing denied in 68 Neb. 479, 96 N. W. 151, 4 Ann. Cas. 312.

party, by testimony about dealings with such party in his lifetime.

In *Rothschild v. Hatch*, 54 Miss. 554, A. L. Hatch, plaintiff in ejectment against the heirs of one Griffith, deceased, was held incompetent to testify about certain statements made by deceased in his lifetime as to the nature of his holding of the lands in controversy. In this case it was held that an assignment of the claim restored the competency of the party; whereupon the legislature promptly passed Acts 1878, p. 190, extending the exclusion to one who had assigned.

In *Tucker v. Whitehead*, 59 Miss. 594, it was held that the proponent and contestant were both competent to testify, notwithstanding the statute, and *Kelly v. Miller*,

supra, was cited. But this case was as follows: In deceased's papers was found a will, with the signature torn off. In such case, the law presumes that this was done by the testator, and done *animo revocandi*. (See authorities cited by Mr. Leigh.) The real claim and issue on this issue of *devisavit vel non* was this, and only this: A question of fact, whether, after the death, a brother of the deceased got hold of the will and mutilated it. That was the sole question actually brought before the jury, as is shown by the statement of the case; and it was about that that the parties were in fact held competent to testify.

Neblett v. Neblett, 70 Miss. 572, 12 So. 598, was a controversy between two sets of devisees; the devises having been made in

In Alabama it is held that a statute disqualifying as witnesses persons testifying to transactions with or statements by any deceased person whose estate is interested in the result of the suit does not disqualify as witnesses to the fact of the execution and attestation of a will legatees or devisees therein, in a suit or proceeding in which the validity of the will is involved, since the controversy is one to determine the status of the estate of the decedent and the condition in which he died, whether testate or intestate; hence it is a controversy between living parties, affecting only their interests, and in no proper sense is the estate of the testator interested in the result. *Snider v. Burks*, 84 Ala. 53, 4 So. 225; and to the same effect, see *Kumpe v. Coons*, 63 Ala. 448.

The estate of a decedent is not interested within the meaning of this statute in proceedings to probate a will, since it remains the same whether the will is probated or not. Hence the parties in interest are competent to testify to any fact relevant and material to the issue raised by a contest over the probate of a will on the ground of fraud, undue influence, or mental incapacity. *Henry v. Hall*, 106 Ala. 84, 54 Am. St. Rep. 22, 17 So. 187.

The grounds of the doctrine were thus stated in *Kumpe v. Coons*, *supra*: "An original proceeding in the court of probate for the probate of a will is a proceeding *in rem*. The purpose is to ascertain the status of the estate of the decedent, and the condition in which he died, whether testate or intestate. It does not assume the form and is not a suit *inter partes*, until the heirs or distributees intervene in the mode prescribed by the statute. . . . The character of the suit is not changed if there is no contest in the court of probate, and the heir at law, or next of kin, resort to the statutory remedy by bill in chancery. That remedy stands in the place of, and is the substitute for, proof of the will in solemn form, as practised in the ecclesiastical courts; or, if the will is of real estate, the action of ejectment at common law. . . . In either proceeding—the con-

tests in the court of probate or by bill in a court of equity—the parties claiming under the will are in fact the actors, bound to support it affirmatively, while the heir or next of kin is in the relation of a defendant. . . . In either court, the controversy is between living parties, the estate of the testator is not interested. The interests of those claiming to succeed to it, either by operation of law, or by operation of the instrument propounded as a will, are alone involved. The estate remains intact, undiminished, whatever may be the result of the controversy, and the subject-matter of investigation is not a transaction with or statement by the decedent, but an act of his in its nature ambulatory and revocable, taking effect only by his death. . . . Upon all questions involved, the parties are competent witnesses,—competent as attesting witnesses, though devisees or legatees,—competent to prove any fact which may be involved in the real issue, whether there is a will or not."

In Georgia the statute declaring that where any suit is instituted or defended by the personal representatives of a deceased person the opposite party shall not be permitted to testify in his own favor against the deceased as to transactions or communications with him in his lifetime does not disqualify an executor or legatee as a witness, on the trial of an issue *devisavit vel non*. *Harris v. Harris*, 53 Ga. 678.

Neither does this statute disqualify as witnesses in their own favor in a proceeding to establish and probate a nuncupative will, either the propounders or the caveators, since the cause of action is the factum of the will, and the parties to the proceeding are all in life. In no sense of the word can the testatrix be called "the other party" in opposition to the propounder or the caveator. *Brown v. Carroll*, 36 Ga. 568.

And in Kentucky it is held that in a proceeding in opposition to the probate of a will a devisee therein it a competent witness to testify that, after the execution of the codicil of a will, he handed it to the testator, and the witness is not disqualified by the Code provision that no person

general terms, and the questions turning on the titles of the devisors. Stirling Neblett, Sr., conveyed to his two sons, W. J. Neblett and Stirling Neblett, Jr., in 1857. The father died in 1871, devising his estate to his wife, Ann Neblett. Stirling Neblett, Jr., one of the two donees by the deed above mentioned, died in 1877; his mother being still living. The mother, Ann Neblett, then died in 1881. Then W. J. Neblett, the other donee by the deed above mentioned, died in 1891, ten years after the death of Ann. Bill was filed by the devisees of Ann Neblett, who died in 1881, against the devisees of Stirling Neblett, Jr., who died in 1877, and against the devisees of W. J. Neblett, who died in 1891, to vacate the deed of 1857. Complainants testified in

their own behalf, but it was held that they were incompetent under the statute; their testimony going to show that after the making of the deed of 1857, until his death in 1871, Stirling Neblett, Sr., had retained possession of the lands, etc., and declarations and admissions by the deceased donees.

In *Covington v. Frank*, 77 Miss. 606, 27 So. 1000, Frank filed his bill against the unknown heirs of Covington, deceased, to collect certain notes executed by Covington alone. Covington's widow and daughter made appearance, interposed defense, etc., and testified to prove their relationship. Frank's bill was filed against the "unknown heirs" of Covington, and the depositions of the widow and daughter were strictly responsive, and only proved their

shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or admitted to be done by, a person since deceased, since the purpose of this statute is to protect the estate against the claims of third persons, and not to disqualify as witnesses the heirs, devisees, or legatees, for, in the latter case, the several claimants to the estate are on an equal footing, and there is perfect mutuality and equality so far as concerns the opportunity and the right to testify. *Flood v. Pragoff*, 79 Ky. 607.

In a controversy over the probate of a will the devisees and heirs at law of the deceased are competent witnesses in their own behalf, since such a proceeding is not one to settle the estate of the decedent, nor is it an action against the executor, administrator, heir, or devisee, in the sense in which that term is used by the disqualifying statute. *Milton v. Hunter*, 13 Bush, 163.

In contest over the probate of a will all the parties interested therein are competent witnesses (*Williams v. Williams*, 90 Ky. 28, 13 S. W. 250), including the heirs at law and devisees or legatees under the will (*Phillips v. Phillips*, 81 Ky. 328; *King v. King*, 19 Ky. L. Rep. 868, 42 S. W. 347; *Carmical v. Carmical*, 32 Ky. L. Rep. 171, 104 S. W. 1037; *Cave v. Cave*, 13 Bush, 452); and on the question whether money paid a legatee was an ademption of the legacy, a residuary devisee is a competent witness, and the legatee herself or her husband may testify in her behalf (*Swinebroad v. Bright*, 24 Ky. L. Rep. 2253, 73 S. W. 1031).

b. Cases holding statute applicable.

In the following cases the parties to a proceeding to probate a will or succeed to an estate, or persons interested in such proceeding, are held disqualified as witnesses in their own behalf.

In Kansas it is held that in a proceeding to contest a will the heirs of the testator are disqualified as witnesses with reference to personal communications of the 51 L.R.A.(N.S.)

testator in his lifetime by the statutory provision that no party shall be allowed to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person when the adverse party is the executor, administrator, heir at law, or next of kin of the deceased, where they have acquired title to the cause of action immediately from such deceased person, since the heirs of a deceased person acquire title immediately from their deceased ancestor within the spirit and meaning of this act. *Wehe v. Mood*, 68 Kan. 373, 75 Pac. 476. In a proceeding to quiet title to land where all the parties claim from the same ancestor, evidence of any of them as to communications of the deceased ancestor is incompetent. *Renz v. Drury*, 57 Kan. 84, 45 Pac. 71. So, one who is executor and a devisee is incompetent in a suit to have a will set aside and the probate thereof vacated, to testify concerning personal communications with deceased. *Rich v. Bowker*, 25 Kan. 7.

And in Iowa it is held, under a statute providing that no party to an action or proceeding, or any person interested in the event thereof, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person since deceased, against the executor, heir at law, or next of kin of such deceased person, that one of the proponents of a will, and a devisee therein, is disqualified as a witness in a proceeding to probate the will to which the heirs of the testator are parties, where the testimony relates to transactions or communications with the deceased, and is offered in behalf of the other proponents. *Sisters of Visitation v. Glass*, 45 Iowa, 154; to the same effect see *Blake v. Rourke*, 74 Iowa, 519, 38 N. W. 392. A son of the testator, being also a beneficiary under his will, is incompetent to testify in his own interest in a will contest as to personal transactions or communications with the deceased (*Re Rehard*, — Iowa, —, 143 N. W. 1106); and the exclusion also applies to the same extent to a contestant (*Ross v. Ross*, 140 Iowa, 51,

identity as being those heirs, whom the complainant had called into court by the general terms of his bill. In that action they were not pursuing the estate for anything, and no decree rendered in their favor could have established any right in them as against any representative or heir of the estate. On the other hand, they were not testifying defensively, within the meaning of the statute, because they were not being pursued in behalf of the estate of any person whatever. It was simply one instance of the well-recognized class of cases (of which there are numerous other instances in the decisions on this statute) where the testimony would only remotely or collaterally claim an interest, which would have to be vindicated or asserted effectually in

some other suit or proceeding, if asserted at all. See note to *Townsend v. Kennard*, 1 Miss. Dec. 222, 224.

In *Steen v. Kirkpatrick*, 84 Miss. 63, 36 So. 140, T. J. Steen and his wife had an antenuptial agreement that, if one should die, the survivor should take interest in the deceased's estate for life only, and that at the death of the survivor such interest should revert to the estate of the first decedent. Under this agreement, when Steen died, his wife received \$1,750 as her share of his estate, and while she lived fully recognized that on her own death this money was to be property of her husband's estate. She did die; and a son of Steen (by a former marriage), in behalf of himself and his brothers of the whole blood,

117 N. W. 1105); and the disqualifying rule includes controversies between the heirs over their ancestor's property (*Neas v. Neas*, 61 Iowa, 641, 17 N. W. 30).

In West Virginia the disqualifying statute is limited to testimony in regard to a personal transaction or communication had with the decedent where the witness is a party to or interested in the result of the suit. Under this statute an heir at law of the testator is disqualified as a witness in his own behalf in a proceeding in chancery attacking a probated will where the testimony relates to transactions or communications had personally with the deceased. *Kerr v. Lunsford*, 31 W. Va. 659, 2 L.R.A. 668, 8 S. E. 493; *Freeman v. Freeman*, 71 W. Va. 303, 76 S. E. 657; *Bailey v. Bee*, — W. Va. —, 80 S. E. 454.

In *Freeman v. Freeman*, supra, it is said that the purpose of this disqualifying provision is to prevent a person having an interest to be affected by the suit from giving testimony concerning the words or actions of the decedent which he, if living, could contradict, against those who claim under the decedent. "Death having sealed the lips of one, the law closes the mouth of the other. Therefore the words 'transactions or communications,' as used in the statute, should be given a liberal construction."

But according to a statement in *Barker v. Hinton*, 62 W. Va. 639, 59 S. E. 614, 13 Ann. Cas. 1150, a devisee or legatee who is also an heir at law of the testator, not an attesting witness, is competent and may be examined to sustain the probate of a will in a proceeding in equity to have the same declared not to be the last will and testament of the testator, and the proceedings probating same annulled and set aside. The testimony of this witness related to the fact of the execution of the will by the testator, while in the cases holding the witness disqualified on the ground of interest, the testimony related to a personal transaction or communication with the deceased, and was offered on the issue of the testamentary capacity of the testator.

In North Carolina, in *Pepper v. Brough*, 51 L.R.A. (N.S.)

ton, 80 N. C. 251, the proponents and caveators upon an issue *devisavit vel non* were held to be adversary parties within the North Carolina statute forbidding a witness having a legal or equitable interest which may be affected by the event of the action from being examined in regard to any transaction or communication between such witness and a person at the time of the examination deceased, against a party then prosecuting or defending the action as executor, so that the husband of one of them was incompetent to testify in regard to a transaction or communication between himself and the decedent. The contest in this case was between persons claiming respectively under an earlier and later will, the next of kin and heirs at law having failed on citation to take sides. On the authority of that case it was declared in *Umstead v. Bowling*, 150 N. C. 507, 64 S. E. 368, that an executor and devisee would be incompetent to testify upon the trial of an issue *devisavit vel non* in regard to any transaction or communication with the deceased, though the testimony offered in this case was held not to relate to a personal transaction or communication, and was therefore not excluded. And in *Linebarger v. Linebarger*, 143 N. C. 229, 55 S. E. 709, 10 Ann. Cas. 596, the wife of one of the caveators was held incompetent as a witness to prove declarations of the alleged testator.

And the Wisconsin court holds that the statutory provision that no party in interest shall be examined as a witness in respect to any transaction or communication by him personally with a deceased person disqualifies as a witness in his own interest the principal legatee, where the latter took part and assisted in the execution of the will. *Goerke v. Goerke*, 80 Wis. 516, 50 N. W. 345. Heirs at law of the testator who are devisees and legatees in his will are necessary parties to a proceeding for the probate thereof, and hence are disqualified as witnesses therein, and the husbands or wives of such parties are likewise disqualified. *Re Valentine*, 93 Wis. 45, 67 N. W. 12. And the daughter of a testator is

undertook to probate this claim against the estate of his stepmother. This probate was contested by the children of Mrs. Steen by her first marriage. In this state of the case it was held that W. T. Steen could testify. The decision was expressly put on the ground that "this claim is a controversy between the two sets of children, and did not originate during the lifetime of the decedent, Mrs. Steen."

In *Watson v. Duncan*, 84 Miss. 763, 37 So. 125, Duncan, surviving his wife, renounced her will and elected to take under the law. His right to renounce was denied, and a prenuptial contract set up against him. He undertook to testify that the important clause in that contract was a forgery.

We think the points before the court in the several cases are fairly stated, and it will be observed that this court seems to have employed language and decided cases which can be construed to be on either side of this controversy. If Mrs. Kirk is competent to testify, her testimony will have the effect to destroy the will of her husband. Her evidence relates to the conduct and declarations of the deceased, and tends to prove that he was not mentally capable to make a will. If this incapacity is established, she would inherit all of his property, and her title to same was absolutely fixed and irrevocable, provided only she survived her incurably afflicted spouse. The effect of Mrs. Kirk's testimony is to make it impossible for any act of Mr. Kirk to deprive

not a competent witness to a conversation with him during his lifetime in a proceeding to probate the latter's will, where the testimony is in her own interest. *Anderson v. Langen*, 122 Wis. 57, 99 N. W. 437.

Under § 829 of the New York Code of Civil Procedure, which disqualifies a party or person interested from testifying in his own behalf concerning a personal transaction or communication between himself and a deceased person, "against the executor, administrator, or survivor of the deceased person . . . or a person deriving his title or interest from, through, or under a deceased person . . ." testimony of a legatee or devisee in behalf of the will is incompetent where it relates to matters included in the provision. *Lane v. Lane*, 95 N. Y. 494; *Cadmus v. Oakley*, 3 Dem. 324; *Re Voorhis*, 1 How. Pr. N. S. 261. And to the same effect see *Re Dunham*, 121 N. Y. 575, 24 N. E. 932; *Re Bernsee*, 141 N. Y. 391, 36 N. E. 314.

In *Lee v. Dill*, 39 Barb. 516, a devisee was held an incompetent witness to a personal transaction between the testator and himself, tending to establish the will, under § 399 of the Code of Procedure, which at that time excluded the testimony when the opposite party was the executor, administrator, or "legal representative" of the deceased person.

In a proceeding in equity to restore a lost will the plaintiff was held, in *Timon v. Claffy*, 45 Barb. 438, not competent as a witness in his own behalf to prove conversations between himself and the deceased at the time of making the will and in reference thereto, under § 399, which then excluded the testimony if the action was brought "by or against the executors, administrators, heirs at law, next of kin, or assignee" of the deceased person.

The heirs at law or next of kin of the testatrix are incompetent as witnesses in their own behalf in a proceeding to probate a will where their testimony relates to transactions or conversations with the deceased. *Schoonmaker v. Wolford*, 20 Hun, 166; *Hatch v. Peugnet*, 64 Barb. 189.

So, the heir at law is disqualified from § 1 L.R.A. (N.S.)

testifying in a partition proceeding commenced by him to partition the land of his ancestor upon the theory that a will of the latter, disposing of the land, is invalid. *Scott v. Scott*, 13 N. Y. S. R. 202.

The disqualification under § 829 applies to strangers in blood to the testator who are respectively claiming his estate under different wills, and both are disqualified as witnesses to transactions or conversations with the testator in his lifetime, for the position of such parties, though not precisely analogous, is similar, to that of heirs or next of kin. *Re Smith*, 95 N. Y. 516.

Dieterich's Will, 1 Tucker, 129, holding that a widow who contested a will propounded by the person named as executor was not disqualified from testifying, the only heir at law and next of kin being also a contestant, was decided under § 399 of the Code of Procedure, which excluded testimony against "executors, administrators, heirs at law, next of kin, or assignees" of deceased.

VI. Where exclusion limited to matters equally within knowledge of decedent.

A statute disqualifying as a witness "a party to any civil action, suit, or proceeding, and any person directly interested in the event thereof, and any person from, through, or under whom such party or interested person derives his interest or title or any part thereof, when the adverse party in such action, suit, or proceeding claims or opposes, sues or defends, as . . . the executor or administrator, heir, legatee, or devisee of any deceased person. . . . as to any statement by, or transaction with, such deceased . . . person, or matter of fact whatever, which must have been equally within the knowledge of both the witness and such . . . deceased person, unless such witness be called to testify thereto by such adverse party so claiming or opposing, suing or defending in such action, suit, or proceeding." does not apply to a contest of a will, and hence in a proceeding to revoke a will the heirs at law

her of a sure title to his estate, no matter what may be the equities of the case. If she could succeed in convincing a jury that her husband was incurably insane at and before the execution of his will, her status is conclusively fixed.

Nobody would contend that she was competent to testify that Mr. Kirk conveyed his property to her before his death, and that the deed of conveyance was properly acknowledged before an officer now dead, and that the deed was lost or destroyed. If she could establish such conveyance, it would follow that Mr. Kirk did not own any property, and that his will conveyed nothing to his devisees. If she can establish his insanity, the same result is reached, and her claim to his property originated

before his death, and this inchoate claim would become a complete title, should she survive him. As a matter of fact, she is not testifying about an inchoate right, but about a right already ripened into a sure thing. She related to the jury the conduct and declarations of the dead, which testimony has established his insanity; and the insanity establishes her claim to his estate, and this claim is established by the acts and conduct of deceased, and it logically follows that her claim not only began or originated in the lifetime of the deceased, but was established then so far as the deceased was concerned. According to Mrs. Kirk's testimony, his power to change her inchoate claim was abrogated by something originating in his lifetime, and death alone

of the testator are competent witnesses to testify as to statements made by the testator and by the chief beneficiary in his will, tending to show undue influence by the latter, practised upon the former, to secure the will. *Miller v. Livingstone*, 31 Utah, 415, 88 Pac. 338, overruling upon this point so far as it is in conflict with the doctrine stated, *Re Atwood*, 14 Utah, 1, 60 Am. St. Rep. 878, 45 Pac. 1036, holding that on a petition by a child omitted from the testator's will, to be allowed her share in the testator's estate, the legatees under the will are disqualified to testify as to the reasons given by the testator for such omission.

In *Miller v. Livingstone*, supra, it is said: "The act of the testator in making the alleged will is the only subject-matter of the investigation. The estate of the testator is not interested. The interests of those claiming to succeed to it either by operation of law or by operation of the will are alone involved. The estate remains intact and undiminished whatever may be the result of the controversy, and the subject-matter of the investigation is not a transaction with nor a statement by the decedent. As to such an investigation, the parties to the suit and those interested in the result thereof are upon terms of equality in regard to the opportunity of giving testimony."

In Michigan it is held that a statute providing that when a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, an interested party, if examined as a witness in his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person, does not disqualify as a witness in his own behalf a legatee in a proceeding to probate his testator's will, although such legatee is also a proponent of the will, since the statute does not apply to proceedings for the probate of wills. It is said that such a contest is between persons claiming an interest in the estate, and as to the estate proper they are third persons and represent no one but themselves. The contest is not between the estate or the

representative of the estate, and the proponent. The object of the statute is to prevent fraud and false swearing whereby estates become unjustly depleted in cases where no person on the part of the estate, except the deceased, has any knowledge of the facts necessary to sustain the claim in favor of the estate, or to make good the defense of the estate when unjust claims are attempted to be enforced against it; hence it is limited in its spirit and scope by fair construction to contests and litigation upon claims between other persons and the deceased, existing prior to his death, to such suits and proceedings as the deceased would have been a necessary party to, and since which, his heirs, devisees and legatees, personal representatives or assigns, are compelled to prosecute or defend for him in his place. *Brown v. Bell*, 58 Mich. 58, 24 N. W. 824; and to the same effect are *Re Disbrow*, 58 Mich. 96, 24 N. W. 624; *Re Lambie*, 97 Mich. 49, 56 N. W. 223; *Re Lautenschlager*, 80 Mich. 285, 45 N. W. 147; *McHugh v. Fitzgerald*, 103 Mich. 21, 61 N. W. 354; *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460.

VII. Where limited to claims against decedent.

In Mississippi the disqualifying statute provides that a person shall not testify as a witness to establish his own claim or defense against the estate of a deceased person which originated in his lifetime.

It will be observed that in a number of cases, local statutes have been held inapplicable to will contests, notwithstanding that they were by their terms much less favorable to that view than the Mississippi statute. Indeed, so far as the form and phraseology of the statute are concerned, none of the other statutes appears so unfavorable as the Mississippi statute to the view adopted in *WHITEHEAD v. KIRK*. The discussion in the opinion in that case of the earlier Mississippi cases makes it unnecessary to repeat them here. Some of them, as conceded by the opinion, are opposed to the result reached in that case.

could rob her of her claim to his estate. This status, alleged to have originated during the lifetime of the husband, is the thing to be established by the testimony of the wife; and, when thus established, her claim to the estate is established, originating when the husband lost his mind, but not coming into full flower until his death.

The policy of the statute is to close the mouth of the living, because death has sealed the lips of the dead. In the instant case the husband cannot speak in defense of his right to dispose of one half of his estate by will; and, if the policy of the law means anything, the living should not be

permitted to establish a state of facts which the defendant cannot now deny, when, as here, the living wife absolutely fixes her claim to that portion of the estate. We think counsel for appellants in their brief thus accurately state the rule to be followed in determining whether or not the evidence offered should be admitted:

"Whenever a witness is offered for the purpose of proving any transaction, act, contract, admission, license, condition, etc. (whatever may be its exact nature), as 'a fact to be proven,' and proven as a fact existing or occurring prior to the death, and the proof of such fact as then existing

The court seems to have been influenced in a large measure by the view that the testimony of the widow in this case was within the spirit and the general purpose of the statute, or at least, that it involved the same mischief that was intended to be guarded against by the statute, and that the terms of the statute, when liberally construed, were not necessarily fatal to giving it such effect. In many, if not a majority, of the states, however, the courts have apparently adopted the view that will contests or other contests over the right to succeed to a decedent's estate are not within the scope or spirit of the statute, and have given effect to that view notwithstanding that it was necessary, in some instances, at least, to construe the statute somewhat strictly and technically. While in a number of states the local statute is held applicable to such controversies, there seems to be no authority, outside of Mississippi, for the view that the right to succeed to a decedent's estate, as widow or heir, amounts to "a claim" against the estate; much less that it amounts to a claim against the estate originating in the lifetime of the decedent.

It is also to be observed that the disqualifying provision of the statute relates to an attempt by the witness to establish his claim or defense against the estate of decedent, but *WHITEFIELD v. KIRK* clearly extends the statute to proceedings which may merely affect a subsequently asserted claim of the witness, and where the present effect of the testimony of the witness is not to establish her claim, but to defeat claims, the defeat of which will be to the advantage of the witness as a claimant to the succession of the testator's estate as his widow.

VIII. Special statutory exceptions.

Under the exception to the Pennsylvania disqualifying statute to the effect that it shall not apply to issues and inquiries vel non and others, respecting the right of a deceased owner between parties claiming such right by devolution on the death of the owner, a person who is executor and also devisee is a competent witness upon the trial of a feigned issue to deter-

mine the validity of a purported will of the testator. *Bowen v. Goranlo*, 73 Pa. 357.

In a proceeding to partition the land of a deceased person an heir and devisee under his will, who is interested in the suit, and whose interest in the land was charged with advancements, is not a competent witness in his own favor in matters which occurred in the lifetime of the testator for the purpose of disputing the amount of the advancement as set forth in the will. *Dunshree v. Dunshree*, 243 Pa. 599, 90 Atl. 362.

A statutory provision excepting from the operation of the disqualifying clause the heirs of the decedent and legatees claiming under his will in cases to contest the validity of or set aside the will virtually withdraws contests of this character from the operation of the disqualification clause. *Wolf v. Powner*, 30 Ohio St. 472.

And an heir who is one of the plaintiffs in a proceeding to set aside the will of his ancestor is a competent witness to testify against the will to facts which transpired in the lifetime of the testator, although the person nominated as executor in the will is a party defendant to the proceeding, since, in the contest of wills, the executor is merely a formal party. *Thompson v. Thompson*, 2 Ohio Dec. Reprint, 214.

IX. Extent of exclusion.

a. Evidence of mental incompetency.

1. In general.

Since an opinion as to mental competency of the testatrix is not a transaction, an heir at law of the testatrix is competent to testify as to the latter's mental competency and to the facts upon which he bases his opinion, including conversations with the testatrix. *Rakestraw v. Pratt*, 160 N. C. 436, 76 S. E. 259.

In a proceeding to set aside a will the heirs and the wife of the testator and devisees or legatees in a will are competent witnesses on the question of the mental competency of the testator. *Lamb v. Lamb*, 105 Ind. 456, 5 N. E. 171. And see *Hiatt v. McColley*, 171 Ind. 91, 85 N. E. 772.

In a proceeding to contest a will, the legatee is competent to testify as to the

or occurring is determinative of a claim or right of such witness to or in property of the deceased, and establishes such claim or right directly and finally, there the witness is testifying to establish his claim which originated during the lifetime of such deceased. In short, the word 'claim,' as used in this statute, is employed in a broad and general sense; and it draws into the prohibition all testimony, the direct, immediate, and final effect of which is to establish in the witness's own behalf a right in or to things prior to the death. The statute must be taken as dealing with an effectual claim,—with a claim which means some-

thing, and is not a mere shadow. If the issue on the trial is such, in order for the claim to amount to anything, it is necessary to prove or disprove certain facts as existent or nonexistent before the death, then the claim originated before the death; for neither logically nor legally can the 'claim' be separated from what is necessary to make it effectual, or from anything that flows into it, becomes part of it, augments and increases it, and fixes, or contributes to fix, the scope of it."

We do not undertake to harmonize the decisions of this court construing § 1917 of the Code, but content ourselves with de-

mental competency of the testator. *Harper v. Harper*, 83 Kan. 761, 113 Pac. 300.

Persons interested in contesting a will in a proceeding to set the same aside are competent witnesses upon the question of the mental competency of the testator where the evidence does not involve personal transactions with the deceased. *Denning v. Butcher*, 91 Iowa, 425, 59 N. W. 69.

The widow of a deceased testator may testify to the appearance, demeanor, and conduct of her husband during his lifetime as bearing upon his mental competency in a proceeding to contest his will. *Re Evans*, 114 Iowa, 240, 86 N. W. 283.

In a proceeding to set aside the probate of a will, the son of the testator is competent to testify in regard to the condition of his father's health for some years before he died, and especially at the time of the making of the will, and before and about that time, since the questions do not relate to any personal transaction or communication between the witnesses and the decedent. *Sim v. Russell*, 90 Iowa, 656, 57 N. W. 601.

As the proponent of a will the husband of a legatee therein is competent to testify in a proceeding to probate the will as to whether he observed any difference in the testator's mental condition as bearing upon his mental incompetency. He is not, however, a competent witness to testify as to any personal transactions or communications between himself and the testator. *Severin v. Zack*, 55 Iowa, 28, 7 N. W. 404.

In New York, however, it is held that the statute disqualifies an heir at law and contestant of his ancestor's will from testifying in a proceeding to probate the will as to the appearance of the testator at about the time the will was executed, for the purpose of showing that the latter's appearance was such as to indicate his mental incompetency to make the will. *Re McArthur*, 59 Hun, 619, 12 N. Y. Supp. 822.

On a bill in equity to contest the validity of a will of their ancestor by some of his heirs they are parties to the proceeding, and hence incompetent as witnesses with reference to the mental capacity of their ancestor. *Brace v. Black*, 125 Ill. 33, 17 N. E. 66.

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And an heir at law who is also a party to a proceeding in equity to contest the will is not competent to testify as to the testamentary capacity of the deceased, or to detail a conversation alleged to have been had with him, or to give testimony as to facts or circumstances tending to support the issues on behalf of the contestants. *Volbracht v. White*, 197 Ill. 298, 64 N. E. 324.

2. Where opinion is based upon personal conversations or transactions with decedent.

In *Freeman v. Freeman*, 71 W. Va. 303, 76 S. E. 657, it is said that the words of the statute disqualifying an interested witness as to "transactions or communications" with a deceased person should be given a liberal construction. To limit their meaning so as to include only individual conversations and direct personal dealings between the witness and deceased would be too narrow a construction and would result in defeating the purpose of the statute, in many cases. The words of the statute include personal contact with and observations of deceased's conduct, on which an opinion of his mental condition could be formed. A "transaction" within the meaning of the statute is an action participated in by witness and decedent, as something done in decedent's presence, to which, if alive, he could testify of his personal knowledge, and the term embraces every variety of affairs, the subject of negotiations, actions, or contracts and the two terms "transactions and communications" include every method by which one person can derive any impression or information from the conduct, condition, or language of another.

An interested party is disqualified by the statute not only from giving testimony to conversations with the testator, but also from testifying as to his mental capacity where his information is based upon such conversations. *Re Goldthorp*, 94 Iowa, 336, 58 Am. St. Rep. 400, 62 N. W. 845.

As bearing upon the mental competency of his father, a son who was present and aided the former in a transaction between the father and a third person is incompetent as a witness to testify as to such trans-

ciding that Mrs. Kirk's evidence was to establish her claim to the estate of her deceased husband, within the meaning of the statute. So it is we have concluded that the testimony of Mrs. Kirk, relating to confidential relations and conduct of her husband, should not have been permitted to go to the jury, because the rule forbidding husband and wife to give such evidence is founded upon public policy, for the pro-

tection and conservation of the marital relations. We have further concluded that Mrs. Kirk is disqualified to testify in support of, or in aid of, her claim to the estate of her deceased husband, about matters occurring within the lifetime of her husband. Reversed and remanded.

Suggestion of error overruled.

action in a proceeding for the probate of the father's will. *Re Van Houten*, 147 Iowa, 725, 140 Am. St. Rep. 340, 124 N. W. 886.

The contrary conclusion is reached in *Rakestraw v. Pratt*, 160 N. C. 436, 76 S. E. 259, on the theory that as the opinion of a witness with regard to the mental competency of a person executing a will is not a transaction with such person, an interested party is competent to testify as to such mental competency, and to the facts upon which his opinion is based, including conversations with the testator.

And the husband of the testatrix is a competent witness as to personal transactions and conversations with her in her lifetime on an issue as to the mental capacity of the latter, although the testimony is against the validity of the will. *Orr v. Cox*, 3 Lea, 617.

b. Where witness took no part in transaction or conversation.

It has been held that the disqualification extends to testimony as to conversations or transactions in the presence of the witness, on the theory that a communication made in the presence of the witness will be deemed to have been made to him. *Re Dunham*, 48 Hun, 618, 1 N. Y. Supp. 120, affirmed in 121 N. Y. 575, 24 N. E. 932.

And a legatee is disqualified to testify as a witness to transactions between the decedent and a third person in his presence, although he took no part therein. *Re Bernsee*, 141 N. Y. 391, 36 N. E. 314.

In holding that the disqualification of the statute extends to testimony relative to a conversation with or transactions by a deceased person in the presence of the witness, although he took no active part therein, in *Re Bernsee*, supra, it is reasoned that, "if active participation in the conversation was necessary to exclude an interested witness, and he should, as an observer, be permitted to testify to transactions in form between the deceased and third persons, although such transactions were in his interest, it would furnish an easy and convenient method in every case of evading the statute. The decisions have enforced the spirit of the statute by excluding such evidence, and have treated transactions between the deceased and third persons in the presence of interested parties as if the witness actually participated therein."

It has been held that where the interested witness is present during the whole interview during which the will was executed, and took part in its subscription by the testator, the disqualification of the statute extends to him, since the act of executing the will, "although consisting of several incidents, constitutes but one transaction, and derives its efficacy as a valid execution from the performance of each requirement of the statute. The transaction was continuing and related to but one subject . . . the execution of a will. A participation by a person in any of the material acts required to complete its valid execution made the transaction one between the testator and that person." *Re Eysaman*, 113 N. Y. 62, 3 L.R.A. 599, 20 N. E. 613.

This disqualification applies to a person interested in the event of a proceeding to contest a will, although the testimony relates to conversations between the testator and a third person which he overheard, and in which he took no part. *Eighmie v. Taylor*, 68 Hun, 587, 23 N. Y. Supp. 248.

In a proceeding to contest the probate of a will on the ground of its invalidity an heir at law of the testator is incompetent to testify as a witness to conduct of the testator in his presence, or to statements by the former in his hearing, although he took no part in the transaction. *Holland v. Holland*, 98 App. Div. 366, 90 N. Y. Supp. 208.

It has, however, been held that this disqualification does not extend to testimony by a legatee in his own interest, where it relates to a conversation between the testator and a third person in the witness's presence, and in which he took no part. *Lane v. Lane*, 95 N. Y. 494.

In Iowa it is held that an interested witness and a party to the proceeding may testify to a conversation he overheard between the testator and another defendant, where he took no part therein. *Smith v. James*, 72 Iowa, 515, 34 N. W. 309.

c. Where testimony is adverse to interest of witness.

Beneficiaries under a will are opposite parties to the contestant, and hence are competent witnesses against the will. *Sanders v. Kirbie*, 94 Tex. 564, 63 S. W. 626.

The heirs at law of the testatrix are competent witnesses to sustain the will where their testimony is against their interests. *Re Hedges*, 57 App. Div. 48, 67 N. Y. Supp. 1028.

Where a will is attacked upon the ground of undue influence practised upon the tea-

tatrix by the chief beneficiaries in her will, the latter may be called by the contestant as witnesses against their own interests and in favor of the contestant, and their testimony as to conversations between themselves and the testatrix, tending to show undue influence or mental incapacity, is competent as a whole, and should not be limited to a garbled and one-sided account of the colloquy. *Re Potter*, 161 N. Y. 84, 55 N. E. 387.

And see *Bailey v. Bee*, — W. Va. —, 80 S. E. 454, applying § 23, chap. 130, Code 1906, declaring incompetent a party to a suit when examined about a transaction or communication with one then deceased, and holding that in a proceeding in equity to annul a will, an heir at law is not incompetent as a witness in favor of the will upon a question of the testamentary capacity of the testatrix, where such testimony is adverse to his interests.

The question of interest will not be determined by the position of the parties in the case as to whether they are complainants or defendants, but the court will disregard mere matters of form, and will look to the substance, and see on which side of the controversy the real interest of the proposed witness lies; and it will determine his competency according to his interest, regardless of the mere question of pleadings. *Bardell v. Brady*, 172 Ill. 420, 50 N. E. 124; to the same effect is *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999.

The true test of the competency of a witness is to be determined by ascertaining whether he would gain or lose by a decree setting aside the will. It devolves upon the party objecting to show that the interest of the witness is with the party offering him, if that fact does not otherwise appear. *Campbell v. Campbell*, 130 Ill. 466, 6 L.R.A. 167, 22 N. E. 620.

Defendants to a proceeding in chancery to contest a will are prima facie competent to testify on behalf of the contestants, and before excluding them the court must ascertain their real interest. The fact that they are heirs at law of the testator does not of itself establish their incompetency where they are also devisees. *Ibid*.

Although the proposed witnesses are defendants to a chancery bill to set aside a will, where their interests are common with those of the complainant, they are not competent witnesses in behalf of the former. *Corderoy v. Hughes*, 6 Ill. App. 401.

The widow of the testator, whose interest lies in sustaining his will, is not disqualified as a witness in behalf of the heirs contesting the will, if her testimony is otherwise competent. *Donnan v. Donnan*, 236 Ill. 341, 86 N. E. 279.

A nephew and heir of the testator, whose interests are adverse to the interests of a devisee seeking a construction of the will as to her devise, is competent as a witness in favor of such devisee. *Hoffner v. Custer*, 237 Ill. 64, 86 N. E. 737.

A legatee is a competent witness against the will although he has an agreement with

the contestants that he shall suffer no financial loss if the will is set aside, since an agreement of this character affects the witness's credibility as a witness, but not his competency. *Wetzel v. Firebaugh*, 251 Ill. 190, 95 N. E. 1085.

As shown by most of the cases included in this note, as well as those expressly referred to under most disqualifying statutes as construed by the courts, an interested witness is disqualified only from testifying in his own interest, and he is a competent witness where his testimony is against his interest. In Iowa, however, it is sufficient to disqualify a witness in a proceeding to contest a will if it appears that he is interested in the event of the proceeding; and where his interest is a present, contingent, and valuable one, which may be increased or diminished by the result of the action, the prohibition of the statute applies without reference to whether his testimony is offered for or against his interest. The disqualifying statute in this state, however, provides that no person interested in the event of any action shall be permitted to testify to personal transactions of the decedent, against the legatee or devisee of such person. *Re Martin*, — Iowa, —, 142 N. W. 74.

d. Matters not involving transactions with or communications by deceased person.

A statutory provision forbidding a witness having a legal or equitable interest which may be affected by the event of the action from being examined in regard to any transaction or communication between such witness and a person deceased at the time of such examination, the testimony to be used against a party then prosecuting or defending the action as executor, etc., when the interest of the witness may be affected by the result, does not exclude the testimony of such a person as to what he saw the testator do at about the time of executing his will and in regard to executing the will, or where the testator went, the means of his conveyance, or the relative position of the parties when the will was executed. *Umstead v. Bowling*, 150 N. C. 507, 64 S. E. 368.

It is, however, held under the New York statute that a legatee in a will is disqualified as a witness to testify to his observations of the acts and conduct of, or conversations with, the testator at or about the time of the execution of his will. *Re Eysaman*, 113 N. Y. 62, 3 L.R.A. 599, 20 N. E. 612.

The New York statute does not disqualify as a witness in favor of a will a devisee therein and one of the proponents, who was present at the execution of the will, and whose testimony relates to the manner in which the will was executed by the testator, and tends to disprove the testimony on this point of one of the attesting witnesses. *Re Bernsee*, 63 Hun, 628, 17 N. Y. Supp. 669.

In a proceeding to set aside the probate of a will, a legatee under a will is a competent witness to testify to finding letters addressed to the testatrix among her papers subsequently to her death, and which were material on the question in issue. *Doyle v. Doyle*, 257 Ill. 229, 100 N. E. 950.

The widow of decedent, although named as legatee and devisee in his will, is competent to prove that the testator's will was found after his death, among his valuable papers, since such evidence does not relate to any personal transaction or communication with the deceased. *Cornelius v. Brawley*, 109 N. C. 542, 14 S. E. 78.

The widow of the testator, who is contesting the probate of his will, may testify to the amount of money and property held by her at the time of her marriage to decedent, and that she sold the property, and loaned the proceeds of the sale to him. *McDonald v. McDonald*, — Tex. Civ. App. —, 150 S. W. 593.

The contestants of a will are competent to testify as to the amount of money or property advanced to them by the testator in his lifetime as bearing upon the validity of the latter's will in a contest over the probate thereof. *Re Perkins*, 109 Iowa, 216, 80 N. W. 335.

An interested party may testify to the facts negating the claim that he had certain transactions with the deceased in the latter's lifetime, and where the will recites that he has received all that is coming to him from the deceased, he may deny that he has received anything. *Re Winslow*, 143 Iowa, 649, 122 N. W. 971.

And he may deny that he was a party to personal communications with the testator in his lifetime with reference to his will. *Gaston v. Gaston*, 83 Kan. 215, 109 Pac. 777.

A legatee may deny that he was a party to any transaction with the testator with reference to the execution of the latter's will. *Kerr v. Kerr*, 85 Kan. 460, 116 Pac. 880.

The opinion of an interested witness that a certain paper which is offered as a will is in the handwriting of the alleged testator is not testimony as to any statement by the testator, nor is it testimony as to any transaction with him; and hence as to such matters the witness is competent. *Martin v. McAdams*, 87 Tex. 225, 27 S. W. 255.

X. Persons to whom disqualification applies.

a. Heirs or legatees.

1. In general.

As shown by the great majority of cases considered in this note, if a disqualifying statute is applicable to proceedings relative to the succession to the property of the deceased person, it will disqualify the heirs at law and the legatees or devisees who claim under a will of the decedent. 51 L.R.A.(N.S.)

Where a devisee in one will has a direct interest in defeating the probate of another will, this interest disqualifies him as a witness against the latter will. *Hathaway v. Hathaway*, 91 N. C. 139.

An heir of the testator, who is also a beneficiary under his will, is disqualified as a witness with reference to personal transactions with the testator in his lifetime in an action involving a contest of the testator's will. *Re Rehard*, — Iowa, —, 143 N. W. 1106.

An heir at law of the testator (*Anderson v. Laugen*, 122 Wis. 57, 99 N. W. 437), an heir at law who is also a legatee (*Re Valentine*, 93 Wis. 45, 67 N. W. 12), or a legatee (*Goerke v. Goerke*, 80 Wis. 516, 50 N. W. 345), are incompetent as witnesses to transactions or communications with a deceased person where the testimony is in their own interest, in a proceeding to probate the will under which they claim or which affects their interest.

And under the New York statute legatees (*Lane v. Lane*, 95 N. Y. 494; *Lee v. Dill*, 39 Barb. 516; *Cadmus v. Oakley*, 3 Dem. 324; *Re Voorhis*, 1 How. Pr. N. S. 261), heirs at law (*Schoonmaker v. Wolford*, 20 Hun, 166; *Hatch v. Peugnet*, 64 Barb. 189; *Scott v. Scott*, 13 N. Y. S. R. 202), or even strangers in blood to the testator claiming his estate under different wills (*Re Smith*, 95 N. Y. 516), are disqualified as witnesses in proceedings affecting the validity of a will of the testator, where the testimony relates to personal transactions or conversations with the testator in his lifetime. In an inferior New York court, however, it is held that an heir opposing the probate of the will of his ancestor is not within the terms of the statute. *Dieterich's Will*, 1 Tucker, 129.

It has, however, been held that a devisee or legatee who is not an attesting witness is not within the terms of the prohibition of the statute, and hence may be examined in support of the will like any indifferent person. *Barker v. Hinton*, 62 W. Va. 639, 59 S. E. 614, 13 Ann. Cas. 1150.

On a bill for the partition of land by the infant sons and heirs of their deceased father, who was one of two heirs to the real estate sought to be partitioned, the other heir is not a competent witness to prove advancements to the complainants' father by his ancestor, in order to decrease the interest of the complainants. *Comer v. Comer*, 119 Ill. 170, 8 N. E. 796.

This rule, however, is modified to the extent that where there arises a controversy as to the distribution of the estate among the conceded heirs thereto they may testify, as such testimony does not tend to reduce or impair the estate among them. *Laurence v. Laurence*, 164 Ill. 367, 45 N. E. 1071; *Re Maher*, 210 Ill. 160, 71 N. E. 438; *Pigg v. Carroll*, 89 Ill. 205.

Where the heirs of the testator are also devisees or legatees under his will and are not appellants from the probate thereof, they are competent witnesses on the trial of the appeal, since they are not parties to the

proceeding within the terms of the disqualifying statute, although they are interested in the event of the action. *Wheeler v. Towns*, 43 N. H. 56.

In *McCoy v. Conrad*, 64 Neb. 150, 89 N. W. 665, applying the statute that no person having a direct legal interest in the result of any civil action or proceeding when the adverse party is the representative of a deceased person shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, a distinction is made between a legatee or devisee and the heirs at law of the testator, and it is said that while this statute disqualifies devisees or legatees as witnesses in a proceeding to probate the will under which they claim, it does not disqualify the heirs at law of the testator in such proceeding. The court reasoned that after the will of a decedent had been established, the devisees and legatees are properly regarded as within the protection of the statute; but so long as they are merely the proponents of a contested alleged will of the deceased, their interests are as clearly adverse to those of the heirs at law or other acknowledged representatives of the decedent as are those of other litigants seeking to recover against his estate on account of any other transaction had with him in his lifetime. In such litigation the plaintiffs or proponents, being named as devisees or legatees, as the case may be, are assailing the estate with the view of the appropriation of it or part of it to their own uses. Any such assailants are therefore clearly excluded by the statute, and so, of course, is the executor in a proposed will.

Parties who, as heirs or next of kin, would have been entitled to the property of a deceased person, had he died intestate, are not disqualified from testifying as to transactions and conversations with the deceased in a contest over his alleged will. *Williams v. Miles*, 68 Neb. 463, 62 L.R.A. 383, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151, 4 Ann. Cas. 306.

2. Where legacy is invalid or contingent.

A legatee is disqualified as a witness in his own interest although the legacy is conditional, being conditioned upon the rendition by him of certain services of a religious character. *Re Burke*, 5 Redf. 369.

And where a legacy is contingent upon the death of a direct legatee before reaching his majority, the contingent legatee is disqualified by statute as a witness to sustain the will. *Re Klinzner*, 71 Misc. 620, 130 N. Y. Supp. 1059.

A legatee under a prior will is not, by reason of that fact, disqualified as a witness against the subsequent will, since at most her interest is merely contingent. *Titlow v. Titlow*, 54 Pa. 216, 93 Am. Dec. 691.

Where a person is a legatee in one will which is being contested, this fact does not disqualify him as a witness in a contest over 51 L.R.A. (N.S.)

the will of another person, although, if the latter will is established, the witness will lose his legacy. *Re Masterton*, 6 Dem. 35, 19 N. Y. S. R. 789, 3 N. Y. Supp. 209.

But the disqualification of the statute extends to a legatee in a prior will as a witness against the validity of a subsequent will (*Pringle v. Burroughs*, 100 App. Div. 366, 91 N. Y. Supp. 750. Compare with *Re Hennessey*, 157 App. Div. 136, 141 N. Y. Supp. 736); especially where he intervenes in and is made a party to a proceeding to probate the subsequent will (*Re Jeffrey*, 129 App. Div. 791, 114 N. Y. Supp. 667).

A legatee in two wills offered for probate simultaneously, who receives a larger legacy by the will first executed than by the later will, may testify in favor of the later will. *Re Kindberg*, 207 N. Y. 220, 100 N. E. 789.

3. Effect of release of interest.

A release by a legatee or devisee of his interest in the estate of a deceased person under his devise or legacy will remove the disqualification of the statute, and render him competent as a witness in favor of the will. *Re Wilson*, 103 N. Y. 374, 8 N. E. 731; *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. 874; *Reeve v. Crosby*, 3 Redf. 74; *Harper v. Harper*, 1 Thomp. & C. 351; *Re Kindberg*, 207 N. Y. 220, 100 N. E. 789.

In Missouri by statute it is expressly provided that if a subscribing witness who is also a devisee or legatee in a will, before giving testimony concerning the execution of the will, releases any legacy or devise therein given him, he shall be admitted as a witness. *Grimm v. Tittman*, 113 Mo. 56, 20 S. W. 664.

The express acceptance of a will by an heir or legatee of the testator, and a covenant and agreement not to institute or prosecute any suit to contest the same, or voluntarily to assist any other person in so doing, does not remove the disqualification imposed on the witness by statute, where he is offered as a witness in behalf of the party seeking to set aside the will, and where, in spite of this agreement, the interests of the witness will be subverted by his own testimony. *Dougherty v. Gaffney*, 239 Ill. 640, 88 N. E. 150.

4. Disclaimer or withdrawal from proceedings.

The disclaimer by an heir at law of the testator for the purpose of rendering himself a competent witness in a proceeding in equity to contest his ancestor's will does not remove the disqualification of the statute. *Volbracht v. White*, 197 Ill. 298, 64 N. E. 324.

An heir at law of the testator, and a contestant of his will, is incompetent to testify as to personal transactions and communications with the testator, although, after tendering such testimony, the witness withdraws from the contest. *Re Lassak*, 56 Hun. 647, 10 N. Y. Supp. 80, affirmed in 131 N. Y. 624, 30 N. E. 112.

The dismissal of a witness as a complain-

ant in a bill in equity to contest a will, and naming him in the pleadings as a defendant, has no effect to render him an adverse party in interest to the complainants, and does not qualify him as a witness in their behalf. *Volbracht v. White*, supra.

b. Husband or wife of devisee or legatee.

On the ground of interest this statutory disqualification also extends to the wife of a party to a will contest, who, if the will was sustained, would acquire an inchoate right of dower. *Johnson v. Cochrane*, 91 Hun, 165, 36 N. Y. Supp. 283, affirmed in 159 N. Y. 555, 54 N. E. 1092; *Steele v. Ward*, 30 Hun, 555; *Re Weed*, 143 App. Div. 822, 127 N. Y. Supp. 966.

The statute disqualifies from testifying as to personal transactions and communications with the testator, the wife of one of the testator's next of kin, where the testimony is against the will, and the testator left real estate which, except for the will, would descend to his heirs at law. *Roche v. Nason*, 105 App. Div. 256, 93 N. Y. Supp. 565.

And it has been held that this disqualification exists although the husband does not join in the proceeding to contest the will, where, however, he would profit if the will were invalidated. *Re Blaine*, 143 App. Div. 687, 128 N. Y. Supp. 186. Compare with *Burmeister v. Gust*, *infra*, d.

And evidence by the husband of an interested party to a will contest as to personal communications of the deceased is held incompetent in *Re Brown*, 143 Iowa, 649, 120 N. W. 667.

Where one of the parties to a proceeding to annul a will, being the grandchild of the testatrix, is disqualified as a witness in her own behalf, her husband is likewise disqualified. *Bailey v. Bee*, — W. Va. —, 80 S. E. 454.

To the same effect is *Freeman v. Freeman*, 71 W. Va. 303, 76 S. E. 657, wherein it is said that where one consort is forbidden by a disqualifying statute "to give testimony in regard to a personal transaction or communication had with the decedent, because of his or her being a party to or interested in the result of the suit, the other consort is also denied the right to testify. The denial of the right rests on two grounds, *viz.*: (1) if the testimony offered would be in favor of the other consort, it is excluded on the ground of identity of interest of husband and wife; and (2) if the testimony is adverse to the interest of the other consort, it is excluded on the ground of public policy. It would certainly not be conducive to domestic happiness and concord to permit one consort to testify against the interest and the will of the other."

The wife of one of the heirs at law of the testator, who is contesting the latter's will, is disqualified as a witness against the will. *Linebarger v. Linebarger*, 143 N. C. 229, 55 S. E. 709, 10 Ann. Cas. 596.

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An heir at law of the testator, who is also a devisee or legatee in his will, is disqualified as a witness in his own behalf in a proceeding to probate the will, and the spouses of such parties are likewise disqualified to the same extent. *Re Valentine*, 93 Wis. 45, 67 N. W. 5.

In *Scherrer v. Kaufman*, 1 Dem. 39, it is held, however, that the wife of an heir at law of the testator is not disqualified as a witness in a proceeding to probate the latter's will, although her testimony is in favor of the interests of her husband. But compare with New York cases *supra*.

The statutory provision that no party to a civil action shall be allowed to testify in any action where the adverse party is the executor or administrator of a deceased person, or is a party claiming or defending as heir, grantee, or devisee of the deceased person, is intended to exclude from testifying the real, and not the mere formal, nominal, or wholly unnecessary parties, and hence does not exclude the husband of a devisee or heir of the testator who is merely joined with his wife in a proceeding *devisavit vel non* because of her coverture, where, to give her a standing in court, she needed neither the aid of her husband nor her next frined. *Wolf v. Powner*, 30 Ohio St. 472.

In *Spivey v. Walton*, — Miss. —, 64 So. 947, it is held that the Code provision that a person shall not testify as a witness to establish his own claim or defense against the estate of the deceased person which originated during the lifetime of such person does not disqualify the spouse of such person.

c. Widow of decedent.

Ordinarily the widow of a deceased person is either made one of his heirs or a distributee by statute, hence she is an interested witness, and where the disqualifying provisions of the statute are held applicable to proceedings to succeed to the estate of the deceased person the qualification will be held to apply to her. Many of the cases applying the provision to the widow of the deceased will be found under the various subdivisions. As to the right of an alleged widow of a deceased person, in a proceeding to succeed to the latter's estate, to testify to the fact of marriage, where this is the matter in dispute, see note appended to *Berger v. Kirby*, *ante*, 182.

The widow of a testator, and a legatee in his will, is incompetent to testify, in support of his will, to communications of the decedent during his life time. *French v. French*, 14 W. Va. 458.

And a widow cannot testify to communications made to her by her deceased husband in a proceeding to contest the latter's will. *Re Evans*, 114 Iowa, 240, 86 N. W. 283.

In a contest over the probate of a will, the widow of the testator is incompetent as a witness as to statements of her husband with reference to his reasons for not making any testamentary provision for his chil-

dren. *Re Perkins*, 109 Iowa, 216, 80 N. W. 335.

On a bill in equity by some of the heirs to set aside a probated will of their ancestor on the ground of his mental incapacity, in which the widow and part of the heirs are made parties defendant, the widow is not a competent witness to sustain the will. *Freeman v. Easley*, 117 Ill. 317, 7 N. E. 656.

In Mississippi it is held that the surviving spouse is not a competent witness in his or her own favor in a proceeding involving the succession to a share of the testator's estate, although the relationship is conceded. *WHITEHEAD v. KIRK*; *Watson v. Duncan*, 84 Miss. 763, 37 So. 125.

On the ground of interest the widow of the testator is not disqualified from testifying against the will of her deceased husband where there is in existence another will previously executed by him, by the terms of which she receives the same amount as she does under the will being contested. *Talbot v. Talbot*, 23 N. Y. 17.

But a widow of a deceased person is not a party to a proceeding to probate a will, although she filed a caveat as next friend for her infant children, and hence she is not disqualified as a witness therein. *Johnson v. Johnson*, 105 Md. 81, 121 Am. St. Rep. 570, 65 Atl. 918.

d. Executor.

The interest of a person nominated in a will as executor in the fees which would accrue to him if he were appointed and served is not sufficient to disqualify him as a witness in favor of the will. *Re Wilson*, 103 N. Y. 374, 8 N. E. 731; *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. 874; *Re Folts*, 71 Hun, 492, 24 N. Y. Supp. 1052; *Reeve v. Crosby*, 3 Redf. 74; *Re Gagan*, 20 N. Y. Supp. 426.

An executor is not disqualified by the Georgia statute as a witness on the trial of an issue *devisavit vel non*. *Harris v. Harris*, 53 Ga. 678.

And see *Re Spiegelhalter*, 1 Penn. (Del.) 5, 39 Atl. 465, holding that an executor named in a will was competent as a witness in favor of the will in a proceeding for its probate.

A statute providing that it shall not be competent for any party to an action or any person interested in the event thereof, to give evidence therein of or concerning any conversation with, or admission of, a deceased party, does not disqualify as a witness a person named as executor in the will sought to be probated, although he is also the husband of one of the legatees therein, since the proceeding to establish a will is one *in rem*, and the executor is not a party to the action, within the meaning of the statute; for the disqualification of the statute does not extend to all parties to the record, but only to such as are parties to the specific issue to which the testimony relates. Neither is the executor disqualified as a person having an interest in the event of the action; for his interest is 51 L.R.A. (N.S.)

not pecuniary, legal, certain, and immediate. *Burmeister v. Gust*, 117 Minn. 247, 135 N. W. 980.

And in Maine it is held that an executor is not a party prosecuting or defending the suit within the meaning of the disqualifying statute, so as to disqualify him as a witness, in a contest over the probate of a will. *Millay v. Wiley*, 46 Me. 230; *McKeen v. Frost*, 46 Me. 239.

Where by statute no party to a civil action, or person directly interested in the event thereof, may testify therein when the adverse party sues or defends as executor, administrator, heir, legatee, or devisee, unless called as a witness by the adverse party, the executor of a will, although made a party defendant, cannot testify in favor of the complainants, where his interests lie with the complainants, and not with the defendants. *Bardell v. Brady*, 172 Ill. 420, 50 N. E. 124.

Where a person becomes an active party in a proceeding to probate a will his interest in securing the admission of the will to probate disqualifies him as a witness; but where he has contracted with the decedent to execute his will without compensation, and, being so bound, he seeks the probate of the will in the performance of his agreement, he is not thereby disqualified to testify on the part of the contestants in a proceeding to set aside a second will. *Godfrey v. Phillips*, 209 Ill. 584, 71 N. E. 19.

And a person named as executor by a nuncupative will is not a competent witness to establish same. *Watts v. Holland*, 56 Tex. 54.

And see *Umstead v. Bowling*, 150 N. C. 507, 64 S. E. 368, and *Bowen v. Goranflo*, 73 Pa. 357, holding an executor to be incompetent as a witness in favor of a will.

In *Hogan v. Hinchey*, 195 Mo. 527, 94 S. W. 522, the court remarked that the fact that a will directed the collection of certain notes and the application of the proceeds toward the payment of designated debts, and the application of the balance according to verbal instructions known only to the appointee, gave him an interest in sustaining the will, and they were not prepared to say that he was a competent witness.

In *Anderson v. Laugen*, 122 Wis. 57, 99 N. W. 437, the court intimated that an administrator, as such, was excluded as a witness with reference to a transaction or communication with deceased by the statutory provision that no party shall be examined in respect to a personal transaction or communication with the deceased. This provision, however, was held to be modified by an amendment providing that no party shall be examined as a witness in his own behalf; and under this amendment an executor who is the proponent of the will, but not a devisee or legatee therein, was held not disqualified.

e. Miscellaneous.

Merely that a will provides that an attesting witness shall be employed by the

executor as his attorney in settling the estate is not sufficient to disqualify such person as a witness to the will, on the ground that he is a party in interest under its provisions. *Re Rehard*, — Iowa, —, 143 N. W. 1106. A. G. S.

WASHINGTON SUPREME COURT.
(Department No. 1.)

JAMES A. DOUGAN, Appt.,

v.

CITY OF SEATTLE, Respnt.

(— Wash. —, 136 Pac. 1165.)

Highway — injury to pedestrian — presumption of negligence.

1. It is not negligence *per se* for a city to maintain a sidewalk without cleats on a grade of 12.9 per cent.

Evidence — judicial notice — grade of walk.

2. The court may take judicial notice

Note. — Negligence with respect to slope or grade of sidewalk.

This note, as indicated in its title, is confined to the question whether the maintenance of a sloping sidewalk or cross walk does or does not constitute negligence. This, of course, includes the question what is a proper grade or slope. Cases where the injury occurred upon a sloping walk, but negligence with respect to the grade or slope was not made an issue, are excluded. The note to *Elam v. Mt. Sterling*, 20 L.R.A. (N.S.) 513, treating generally of the liability of municipal corporations for defects or obstructions in streets, includes, at page 619, some of the earlier cases on this question.

As to liability of municipality for injury from unevenness in sidewalks or cross walks, see notes in 20 L.R.A. (N.S.) 640; 29 L.R.A. (N.S.) 180; 35 L.R.A. (N.S.) 666, and 43 L.R.A. (N.S.) 1158.

The present note, being confined to cases where the liability is predicated upon the construction of a walk with a slope or grade, does not purport to cover the cases where the liability is predicated upon the failure to remove ice or snow from such a walk, though it is intended to include the cases where the fact that ice and snow are liable to accumulate on the walk is considered as an element of the question whether the construction was negligent. As to liability for permitting accumulation of snow and ice, see Index to L.R.A. Notes, "Highways," §§ 71, 84, 86, 91.

The question as to contributory negligence of one using a walk with a slope or grade is not within the scope of the present note. On that question, see notes to *Lerner v. Philadelphia*, 21 L.R.A. (N.S.) 614, 638, and *Knoxville v. Cain*, 48 L.R.A. (N.S.) 628, 634.

Municipal corporations are under no obligation to maintain a perfectly level side-

that 13 per cent grades are common in the cities and towns of the state, and that they have not been prohibited by law.

Appeal — findings of trial court — conclusiveness.

3. The findings of the trial court will be accepted as conclusive, unless the evidence preponderates against them.

(Gose, J., dissenta.)

(December 13, 1913.)

APPEAL by plaintiff from a judgment of the Superior Court for King County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. James A. Dougan, *in propria persona*:

Failure of municipal authorities to place cleats, or other safeguards, on a portion of

walk. So, while municipalities are not bound to protect pedestrians against extraordinary or unlikely conditions, and are not liable where accidents are caused by the mere slipperiness of the walks in no way connected with a faulty construction, the law requires a municipal corporation to so construct its walks that they will be reasonably safe under all ordinary conditions. In constructing a walk upon a slant, a municipality should take into consideration, local, climatic, and topographical conditions, with a view to making the walk reasonably safe for pedestrians. Consequently, a municipality is negligent in failing to anticipate and guard against the danger of a pedestrian slipping upon a walk built upon a slant and likely to become slippery because of water and ice. *Smith v. Yankton*, 23 S. D. 352, 121 N. W. 848.

So, where an adjoining owner in rebuilding changes the grade of a sidewalk, so as to give it a lateral pitch of 7½ inches instead of 2 inches in 10 feet, thus rendering the walk, because of its slope, dangerous to pedestrians, the municipal corporation was, in *Urquhart v. Ogdensburgh*, 97 N. Y. 238, limiting 91 N. Y. 73, 43 Am. Rep. 655, held guilty of negligence for failure to remedy the defect after notice.

It is negligence for a municipal corporation to maintain a sidewalk on an incline with an exceedingly smooth surface, which is especially dangerous in moist weather, without adopting, as is usual in such cases, the ordinary rough finish. *Armour v. Peterborough*, 10 Ont. L. Rep. 306, 5 Ont. Week. Rep. 630. An action for injuries in such a case as the above would be for failure to repair.

A walk 6 feet long, having a longitudinal slope of 18 inches, is improperly and negligently constructed, where the contour of the ground on which it was laid, or the surrounding conditions, did not render an in-

the sidewalk which is at a great incline, renders the city liable to a pedestrian who is injured.

Ford v. Des Moines, 106 Iowa, 94, 75 N. W. 630, 4 Am. Neg. Rep. 379; Grossenbach v. Milwaukee, 65 Wis. 31, 56 Am. Rep. 614, 26 N. W. 182; Perkins v. Fond du Lac, 34 Wis. 435; White v. Trinidad, 10 Colo. App. 327, 52 Pac. 214; Calder v. Walla Walla, 6 Wash. 377, 33 Pac. 1054; Henkes v. Minneapolis, 42 Minn. 530, 44 N. W. 1026; Cook v. Milwaukee, 24 Wis. 270, 1 Am. Rep. 183; Smith v. Yankton, 23 S. D. 352, 121 N. W. 848; Hartley v. Salt Lake City, 41 Utah, 121, 124 Pac. 522; Hill v. Fond du Lac, 56 Wis. 248, 14 N. W. 25; Stilling v. Thorp, 54 Wis. 528, 41 Am. Rep. 60, 11 N. W. 906; Elam v. Mt. Sterling, 132 Ky. 657, 20 L.R.A.(N.S.) 512, 117 S. W. 250.

Where it is the duty of the city to make certain improvements, that duty cannot be altered, or the necessity for the city to perform that duty cannot be changed, by rea-

cline necessary. White v. Trinidad, 10 Colo. App. 327, 52 Pac. 214.

In the following cases, no municipal liability for injury to a pedestrian by falling upon a sloping sidewalk or cross walk, based upon negligence with respect to the grade or slope of the walk, was established: McQueen v. Elkhart, 14 Ind. App. 671, 43 N. E. 460 (8 feet inclines, sloping 12 inches, connecting two sidewalks of different level); Lush v. Parkersburg, 127 Iowa, 701, 104 N. W. 336 (approach from street to sidewalk, sloping 1 foot in 7. A town was not negligent in constructing such a slope, in the absence of a finding that the slope rendered the walk dangerous); Wesley v. Detroit, 117 Mich. 658, 76 N. W. 104, 4 Am. Neg. Rep. 651 (earth incline at end of walk about 12 inches in 3 feet, the walk being made unsafe solely by snow and ice); Owen v. New York, 141 App. Div. 217, 120 N. Y. Supp. 38 (slope towards curb of 1½ inches in 11 feet); Cook v. Milwaukee, 27 Wis. 191 (stone leading across gutter from sidewalk into street, having inclination of about 1 inch to a foot, and sidewalks having inclination of 6 inches in the 2 feet immediately adjacent to such stone); Schroth v. Prescott, 63 Wis. 652, 24 N. W. 405 (decline 3½ inches to 2½ feet in plank sidewalk in city of 800 inhabitants); Grossenbach v. Milwaukee, 65 Wis. 32, 56 Am. Rep. 614, 26 N. W. 182 (apron at crossing 8 feet long, ascending from 8 to 12 inches in whole length); De Pere v. Hibbard, 104 Wis. 666, 80 N. W. 933 (inclination of apron at cross walk amounting to fall of 1 inch in 10, even though combined with a slight lateral inclination); Snyder v. Superior, 146 Wis. 671, 132 N. W. 541 (cross walk is not unsafe because a 10-inch plank therein on the outer edge inclines at an angle of about 33½ degrees, making it easier for teams and wagons to go over the crossing, and leaving a drop of about 4 inches

son of any question with regard to the cost of the work.

Lindsay v. Des Moines, 68 Iowa, 368, 27 N. W. 283; Dallas v. Strayer, — Tex. Civ. App. —, 73 S. W. 980; Prideaux v. Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Mill-edgeville v. Cooley, 55 Ga. 17; Whitfield v. Meridian, 66 Miss. 570, 4 L.R.A. 834, 14 Am. St. Rep. 596, 6 So. 244.

Where there is no evidence offered on behalf of defendant to rebut any of the evidence of plaintiff, the court will consider all the evidence and decide the case upon the merits, without being influenced by the findings of the lower court.

Dougherty v. Soll, 70 Wash. 407, 126 Pac. 924; Allen v. Migliavacca Realty Co. 74 Wash. 347, 133 Pac. 580; Smith v. McLain Orchard Co. 75 Wash. 27, 134 Pac. 469.

Messrs. James E. Bradford and Melvin S. Good, for respondent:

The construction of a wooden sidewalk

on the extreme outer edge, the drop in the walk not exceeding 2 inches at any place where a pedestrian would naturally be expected to walk); Koepke v. Milwaukee, 112 Wis. 475, 88 N. W. 238 (longitudinal decline of three quarters of an inch to the foot, because of ground sinking beneath walk, together with a lateral pitch of one fourth of an inch to the foot).

It is not negligent *per se* to construct an approach from a street to a sidewalk at a slope of 1 foot in 7; and the fact that plaintiff slipped on such an approach when it was covered by a recent fall of snow would not be sufficient to warrant the jury in finding that the slope was in itself, as a matter of fact, too great, and that the approach was therefore negligently constructed and maintained; nor was the allegation of negligence in constructing the walk so that the plank ran lengthwise instead of crosswise such an allegation of negligence as should have gone to jury in the absence of any evidence whatever that it was unusual or improper to employ the former form of construction instead of the latter, or that the approach was more dangerous on account of the form of construction employed. Lush v. Parkersburg, *supra*.

So, a city is not negligent in maintaining a plank apron at a cross walk 6 feet wide and 6 feet long, sloping 2 inches to the foot for the 6 feet, although cleats 14 inches apart nailed to planks had become covered with ice. Cooper v. Waterloo, 98 Wis. 424, 74 N. W. 115.

Where a sidewalk is not negligently constructed nor allowed to become unsafe or dangerous, an injury caused by a mere slant in the sidewalk is not actionable. Price v. Maryville, 174 Mo. App. 698, 161 S. W. 295.

Whether the maintenance of a sloping sidewalk or cross walk, without taking some precaution, such as providing cleats, to pre-

on an incline does not constitute a defective construction, nor is it negligence *per se*, for which the city is liable.

Morrison v. Madison, 96 Wis. 452, 71 N. W. 882; *Koepke v. Milwaukee*, 112 Wis. 475, 88 N. W. 238; *De Pere v. Hibbard*, 104 Wis. 666, 80 N. W. 933; *Beaton v. Milwaukee*, 97 Wis. 416, 73 N. W. 53; *Cooper v. Waterloo*, 98 Wis. 424, 74 N. W. 115; *Wesley v. Detroit*, 117 Mich. 658, 76 N. W. 104, 4 Am. Neg. Rep. 651; *Kaveny v. Troy*, 108 N. Y. 571, 16 N. E. 726; *McGuinness v. Worcester*, 160 Mass. 272, 35 N. E. 1068; 5 *Thomp. Neg.* § 6184; *Baker v. Madison*, 56 Wis. 374, 14 N. W. 289; *Schroth v. Prescott*, 63 Wis. 652, 24 N. W. 405; *Clark v. Chicago*, 4 Bias. 486, Fed. Cas. No. 2,817; *Lush v. Parkersburg*, 127 Iowa, 701, 104 N. W. 336; *Isaacson v. Boston*, 195 Mass. 114, 80 N. E. 809; *Newton v. Worcester*, 174 Mass. 181, 54 N. E. 521.

Chadwick, J., delivered the opinion of the court:

Plaintiff slipped and fell upon a sidewalk laid upon a slope of 12.9 per cent, suffering injuries for which he seeks compensation in this action. The accident occurred on the morning of the 5th day of April, 1912. There was a slight frost on the sidewalk. From a judgment in favor of the defendant, plaintiff has appealed.

Plaintiff estimated the grade of the walk at about 17 per cent. The court made no specific finding upon this point, holding, in addition to the fact that the city was not

negligent, that plaintiff was guilty of contributory negligence, and it made no difference whether the grade was 13 per cent or 17 per cent. The evidence of a city engineer based on actual measurements fixes the grade at 12.9 per cent, and we shall accept his finding.

Waiving the question of contributory negligence, there is but one question in this case; that is, whether it is negligence *per se* for a city to maintain a sidewalk without cleats on a 12.9 per cent grade.

Negligence is not to be presumed from the sole fact that plaintiff fell and was injured. *Grossenbach v. Milwaukee*, 65 Wis. 32, 56 Am. Rep. 614, 26 N. W. 182; *Sorenson v. Menasha Paper & Pulp Co.* 56 Wis. 338, 14 N. W. 446; *Lush v. Parkersburg*, 127 Iowa, 701, 104 N. W. 336. The testimony does not show the opinion of those who are competent to pass an opinion upon the physical facts disclosed; nor is it made to appear that other accidents upon sidewalks similarly constructed have happened with sufficient frequency to put the city upon notice of its dangerous character.

No cases are cited, nor have we found any, where courts have assumed to hold a grade of like character dangerous as a matter of law. We may take judicial notice that such grades are frequent—in fact common—in the cities and towns of this state, and that they have been maintained without prohibitive or regulative legislation. The courts have treated the question of negligence in such cases as one of fact,

vent pedestrians slipping in case the walk should become slippery because of water, snow, or ice, is negligence, is generally a question of fact for the determination of the jury. *Griffith v. Denver*, 55 Colo. 37, 132 Pac. 57 (incline one-half inch to foot toward street, such incline being slightly in excess of that fixed by ordinance); *Beirness v. Missouri Valley*, post, 218 (sidewalk varied from grade of the center of the street, the latter being at the grade of 13 per cent and the former at the grade of 14 $\frac{79}{100}$ per cent); *Breckman v. Covington*, 143 Ky. 444, 136 S. W. 805 (a sidewalk is not dangerous as matter of law where, within 1 $\frac{1}{2}$ feet of some stone steps leading into a grocery store, it had a slope of 3 $\frac{1}{2}$ inches); *Moynihan v. Holyoke*, 193 Mass. 26, 78 N. E. 742 (smooth, slippery sidewalk, made partly of glass, sloping longitudinally 2 $\frac{1}{2}$ inches in 10 feet); *Connell v. Canton*, 24 S. D. 572, 124 N. W. 839 (approach to cross walk 6 feet long, sloping in that distance 10 inches); *Morrison v. Madison*, 96 Wis. 452, 71 N. W. 882 (apron from the sidewalk across the gutter constructed on a slope of 1 $\frac{1}{2}$ inches to the foot).

A city is not bound to construct its sidewalk so that, rendered slippery with snow and ice, it would be impossible for one step-

ping over it to slip and fall; nor is a city negligent as matter of law in maintaining a plank sidewalk without cleats on an incline of 4 $\frac{1}{2}$ feet to about 32 feet. *Owens v. Chicago*, 162 Ill. App. 196.

Where a walk sloped toward the center of a street, the side or edge next to the fence being 10 inches higher than the other, it was held in *Shumway v. Burlington*, 108 Iowa, 424, 79 N. W. 123, that whether the city was negligent in not anticipating and providing against the dangerous condition of such sloping walk, because of water discharging thereon and freezing, was a question for the jury, where the evidence tended to show that water from adjacent premises had been discharged through a hole in the fence, over the walk, for so long a time that the defendant should be charged with knowledge of it.

It was held in *Clemence v. Auburn*, 66 N. Y. 334, to be a question for the jury whether a stone 3 $\frac{1}{2}$ feet, laid at a slope of 6 inches to its width, connecting two sidewalks of different levels, was so unsafe as to render the city liable to one who, while passing over this stone when it was covered with a light fall of snow, slipped, fell, and was injured.

It was held a question of fact for the jury

and have persistently refused to direct verdicts or render judgment *non obstante*.

In *Morrison v. Madison*, 96 Wis. 452, 71 N. W. 882, the slope was 22 inches in 134 feet, or 13.6 per cent. The court said: "The facts in regard to its construction and condition are all undisputed; yet, if there was any room for honest differences of opinion among reasonable men of unbiased minds in respect to the inferences that should be drawn therefrom regarding the fact in issue, then it was for the jury, and not the court, to draw the correct inference. It is only when the facts are undisputed, and the reasonable inferences therefrom in regard to the ultimate fact in issue are all one way, that what is the proper inference is a question of law for the court to answer." This case is instructive in that it refers to many cases where the grade and absence of cleats were the only defects complained of. In *Lush v. Parkersburg*, *supra*, it is said: "The only evidence as to the approach to the sidewalk being dangerous, and as to the negligence of the defendant in allowing it to remain in a dangerous condition, was to the effect that it should have been provided with cleats or strips nailed across it. The approach was of pine planks laid lengthwise, 5 feet long, and it was 8½ inches higher where it joined the sidewalk than where it joined the street. The slope of the approach was therefore 1 foot in 7, and there is no evidence whatever that this slope in itself rendered the approach dangerous, or

that the town was negligent, in view of all the circumstances, in constructing the approach at such a slope." The annotator of the *Lawyers' Reports*, in an exhaustive monographic note following the case of *Elam v. Mt. Sterling*, 20 L.R.A.(N.S.) 512, finds the rule to be: "Whether a given street was in a reasonably safe condition for the convenience of travel is a practical question, to be determined by the jury in each case by the particular circumstances."

Plaintiff cites many cases holding that it is negligence for the city to maintain a sloping sidewalk without cleats. We have examined these cases carefully and find confirmation of our tentative opinion that it has always been so held in aid of the verdict of a jury. In other words, an appellate court will not so hold as a matter of law unless the facts are so patent as to warrant it in saying that the minds of reasonable men would not differ in their conclusion; but a jury, having considered all the facts, and having so found, its verdict will not be disturbed. Reference to the cases will show that the grade complained of in this case is not unusual. The instant case was tried before the court, and findings made that the city was not negligent.

It is the settled practice of this court to treat such findings as a verdict of a jury, and sustain them, unless, upon an examination *de novo*, we find that the evidence preponderates against them. Rem. & Bal. Code, § 1736.

to determine, in *McMaugh v. Milwaukee*, 32 Wis. 200, whether a cross walk 2 feet 4 inches wide, extending over a gutter 2½ feet below the walk, the walk descending at that place at the rate of 18 feet in 100 (the grade established by the city ordinance being 1 foot in 100 feet), was a properly constructed walk, reasonably safe for travelers who might have occasion to pass over it in the night when it might be covered with ice and snow.

It was stated in *Whitney v. Milwaukee*, 57 Wis. 639, 16 N. W. 12, where the sufficiency of a cross walk was held a question of fact for the jury, that a jury might say that a cross walk but 5½ feet wide, descending from a sidewalk 14 feet and 9 inches wide, on an incline of 3½ feet in 8 feet, not in line with the sidewalk, and without any guard or railing, on one of the great thoroughfares of a large city, was constructed in a faulty and unsafe manner, and that it was practicable to construct it so as to avoid the danger of passing up and down the descent.

Whether the maintenance of an incline of 2½ feet in 20, from a bridge to a sidewalk, with cleats 1 foot apart, constituted negligence on the part of the city, was held a question for the jury in *Perkins v. Fond* 51 L.R.A.(N.S.)

du Lac, 34 Wis. 435, the court observing that, it being inferable from the evidence that it was practicable to construct the walk differently and more on the level with the bridge, so as to avoid the danger of passing up and down the descent, the jury might have found that the walk was improperly built, and that, as a consequence, it was not safe and convenient for ordinary travel.

In *Hill v. Fond du Lac*, 56 Wis. 248, 14 N. W. 25, the question was not whether the mere sudden declivity in the sidewalk, in the absence of any storm or freezing, would have been dangerous, nor whether the mere storm and freezing weather in the absence of the walk in question, and with the walk differently constructed, would have caused danger, but whether that walk so constructed, with such ice and snow as would ordinarily accumulate upon it during such severe storms and freezing weather as ordinarily occurred at that season of the year at the place of the injury, would be unsafe for travelers upon it. If, in that condition and under such circumstances, it was unsafe, then it was defective. It was clearly the province of the jury to determine that question. J. D. C.

Plaintiff cites the cases of *Calder v. Walla Walla*, 6 Wash. 377, 33 Pac. 1054; *Short v. Spokane*, 41 Wash. 257, 83 Pac. 183; and *Bull v. Spokane*, 46 Wash. 237, 13 L.R.A. (N.S.) 1105, 89 Pac. 555. We have examined these cases and find that they suggest nothing in opposition to our present conclusion.

The judgment is affirmed.

Crow, Ch. J., and Ellis and Main, JJ., concur.

Gose, J., dissenting:

It was not necessary to offer evidence to show that one is more liable to fall when descending a smooth, slippery inclined plane than when walking over a smooth, slippery level. That fact is one of common knowledge. The danger necessarily increases as the grade increases. When a sidewalk is laid at such a grade as to render travel upon it unsafe, its maintenance without cleats or other safeguard is a negligent act. It requires neither evidence nor argument to prove that a smooth-surfaced sidewalk laid upon a grade of approximately 13 per cent is unsafe and dangerous. That fact is so obvious, as I view it, that evidence can neither emphasize nor weaken its force. Nor was it necessary to prove that others had fallen. The inference to be drawn from the majority opinion is that the first traveler who fell, or perhaps the first half dozen who were so unfortunate as to fall and sustain injuries, could have no redress, but that those who later fell, and who could prove the misfortune of their brethren, could recover. The city laid and maintained the walk and knew its condition. To my mind its negligence is apparent. The appellant testified that he did not observe the frost, which was a light one, before he fell. He is therefore not chargeable with contributory negligence. I therefore dissent.

IOWA SUPREME COURT.

MARGARET BEIRNESS, Appt.,
v.
CITY OF MISSOURI VALLEY.

(— Iowa, —, 144 N. W. 628.)

Proximate cause — snow and ice on walk — injury to pedestrian.

1. The negligence, if any, of a municipal

Note. — As to liability of municipal corporation for injuries from rough or uneven snow or ice accumulated from natural causes on a street or sidewalk, see notes to *Bull v. Spokane*, 13 L.R.A. (N.S.) 1105, and *Jackson v. Grand Forks*, 45 L.R.A. (N.S.) 51 L.R.A. (N.S.)

corporation in permitting snow and ice to remain on a sidewalk in rough and uneven surfaces, is immaterial where the undisputed evidence shows that plaintiff had, before falling, passed over the part of the walk where the ridges and rough surfaces were claimed to have been.

Evidence — ice on walk — constructive notice.

2. Where, in an action against a municipality for injuries from a fall on an icy sidewalk on Wednesday morning, it is shown that, on the preceding Sunday and Monday, there had been a fall of snow, and that between Sunday and Tuesday evening there had been a slight thaw, and on Tuesday night an additional snowfall of about one-half inch, there is nothing to warrant a jury in the conclusion that a small spot of ice covered with snow on the walk had existed for such time as would charge the city with notice of it.

Municipal corporation — ice on walk — right to wait for thaw.

3. When cold follows a melting of snow, causing a film of ice upon the sidewalks which it is practically impossible to remove, the municipality may, without being guilty of negligence, wait for a change of temperature to remedy the condition.

Notice — complaint of condition of walk.

4. Complaint to a city official of the condition of a walk does not charge the city with notice of a condition to which the complaint did not relate.

Highway — variance between grade of sidewalk and of street.

5. The fact that the grade upon which a sidewalk was constructed varied from the grade of the street, to the extent of increasing its slant about 1 inch in 2 feet, cannot be held a contributing cause to an injury sustained by a pedestrian who slipped upon a spot of ice covered with snow, since it is pure speculation as to whether the accident would or would not have happened had the sidewalk conformed to the street grade.

Same — smooth surface of walk.

6. The negligence, if any, of a city in constructing a walk with a surface so smooth as to be dangerous to pedestrians, is immaterial where the accident complained of was not caused by the smoothness of the walk, but from the presence of snow-covered ice thereon.

Evidence — sidewalk cleaning ordinance.

7. It is not error, in an action against a city for injury sustained by one falling on a slippery walk, to exclude evidence of an ordinance which requires removal of snow from walks within twelve hours after

75. For other questions in relation to snow and ice, see Index to L.R.A. Notes, "Highways," §§ 71, 84, 86, 91.

As to negligence with respect to slope or grade of sidewalk, see note to *Dougan v. Seattle*, ante, 214.

it has ceased to fall, where the failure to remove the snow within a reasonable time is not shown to have been a contributing cause to the injury.

(December 15, 1913.)

APPEAL by plaintiff from a judgment of the District Court for Harrison County sustaining a motion by defendant for direction of a verdict in its favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Withrow, J.:

Action to recover damages for injury resulting from a fall on an icy sidewalk. The trial court directed a verdict for the defendant, and plaintiff appeals.

Messrs. Ambrose Burke and S. H. Cochran, for appellant:

The construction of the sidewalk on a different grade than provided in the city ordinance is evidence of negligence.

Ford v. Des Moines, 106 Iowa, 94, 75 N. W. 630, 4 Am. Neg. Rep. 379; Weber v. Creston, 75 Iowa, 16, 39 N. W. 126.

The city agents were bound to anticipate the dangers of pedestrians passing over the walk, and construct it in such manner as to prevent accidents like the one in question.

Larah v. Des Moines, 74 Iowa, 512, 38 N. W. 384; Ford v. Des Moines, 106 Iowa, 94, 75 N. W. 630, 4 Am. Neg. Rep. 379; Baxter v. Cedar Rapids, 103 Iowa, 599, 72 N. W. 790; Langhammer v. Manchester, 99 Iowa, 295, 68 N. W. 688.

Whether the defendant was negligent in constructing the walk, and in permitting it to remain as it was at the time of the accident, was a question for the determination of the jury.

Ford v. Des Moines, 106 Iowa, 94, 75 N. W. 630, 4 Am. Neg. Rep. 379; Baxter v. Cedar Rapids, 103 Iowa, 599, 72 N. W. 790; Graham v. Oxford, 105 Iowa, 705, 75 N. W. 473; Hodges v. Waterloo, 109 Iowa, 444, 80 N. W. 523; Schumway v. Burlington, 108 Iowa, 424, 79 N. W. 123; Bailey v. Centerville, 108 Iowa, 20, 78 N. W. 831.

Messrs. John P. Organ and C. W. Kellogg, for appellee:

The evidence shows there was no obstruction of the sidewalk at the place plaintiff fell.

Broburg v. Des Moines, 63 Iowa, 523, 50 Am. Rep. 756, 19 N. W. 340; Huston v. Council Bluffs, 101 Iowa, 33, 36 L.R.A. 211, 69 N. W. 1130, 1 Am. Neg. Rep. 227; Dempsey v. Dubuque, 150 Iowa, 260, 132 N. W. 758; Tobin v. Waterloo, 131 Iowa, 75, 107 N. W. 1031; Hausmann v. Madi-

son, 85 Wis. 187, 21 L.R.A. 263, 39 Am. St. Rep. 834, 55 N. W. 167; Taylor v. Yonkers, 105 N. Y. 202, 59 Am. Rep. 492, 11 N. E. 642; Chase v. Cleveland, 44 Ohio St. 505, 58 Am. Rep. 843, 9 N. E. 225; Stanton v. Springfield, 12 Allen, 566; Stone v. Hubbardston, 100 Mass. 49; Evans v. Concordia, 74 Kan. 70, 7 L.R.A. (N.S.) 933, 85 Pac. 813; Dill. Mun. Corp. 4th ed. § 1006.

The sidewalk upon which plaintiff fell was not defective.

Shelby v. Burlington, 125 Iowa, 343, 101 N. W. 101; Lindsay v. Des Moines, 74 Iowa, 111, 37 N. W. 9; Beltz v. Yonkers, 148 N. Y. 67, 42 N. E. 401; Burns v. Bradford, 137 Pa. 361, 11 L.R.A. 726, 20 Atl. 997; Urquhart v. Ogdensburg, 91 N. Y. 67, 43 Am. Rep. 655; McQueen v. Elkhart, 14 Ind. App. 671, 43 N. E. 460; De Pere v. Hibbard, 104 Wis. 660, 80 N. W. 933; Baker v. Madison, 56 Wis. 374, 14 N. W. 289; Hoyt v. Danbury, 69 Conn. 341, 37 Atl. 1051, 3 Am. Neg. Rep. 524; Van Pelt v. Davenport, 42 Iowa, 308, 20 Am. Rep. 622; Hoehl v. Muscatine, 57 Iowa, 444, 10 N. W. 830; Johnston v. District of Columbia, 118 U. S. 19, 30 L. ed. 75, 6 Sup. Ct. Rep. 923.

Neither an obstruction of the sidewalk with snow, or the alleged defect in the walk, was the proximate cause of plaintiff's accident.

Tobin v. Waterloo, 131 Iowa, 75, 107 N. W. 1031; Langhammer v. Manchester, 99 Iowa, 295, 68 N. W. 688; Taylor v. Yonkers, 105 N. Y. 202, 59 Am. Rep. 492, 11 N. E. 642.

The city had no notice of any obstruction of the sidewalk by snow or ice, or of any defect therein.

Ruggles v. Nevada, 63 Iowa, 185, 18 N. W. 866; Goodson v. Des Moines, 66 Iowa, 255, 23 N. W. 655; Cook v. Anamosa, 66 Iowa, 427, 23 N. W. 907; Burns v. Bradford, 137 Pa. 361, 11 L.R.A. 726, 20 Atl. 997; Doulon v. Clinton, 33 Iowa, 397.

Withrow, J., delivered the opinion of the court:

I. The appellant received certain injuries as the result of a fall while passing along a sidewalk in the city of Missouri Valley. She brought action to recover damages, alleging that the city was negligent: (1) In permitting the construction and maintenance of the sidewalk at a grade which was steeper than the established grade of the street to which it was adjacent, which it is alleged was dangerous to the public using the same. (2) In constructing the walk in this climate with a smooth surface, and in permitting snow and ice to remain on the walk in violation of the city

ordinance, in violation of law, and in permitting snow and ice to remain on the walk in rough and uneven surfaces. There was a trial to a jury, which resulted in a verdict being directed in favor of the defendant, from which this appeal is taken by the plaintiff.

II. Appellant's accident and injury occurred about 8:30 o'clock A. M. Wednesday, December 7, 1910. On the preceding Sunday and Monday there had been a fall of snow, estimated by witnesses as from 3 to 5 inches in depth. On the night before the accident there had been an additional snow fall of about one-half inch. Between Sunday and Tuesday evening there had been a slight thaw, the effect of which was to remove some, but not all, of the snow from the walk. In the center of the walk, which was of concrete structure, a path had been made by travelers over it. The effect of the travel along the path had been to create ridges or uneven conditions raised by the imprint and pressure of feet in the snow, followed by freezing, which made the raised places more or less solid. The walk was sloping, being built upon a hillside; the grade of descent at the point where the accident occurred, being near 15 per cent. At the time of the accident, the appellant was going down the hill, upon the sidewalk.

While it is urged that the accident resulted from the combined causes of the rough and uneven surface of the walk, occasioned by the snow and ice upon it, in connection with the steep grade, which it is charged is not in accordance with the established grade of the street at that point, the evidence shows without dispute, and it therefore must be taken as true, that appellant had passed over the part of the walk where the ridges and rough surface are claimed to have been, and her fall resulted from stepping upon a place covered by the snow of the previous night, which under the pressure of her weight slipped on a thin coating of ice beneath, occasioning her fall. These facts remove from the case, as a charge of negligence, the permitting of the snow and ice to remain upon the walk in rough and uneven surface, as that particular condition is shown to have had no proximate connection with her fall.

III. The testimony of the appellant and her husband was to the effect that the ice upon which she slipped covered a surface about the size of a hand, by her described as "just a little spot of ice." Where she fell the sidewalk was bare in spots, having the appearance of being covered with sleet. At that place the snow was soft. We are therefore led directly to

the question whether the spot of ice at the particular place where the accident happened is shown to have existed for such length of time as created liability for failure to remove it. The evidence shows without dispute that in near-by places the walk appeared to be sleet. There is no evidence of there having been a fall of sleet; but that condition is explained by the evidence which shows that between Sunday and Tuesday evening there had been a slight thaw, which, followed by a freeze, would occasion ice surface at places where the water rested or had not flowed away. We do not find in the evidence that which would permit us or warrant a jury in the conclusion that the particular icy condition at the place of the accident had existed for such time as charged the city with notice of it. *Tobin v. Waterloo*, 131 Iowa, 75, 107 N. W. 1031; *Goodson v. Des Moines*, 66 Iowa, 255, 23 N. W. 655.

But independent of the question of notice, actual or presumed, it has been held that when cold follows a melting of snow, causing a film of ice upon the sidewalks which it is practically impossible to remove, the municipality may, without being guilty of negligence, wait for a change of temperature to remedy the condition. 28 Cyc. 1378; *Taylor v. Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492, 11 N. E. 642; *Luther v. Worcester*, 97 Mass. 268.

There is in the record evidence which tends to show that, prior to the time of the accident, complaint of the condition of the walk had been made by a citizen to an official of the city; but even if this be held as notice, it did not reach to the condition which is the controlling one in this case.

IV. There remains the question whether the variance between the established grade of the street, and the grade upon which the sidewalk was built, constituted negligence which caused the injury, either alone or concurrently with other causes. The established grade of the street at the intersection of Fifth and Huron streets was 64.50, and at the intersection of Fifth and Superior streets it was 112.60, both above the plane of reference. The accident occurred about 50 feet north of the intersection of Fifth and Huron. The sidewalk between the intersections named varied from the grade of the center of the street, the latter being at a grade of 13 per cent, and the sidewalk at a grade of 14.79 per cent, which, as the testimony shows, increases the slant of the sidewalk, as claimed by appellant, 7.6 feet in 180 feet, or about 1 inch in 2 feet. The appellee makes different deductions from the measurements, but for our present purpose we

follow the claim of appellant. It is the rule that an ordinance establishing a grade for the center of the street operates to establish a grade for that portion of the street occupied by sidewalks. *Gallaher v. Jefferson*, 125 Iowa, 324, 101 N. W. 124. Such was expressly required by an ordinance of the defendant city.

Such variance arising, does it follow that in failing to follow the established grade the city was negligent in such manner as to contribute to the injury of the appellant? We have been cited to no case holding that under such conditions, where the sidewalk is a permanent structure, negligence arises as a matter of law because of the difference between established grade and structure. Cases cited by the appellant are to the effect only that, where the manner of constructing a sidewalk was such that it did not afford reasonable safety to those who might pass along it, the question of negligence is for the jury. *Ford v. Des Moines*, 106 Iowa, 97, 75 N. W. 630, 4 Am. Neg. Rep. 379; *Langhammer v. Manchester*, 99 Iowa, 295, 68 N. W. 688.

But assuming, as contended by appellant, that the grade upon which the walk was constructed varied to the extent shown by the evidence from the established grade of the street, can it be said that such difference in grade had causal connection with appellant's injury? The suggestion of the question immediately presents the difficulties which must attend its solution, and, as applied to this case, a question almost impossible of a reasonably certain or fairly probable answer. Upon a walk built in accordance with the established grade, under such conditions and circumstances as attended the accident in question, it cannot be said, either as a matter of law, or as a question upon which testimony might be offered, that the accident would not have happened, for such would be a mere conjecture, incapable of definite demonstration as a probable result. To have submitted the question upon the claim of negligence based upon such facts, it would have been the duty of the trial court to instruct the jury that defendant would be liable if it found that but for the added slope in the sidewalk the injury would not have been sustained. *Langhammer v. Manchester*, supra.

In the present case the appellant slipped upon the snow-covered ice. That was the operating cause of her fall. It is possible the increased slope of the walk had something to do with it, and likewise possible that it did not, and a conclusion as to either is necessarily a matter of speculation, without the support of substantial

proof. Under such conditions, the grade slant of the sidewalk cannot be held to be a contributing cause to the injury. *Taylor v. Yonkers*, supra; *Moore v. Abbot*, 32 Me. 46; *Billings v. Worcester*, 102 Mass. 329, 3 Am. Rep. 460.

V. The claim of negligence based upon the construction of the sidewalk with a surface so smooth as to be dangerous to pedestrians is without support as applied to this case, for the reason that it is not shown that the accident resulted from such condition, but rather from the snow-covered ice.

VI. Appellant offered in evidence the ordinance of the city of Missouri Valley which required the removal of snow from the sidewalks within twelve hours after it has ceased to fall. The trial court refused to admit it in evidence, and error is based upon such refusal. Because of the conclusions we have reached as stated above, this was not error, as the failure to remove the snow within a reasonable time was not shown to have been a contributing cause to the injury.

We agree with the conclusion reached by the trial court, and its judgment is affirmed.

Weaver, Ch. J., and Gaynor and Deemer, JJ., concur.

IOWA SUPREME COURT.

SADIE ROEH, Admr., etc., of Albert Roeh,
Deceased,

v.

BUSINESS MEN'S PROTECTIVE ASSOCIATION OF DES MOINES, Appt.

(— Iowa, —, 145 N. W. 479.)

Insurance — gunshot accident — witness of event.

1. A provision of an accident insurance policy relieving the insurer from liability for injuries caused by discharge of firearms, unless the accidental character of the discharge shall be established by at least one

Note. — Insurance: validity and construction of provision requiring the fact or circumstances of loss to be established by eyewitness.

The reason for the incorporation of the provision under consideration in life or accident policies was doubtless the difficulty experienced by insurers in establishing their defenses, where the evidence as to the fact or circumstances of the death was entirely circumstantial, especially the defenses that depended upon the cause of death, or whether or not it was suicidal.

The decisions which have considered provisions of the kind under consideration are

person other than the insured, who was an eyewitness of the event, requires the witness to have seen the shooting.

Same — validity — control of court proceedings.

2. Requiring the establishment of the accidental nature of an injury by a gunshot wound before liability attaches therefor under an accident policy is not against public policy as an attempt to modify or control the procedure of courts of justice.

(February 19, 1914.)

APPEAL by defendant from a judgment of the District Court for Jackson County in plaintiff's favor in an action brought to recover the amount alleged to be due on an accident insurance policy. Reversed.

Statement by Deemer, J.:

Action upon a benefit certificate in the defendant association. The defendant denied liability upon grounds which will be referred to in the body of the opinion. The case was tried to the court without a jury, resulting in a judgment for plaintiff for the amount of the certificate with interest, and defendant appeals.

Messrs. Dunshee & Haines, for appellant:

The by-law being in force at the time the decedent joined, and having been as-

few. In *Lewis v. Brotherhood Acci. Co.* 194 Mass. 1, 17 L.R.A. (N.S.) 714, 79 N. E. 802, the facts and circumstances of a drowning accident were held to be sufficiently established within the meaning of an accident policy limiting the insurer's liability in case of drowning, "when the facts and circumstances of the accident and injury are not established by the testimony of actual eyewitnesses," where witnesses testified to having seen the insured in a cranky canoe, with a companion, within three or four minutes of the time of the accident, and to having seen the overturned canoe and evidence of its having recently capsized within a few minutes after it overturned, although they did not actually see it go over.

In the only other case which appears to have considered such a provision, it was held that the insured, who had received a nonfatal injury by shooting, was an eyewitness to his own injury, within the meaning of a provision of an accident policy limiting liability if the injury was caused by "shooting, when the facts and circumstances of the accident and injury are not established by the testimony of an actual eyewitness." *National Acci. Soc. v. Ralstin*, 101 Ill. App. 192. The court said: "The contention of appellant is that appellee is not an actual eyewitness to establish the facts and circumstances of his accident, within the meaning of the policy, and that,

presented to by him, the plaintiff cannot question its validity.

Bacon, Ben. Soc. 3d ed. § 87; *Austin v. Searing*, 16 N. Y. 112, 69 Am. Dec. 665.

A contract setting aside a rule of evidence is valid.

Kelly v. Supreme Council, C. M. B. A. 46 App. Div. 79, 61 N. Y. Supp. 394; *Metro-politan L. Ins. Co. v. Willis*, 37 Ind. App. 48, 76 N. E. 560; *Keller v. Home L. Ins. Co.* 95 Mo. App. 627, 69 S. W. 612; *Russ v. The War Eagle*, 14 Iowa, 363.

The by-law makes proof of the accidental character of the discharge by an eyewitness a condition precedent.

Connell v. Iowa State Traveling Men's Asso. 139 Iowa, 444, 116 N. W. 820.

Even though a provision of the by-law be deemed to be a condition subsequent, the evidence establishes the fact that there was no eyewitness to the shooting.

Lockridge v. Minneapolis & St. L. R. Co. — Iowa, —, 140 N. W. 834.

The contract was entire, and if the provision of the by-law is held void, the entire contract fails.

Page, Contr. § 509.

Messrs. C. M. Thomas and G. E. Hilsinger, for appellee:

A contract setting aside a rule of evidence is null and void.

Carrugi v. Atlantic F. Ins. Co. 40 Ga. 135, 2 Am. Rep. 567; *City F. Ins. Co. v. Carrugi*, 41 Ga. 660; *Reynolds v. Equitable Acci. Asso.* 59 Hun, 13, 1 N. Y. Supp.

as no other witness testifies to the manner of the shooting, appellant is only liable for \$40, one twentieth of the sum otherwise payable. Appellee was by law a competent witness. As such he detailed the facts and circumstances of his accident as it occurred. He was an actual eyewitness whose testimony showed that the shooting was wholly unintentional. He was corroborated as to the shooting being accidental by his daughter, who swore that she saw her father get his gun and go with it from the house into the yard to shoot the cat, and that she, within a short time, heard the report of the gun and immediately saw her father's hand lacerated and bleeding. Policies of insurance should be construed most strongly against the insurer. *May, Ins.* § 175; *Aurora F. Ins. Co. v. Eddy*, 49 Ill. 106; *Niagara F. Ins. Co. v. Scammon*, 100 Ill. 644. An eyewitness to a shooting does not mean one who saw the load leave the discharged gun. Nor does its meaning exclude anyone whom the statute says may testify to a matter in issue. If appellant desired to exclude appellee from establishing the fact of injury from shooting by his own testimony, it should have inserted in the policy after the words, 'when the facts and circumstances of the accident and injury are not established by the testimony of an actual eyewitness,' the words 'other than the insured.'

J. T. W.

738; *Insurance Co. v. Bennett*, 90 Tenn. 256, 25 Am. St. Rep. 685, 16 S. W. 723; *Utter v. Travelers' Ins. Co.* 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18.

The provision requiring proof by eyewitnesses is illegal, against public policy, and void.

Nute v. Hamilton Mut. Ins. Co. 6 Gray, 174; *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18; *Reynolds v. Equitable Acci. Asso.* 59 Hun, 13, 1 N. Y. Supp. 738.

To be an eyewitness to the event, within the meaning of the policy, it is not necessary that witness see the actual discharge of the firearms. The event consists of all matters and circumstances leading up to, including, and following the discharge. An eyewitness to any of these facts is an eyewitness of the event.

Lewis v. Brotherhood Acci. Co. 194 Mass. 1, 17 L.R.A.(N.S.) 717, 79 N. E. 802; *National Acci. Soc. v. Ralstin*, 101 Ill. App. 192; *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360.

Deemer, J., delivered the opinion of the court:

The defendant is a mutual assessment accident association incorporated under chapters 7 and 8 of title 9 of the Code of Iowa. As such, on the 21st day of March, 1912, it received an application from one Albert Roeh for membership in the association. The application contained a statement that the insured would accept the certificate issued by the association "subject to all the conditions, provisions, and limitations contained in defendant's articles and by-laws." The application was accepted and a certificate was issued to and accepted by the insured on March 30, 1912. It provided certain indemnities in case of injury or death resulting from accident. No beneficiary is designated, but the articles provided that the indemnity should be paid to a surviving wife or heir of the member. On July 26, 1912, the insured came to his death as a result of the discharge of a rifle; whether the discharge was accidental or with suicidal intent does not clearly appear. This action was commenced by the administratrix of his estate to recover the benefits and indemnity of \$1,000, in case of death by accidental means. Defendant introduced many defenses, and the case was tried on a stipulation of facts, supplemented by certain oral testimony.

51 L.R.A.(N.S.)

Among other things it was stipulated in the certificate of membership that "the articles of incorporation and by-laws may be changed by amendments legally adopted, and the rights of the member to claim benefits or indemnity shall be determined by the provisions of the articles and by-laws in force at the time a claim arises. Acceptance. I hereby accept this certificate of membership subject to all the provisions, conditions, and limitations of the articles of incorporation and by-laws, and agree that both myself and my beneficiary shall be bound by future amendments legally adopted, and also subject to the terms and conditions hereinbefore set out; and I agree that the articles of incorporation, by-laws, my application, and this certificate shall jointly constitute the contract between myself, my beneficiary, and the association."

The articles of incorporation provided that "the association shall pay to the beneficiary designated in writing by any member of the accident department, who must be either the surviving wife or an heir of such member, the proceeds of one full assessment on each member of the accident department in good standing at the time of the accident, to an amount not exceeding the sum specified in his certificate for indemnity, on account of the death of any member of the accident department occurring within ninety days from the happening of the accident, and resulting directly and without intervening cause from a bodily injury sustained by the member while in good standing, and effected solely by external, violent, and accidental means, subject only to the conditions, provisions, and limitations of the by-laws. Article 5, § 14. The right of any member or person claiming by, through, and under any certificate issued to any member, to claim weekly benefits or indemnity from the association, shall be fixed and established by the provisions of the articles of incorporation and of the by-laws in force at the time the accident occurred or sickness commenced out of which any claim arises."

And the by-laws had these, among other, provisions:

"Article 1, § 3. The contract between the association and its members shall consist of the articles of incorporation and by-laws and the application and the certificate of membership."

"Article 4, § 5. This association shall not be liable for the payment of benefits or indemnity on account of disability or death resulting from a bodily injury caused by the discharge of firearms, unless the member or person claiming by, through, or under any certificate issued to such member,

shall establish the accidental character of such discharge by the testimony of at least one person other than the member, who was an eyewitness of the event."

The only oral testimony as to the manner of death, we here quote: Plaintiff testified: "I had some talk with my husband about noon on the day of his death over the telephone. He wanted to know what kind of meat I wanted for dinner, and said he would be down in a short time. That was somewhere between 12:30 and 1 o'clock. I heard of his death about 1:30 the same day."

Another witness said: "I saw the body of Mr. Roeh on the 26th day of July, 1912, after he was dead. I was called in there by Mr. Anderson. I found the body in the revolving chair with his head against the wall and his rifle at his left side on the floor. The ramrod was across his knees, and his legs were crossed. His right hand was hanging down, and his left hand was on his lap. The ramrod was an ordinary ramrod, about 3 feet long, with a crook on the end of it, and on the other end of it there was a rag for cleaning the gun. The rag was a little black from the powder from the gun. The rifle was a 32 Magazine Winchester, the trigger being guarded by the lever, which works up and down. The rifle was usually kept in the shop right at the desk where he was sitting. It was used for killing cattle, Roeh being in the butcher business. I do not remember how many days it was prior to this occurrence that they had killed cattle. I think it was two days, and that the supply of meat was low. I know Roeh had some cattle ready for killing out at a farmer's. I do not know whether he had any arrangements for killing them on that day. It was in the neighborhood of 1 o'clock when I saw the body in the chair." Cross-examination: "Mr. Roeh was dead when I arrived. I did not hear the report of the rifle. I was called in there." Redirect examination. "I did not know that Roeh was dead until after the doctor had been there. That was about ten minutes after I first saw him. I did not examine him to see if he was dead."

Another gave the following testimony: "I was working for Mr. Roeh in the butcher shop the day he was killed. I had a talk with Mr. Roeh about 12 o'clock on that day. He picked up the rifle and said: 'I don't believe this rifle has been cleaned out for ten years, it is so dirty.' Then he told me to get my dinner and come back to the barn and get the horses and wagons, and get back as early as possible, as we had a big afternoon's work ahead of us. I left the shop right at 12 o'clock or close to it, and it was about 1 when I got back. When

I got back I stood on the sidewalk holding the team and hollered two or three times for him to come out. When he did not come, I tied the horses and went through the shop. I called as I went in, but got no answer. I glanced into the office and saw him in the chair. He was sitting in the revolving chair with his head back against the partition. I did not stop to look further, but ran out and called Mr. Goose and Mr. Peterson." Cross-examination: "I think Mr. Roeh was dead when I first saw him. I did not hear the rifle shot. I was not present when the shooting took place. Nobody else was present that I know of or ever heard of. Our town is about 1,200 population, and I never have heard that anybody was there. Nobody ever heard the shot. Nobody saw or heard the shooting."

And the last and only other witness said: "I am the person who was called by Mr. Anderson the day on which Roeh was killed. When I got in, I found the body sitting in the revolving chair with the head leaning back against the wall, the rifle to his left side, his legs crossed, and the ramrod across his right foot. The muzzle of the gun was pointing south. He was sitting facing north. The ramrod had a rag on it, and it appeared to be a little black from running through the gun. That is all I know." Cross-examination: "I was not present at the time of the shooting, and I did not see it. So far as I ever heard of, no one heard the shot."

The defendant insisted, and still contends, that there can be no recovery under this record for the reason that there was no eyewitness to the shooting other than the member himself. On the other hand, it is argued for appellant that there is such testimony as the policy requires, and, in any event, that the provisions of the articles and by-laws on which defendant relies are contrary to public policy, null, and void, because they undertake to make a rule of evidence and interfere with the orderly procedure of courts of justice. Upon the first proposition plaintiff contends that the by-law requiring testimony of at least one person other than the member, who was an eyewitness of the event, does not necessarily mean that this other person should have been present and actually have seen the shooting; that the event includes all matters and circumstances leading up to and following the discharge, provided these be sufficient to show the character of the discharge of the gun.

The event referred to in the by-law relied upon is manifestly death resulting from a bodily injury caused by the discharge of firearms, and provides that the independent testimony should come from one

who was an eyewitness of that event. The objects and purposes of this rule or by-law are clear. It was to remove the presumption of accident arising from death as a result of a gunshot wound, and to require eyewitnesses of the event in order to establish liability on the part of the insurer. Not only is the beneficiary to prove the operating cause of death, as that it was from a gunshot wound; but he must prove by eyewitnesses of the event that the gun was accidentally discharged. It is not enough that he prove that it might have been so committed. His proof must have been stronger than that, and fairly preponderate in favor of the proposition that the gun was accidentally discharged. The clause which we are now considering is quite different from any that have heretofore been before the courts. The nearest approach to it seems to be found in *National Acci. Soc. v. Ralstin*, 101 Ill. App. 192. In that case the insured was injured by the discharge of a gun, and gave testimony as to the manner of the discharge. It was held that, as the plaintiff was an eyewitness of his own injury, the provision of the certificate issued by the company was complied with. In *Lewis v. Brotherhood Acci. Co.* 194 Mass. 1, 17 L.R.A.(N.S.) 714, 79 N. E. 802, the provision of the policy was as follows: "In the event of any accidental bodily injury, fatal or nonfatal, contributed to or caused by . . . drowning or shooting, when the facts and circumstances of the accident and injury are not established by the testimony of an actual eyewitness, . . . then and in every such case the limit of the liability of this company hereunder shall be one twentieth of the accidental death benefit provided for in this policy not to exceed \$250 for accidental death, and for nonfatal injuries causing total or partial disability, one fifth of the weekly indemnity provided for in this policy." It will be noticed that the facts and circumstances of the accident and injury were to be established by an eyewitness, and the court held that death by accidental drowning might be established by eyewitnesses of the facts and circumstances; in other words, that the accidental drowning might be established by circumstantial evidence.

In the case at bar, that the event, that is to say, the accidental character of the discharge of firearms resulting in death, must be established by at least one person other than the insured, and "who was an eyewitness," does not necessarily mean that the witness should have seen the exact manner of the discharge; but it seems to us that it does comprehend the presence of the witness at or near the scene, and his direct observation of such facts and circum-

stances connected with the immediate transaction as of themselves, and without any aid from presumption or inference arising from love of life, or the instincts of self-preservation, indicate that the shooting was accidental. The following quotation from the *Lewis Case*, supra, indicates our thought in the matter: "An eyewitness is a person who testifies to what he has seen. By the terms of this policy the facts and circumstances of the accident and injury are to be established by those who saw them. Not only are the facts and circumstances of the injury to be established by an eyewitness, but also those of the accident; that is, the operating cause of the injury. Enough must be testified to by eyewitnesses to show the operating cause of the injury, or at least to show that at the time of the injury there was an operating cause to which the accident may fairly be attributed, and to indicate in a general way the nature of that cause and the manner of its working. To illustrate: Suppose a person standing upon the shore sees not far out a boat sailing peacefully along in a mild breeze, with a competent and careful man at the helm. The boat is so large and steady that it is not likely to be capsized by any movement that the man would make, nor by the wind as then blowing. In no sense can the boat be said to be in then present peril from any cause. Suppose the observer leaves the shore and returns in an hour, and then sees the upturned boat near where he first saw it. During his absence an accident has happened resulting in the upsetting of the boat. Can it be said that he has seen the circumstances of the accident within any fair interpretation of the language? He has seen no cause in operation to which the accident may be fairly attributed. But suppose that when he first sees the boat, or while he is looking at it, a squall suddenly looms up in the distance and rapidly approaches the boat. He sees it strike the boat, putting her in evident peril. Wanting to get a better look, he runs to a house for a spyglass, is gone only a few minutes, and when he returns sees only a capsized boat. Such a man is an eyewitness of the accident, although he did not actually see the boat capsize. He saw the boat in peril from a then impending cause. He saw the cause at work, and he saw what was the natural effect of such a cause. That is far enough; and in such a case the cause of the accident must be held to have been established by an eyewitness within the meaning of the policy."

In the instant case no one heard the shot, although it must be conceded under the record that insured died as a result of a rifle

shot. Leaving out all presumptions and inferences as to the nature of the operating cause, the proof adduced would in itself be insufficient, as we think, to show (by eyewitnesses) that the gun was accidentally discharged. Not only was the burden upon the plaintiff to show that the gun was accidentally discharged; but she had to do this by eyewitnesses of the event, and that event was, of course, the discharge of the gun.

If the by-law is good, we think plaintiff has failed to make out a case.

II. It is contended that the by-law is contrary to public policy, in that it attempts to modify and control the procedure of courts of justice. It does not in any manner deprive courts of their jurisdiction, but simply provides a rule of evidence or a condition precedent or subsequent to a right of recovery. We see nothing in the by-law contrary to public policy. Contracts relating to procedure have frequently been sustained. The parties may, by contract, fix their own statute of limitations. See *Harrison v. Hartford F. Ins. Co.* 102 Iowa, 112, 47 L.R.A. 709, 71 N. W. 220. They may also specify the terms and conditions of liability, even though without the contract recovery might be had. *Griswold v. Illinois C. R. Co.* 90 Iowa, 265, 24 L.R.A. 647, 57 N. W. 843. A contract may be made waiving a jury trial. *Bank of Columbia v. Okely*, 4 Wheat. 235, 4 L. ed. 559. A by-law much like the one now before us was applied in *National Acci. Soc. v. Ralstin*, supra; *Kelly v. Supreme Council*, C. M. B. A. 46 App. Div. 79, 61 N. Y. Supp. 394. A contract providing a rule of evidence was also upheld by this court in *Russ v. The War Eagle*, 14 Iowa, 363.

The legislature has not spoken upon this subject, and, until it does so, we see nothing inimical to public policy in the by-law now before us.

For the reasons pointed out, the judgment must be, and it is, reversed.

Ladd, Ch. J., and Gaynor and Withrow, JJ., concur.

IOWA SUPREME COURT.

A. PATTEN, Appt.,
v.

H. B. HASELTON et al.

(— Iowa, —, 146 N. W. 477.)

Elections — death of successful candidate — right of rival.

Where a candidate for election dies before election day, too late to have a candi-

date substituted as provided by statute, or to notify the voters of his death, so that a majority vote for him in ignorance of his death, the person receiving the next highest number of votes cannot be declared elected, but a vacancy will exist in the office, where the statute provides that the person having the greatest number of votes shall be declared elected.

(April 7, 1914.)

A PPEAL by plaintiff from a judgment of the District Court for Carroll County dismissing his petition for a writ of mandamus to compel defendants to declare him elected at a general election as a member of the board of supervisors of Carroll County. Affirmed.

Statement by Evans, J.:

Action of mandamus against the members of the board of supervisors of Carroll county acting as canvassers of election re-

Note. — Right of candidate receiving next highest number of votes where person receiving highest number died before election.

As to the closely related question of right of candidate receiving next highest number of votes in the event that the person receiving the highest number is ineligible, see the notes to *State ex rel. Clawson v. Bell*, 13 L.R.A. (N.S.) 1013, and *Hanson v. Grat-tan*, 34 L.R.A. (N.S.) 240.

For a note on when vacancy in party ticket occurs within a statute authorizing the filling of vacancies, see *State ex rel. Curryea v. Wells*, 41 L.R.A. (N.S.) 1088.

It is held that where a person who has died shortly before or during an election receives the highest number of votes, and the voters had no knowledge of this fact, the votes cast for him are so far of force as to prevent the election of the candidate receiving the next highest number of votes.

Thus, the candidate receiving the next highest number of votes was held not to have been elected in *State ex rel. Sheets v. Speidel*, 62 Ohio St. 156, 56 N. E. 871, where the one receiving the highest number of votes died during the election. The court here said: "The claim of Cover that he has the right to be inducted into the office of sheriff of Clermont county has no foundation. Whether Buvinger, the deceased candidate, was elected or not, Cover was not elected. No process of valid reasoning can make 3,802 votes to be more than 4,369 votes. Not merely a plurality, but a majority, of all the votes cast for sheriff on that election day, were cast against Cover; and it does not avail him that the majority of votes was cast, in good faith, for a man who had died during the election. The majority was not for Cover, and that is all he can make of it. The election may fail altogether by reason of the death of the person receiving the largest number of votes

turns. The prayer of the petition is that the defendants be ordered to declare the plaintiff duly elected at the general election of 1912, as a member of the board of supervisors of Carroll county for the term beginning January 1, 1914. Upon trial had, plaintiff's petition was dismissed, and he appeals.

Messrs. Lee & Robb and Charles C. Helmer, for appellant:

The death of a candidate before election day creates a vacancy in the ballot, which may be filled in the manner provided by the statute.

Iowa Code, §§ 1102, 1108; Code Supp. 1907, §§ 1087a-24.

The person receiving the highest number of votes should be declared elected.

Iowa Code, § 1170.

A dead man is not a "person" within the meaning of the statute.

State ex rel. Bancroft v. Frear, 144 Wis. 79, 140 Am. St. Rep. 992, 128 N. W. 1068; Morton v. Western U. Teleg. Co. 130 N. C. 299, 41 S. E. 484.

The natural and obvious signification of the word "person" in the statute is a living being. When a statute speaks of one who is dead, they speak of him as a "deceased person" or a "person deceased."

cast, or by reason of ineligibility of the successful candidate, or by reason of irregularities, but that could not elect a man who in fact has received a smaller number of votes than his opponent. We will not attempt to follow and discuss all the refinements of reasoning in which counsel indulge on this subject; but it is worthy of note that it is not made manifest to us that a single vote was cast after Buvinger's death. It is true that the argument is that the death of the candidate one hour and three quarters before the close of the election made a vacancy on the ticket, and that the case is one in which the law will not regard a fractional part of a day; and that if there was a vacancy on the ticket for part of the day, it was a vacancy for the whole day, and therefore that none of the 4,369 votes cast for Buvinger were cast for a living person. We have already answered that argument; but it may be added that if it is just reasoning that there was a vacancy on the ticket for the whole day, because there was a vacancy for one hour and three quarters, it is equally fair to maintain that there was no vacancy at all on the ticket, during that whole day, because there was no vacancy on the ticket during ten hours and one quarter of the day."

And in harmony with the preceding decision, it was held in *Howes v. Perry*, 92 Ky. 260, 36 Am. St. Rep. 591, 17 S. W. 575, where the candidate for clerk of court who received the greatest number of votes died during the election, that the only other

Sawyer v. Mackie, 149 Mass. 269, 21 N. E. 307; *Morrill v. Lovett*, 95 Me. 165, 56 L.R.A. 634, 49 Atl. 666.

Mandamus is the appropriate remedy to compel the board of supervisors, acting as canvassers of election returns, to declare elected and so certify the persons receiving the highest number of votes cast.

Bradfield v. Wart, 36 Iowa, 291.

Messrs. Reynolds & Meyers, E. A. Wissler, Douglas Rogers, and Brown McCrary, for appellees:

Mandamus can be maintained only when there is no other adequate remedy.

26 Cyc. 139.

The court has no authority by mandamus to compel the canvassing board to declare plaintiff elected to an office, when the law requires such officers to act upon the returns of the various precincts as made, and no other.

Code, §§ 1138, 1143, 1144, 1149; 14 Am. & Eng. Enc. Law, 145.

Plaintiff had the right to contest the election upon the grounds alleged in his petition, to wit (in any error of the board of canvassers in declaring the results). On another ground "any other cause which shows that another person was the person, elected."

opposing candidate was not entitled to the office.

A distinction has been recognized between cases where the death of the candidate was generally known to the voters at the time of voting, and those where the death was not known.

Thus, in *State ex rel. Bancroft v. Frear*, 144 Wis. 79, 140 Am. St. Rep. 992, 128 N. W. 1068, this distinction was adhered to, and where one whose name had been printed on the primary ballot as a candidate met a tragic death shortly before the election, and the fact was published in the newspapers of the state and disseminated by means of telegrams and party workers, and he received the highest number of votes, it was held that under the circumstances it might be assumed that the voters generally were informed of the candidate's death, and that the votes cast for him could not be counted, and that the one receiving the next highest number was entitled to have his name placed on the party ticket. The court said: "Elections are held for the purpose of selecting officers, not for the purpose of creating a vacancy to the end that the place may be filled by appointment or even by a new election. The function of the voter is to express an affirmative choice of some person; not to content himself with merely expressing his disapproval of certain candidates. If a vote for a man known by the voter to be dead can be counted, then a vote for a stick or a stone or for 'the man in the moon,' as is said

State ex rel. Cormie v. Ramsey, 27 S. D. 302, 130 N. W. 768.

The board of canvassers have no right to go behind the returns.

Jones v. Fisher, — Iowa, —, 137 N. W. 940; *Ferguson v. Henry*, 95 Iowa, 439, 64 N. W. 292.

While mandamus will lie to compel the board of canvassers to discharge their ministerial duties in canvassing votes or returns, it will not lie where the right of the relator sought to be enforced is not clear.

26 Cyc. 275.

When it becomes necessary to go behind the returns and consider the questions touching the legality of the election, mandamus is not the proper remedy.

Hoy v. State, 168 Ind. 506, 81 N. E. 509, 11 Ann. Cas. 944.

Where electors vote for an ineligible candidate without knowledge of his disqualification, and such candidate receives a plurality of the votes cast, his disqualification does not result in electing the candidate receiving the next highest number of votes. In such a case the votes cast for the ineligible candidate must be counted, and there is a vacancy in the office instead of an election of the candidate receiving then a plurality of the votes.

State ex rel. Dunning v. Giles, 2 Pinney

(Wis.) 166, 52 Am. Dec. 149; *State ex rel. Off v. Smith*, 14 Wis. 497; *State ex rel. Holden v. Tierney*, 23 Wis. 430; *Naar, Elections*, 163; *Barnum v. Gilman*, 27 Minn. 466, 38 Am. Rep. 304, 8 N. W. 375; *Opinion of Justices*, 38 Me. 598; *People ex rel. Crawford v. Molitor*, 23 Mich. 341; *Saunders v. Haynes*, 13 Cal. 145; *People ex rel. Furman v. Clute*, 50 N. Y. 451, 10 Am. Rep. 508; *State ex rel. Hardwick v. Swearingen*, 12 Ga. 23; *State ex rel. Goodell v. McGeary*, 69 Vt. 461, 44 L.R.A. 446, 38 Atl. 165; *Re Corliiss*, 11 R. I. 638, 23 Am. Rep. 538; *Com. ex rel. McLaughlin v. Cluley*, 56 Pa. 273, 94 Am. Dec. 75; *Dryden v. Swinburne*, 20 W. Va. 89; *State ex rel. Bancroft v. Frear*, 144 Wis. 79, 140 Am. St. Rep. 992, 128 N. W. 1068; *State ex rel. Sheets v. Speidel*, 62 Ohio St. 156, 56 N. E. 871; *Howes v. Perry*, 92 Ky. 260, 36 Am. St. Rep. 591, 17 S. W. 575.

Votes cast for a candidate with knowledge of his death should be counted against the other candidate.

State ex rel. Herget v. Walsh, 7 Mo. App. 142; *Sheridan v. St. Louis*, 183 Mo. 25, 81 S. W. 1082, 2 Ann. Cas. 480.

Though, at the time of trial, relator had a right to a certificate of election, his failure to qualify within the time prescribed by statute creates a vacancy, and

in the English cases, should be counted. It is true that in this country the majority rules, but the majority should not pursue a policy of mere negation. If the majority should contumaciously persist in voting for candidates notoriously ineligible, it might not be possible to fill the office at all. The illustration may be somewhat far-fetched, but instances have occurred in England where an ineligible candidate for member of Parliament received a majority of the votes cast at election after election, and such occurrences are by no means impossible in this country. Besides, there can be no affirmative choice by the electors unless a new election is provided for and held. Either the Republican state central committee or the governor must select the new candidate, if there is a vacancy in the instant case. It may be that a single officer or a committee consisting of a couple of dozen members could make a selection that would be more acceptable to the majority in the present instance than would be the candidate for whom over 56,000 votes were cast, but conditions might easily change so that the contrary would be true."

And it was further held that a statute providing that "if the nominee die after the ballots are printed, and no nomination shall be made as herein provided, the votes cast for him shall be counted and returned, and if he shall receive a plurality, the vacancy shall be filled as in case of vacancies occurring by death after election," was not incorporated into the primary election law 51 L.R.A. (N.S.)

by § 25, providing that the statutes in force in relation to the holding of elections, the solicitation of voters at the polls, the challenging of votes, the manner of conducting elections, of counting the ballots and making return thereof, and all other kindred subjects, should apply to all primaries, in so far as they were consistent with the primary act, and it was therefore held that such statute did not affect the holding that the votes cast for the deceased candidate should not be counted for any purpose. *Ibid.*

But in *State ex rel. Herget v. Walsh*, 7 Mo. App. 142, it was held that the fact that the death a few hours before the opening of the polls, of the candidate who received the highest number of votes, and knowledge thereof by the voters and judges of the election, did not prevent the votes cast for him being counted against the candidate having the next highest number of votes; and see the quotation from this case in *PATTEN v. HASELTON*.

It was held in *State ex rel. Bancroft v. Frear*, supra, that a dead man was not a "person" within the meaning of a statute providing that "the person receiving the greatest number of votes at a primary as the candidate of a party for an office shall be the candidate of that party, and his name as such candidate shall be placed on the official ballot at the following election," the court remarking that the word "person," as it is ordinarily used, means a living human being.

J. T. W.

he would have no further interest in this action, and it therefore becomes a moot question, and plaintiff's appeal should be dismissed.

State ex rel. Brick v. Cahill, 131 Iowa, 156, 105 N. W. 691; Davis v. Boyer, 122 Iowa, 132, 97 N. W. 1002; Potts v. Tuttle, 79 Iowa, 253, 44 N. W. 374; State ex rel. Harnett v. Powell, 101 Iowa, 382, 70 N. W. 592.

Evans, J., delivered the opinion of the court:

Some controversy is presented over questions of practice. The defendants challenge the right of the plaintiff to try the question presented in an action of mandamus. In view of our conclusions on other features of the case, we shall have no occasion to pass upon this question. Also the appellant contends that the case is triable here *de novo*, on appeal, whereas the defendants contend that it is triable on errors only.

We find ourselves in accord with the trial court in the finding of facts. It is therefore immaterial, for the purpose of this appeal, whether it be deemed triable *de novo* or otherwise.

The material facts are undisputed. The plaintiff was the regular Republican candidate upon the ballot in the general election of 1912 in Carroll county, for the office of county supervisor, for the term to begin January 1, 1914. One Shirek was the regular Democratic candidate upon the ballot for the same office. At 8:30 o'clock of the night preceding the election day, Shirek died. The election proceeded on the following day without any change in the official ballot, and without any attempt at filling the vacancy on the part of the party officials, and without knowledge on the part of the voters generally that the death of the candidate had occurred. Upon a canvass of the election returns, by the canvassing board, it was found that more than 1,800 votes had been cast for Shirek, and that about 1,100 were cast for the plaintiff. No other candidate received an equal number with the plaintiff. It will be noted, therefore, that the highest number of votes cast, were cast for the deceased candidate, and the next highest number were cast for the plaintiff. It is the contention of plaintiff that the death of Shirek prevented his election, even though a majority of the votes were cast for him, and that the plaintiff therefore was the person who received the greatest number of votes. The argument is that the death of Shirek before the day of election created a vacancy upon the Democratic ticket, and that the statute points out the method by which such va-

cancy should have been filled, and that the failure of the party officials to adopt such method left the Democratic ticket without a candidate, and rendered nugatory all votes which purported to be cast for the dead candidate. The following sections of the Code are involved:

Section 1087 a—24 (Code Supp. 1907): "Vacancies occurring after the holding of any primary election occasioned by death, withdrawal or change of residence of any candidate, or from any other cause, shall be filled by the party committee for the county, district, or state, as the case may be, representing the party in which the vacancy nomination occurs."

Section 1102: "If a candidate declines a nomination, or dies before election day, or should any certificate of nomination or nomination paper be held insufficient or inoperative by the officer with whom it may be filed, or in case any objection made to any certificate of nomination, nomination paper, or to the eligibility of any candidate therein named, is sustained by the board appointed to determine such questions as hereinafter provided, the vacancy or vacancies thus occasioned may be filled by the convention, caucus, meeting or primary, or other persons making the original nominations, or in such a manner as such convention, caucus, meeting or primary has previously provided. If the time is insufficient for again holding such convention, caucus, meeting or primary, or in case no such previous provisions being made, such vacancy shall be filled by the regularly elected or appointed executive or central committee of the particular division or district representing the political party or persons holding such convention, primary, meeting or caucus, and certified as hereinbefore provided. The certificates of nominations made to supply such vacancies shall state, in addition to the facts hereinbefore required, the name of the original nominee, the date of his death or declination of nomination, or the fact that the former nomination has been held insufficient or inoperative, and the measures taken in accordance with the above requirements for filling a vacancy, and shall be signed and sworn to by the presiding officer and secretary of the convention, caucus, meeting or primary, or by the chairman and secretary of the committee, as the case may be."

Section 1108: "The name supplied for a vacancy by the certificate of the secretary of state, or by nomination certificates or papers for a vacancy filed with the county auditor, or city or town clerk, shall, if the ballots are not already printed, be placed on the ballots in place of the name of the

original nominee, or, if the ballots have been printed, new ballots, whenever practicable, shall be furnished. Whenever it may not be practicable to have new ballots printed, the election officers having charge of them shall place the name supplied for the vacancy upon each ballot used before delivering it to the judges of election. If said ballots have already been delivered to the judges of election, said auditor or clerk shall immediately furnish the name of such substituted nominee to all judges of election within the territory in which said nominee may be a candidate, and such election officer having charge of the ballots shall place the name supplied for the vacancy upon each ballot issued before delivering it to the voter, by affixing a paster, or by writing or stamping the name thereon."

Section 1170: "All canvassers of returns shall be public, and the persons having the greatest number of votes shall be declared elected."

It is argued that a dead man is not a "person," within the meaning of § 1170. As a legal proposition, this may be conceded; but it does not become decisive of the case. It can properly be said that, because of his death, Shirck was not a "person having the greatest number of votes." This was the holding in *State ex rel. Bancroft v. Frear*, 144 Wis. 79, 140 Am. St. Rep. 992, 128 N. W. 1068, which is relied on by appellant. It can also be properly said that, because Shirck was not a "person" within the meaning of § 1170, the canvassing board could not declare him elected. On the other hand, though plaintiff was a "person" within the meaning of this section, yet, in an important sense, he did not have the "greatest number" of votes. It is quite clear to us that the case cannot be determined upon the mere terms of this section, because the contingency now confronting us was not within the contemplation of such section.

Turning to the sections above quoted relating to the filling of vacancies upon a ballot, it would be uncandid to hold, upon the facts appearing in this record, that it was a practical possibility for the party officials to have filled the vacancy in time for the opening of the polls. With one or two exceptions, none of these officials knew of the death until the following day and after the voting had begun. The precise question presented to us therefore is: Where a regular candidate dies only a few hours before election day, so that the time intervening between such death and the opening of the polls is so brief that fair compliance with the provisions of the statute for filling vacancies is impossible, and § 1 L.R.A. (N.S.)

where the name of such dead candidate appears upon the official ballot at the time of the voting, and where the fact of his death is not generally known to the voters, and where a majority of the voters vote for him as a purported candidate, will the candidate having the next highest number of votes be entitled, as a matter of law, to claim his own election? This precise question is involved in some doubt. It has not frequently arisen, and the authorities are very few. Analogous questions, however, have arisen quite frequently, and the authorities thereon may be looked to for some light hereon.

It has not infrequently happened that ineligible candidates have been voted for by a majority of the voters. Though the candidate thus voted for by a majority cannot be declared elected because of his ineligibility, and the majority vote is thereby rendered ineffective for such purpose, yet it is quite uniformly held that such majority vote is effective to forbid the election of the candidate having the next highest number of votes. The effect of such majority vote is to render the purported election nugatory, and to leave a vacancy in the office thus attempted to be filled. *State ex rel. Sheets v. Speidel*, 62 Ohio St. 156, 56 N. E. 871; *State ex rel. Dunning v. Giles*, 2 Pinney (Wis.) 166, 52 Am. Dec. 149; *State ex rel. Holden v. Tierney*, 23 Wis. 430; *Barnum v. Gilman*, 27 Minn. 466, 38 Am. Rep. 304, 8 N. W. 375; *People ex rel. Crawford v. Molitor*, 23 Mich. 341; *State ex rel. Goodell v. McGear*, 69 Vt. 461, 44 L.R.A. 446, 38 Atl. 165; *People ex rel. Furman v. Clute*, 50 N. Y. 451, 10 Am. Rep. 508; *State ex rel. Bancroft v. Frear*, 144 Wis. 79, 140 Am. St. Rep. 992, 128 N. W. 1068; *State ex rel. Clawson v. Bell*, 169 Ind. 61, 13 L.R.A. (N.S.) 1013, 124 Am. St. Rep. 203, 82 N. E. 69.

Some authorities make a distinction as between cases where the ineligibility of the candidate was generally known to the voters at the time of the voting, and those cases where such ineligibility was not known. We have no occasion to deal with that distinction in the present case.

In cases where the candidate died upon election day, the authorities also seem to be uniform. If, in such a case, the majority or plurality of the voters vote for the dead candidate, such candidate cannot thereby be deemed elected. But such casting of the majority or plurality vote is nevertheless effective to prevent the election of the candidate having the next highest number of votes. *State ex rel. Sheets v. Speidel*, 62 Ohio St. 156, 56 N. E. 871; *Howes v. Perry*, 92 Ky. 260, 36 Am. St. Rep. 591, 17 S. W. 575. No case is brought to our attention hold-

ing otherwise on this question, and appellant concedes such rule as here stated. The general reason underlying the foregoing decisions is that, though the vote of the majority cannot be given effect to the extent of electing an ineligible or dead candidate, because such election is legally impossible, yet that such majority vote is effective as an expression of the will of the voters, such will being thwarted by the unforeseen contingency, and that it is sufficient to negative a claim of election as against the minority candidate. The rule is a logical and reasonable one, at least where the voters are in ignorance of the disability. Under our present statutes, the voter receives the official printed ballot at the hands of public officials. He has a right to presume that the purported candidates are eligible and living. If the fact be otherwise, it presents a case analogous to fraud, accident, or mistake in civil transactions, and furnishes quite as persuasive a reason why the attempted election of a candidate in such a case should be deemed a nullity. We see no logical reason why the same rule should not be held fairly applicable to such a case as the one before us. It tends to the protection of majority rule, which is one of the fundamentals of our form of government. The appellant relies at this point upon *State ex rel. Bancroft v. Frear*, 144 Wis. 79, 140 Am. St. Rep. 992, 128 N. W. 1068. In that case the validity of a nomination at a primary election was involved. The purported candidate, who received a majority of the votes, had died several days before the election was held. The fact of his death was universally known. The statutes of that state provided for the manner of filling the vacancy upon the primary ballot. No attempt was made to comply with these statutes. It was held that, under the provisions of the Wisconsin statutes, the candidate having the next highest number of votes was entitled to the nomination. We think the case is not sufficiently in point as to its decisive features to warrant us in deeming it as an authority to be followed in the case at bar. The conclusion reached therein was based upon the expressed terms of the Wisconsin statute, and upon the further fact that such statutes were knowingly ignored by the party officials, and that the votes were cast with knowledge of the voters that the purported candidate was not living. We have no occasion, therefore, to agree or disagree with its reasoning or its conclusions. The closeness of the question presented in that case is indicated by the fact that the decision was by a divided court, 51 L.R.A. (N.S.)

four to three. If in the case at bar it appeared that the fact of Shirck's death was generally known to the voters, and especially if it appeared that there had been sufficient time since the death to comply with the statutory provisions as to filling vacancies in such cases, a materially different question might be presented. For our present purposes, we give that phase of the question no consideration, and therefore reach no conclusion thereon.

The conclusion which seems to us the rational one in the case at bar has definite support in *State ex rel. Herget v. Walsh*, 7 Mo. App. 142; *Howes v. Perry*, supra. The following excerpts from *State v. Walsh* will indicate the general nature of the holding: "Yet, unless we depart from the principle upon which the only sound rule rests, we must hold that the ballots upon which was the name of Mr. Miltenberger are properly counted, not for himself, for he was not in existence, but against his opponent, so far as to render a new election necessary. The relator had no plurality of votes. The will of the electors was declared against him. He is not 'the person having the highest number of votes,' to whom the certificate must, under the statute, be given; for these words imply that the successful candidate shall be the choice of the majority of voters who vote. Thus, the case contemplated by the statute is not met. Through the death of one of the candidates immediately before the polls are open, an exigency arises not contemplated by the law, and the obvious consequence is a new election. It is not the accidental death of his opponent, but the votes of electors, which should give the certificate to a candidate. If it is true that a majority vote operates only to elect, and, failing of that, goes for nothing, then the most innocent mistake of fact on the part of the majority—as, the age of a person voted for—might avail to elect a candidate who had received only a few scattering votes. It is said, on the other hand, that, if the American doctrine is correct, votes cast for a fictitious person avail to defeat an eligible candidate; that, if the voters choose to stay away, or, what is the same, throw away their votes, those votes should not be counted as against valid votes. The force of this argument lies in the assumption of an intent to throw away the vote. If the voter can make his vote effective only by voting in a certain way, and if the result of his voting in this way is to secure a new election, at which the majority can elect, how can it be assumed that the voter intended to throw away his vote? If the death of a candidate of a political party takes place,

as here, immediately before the election, there is no time for organization or for preparing new ballots. Not only do our laws recognize primary organization, and minutely describe what ballots shall be legal, but the modes of selecting candidates for political offices are parts of the customs of the country. If the sudden death of a candidate renders the votes of electors ineffective for some purpose, it is not therefore to deprive the voter of his vote. The majority are not obliged to fold their hands, nor are the minority entitled, because of the death, to prevail over the majority. Yet this would be the result if the majority vote is not to be counted against the minority candidate. But the majority of voters, so far from desiring or intending to throw their votes away, wish to use them to their utmost effect; and it is only by a fiction, raised, if at all, by the law, that the majority in such cases throw their votes away. This presumption of an intent on the part of the voter that his vote should not, for any purpose, be effectual, any more than if it were blank paper, is, indeed, to a great extent, a fiction of the English courts, and political considerations have probably contributed to produce it."

Without fully committing ourselves to the reasoning above quoted, we are in accord with the conclusion reached, so far as applicable to the fact in the case at bar. The cited case was later followed by the same court in *Sheridan v. St. Louis*, 183 Mo. 25, 81 S. W. 1082, 2 Ann. Cas. 480.

Our citation of the foregoing Missouri cases is made with the reservation already indicated, viz.: These cases treat the question of knowledge by the voters of the death or ineligibility of the candidate as not material. On this phase of the question we withhold opinion.

What we hold herein is that, where the death of a candidate before the day of election is so recent as to render it practically impossible to properly fill the vacancy, and where a plurality of the votes are cast for the deceased candidate without knowledge on the part of the voters generally that he is deceased, the plurality vote thus cast will be effective to prevent the election of another candidate for the same office having a lesser number of votes. The appellant herein was therefore not entitled to claim election, and his petition was properly dismissed.

Such order of the District Court is therefore affirmed.

Ladd, Ch. J., and Weaver, Gaynor, and Preston, JJ., concur.
51 L.R.A. (N.S.)

KENTUCKY COURT OF APPEALS.

SECURITY TRUST COMPANY, Trustee of
Mrs. Annie B. Barclay, et al., Appts.,
v.

COMMONWEALTH OF KENTUCKY et al.

(156 Ky. 455, 161 S. W. 510.)

Succession tax — proceeding to determine liability.

1. Where, under the inheritance tax law, the duty of collecting such tax is imposed upon all administrators, executors, and trustees, and the sheriff of each county, a trustee or administrator cannot relieve himself from liability for the tax by stating a case in general terms, and calling upon the sheriff to show affirmatively why the commonwealth is entitled to the tax.

Same — property liable — conveyance to trustee.

2. Personal property which has been conveyed to a trust company under a contract by which it undertook to manage and control it during the owner's lifetime, paying her the net income therefrom, and at her death to distribute it among her heirs at law under the statute of descent and distribution then in force in the state, comes to the heirs of such owner by the inheritance laws, and is therefore subject to the inheritance tax, although the owner was a non-resident.

(December 16, 1913.)

APPEAL by plaintiff and certain defendants from a judgment of the Circuit Court for Fayette County in favor of the Commonwealth in an action for the settlement of the estate of Annie B. Barclay, deceased. Affirmed. The facts are stated in the opinion.

Messrs. Hunt, Bullock, & Hunt and S. M. Wilson, for appellants:

Appellants are not liable for inheritance taxes on amounts paid to them under the deed of trust.

1 Cooley, Taxn. 3d ed. p. 452.

An inheritance tax is a special and peculiar burden imposed not upon property, but upon the right of succession to property, and should be construed strictly, and where any doubt exists as to the meaning of the law, or as to the applicability of the law to a particular case, such doubts should

Note.—The question whether personal assets belonging to a nonresident, but held within the state in trust, are subject to the payment of a succession tax upon his death, is considered in the note to *Re Helena*, 46 L.R.A. (N.S.) 1176, which covers the general question as to physical presence or absence of personal property, or evidence thereof, as affecting liability to succession tax.

be resolved in favor of the citizen and against the government.

People v. Koenig, 37 Colo. 283, 85 Pac. 1129, 11 Ann. Cas. 140; *Re Harbeck*, 161 N. Y. 211, 55 N. E. 850.

Mr. D. Gray Falconer for appellees.

Nunn, J., delivered the opinion of the court:

In September, 1911, the Security Trust Company of Lexington entered into a written contract with Mrs. Annie D. Barclay, who, according to the contract, was a resident of Chicago, Illinois. By the contract the trust company agreed to act as trustee for Mrs. Barclay, and as such trustee acknowledged that it had possession of her entire estate, and undertook to manage and control the same during her lifetime. Until her death it would pay her the net income therefrom, and upon her death it would distribute the same "among the heirs at law of the party of the first part [Mrs. Barclay], under the statute of descent and distribution then in force in Kentucky," or, in the event she left a will, same to be paid the beneficiaries named in the will, and which will "may be probated as such by the courts of the commonwealth of Kentucky."

Mrs. Barclay died intestate about a year later, and left an estate of about \$28,000, consisting of personality only. The question presented here is to the application of inheritance tax law provided in article 19 of the Kentucky Statutes (§§ 4281a-4281s). Her only heirs at law are the appellants, who are brothers and sisters, and some children who are descendants of two deceased sisters. It is conceded that this class of kindred do not come within the exceptions provided in the inheritance tax law, and, if the estate is taxable, then such taxes should be deducted from the estate before distribution.

The trustee brought this action in equity for a settlement of the estate. The only excuse for it, and in fact its avowed purpose, is to have the lower court guide and direct it in the payment of inheritance taxes, and to that end it makes the sheriff of Fayette county a party defendant, and asks that he be required to assert any claim which the commonwealth may have against the estate for inheritance taxes. The heirs at law, including appellants, are also made parties defendant. The petition states that Mrs. Barclay died in Kentucky, that it has in possession all of her estate, and the clear inference is that all of it is in Kentucky. It is true the trust company "states that said estate in its hands is not liable for any inheritance taxes to the commonwealth of Kentucky, as it is advised." This is simply

a conclusion of the pleader. Subsequently, the trust company qualified as administrator of the estate, and in that capacity made itself a party to the action, praying for the advice of the court upon the same matter suggested in the original petition.

Under the state of facts presented by the record, it is immaterial where Mrs. Barclay resided or was domiciled at the time of her death. The actual situs of her property was in Kentucky, and that fact governs the application of the inheritance tax law. Section 4281a of the Kentucky Statutes provides: "All property which shall pass, by will or by the intestate laws of this state, from any person who may die seized or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state, . . . shall be, and is, subject to a tax," etc.

Under the inheritance tax law all administrators, executors, trustees, and the sheriff are made servants of the commonwealth, and the duty is especially imposed upon them of collecting taxes due upon inheritances. There is no right or authority in either one to shift this duty upon the other. The trustee has no right to state a case in general terms, and call upon the sheriff to show affirmatively why the commonwealth is entitled to the taxes. If the sheriff by lax pleading, or no pleading at all, should fail in the performance of his duty, the trustee or administrator could not be excused of liability for the taxes if, by an incomplete statement of the facts, it secured direction from the court to distribute the estate among the heirs. However, the appellants, heirs at law, are in no position to complain of the faulty pleadings of either the sheriff or trustee. These appellants were parties from the beginning, and they never filed any answer or pleading of any sort, and never asserted any claim for relief or exemption from the inheritance taxes.

It is insisted that this property does not come to the appellants by the inheritance laws, or by any deed, grant, sale, or gift made in contemplation of the death of the grantor. It comes to them by the deed above referred to, upon the death of the grantor. If they are not entitled to it by the laws of descent and distribution of this state, then they are not entitled to it at all, for by the very terms of the deed the trust company, upon the death of Mrs. Barclay, is to distribute it, and to only those who are her heirs at law "under the statute of descent and distribution then in force in Kentucky."

In our opinion, the lower court properly

charged this estate with inheritance taxes, and its judgment is therefore affirmed.

Petition for rehearing denied.

MICHIGAN SUPREME COURT.

LAKE FARM

v.

DISTRICT BOARD OF SCHOOL DISTRICT NO. 2, TOWNSHIP OF KALAMAZOO, Plff. in Certiorari.

(— Mich. —, 146 N. W. 115.)

School — right of children in institution.

Children of nonresident parents who are committed to a charitable institution within the limits of a school district, which has

Note. — What constitutes residence entitling child to the privileges of public schools.

This note supplements notes on the subject to *Sherlock v. Stuart*, 26 L.R.A. 581, and *Stanford Graded Common School Dist. v. Powell*, 36 L.R.A. (N.S.) 341.

In *LAKE FARM v. DISTRICT BOARD* the holding of the court that neglected boys committed to a private corporation for support, care, and education, which was untaxed because a charitable institution, were not entitled to free admission to public schools of the district in which the corporation was located, was in part based upon the fact that the institution to which these boys were committed did not pay any school tax in the district.

In *Black v. Graham*, 238 Pa. 381, 44 L.R.A. (N.S.) 693, 86 Atl. 266, under a somewhat similar state of facts, except that dependent and incorrigible children were committed to the care of different persons who were residents of a school district, and who were compensated either by the county or by other persons legally responsible for the support of the particular child, the conclusion was also reached that such children were not legally residents of the school district of the persons with whom they lived, within the meaning of the statute, but were residents of the school districts of their respective parents or guardians, or of the persons sustaining parental relation to them at the time the juvenile court took charge of them. The court said that these children were not in any sense members of the family to which they were committed; that the relation established by order of the juvenile court and the contract made thereunder was really penal in its nature, and was not permanent.

In *State ex rel. Halbert v. Clymer*, 164 Mo. App. 671, 147 S. W. 1119, a boy was held, to all intents and purposes, a resident of the school district of his grandfather, with whom he lived as a member of the 51 L.R.A. (N.S.)

undertaken to furnish them with support and education, are not entitled to the benefits of a statute providing that all persons of certain age, residents of any school district, shall have equal right to attend any school therein.

(March 26, 1914.)

CERTIORARI to the Circuit Court for Kalamazoo County to review a judgment granting a writ of mandamus to compel respondents to allow certain boys, inmates of the plaintiff institution, to attend school in their district. Reversed.

The facts are stated in the opinion.

Mr. Lynn B. Mason, for plaintiff in certiorari:

Children of school age, to entitle them to free admission to the public schools, must be bona fide residents of the district in

family under an agreement made with his father, who resided in another district, by which the grandfather agreed to care for and educate him, where the contract was not made for the sole purpose of permitting the boy to attend the public school located in the district of the grandparent's residence, there being no claim that the contract was not made in good faith, or that it was not being strictly performed by the parties thereto. And hence the boy was held entitled to enjoy the public school facilities of the district of the grandfather's residence without payment of tuition. The court said that the policy of the state "is to educate and furnish free of charge good schools for all children of school age, and even to compel the attendance of children thereto." And the court quotes approvingly from *State ex rel. School Dist. v. Thayer*, 74 Wis. 48, 41 N. W. 1014, to the effect that, "to secure these ends, laws relating to public schools must be interpreted to accord with this dominant controlling spirit and purpose in their enactment, rather than in the narrower spirit of their possible relations to question of pauperism and administration of estates."

In *Board of Education v. Crill*, 149 App. Div. 407, 134 N. Y. Supp. 311, reversing the same case as reported in 73 Misc. 472, 133 N. Y. Supp. 394, which is referred to in the note to *Stanford Graded Common School Dist. v. Powell*, 36 L.R.A. (N.S.) 343, it is held that where the parents of children lived in the country and this country place constituted the father's permanent place of residence, and was his domicile, and he was assessed there as a resident taxpayer, and he registered and voted there after he moved to another district, and was elected to the office of supervisor, and qualified and acted as such while he was living in the other district, the children were not entitled to the public school facilities of the latter district without the parent paying tuition therefor. A. G. S.

which they seek to attend school, and mere sleeping, eating, and physical presence in the district, of themselves, and independent of the conditions, circumstances, and purposes of their presence there, are not sufficient to constitute a "residence" for common school purposes.

35 Cyc. 1112; Board of Education v. Foster, 116 Ky. 484, 76 S. W. 354, 3 Ann. Cas. 692; School Dist. v. Patterson, 10 Mont. 17, 24 Pac. 698; School Dist. v. Matherly, 90 Mo. App. 403, 84 Mo. App. 140; Gardner v. Board of Education, 5 Dak. 259, 38 N. W. 433; Wheeler v. Burrow, 18 Ind. 14; Haverhill v. Gale, 103 Mass. 104.

Inmates of charitable institutions are not entitled to free school privileges.

Com. ex rel. Fry v. Upper Swatara Twp. School Dist. 164 Pa. 603, 26 L.R.A. 581, 30 Atl. 507; Com. ex rel. Parris v. Brookville School Dist. (Com. ex rel. Parris v. Balmer) 164 Pa. 607, 26 L.R.A. 584, 30 Atl. 509; State ex rel. Orphan Asylum v. School Dist. 10 Ohio St. 448; Sheldon Poor House Asso. v. Sheldon, 72 Vt. 126, 47 Atl. 542; Opinion of Justices, 1 Met. 580.

Messrs. Sidney S. Wattles and Harry C. Howard, for defendant in certiorari:

The boys, Claude Diamond and Frederick Millen, are residents of the district, within the meaning of the law.

Wright v. Genesee Circuit Judge, 117 Mich. 244, 75 N. W. 465; 35 Cyc. 1112; Public Schools v. Wright, 176 Mich. 6, 141 N. W. 866; McNish v. State, 74 Neb. 261, 104 N. W. 186, 12 Ann. Cas. 806; Yale v. West Middle School Dist. 59 Conn. 489, 13 L.R.A. 161, 22 Atl. 295; Board of Education v. Hobbs, 8 Okla. 233, 56 Pac. 1052; Mizner v. School Dist. 2 Neb. (Unof.) 238, 96 N. W. 128; People ex rel. Brooklyn Children's Aid Soc. v. Hendrickson, 54 Misc. 337, 104 N. Y. Supp. 122, 125 App. Div. 256, 109 N. Y. Supp. 403; State ex rel. School Dist. v. Thayer, 74 Wis. 52, 41 N. W. 1014; State ex rel. Mickey v. Selleck, 76 Neb. 747, 107 N. W. 1022; Kramm v. Pogue, 127 Cal. 122, 59 Pac. 394; School Dist. v. Pollard, 55 N. H. 503.

Kuhn, J., delivered the opinion of the court:

The relator is a private corporation organized under the laws of this state. Its purposes, as expressed in article 2 of its articles of association, are the "support, care, and education of homeless and needy boys, and the promotion of their moral and material needs." It is maintained solely by private subscriptions and donations, and its principal office and place of business is in the city of Kalamazoo. For the purposes as above stated it maintains a farm in the 51 L.R.A.(N.S.)

township of Kalamazoo, a part of which, including the building in which the boys are kept, is situated within the boundaries of school district No. 2 of the township of Kalamazoo, the respondent herein. Being a charitable and benevolent institution within the meaning of § 9, subdiv. 1, act No. 309, of the Public Acts of 1909, and § 7, subdiv. 4, act No. 174, of the Public Acts of 1911, its property is exempt from taxation for any purpose, and is not assessed nor taxed for any purpose whatsoever. It further appears that some fourteen boys were being kept and cared for on this farm. Among them were Claude Diamond and Frederick Millen, both of the age of fourteen years. Claude Diamond, in April, 1909, being found to be a neglected child, was committed to Lake Farm by an order of the juvenile division of the probate court of Kalamazoo county, and prior to that time he had lived with his mother and stepfather in the city of Kalamazoo. Frederick Millen was likewise committed to Lake Farm in July, 1910, by said probate court, and both of his parents also resided in the city of Kalamazoo. None of the parents of these two boys were residents of school district No. 2, the respondent. Neither of the boys had ever attended the school in this district, and during a part of the school year of 1912 they attended the public schools in the city of Kalamazoo, and during the remainder of the school year had a private tutor provided for them at Lake Farm. At the beginning of the present school year, the two boys were sent to the school maintained in district No. 2, to enroll and attend. The district board, having theretofore duly determined not to receive nonresident pupils into its school, refused admission to the boys. Relator applied to the circuit court of Kalamazoo county for a writ of mandamus, and the order granting this writ is brought here by certiorari for review.

Section 4683, Comp. Laws 1897, provides as follows: "All persons residents of any school district, and five years of age, shall have an equal right to attend any school therein; and no separate school or department shall be kept for any persons on account of race or color: Provided, that this shall not be construed to prevent the grading of schools according to the intellectual progress of the pupil, to be taught in separate places as may be deemed expedient."

The sole question here involved is whether or not the inmates of an institution chartered for the support, care, and education of homeless and needy children, by their presence in such an institution for the purposes of education and maintenance, shall become entitled to free admission to the

schools of the district in which it is located, the same as resident children. The circuit judge held that, as the Lake Farm stood in *loco parentis* to the boys, they were entitled to admission, because to deny them that right would not be in accord with the liberal educational policy of the state, and would be contrary to public policy. This conclusion must necessarily be based upon the proposition that, as the institution was in *loco parentis* to the children, mere physical presence is all that is necessary to constitute a residence, within the meaning of the language of the statute. We are of the opinion, however, that in construing this language some consideration must be had of the occasion and purposes of such presence. The parents of these children were not residents of the district, and the children were brought to the farm for the very purpose of giving them proper support and education, which the institution under its charter had agreed to do. Can it be said that, after having assumed this obligation, the institution can shift this responsibility and undertaking to the school district, and oblige the school district to do what it has undertaken to do? If it can send two of its boys to the district school for free tuition, it can with equal right increase the number, being limited only by the extent of its facilities to accommodate them on the farm. The injustice and unfairness of thus forcing onto a school district the education of the inmates of such an institution can readily be seen. It might easily result in the denial to the children actually residing in the district, and whose parents sustain the school, of the facilities they would otherwise have therein. This state has from its beginning maintained a liberal educational policy, and it is one of the glories of its people that free education has always been provided for children. The purposes of this institution are indeed laudable and should be encouraged; but if it finds that it cannot fulfil its undertaking, it should decline to receive more than it can properly support and teach in conformity with its charter, and not attempt to place additional burdens upon others who are under responsibility to provide school facilities for the children who are legally dependent upon them. While we have been unable to find that this question has been raised in this state, our attention has been called to two Pennsylvania cases in which the facts were very similar to the case under consideration. See *Com. ex rel. Fry v. Upper Swatara Twp. School Dist.* 164 Pa. 603, 26 L.R.A. 581, 30 Atl. 507; *Com. ex rel. Parris v. Brookville School Dist.* (Com. ex rel. Parris v. Balmer) 164 Pa. 607, 26 L.R.A. 584, 51 L.R.A. (N.S.)

30 Atl. 509; also *State ex rel. Orphan Asylum v. School Dist.* 10 Ohio St. 448.

The principal case relied upon by appellee is *State ex rel. School Dist. v. Thayer*, 74 Wis. 48, 41 N. W. 1014. In that case the question was the relationship between the child and the person in whose family it was living. The child had a mother residing in another part of the state, and the school district attempted to apply the doctrine that its legal residence followed that of its mother. We do not decide in this case that, if these boys become bona fide members of a family who resided in the school district, and who were in the position of *loco parentis* to them, that would not give them a residence so as to entitle them to school privileges. What we do decide is that non-residents of a district do not acquire a residence therein for school purposes by becoming inmates of an institution whose purpose, as expressed in its charter, is the support and education of children, and which does not contribute to the support of the schools in that district.

The writ of mandamus should not have issued. The order and judgment of the Circuit Court is reversed, and the petition of relator for the writ of mandamus is dismissed.

MINNESOTA SUPREME COURT.

CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY, Appt.,

v.

CITY OF MINNEAPOLIS, Resp't.

(115 Minn. 460, 133 N. W. 169.)

Railroad — bridging street.

1. The rule that a railway company may be required to erect and maintain a bridge to carry its tracks over a street crossing extends to all cases where the public safety, convenience, or welfare requires such bridge.

Same — artificial waterway.

2. A waterway with walks on each side, duly established by public authority for public use, connecting navigable lakes and public grounds, as to the principles applicable thereto, is not distinguishable, either by the fact that it is artificial or by the

Headnotes by SIMPSON, J.

Note. — The decision in the above case has been affirmed by the United States Supreme Court (232 U. S. 430, 58 L. ed. —, 34 Sup. Ct. Rep. 400), that court holding that the decision of the state court did not amount to a deprivation of property without due process of law. The Supreme Court, like the state court, followed the decisions involving ordinary highways, remarking that

fact that it is in part a waterway, from a natural waterway or from a landway.

Eminent domain — canal — railroad — expense of bridge.

3. The rule applicable to crossings of streets and railroads applies to the crossing of a public canal and a railroad, and in proceedings to condemn a right of way for a public canal across a railway right of way, through an embankment, the company is not entitled to be awarded, as damages, the necessary expense of building a bridge to carry its tracks over the canal.

(Start, Ch. J., dissents.)

(October 27, 1911.)

A PPEAL by defendant from a judgment of the District Court for Hennepin County refusing to award to it as damages the necessary expense of building a bridge to carry its tracks over a canal, the right of way for which was sought to be acquired under the power of eminent domain. Affirmed.

The facts are stated in the opinion.

Mr. F. W. Root for appellant.

Mr. C. J. Rockwood, for respondent:

Where a railroad intersects a land highway, without regard to priority in time of establishment, the duty rests upon it to do whatever is necessary to make the crossing reasonably convenient and safe to the public, including the separation of grades and the erection of bridges when necessary.

State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 35 Minn. 133, 59 Am. Rep. 313, 28 N. W. 3; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047, 214 U. S. 498, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698; State ex rel. Duluth v. Northern P. R. Co.

it could not make a difference in the constitutional rights of the railway company that the way was not constructed entirely or chiefly of solid earth; that it was the fact, and not the mode, of public passage, that was controlling.

As to the power to compel a railroad to establish or maintain at its own expense overhead or underground crossing, as affected by the fact that the street or highway is opened subsequently to the construction of the railroad, see note to State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 28 L.R.A.(N.S.) 298, affirmed in 214 U. S. 497, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698; see also Cincinnati, I. & W. R. Co. v. Connersville, 218 U. S. 336, 54 L. ed. 1060, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206, holding that the expense of constructing a railway bridge over a highway, made necessary by the action of the municipality in opening such highway through the railway company's embankment, may be cast upon

98 Minn. 429, 108 N. W. 269, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341.

The railroad company, when proceedings are had in eminent domain to take a right of crossing for highway purposes, is not entitled as a part of its damages to reimbursement for the expenses which it will be obliged to incur, either in readjusting its own track to the changed conditions, or in doing whatever may be required of it under the police power of the state to render the crossing safe to the public.

State ex rel. St. Paul, M. & M. R. Co. v. District Ct. 42 Minn. 247, 7 L.R.A. 121, 44 N. W. 7; New York, C. & St. L. R. Co. v. Rhodes, 24 L.R.A.(N.S.) 1225, and note, 171 Ind. 521, 86 N. E. 840; Cincinnati, I. & W. R. Co. v. Connersville, 170 Ind. 316, 83 N. E. 503, affirmed in 218 U. S. 336, 54 L. ed. 1060, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206; Lake Erie & W. R. Co. v. Shelley, 163 Ind. 36, 71 N. E. 151; Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109; St. Louis & S. F. R. Co. v. Fayetteville, 75 Ark. 534, 87 S. W. 1174.

Mr. Daniel Fish also for respondent.

Simpson, J., delivered the opinion of the court:

This is an appeal from a judgment of the district court of the county of Hennepin in a controversy submitted on an agreed statement of facts, pursuant to § 4286, Rev. Laws, 1905. The stated facts are substantially as follows:

Within the corporate limits of the city of Minneapolis, the respondent herein, are three meandered lakes,—Lake Calhoun, having an area of 460 acres; Lake of the Isles, having an area of 107 acres; and Cedar lake, having an area of 150 acres. Each of these lakes is adapted for use by the public for pleasure boating, ice boating, skating,

the railway company without denying the due process of law guaranteed by the Federal Constitution, which requires that compensation be made when private property is taken for public use.

For the analogous question as to the necessity of making compensation, and measure thereof, upon laying out a street across railway, see note to New York, C. & St. L. R. Co. v. Rhodes, 24 L.R.A.(N.S.) 1225.

As to power to lay out streets or highways across railway property or rights of way, see note to Louisville & N. R. Co. v. Louisville, 24 L.R.A.(N.S.) 1213.

The duty of a railroad company to construct bridges at its own expense over public drainage districts is treated in the note to Chicago, B. & Q. R. Co. v. Appanoose County, 31 L.R.A.(N.S.) 1118.

For canal as navigable water, see note to State ex rel. Lyon v. Columbia Water Power Co. 22 L.R.A.(N.S.) 435. G. H. P.

and other like uses, and is actually used by the public for such purposes. The city of Minneapolis has acquired, for park and parkway purposes, all the lands constituting the shores of Lake Calhoun and Lake of the Isles, as well as a portion of the shores of Cedar lake, also large tracts of land located near to said lakes, and such lands are used for park and parkway purposes. The city of Minneapolis has determined to construct, and is now constructing, two canals for public use, one connecting Cedar lake with the Lake of the Isles, and one connecting the Lake of the Isles with Lake Calhoun. The construction of such canals will greatly enhance the usefulness of said lakes to the public for pleasure boating, ice boating, skating, and like purposes. Lake Calhoun and Lake of the Isles are separated by a narrow strip of land of varying width, at its narrowest point some 600 feet wide. The natural surface of this strip of land where the canal is being constructed is about 2 feet above the level at which the waters are maintained in Lake of the Isles and Lake Calhoun. There is between these two lakes a small natural water course in which water flows from Lake of the Isles to Lake Calhoun.

The appellant railway company is the owner of a right of way, a strip of land 100 feet in width, extending lengthwise along and near the center of the land between Lake Calhoun and Lake of the Isles. Along this right of way the appellant, long before any steps were taken by the respondent city to construct the proposed improvement, had constructed an embankment which, at the point where the canal will intersect it, is about 16 feet in height above the surface of the ground, and about 18 feet in height above the established surface level of the water in the lakes and in the proposed canal. Upon the surface of this embankment the company laid its rails, and has operated and still operates a commercial railway over and along its said right of way.

To enable it to construct the proposed improvement, consisting of a waterway or canal, with walks upon either side thereof, the city seeks to condemn and take an easement in a strip of land 100 feet wide, extending across the right of way of the appellant. The taking of this land is for a public purpose, and the city's right to so acquire this strip is conceded by the appellant railway company for the purposes of this appeal. The location of the proposed canal at the point where it crosses the railway tracks is immediately west of the natural water course between Lake Calhoun and Lake of the Isles; the center

line of the proposed canal being 59 feet west of the point where the waters flowing in such natural course are carried through the embankment of the railway company in a pipe about 3 feet in diameter. The canal, when constructed, will take the place of, and permit the closing of, this natural channel.

The construction and maintenance of the waterway and walks through the embankment of the railway company will necessitate the construction of a bridge to carry the railway tracks over the same. The agreed value of the strip of land 100 feet wide taken from the appellant for the public way is \$10, and the cost of the construction of an adequate bridge over the canal and walks is \$15,969. To such cost of the bridge is added, for purely ornamental features contained in the plans adopted by the parties hereto, the sum of \$2,544. This added cost for ornamental features is assumed by the city. By further agreement of the parties, the city is authorized to take the land involved and construct the proposed improvement. The railway company is to construct the bridge as planned, waiving no claim, however, for damages or compensation to which it is entitled under the law by virtue of such taking as in condemnation proceedings, and the city is obligated to pay all such damages and compensation. Upon trial of the matters so submitted, the court, upon the admitted facts, assessed the appellant's compensation for the taking and damaging of its property for the construction and operation of the public way in the sum of \$2,554, being \$10, the value of the land taken, and \$2,544, the cost of the ornamental features of the bridge, and disallowed the railway company's claim for the cost of constructing an adequate bridge.

By its appeal the railway company presents for consideration and decision the question whether it is entitled to have included, in the assessment of its damages for the taking and injuring of its property for a public use, the cost of constructing a sufficient bridge made necessary by such use. The contention of the appellant is that the taking of its property for this public use, without making compensation, including not only the value of the land taken, but as well the resulting expense of the construction and maintenance of a bridge, will be a taking, destruction, and damaging of private property for public use without just compensation, in violation of § 13, art. 1, Const. (Minn.), and will constitute as well a violation of the 14th Amendment to the Constitution of the United States. This contention is based on the claim that the bridge is made necessary solely through the exercise of the

right of eminent domain by the city, and that—because no question of safety of the crossing of the railway tracks and the public way is involved—the railway company cannot be required, by an exercise of the police power, to bear the uncompensated burden of building the bridge.

In considering the question thus presented, there is no difficulty in determining the nature of the way here involved, established by the city between the lakes and between the surrounding parks and parkways. Such nature clearly appears from the stated facts. Lake Calhoun and Lake of the Isles are public navigable waters, and the proposed waterway connecting them will, when established, be a public navigable waterway. Such connecting waterway will enhance the usefulness of the lakes in affording opportunity to the public for recreation and pleasure. Such waterway will thereby directly tend to promote the health, happiness, and welfare of the public. When this waterway is established, the fact that it is artificial does not distinguish it, as to the law applicable thereto, from a natural water course. Nor does it differ in nature and applicable rules from a landway. The landway, like this waterway, is artificial, laid out and established to meet the public need and promote the general welfare.

The proposed way has on each side walks, and the bridge in question in part is necessary to permit the establishment and use of these walks crossing under the tracks. By the concession of the right of the city to condemn the railway's property for this use, the reasonable necessity and convenience to the public of these footways, as well as of the waterway, are admitted for the purpose of this appeal.

Nor does the fact that the waterway and walks will be used in connection with the lakes and parkway for pleasure and recreation distinguish, as to the legal principles applicable, this way from a road or canal devoted to the movement of goods or other commercial purposes. The desirability of conserving, extending, and maintaining reasonable opportunities for wholesome public recreation is continually gaining in general recognition, because such opportunities and the use thereof concededly tend to promote the general health and welfare of the people. This court has said, speaking of inland lakes: "We are satisfied that, so long as these lakes are capable of use for boating, even for pleasure, they are navigable, within the reason and spirit of the common-law rule." *Lamprey v. State*, 52 Minn. 181, 18 L.R.A. 670, 38 Am. St. Rep. 541, 53 N. W. 1139. The same view is expressed by another court in the state—

ment: "Its navigability for pleasure is as sacred in the eye of the law as its navigability for any other purpose." *Grand Rapids v. Powers*, 89 Mich. 94, 14 L.R.A. 498, 28 Am. St. Rep. 276, 50 N. W. 661.

The way sought to be established,—a canal or waterway, with walks along each side,—being clearly a public way, subject to the rules governing public ways, we are concerned with the nature of the property rights and duties of the railway company involved in crossings of railroads and public ways. The general principle applicable to such crossings has been determined and announced in this state and applied to one kind of crossing. The same general principle has been applied in other jurisdictions to other crossings, until the law relating to establishing and maintaining public ways and improvements across railway tracks, including the incidental questions of the resulting duty of the railway company and just compensation for its property taken or injured, seems clearly settled. The general rule so established is that, where the safety, convenience, or welfare of the public requires that a railway company carry its tracks over a public way, or the public way over its tracks, by a bridge, the uncompensated duty of providing such bridge devolves upon the railway company. The basis of this rule is the superior nature of the public right inherent in the reserved or police power of the state. A railroad, though constructed first in time, is constructed subject to the implied right of the state to lay out and open new highways crossing its right of way. If the operation of the railway upon a particular surface or with a particular form of support for its tracks interferes with the public safety, convenience, or welfare in the exercise of the public right to the use of such highway, then upon the railway company is placed the burden of making such necessary and reasonable readjustment of its tracks as will permit the exercise of the superior public right. In *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 98 Minn. 380, 28 L.R.A. (N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047, and *State ex rel. Duluth v. Northern P. R. Co.* 98 Minn. 429, 108 N. W. 269, this court announced these general principles, and applied them to crossings of city streets and the tracks of railway companies, and held that where railway tracks cross a city street, the uncompensated burden of constructing and maintaining a bridge to carry its tracks over the street, or to carry the street over its tracks, is upon the railway company, if such bridge is necessary to make such crossing reasonably safe for use by the

public; and this, though the railway company acquired its property and operated its road over the place involved before the street was established.

Counsel for the appellant railway company contends that the instant case on its particular facts should be distinguished from the above cases, because in this case of a waterway crossing railway tracks, a grade crossing is impossible, the dangers incident to a grade crossing do not arise, and hence the uncompensated burden of building a bridge cannot be placed upon the railway company under the police powers of the state. We think this contention could be sustained only by placing an unreasonable limitation on the doctrine announced in the crossing cases, and by considering as controlling superficial facts about the proposed way rather than its conceded nature. The opinion in *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* supra, discusses and affirms the right of the state in the exercise of the police power to require safety devices or bridges at crossings, so that the public using the street will not be subjected to danger. The danger in grade crossings was the particular thing in that case calling for an exercise of the police power. But it was not the announcement of the safety device rule that made this case a leading and important one in this state. The safety device rule had been announced in earlier decisions. The important rule announced in the later case is: "A railroad company receives its charter and franchise subject to the implied right of the state to establish and open such streets and highways over and across its right of way as public convenience and necessity may from time to time require. That right on the part of the state attaches by implication of law to the franchise of the railroad company, and imposes upon it an obligation to construct and maintain at its own expense suitable crossings at new streets and highways to the same extent as required by the rules of the common law at streets and highways in existence when the railroad was constructed." And further that "cases where one railroad crosses another have no application, because both stand on an equality respecting rights and obligations, while in cases like that at bar the rights of the public are superior."

The doctrine thus announced does not limit the power of the state to require railways to adapt their tracks to the use by the public of highways, to cases where the use of the highway as laid out and used involves danger to the public. The police power of the state is concerned with the convenience and welfare of the public, as 51 L.R.A.(N.S.)

well as its safety. Nor on principle could the general doctrine so announced be limited to streets and highways, as distinguished from other necessary public improvements crossing the company's right of way. In *State ex rel. St. Paul, M. & M. R. Co. v. District Ct.* 42 Minn. 247, 7 L.R.A. 121, 44 N. W. 7, a distinction is made between necessary planking and safety devices at street crossings. Such distinction, as was pointed out in *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* above, is not recognized by the authorities sustaining and applying the broad rule announced in the later Minnesota case. These authorities do not limit the application of the rule to the requirement of safety devices.

In *Cincinnati, I. & W. R. Co. v. Connersville*, 170 Ind. 316, 83 N. E. 503, the court passed upon the question of the compensation to which the railway company was entitled in condemnation proceedings instituted by the city to open a street across the railroad right of way. The tracks of the railway company were on an embankment 15 feet above the natural surface of the ground. The proposed street extended across the right of way below the tracks through this embankment, thus making necessary a bridge to carry the tracks over the street. No compensation was allowed to cover the cost of the erection and maintenance of this bridge. It is apparent that in the Indiana case the dangers of a grade crossing were in no way involved. The only street proposed passed under the railway tracks. In denying the claim of the railway company for such compensation, it is stated: "Appellant's counsel overlook the fact that there are two distinct principles of law that operate upon the question we have under consideration, namely, 'eminent domain,' which implies a taking by the sovereign for some public benefit, and the 'police power,' which implies a regulation by the sovereign of private property for the preservation of the public safety, health, and general welfare."

This case being taken to the United States Supreme Court, the decision of the state court was affirmed in this language: "The question as to the right of the railway company to be reimbursed for any moneys necessarily expended in constructing the bridge in question is, we think, concluded by former decisions of this court.

. . . The railway company accepted its franchise from the state subject necessarily to the condition that it would conform at its own expense to any regulations not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and

which might, from time to time, be established by the municipality, when proceeding under legislative authority, within whose limits the company's business was conducted. This court has said that 'the power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good.' " *Cincinnati, I. & W. R. Co. v. Connersville*, 218 U. S. 336, 54 L. ed. 1060, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206.

Under this rule as applied in the Indiana case,—and this is clearly the same rule as that announced in this state in *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. supra*,—if the city of Minneapolis were opening a street under the tracks and through the embankment of the appellant railway company, the company would not be entitled to compensation for the necessary bridge. It is clear that no distinction in law exists between such supposed improvement and the one actually proposed to be made. Each is a public way opened below the tracks through the embankment of the railway company, making necessary a bridge to support the tracks. It would be no more possible for the railway company to reconstruct its railway across such a street without a bridge than it is to carry its railway over the proposed canal without a bridge. No property right of the railway company can be interfered with by the removal of its supporting embankment for a waterway, that is not interfered with to the same extent by the removal of the embankment for a landway. Even the superficial facts concerning the two ways differ little. The proposed way here involved has two walks under the tracks through the embankment, the reasonable necessity of which is conceded. These walks make necessary a bridge. The fact that the public has determined that it will be better served by a portion of the way being water instead of land cannot, on any legal principle, shift the burden of a required bridge from the railway company to the public. The railway company is not vested with a property right that can discriminate between public travel passing under its tracks on wheels and in boats. The superficial differences could be further lessened by assuming that a driveway had been laid out along the canal crossing the right of way, or that a waterway was extended to each side of the right of way with a portage beneath the tracks.

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Nor is the general rule requiring railway companies to adjust their tracks to public improvements when the public convenience or welfare requires limited in its application to traveled ways. In *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175, was involved the question of the right to compel a railway company to enlarge a bridge, without compensation, to permit the passage down a natural waterway of waters collected by a system of drainage. The railway company had for years, at a point where its tracks cross a creek, maintained a suitable culvert sufficient to allow the passage of the waters naturally flowing in the creek. Drainage commissioners, having determined to drain a large district into and through the creek in order to reclaim and make tillable wet lands, notified the railway company to enlarge and widen the culvert through its right of way. The company refused to comply with this requirement unless compensated for the expense incurred. The court, in holding that the company might be required to construct the abutments and bridge without compensation, stated: "The learned counsel for the railway company seem to think that the adjudications relating to the police power of the state to protect the public health, the public morals, and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community, apart from any question of the public health, the public morals, or the public safety. Hence, he presses the thought that the petition in this case does not, in words, suggest that the drainage in question has anything to do with the health of the drainage district, but only avers that the system of drainage adopted by the commissioners will reclaim the lands of the district, and make them tillable or fit for cultivation. We cannot assent to the view expressed by counsel. We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. . . . If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. Such is the present case."

In *Chicago & E. R. Co. v. Luddington*, 175 Ind. 35, 91 N. E. 939, 93 N. E. 273, it is held that the rule applicable to highways is also applicable to public ditches

established across the right of way of a railway company, and that compensation need not be made to the railway company to cover the cost of a bridge made necessary to carry its tracks over the ditch. In *Chicago, B. & Q. R. Co. v. Appanoose County* (8th C.) 104 C. C. A. 573, 31 L.R.A. (N.S.) 1117, 182 Fed. 291, it is held: "In proceedings to condemn right of way for a public drainage ditch across a railroad, the company is not entitled to be awarded as damages the expense of building a new bridge over the ditch, but its damages are confined to the value of the easement across its right of way, regardless of whether or not the ditch follows a natural water course over its right of way."

In *West Chicago Street R. Co. v. People*, 214 Ill. 9, 73 N. E. 393, Id., 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518, and in *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367, the duty of a railway company to adapt, without compensation, its tracks to changes made in navigable streams, is affirmed. In the latter case this language is adopted: "The duty of a railroad to restore a stream or highway which is crossed by the line of its road is a continuing duty; and if, by the increase of population or other causes, the crossing becomes inadequate to meet the new and altered conditions of the country, it is the duty of the railroad to make such alterations as will meet the present needs of the public."

In *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471, another application was made of the same general rule. A gas company had laid its pipes in the streets of the city, under a franchise, at the place indicated by the public authorities. Afterwards the city established a drainage system, the construction of which required a change in the location of the gas pipes. It was held that the company property was not taken or injured by the requirement of such change, for the reason assigned, among others: "When it located its pipes it was at the risk that they might be, at some future time, disturbed, when the state might require for a necessary public use that changes in location be made. . . . In complying with this requirement at its own expense, none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*."

It appears from these cases—and many other similar cases might be referred to—that the principle announced by this court in *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 98 Minn. 380, 28 L.R.A. (N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047, while there applied to the 51 L.R.A. (N.S.)

requirement of a safety device at a street and railway crossing, is not limited either to the requirement of safety devices or to crossings of streets and railway tracks, but is broadly applicable to public improvements crossing the railway tracks whenever, to permit such crossing, the convenience or welfare, as well as the health or safety, of the public, requires a reasonable readjustment by the company of the means for supporting its tracks. Under modern conditions railway companies are pioneers in development. Railroads are constructed usually in advance of the public ways and improvements made necessary by subsequent settlements. The railroad is thus first constructed making provision for existing land and water ways, but without reference to subsequent improvements. By such construction natural conditions are changed. Solid embankments may be erected across lowlands, or deep cuts made through higher lands. But it is now clearly established in this state, as in most states, that the company so builds its road subject to the reserved right of the public to lay out highways, locate drains, or establish or improve waterways across the company's right of way when the necessity therefor arises. For the property taken in making such improvements compensation must be made, but for the incidental expense in making reasonable changes in the method of carrying its tracks over such improvements, when public safety, health, convenience, or welfare requires such change, no compensation can be claimed by the railway. Such change is required under the reserved or police power of the state.

In the instant case the railway company constructed and placed its rail on a 16-foot embankment along a strip of land 600 feet wide separating two navigable lakes, confining a natural water course between the lakes in a pipe through such embankment. The company, by such construction, did not acquire such a property right in maintaining its tracks on the embankment that it is entitled to compensation for the cost of a necessary bridge to carry its tracks over a public way thereafter duly established across its right of way. The public right to lay out such way, though asserted subsequent in time to the construction of the road, is so far the prior and superior right that the company is required to make such reasonable readjustment of its tracks as is necessary to permit of the safe and convenient use of the public way. The requirement of such readjustment is not a taking or injuring of property, but rests on the exercise of the reserved or police power of the state. The proposed way is made up of a waterway and walks on each side. The

waterway takes the place of the existing natural water course, and becomes, like the lakes it connects, public navigable water. A bridge to carry the railway tracks over this way is a necessary incident of its use by the public, and is required by public convenience and welfare. These facts clearly bring the instant case within the general principle announced in *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* supra, and within the applications of that principle as repeatedly made by the authorities in the Federal and state courts.

It follows that the trial court properly refused to include in the compensation allowed the railway company the item of the cost of a bridge—exclusive of ornamental features—required to carry the tracks of the railway company over the newly established public way.

Judgment affirmed.

Start, Ch. J., dissenting:

I dissent. The short facts are these: Lake Calhoun and Lake of the Isles, meandered lakes within the territorial limits of the city of Minneapolis, are separated by a narrow strip of land 600 feet in width at its narrowest point. The appellant owns a strip of land 100 feet wide along the entire length of the strip separating the lakes, whereon it has constructed its railroad bed and embankment, which are some 16 feet in height, and laid its track thereon. The respondent city has acquired the shores of the lakes for park purposes, and seeks to acquire, by the exercise of the power of eminent domain, the right to construct a canal and a walk on each side thereof, through a strip 100 feet in width of such tract, to connect the waters of the lakes. This will materially enhance the public use of the lakes for pleasure and ice boating, skating, and like uses. The taking of appellant's land for the canal will, for all practical purposes, divide it into two parts, and necessitate the construction of a bridge over the canal to connect the separated parts of its land, and thereby restore its roadbed to its original condition of safety and utility. The two lakes are not connected by any natural water course, except that, at a point 59 feet east of the center line of the proposed canal, where it will cross appellant's right of way, there is a small water course, the waters of which, coming from Lake of the Isles, are discharged into Lake Calhoun through a pipe 3 feet in diameter placed under the appellant's railroad bed. When the canal is constructed, this water course and pipe will be useless, and they can be closed.

The question presented by the record is whether the appellant is entitled to have 51 L.R.A. (N.S.)

included, in the assessment of its damages for the taking and damaging of its property, so taken for a public use, the necessary cost of constructing a bridge over the canal so as to connect the parts of its roadbed divided by the canal. The contention of the city, which the court sustains, is that the appellant is not entitled to have included in its damages such cost, for the reason that public safety, convenience, and welfare require the construction of the bridge; hence in the exercise of the police power, the uncompensated duty of building the bridge may be imposed upon the appellant. It must be conceded that if the bridge in this case is a necessary safety device, to protect the public from the dangers arising from railway grade crossings over public ways, the uncompensated duty of constructing and maintaining it may, in the exercise of the police power, be imposed upon the appellant. The question, however, is: Do the special facts of this case bring it within the rule stated? How can the bridge in any manner conserve the safety of the public in using the canal? There can, from the very nature of the case, be no grade crossing of a railroad and a canal. Nor can the construction of this bridge promote in any manner public convenience or welfare, for the sole necessity for and function of the bridge will be to connect the parts of the appellant's land which will be separated by the canal, and thereby restore the roadbed to its original condition of safety and utility.

The court in its opinion seem to attach much importance to the fact that there is to be a walk on each side of the canal. I am unable to understand how such fact can be regarded as specially weighty. The walks are a mere incident to the canal, and if the bridge is not essential as a safety device to the canal proper, it cannot be as to the walks on each side of it. Again, the facts of this case do not present any question of the safety of navigation, or of a natural water course to be widened or deepened, or of the obstruction of navigable waters, or of public drainage. We have simply the question whether the state may, in the exercise of its police power, take dry land for the purpose of creating an artificial water course without any compensation except the mere value of the land taken. It is true that, when the right to convert such land into an artificial water course is once secured by the exercise of the power of eminent domain and the payment of just compensation, the waters of the artificial course become public waters, and the right of public navigation thereof paramount, but not before. In the very nature of the case the doctrine of the paramount

right of public navigation cannot have any application to dry land in case the state seeks to take it by the exercise of the power of eminent domain, in order to convert it into an artificial water course. Any attempt to assess the appellant's damages for taking its land for the creation of an artificial water course, on the basis of rights and benefits which will accrue to the public after it has secured the right to take the land and convert it into a canal, would violate the plainest principles of natural justice.

I am, therefore, of the opinion that the uncompensated duty of constructing the bridge here in question cannot, upon the particular facts of this case, be imposed upon the appellant in the exercise of the police power of the state, and that the cost of the bridge ought to have been included in its damages. In reaching this conclusion I am not unmindful of the fact that the police power is an essential and beneficent attribute of sovereignty, the exercise of which, pursuant to valid legislative authority, cannot be controlled by the courts. But when, as is too often the case, such power is invoked to justify the confiscation of private property for public use in violation of constitutional guaranties, the courts may and must interfere for the protection of the citizens' constitutional rights. The police power cannot be used as a mask for removing private property from the protection of the Constitution.

Affirmed by the Supreme Court of the United States, February 24, 1914 (232 U. S. 430, 58 L. ed. —, 34 Sup. Ct. Rep. 400).

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA, Resp.,
v.
MINNEAPOLIS MILK COMPANY et al.,
Appts.

(Two Cases.)

(124 Minn. 34, 144 N. W. 417.)

Indictment — matters of description.

1. Matters of description or inducement

Headnotes by BROWN, Ch. J.

Note. — Necessity or beneficent purpose as excuse or justification for combination to raise price of commodity.

The foregoing question has apparently not been raised, at least in this exact form, in any other case.

In *Com. v. Bavarian Brewing Co.* 112 Ky. 925, 66 S. W. 1016, for reasons very similar 51 L.R.A. (N.S.)

need not be stated with the same particularity in an indictment charging the commission of a crime, as the facts constituting the essential elements of the crime itself are required to be stated.

Same — combination.

2. An indictment under § 5168, Rev. Laws 1905, charging that defendants, several persons and corporations, were "jointly and severally" engaged in a certain occupation, and in violation of the statute formed a combination for the purpose of increasing the price of their products, construed, and held to charge that defendants were to some extent independent dealers, and not jointly associated in business as one concern.

Statute — construction — rules.

3. The language of a statute is to be construed in harmony with the ordinary rules of grammar, except only when such construction will lead to a result obviously contrary to the intention of the legislature.

Conspiracy — monopoly — penalty.

4. For the violation of §§ 5168 and 5169, Rev. Laws 1905, by entering into a combination with others to raise the price of commodities offered for sale by those forming the combination, the domestic corporation is not subject to the penalty imposed by § 5168, but only to the penalty of forfeiture of its charter as prescribed by § 5169.

Same — forfeiture of charter.

5. The original statute, chapter 359, Laws 1899, imposed both fine and forfeiture of charter, but the Revision of 1905 (§§ 5168, 5169) changed the statute in that respect, thereby making the penalty of forfeiture of the charter the exclusive punishment as to domestic corporations.

Same — justification.

6. A violation of the statute by the formation of a combination to do the acts prohibited cannot be excused by facts tending to justify the act, and which would have been proper and legal had the members thereof acted independently of the combination.

Same — raising price — necessity.

7. A combination of several persons and corporations, all independent dealers in milk and cream, to raise and increase the price thereof, is a violation of the statute, though the increased price was necessary to afford them a profit.

Trial — cross-examination — discretion.

8. The credibility of an expert witness is ordinarily to be tested by his cross-examination, and, though it may be proper to do so by the testimony of another expert specially qualified in respect to the subject-matter, the

to those set forth in *STATE v. MINNEAPOLIS MILK Co.*, the court holds untenable the claim that the combination of brewing companies was not an unlawful monopoly under the Kentucky statute, because the purpose was to raise the price of beer, and, since beer was harmful and injurious, the object was a laudable one, for there would be less beer consumed if it sold at a higher price

extent to which the examination of such other expert may be carried rests, as in the case of cross-examination, in the sound discretion of the court.

Evidence — sufficiency.

9. Evidence held to support the verdict, that no errors were committed by the trial court in its rulings upon the admission or exclusion of evidence, or in its charge to the jury.

(Hallam, J., dissents.)

(December 12, 1913.)

APPEAL by defendants from an order of the District Court for Hennepin County denying their separate motions for a new trial of an action in which they were convicted of conspiracy to raise the price of milk and cream in violation of statute. Affirmed.

The facts are stated in the opinion.

Messrs. Brooks & Jamison for appellants.

Messrs. Lyndon A. Smith, Attorney General, James Robertson, Mathias Baldwin, and John F. Bonner, for the State:

A corporation is subject to indictment under § 5168, Rev. Laws 1905.

People v. Detroit White Lead Works. 82 Mich. 471, 9 L.R.A. 722, 46 N. W. 735; State v. Belle Springs Creamery Co. 83 Kan. 389, — L.R.A.(N.S.) —, 111 Pac. 474; Southern R. Co. v. State, 125 Ga. 287, 114 Am. St. Rep. 203, 54 S. E. 160, 5 Ann. Cas. 411; United States v. Union Supply Co. 215 U. S. 50, 54 L. ed. 87, 30 Sup. Ct. Rep. 15; Com. v. Graustein & Co. 209 Mass. 38, 95 N. E. 97; Com. v. Boston Advertis-

ing Co. 188 Mass. 348, 69 L.R.A. 817, 108 Am. St. Rep. 494, 74 N. E. 601; Com. v. New York C. & H. R. R. Co. 206 Mass. 417, 92 N. E. 766, 19 Ann. Cas. 529; State v. Eastern Coal Co. 29 R. I. 254, 132 Am. St. Rep. 817, 70 Atl. 1, 17 Ann. Cas. 96; United States v. MacAndrews & F. Co. 149 Fed. 823; United States v. John Kelso Co. 86 Fed. 304; Overland Cotton Mill Co. v. People, 32 Colo. 263, 105 Am. St. Rep. 74, 75 Pac. 924; Union Colliery Co. v. Reg. 31 Can. S. C. 81, 2 B. R. C. 222.

Brown, Ch. J., delivered the opinion of the court:

Defendants, with other persons and corporations, were jointly indicted by the grand jury of Hennepin county, and thereby charged with a conspiracy to raise the price of milk and cream in violation of § 5168, Rev. Laws 1905. A separate trial was had as to defendants Ruhnke and the Minneapolis Milk Company, a corporation, a verdict of guilty was returned by the jury, and defendants appealed from orders denying their separate motions for a new trial.

The assignments of error present the questions: (1) Whether the indictment states facts constituting a public offense; (2) whether the defendant corporation is indictable under the particular statute, and subject to the fine imposed by § 5168; (3) whether there were any errors in the admission or exclusion of evidence on the trial below, or errors in the instructions or refusals to instruct the jury; and (4) whether the evidence is sufficient to sustain

than if it were sold for a less amount. The court said that the statute prohibiting any combination for the purpose of regulating, controlling, or fixing the price of any merchandise, manufactured articles, or property of any kind, made no exceptions, and the court would likewise refuse to make any exceptions thereto.

In *International Harvester Co. v. Missouri*, 234 U. S. 199, 58 L. ed. —, 34 Sup. Ct. Rep. 859, affirming 237 Mo. 369, 141 S. W. 672, it is held that, although it is found as a fact that the combination complained of is a benefit, and not an injury, to the public, this fact constitutes no defense where the statute makes unlawful all combinations, the purpose of the statute being to secure competition, and preclude combinations which tend to defeat it. The court said that it is too late in the day to assert against statutes which forbid combinations of competing companies, that a particular combination was induced by good intentions, and has had some good effect.

A somewhat similar question was raised in *Reeves v. Decorah Farmers' Co-op. Soc.* — Iowa, —, 44 L.R.A.(N.S.) 1104, 140 N. 51 L.R.A.(N.S.)

W. 844, holding that an organization of farmers for the purpose of creating a live stock market at a certain shipping point, was an illegal combination within the Iowa anti-trust statute, although the object of the combination was apparently to obtain, as far as possible, for the producer the full price paid by the consumer, thereby eliminating the profit of the middle man.

In Kentucky a statute making lawful combinations or pools among farmers for the purpose of disposing of their produce at a price not above its actual value, is held to be valid. *Owen County Burley Tobacco Soc. v. Brumback*, 128 Ky. 137, 107 S. W. 710.

And, accordingly, a combination of farmers is held valid, although one of the purposes is to form a selling agency in order to secure remunerative prices for their products. *Louisville & N. R. Co. v. Burley Tobacco Co.* 147 Ky. 22, 143 S. W. 1040.

And combinations among other concerns for the purpose of securing the actual value of their products are likewise valid. *Com. v. International Harvester Co.* 131 Ky.

the conviction of either defendant. We dispose of these questions in the order stated.

1. The statute upon which the indictment is founded, speaking generally, provides that any person or association of persons who enter into any pool, trust, agreement, or combination, with any person or association, corporate or otherwise, in restraint of trade, which tends in any way or degree to limit, fix, control, maintain, or regulate the price of any article of trade bought and sold within the limits of the state, or which limits and prevents competition in the sale or purchase thereof, or which tends or is designed so to do, shall be guilty of a felony and punished by fine or imprisonment as therein provided. Rev. Laws 1905, § 5168.

Six separate corporations and eight individuals were accused by the indictment of the violation of the statute. It is charged by the indictment that on the 29th day of September, 1912, at Minneapolis, this state, the defendants controlled and did a large percentage of the trade in milk and cream in said city, and that they "jointly and severally" bought and sold large quantities of such milk and cream, and were able to limit, control, and regulate the price of said commodities, and for a long time prior to the date named were selling and disposing of the same at the prices stated; that on said date defendants wilfully and unlawfully entered into a pool, trust, agreement, and understanding, each with all the others, for the purpose of preventing competition in the sale of milk and cream, as well as to limit and fix the price thereof, and did then and there, in pursu-

ance of such conspiracy, raise the price of milk and cream from the price theretofore demanded for the same. The indictment contains other allegations, but the foregoing is sufficient to an understanding of the question whether a public offense is stated therein.

The contention of defendants is that, since the indictment charges that all the defendants on and prior to the date named therein were "jointly" engaged in the sale of milk and cream, they cannot be held to have violated the statute by raising the price of the articles so jointly sold. If the indictment be construed in harmony with defendants' claim, the contention made is sound; for if all these parties were jointly engaged in a common enterprise, and were not independent dealers, they were at perfect liberty to demand such prices for their products as they pleased, and for so doing, even though they raised the price, no charge of violating the statute could be made against them. But we are of opinion, and so hold, that the indictment should not be construed as charging that defendants were jointly engaged in the particular business. It alleges that they were "jointly and severally" so engaged, and from this the conclusion naturally follows that they were to some extent at least independent dealers, and for the purpose of regulating and limiting prices that they formed the conspiracy charged. Though indictments are construed strictly and no intendments indulged in support thereof, a reasonable interpretation of the language employed in stating the offense is always permissible, particularly in respect to matters of de-

551, 133 Am. St. Rep. 256, 115 S. W. 703; American Seeding Mach. Co. v. Com. 152 Ky. 589, 153 S. W. 972.

But if the purpose is to increase the price beyond its actual value, the combination is unlawful. *International Harvester Co. v. Com.* 147 Ky. 564, 144 S. W. 1064, *International Harvester Co. v. Com.* 148 Ky. 572, 147 S. W. 1199.

This Kentucky statute was held unconstitutional by the Supreme Court of the United States in *International Harvester Co. v. Kentucky*, 234 U. S. 216, 58 L. ed. —, 34 Sup. Ct. Rep. 853, on the ground that making the formation of combinations for the purpose of increasing the price of a product beyond its actual value, the test of legality, rendered the statute too uncertain in its application, since the statute offered no standard of conduct that it was possible to know. The court points out that the elements necessary to determine the imaginary ideal are uncertain, both in nature and degree of effect, to the acutest commercial mind, and it is said that "the very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be sup-

posed differently organized and subject to other influences than those under which it acts. . . . If business is to go on, men must unite to do it, and must sell their wares. To compel them to guess, on peril of indictment, what the community would have given for them, if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess." To render more effective combinations among farmers and producers, it was provided by statute that persons entering into such a combination should not dispose of their crop without the consent of the agents of the combination, and the violation of this provision was made an offense punishable by fine. A conviction under this statute, sustained in *Collins v. Com.* 141 Ky. 564, 133 S. W. 233, was reversed by the United States Supreme Court, 234 U. S. 634, 58 L. ed. —, 34 Sup. Ct. Rep. 924, on the ground of the illegality of the statute, pointed out in *International Harvester Co. v. Kentucky*, supra.

A. G. S.

scription or inducement. 2 Dunnell's Dig. 29; 22 Cyc. 300; State v. Mayberry, 48 Me. 218. The allegations of the indictment relative to the nature of the business conducted by defendants, and that they were "jointly and severally" engaged therein, are matters of description or inducement, and properly construed as charging that they were to some extent independent dealers, and not all jointly associated together as one concern. So construing the allegations, the indictment is sufficient and charges a violation of the statute.

2. The question whether a domestic corporation joining in the violation of the statute is subject to the penalty imposed by § 5168, a fine or imprisonment, is presented for the first time. Proceedings against corporations heretofore have been conducted under § 5169, for the forfeiture of their charters. State v. Duluth Bd. of Trade, 107 Minn. 516, 23 L.R.A.(N.S.) 1260, 121 N. W. 395; State v. Creamery Package Co. 110 Minn. 415, 136 Am. St. Rep. 514, 126 N. W. 126, 623. In the case at bar the defendant corporation was proceeded against under § 5168, and the contention of the state is that corporations are subject to the double penalty of a fine of \$500 to \$5,000, under § 5168, and forfeiture of their corporate existence under § 5169. While the defendant milk company insists that it is not subject to criminal prosecution under § 5168, and that the only penalty that may be imposed upon it for a violation of the statute is a forfeiture of its charter. The question is one of legislative intention, to be gathered from the two sections of the statute construed together, and in connection perhaps with the prior statutes of which those referred to are a revision.

It is not contended that a corporation is not indictable for a violation of penal laws, or that it is exempt from that sort of prosecution and punishment because it is not included in the word "person" in statutes declaring that any person violating the law shall be punished; and it is conceded that, generally speaking, corporations are included within the scope of such statutes. But it is claimed that by the revision of the particular statutes, the intention of the legislature to exclude corporations from the penalty prescribed by § 5168 is clear and manifest. In this we concur. By this we are not to be understood as holding that a corporation may not be indicted and convicted under the statute, and the conviction made the basis of proceedings under § 5169 for the forfeiture of its charter. In fact, that would seem an orderly and proper procedure. But we do hold that the corporation may not be proceeded against under that section for the purpose, if found guilty

of a violation thereof, of imposing the fine there prescribed. In our view of the matter, §§ 5168 and 5169 are perfectly clear and unambiguous, and there is no room for construction. If they were the original enactment, no doubt could arise as to the intention of the legislature in respect to the penalties imposed, and the conclusion would necessarily follow, from the language thereof, that separate penalties were intended. The only doubt in the matter arises when reference is made to the prior statutes. The new statute is clear; it becomes ambiguous or doubtful only by referring to the original of which the new is a revision. In construing a revised statute a doubt or ambiguity in its meaning cannot be thus raised. Hamilton v. Rathbone, 175 U. S. 414, 44 L. ed. 219, 20 Sup. Ct. Rep. 155; State v. Stroschein, 99 Minn. 248, 109 N. W. 235. But, applying the rule that the old statute may be referred to, a consideration thereof in connection with the new only confirms the view stated, and leaves no fair doubt that the legislature by the last enactment intended to impose separate penalties upon persons and corporations. The original statute (chap. 359, Laws 1899) covered the entire subject in detail. Section 1 thereof prohibited generally the formation of trusts and combinations by persons and corporations, and declare them unlawful. Section 2 provided that "every person" who shall enter into any such prohibited trust or combination shall be punished by a fine of not less than \$500 nor more than \$5,000 or by imprisonment in the state prison for not less than three nor more than five years. Section 3 provided that "any corporation" organized under the laws of the state, found guilty of a violation of the statutes, should, "in addition to the penalty prescribed by § 2 of this act," forfeit its charter, rights, and franchises. This, as just stated, imposed upon the domestic corporation double punishment for a violation of the statute. The same section imposed as punishment upon the foreign corporation banishment from the state only. Section 7 provides that the word "person" as used in the act should include corporations.

If these various provisions of the statute had been carried forward unchanged into the Revision of 1905, there could be no question of the correctness of the position of the state, for it is clear that double punishment for the guilty corporation was therein intentionally provided for. They were not, however, carried forward in the form as originally enacted, but substantial changes were made which point to but one conclusion, namely, a purpose, as already suggested, to change the law. The original

statute contained several sections and covered the subject of trusts and combinations in some detail. The whole of that act was reduced by the revision and included in two comprehensive sections, 5168 and 5169, which embrace every element of the prior statute. The first section provides that every person violating the statute shall be punished by fine or imprisonment. The next section provides that every domestic corporation violating the act shall, "in addition to the penalties imposed upon the members thereof" by § 5168, forfeit its charter, rights, and franchises. The important change in the language of this section is found in this: The prior statute imposed upon domestic corporations, as a penalty for a violation of the statute, forfeiture of their charters, "in addition to the penalty prescribed in § 2 of this act," which was fine or imprisonment. This was modified by the revision so as to impose a forfeiture of the charter, "in addition to the penalties imposed upon the members thereof." This change was significant and suggestive only of a purpose to relieve the corporation of double punishment. The contention of the state that the words "members thereof," found in the clause last quoted, has reference to members of the unlawful combination, is clearly not sound. The subject-matter of the section is the punishment of domestic corporations, and the reference to "members thereof" refers, and clearly was intended to refer, to members of the corporation with respect to which the section deals. This harmonizes with the grammatical analysis of the language of the section; and it is elementary that, in construing a statute, the ordinary rules of grammar will be applied, except when a manifest injustice will follow, or a result reached which is obviously at variance with the legislative intent. This particular statute does not come within the exception. The language thereof is clear. And while a change in the language of a revised statute does not necessarily indicate an intention to alter the law, and the presumption is that no such purpose was intended, where a change as clear and significant as the one here involved in fact modifies the statute in point of substance, the presumption that no change was intended must yield to the fact. *Farmers' Co-op. Elevator Co. v. Enge*, 122 Minn. 316, 142 N. W. 328. Corporations act only through their officers and members, and such officers and members for a violation of the statute are punishable as individuals under § 5168. The former statute, in so far as it imposed double punishment upon the corporation, was undoubtedly deemed by the revision commission too severe, and the legislature evi-

dently adopted that view in accepting and enacting the statute as revised. In other words, it was thought that the statute was a little drastic in providing for the punishment of the members of the corporation by fine, imposing the same punishment upon the corporation, and then as a climax declaring that the corporation be put to death. Such was the situation before the revision, and we are satisfied that the intention was to change the law, on the theory that to impose a fine upon a corporation was more or less an idle ceremony, and that a forfeiture of its charter would more effectively prevent further violations of the law by the guilty corporation. Our view of the amended statute is sustained by *Standard Oil Co. v. State*, 117 Tenn. 618, 10 L.R.A.(N.S.) 1015, 100 S. W. 705, where a similar statute was construed as not to authorize both a fine and dissolution of the corporation.

3. A number of the assignments of error may be disposed of together and without extended discussion. The statute condemns and prohibits the formation of trusts and combinations in restraint of trade, or for the purpose of controlling the market, or raising the price of commodities of sale. The law was enacted to prevent the same, and to punish those guilty of its violation. In a case like that at bar, where the charge is the formation of a combination between several persons and corporations to increase the price of products sold and dealt in by each, it would seem unimportant that an increase of price was justified, either in view of the cost of production or other circumstances which might justify the individual to demand more for his goods. The statute was not designed as means for the regulation of the public market, nor as an attempt to control the price of goods offered for sale, but rather to check the tendency toward monopolization, and to prohibit several dealers from combining together, the effect of which is the organized stifling of competition; and the aim of the statute was to remedy or prevent that evil. And in this case the first and important issue was whether a combination was formed by the defendant as charged in the indictment, and for the purposes therein alleged. Evidence tending to show that defendants theretofore had been selling their milk and cream at a loss, or that other dealers more favorably situated occupied an advantageous position in the trade, or that defendants had valid and sufficient reasons for raising the price, would not constitute a defense or justify the wrongful combination. Malice is not an essential element in a prosecution for the violation of the statute. The sole inquiry is: Was the combination formed for a purpose prohibi-

ed by the law, and whether the parties intended to violate the law is immaterial. 1 Dunnell's Dig. 3409; State v. Quackenbush, 98 Minn. 515, 108 N. W. 953; State v. Sharp, 121 Minn. 381, 141 N. W. 526. And though defendants, acting independently, could have raised prices without subjecting themselves to a charge of violating the statute, their act in combining together to do so is prohibited, and evidence which only tended to justify or excuse the combination was properly rejected. This covers a number of alleged errors which we do not consider separately.

4. That defendants held a meeting at the time charged in the indictment, either for the purpose of forming a milk dealers' association in Minneapolis, or for the purpose of forming the alleged unlawful combination, is clear from the evidence. In fact, the meeting is not disputed by defendants. They claim, however, that it was for the sole purpose of organizing the association, and with no purpose to combine in an agreement to raise prices. While the state claims that the organization of the Milk Dealers' Association was a mere incident to the main purpose of the meeting, which was to form the unlawful combination charged in the indictment. In some way the public authorities learned of the contemplated action of the milk dealers of the city, and detectives were employed to discover and bring to light the facts. The detectives were informed that the dealers were to hold a meeting at a certain place on the afternoon of September 29, 1912. Prior to the meeting the detectives gained entrance to the room in which it was to be held, and installed therein a dictograph properly connected by wires with a receiver placed in a closet adjoining the meeting room. The detective concealed themselves in the closet and remained there during the meeting, and subsequently reported the information gained by them. One of the detectives was a stenographer and made shorthand notes of things heard over the dictograph, while the other detective listened at the door leading from the closet to the meeting room. Both were produced as witnesses on the trial below. The stenographer testified to the contents of the notes made by him in the manner stated, from which the jury was justified in finding that the meeting was one called and held by the members thereof for the purpose of entering into an agreement to raise the price of milk and cream, and incidently to form a milk dealers' association. The testimony of the witness was corroborated by the other detective who overheard what took place and what was said by the members of the gathering 51 L.R.A. (N.S.)

by listening at the door leading into the room. The stenographer's original notes were received in evidence, and several erasures and interlineations appear to have been made therein. These the witness fully explained, and the verity of his explanation was for the jury. Defendant called R. A. Mabey, a court reporter of long experience, and attempted to show by him the incompetency of the detective as a stenographer, or the inaccuracy of his notes, and that they were unreliable. Much of his testimony upon the subject was received, and other portions excluded by the court on objection by the county attorney. Complaint is made of these rulings. We have examined the record with care and find no sufficient reason for holding that any prejudice resulted to defendants, if it be conceded that some of the rulings were technically error. Why the county attorney persisted in interposing objections to the testimony of this and other witnesses produced by defendants is not made clear by the record. Many of them might well have been omitted. We fail to see, however, wherein defendants were substantially prejudiced. The whole testimony of witness Mabey related to the qualifications of the detective as a stenographic writer, the verity of his stenographic notes, and in point of substance was the opinion of the witness respecting the ability of the detective to make an accurate report of the proceedings; and also his opinion concerning the erasures and changes appearing upon the face of the notes. The credibility of a witness is ordinarily to be tested by cross-examination, and though it may be proper to do so in the manner here attempted, by the testimony of an expert especially qualified in respect to the subject-matter, the extent to which the examination of the expert may be carried for this purpose, where he does not speak from personal knowledge, rests, as in the case of cross-examinations for the same purpose, in the sound discretion of the court, no abuse of which appears. Witness Mabey did not profess any personal knowledge of the qualifications of the detective. People v. Holmes, 111 Mich. 364, 69 N. W. 501; Laros v. Com. 84 Pa. 200; Lawson, Expert Ev. 275 et seq.

5. The charge of the learned trial court was a comprehensive and complete statement to the jury of the issues in the case and the rules and principles of law applicable thereto. We discover therein no error of which defendant can complain. It is well-settled law in this state that the trial judge in criminal cases may review the evidence in his instructions to the jury, and may state to them that it tends to prove

certain facts. *State v. Rose*, 47 Minn. 47, 49 N. W. 404. The only restriction upon the right is that the review shall be fair and impartial, and not in a manner naturally to confuse the jury, or to lead them to a particular result. *State v. Yates*, 99 Minn. 461, 109 N. W. 1070; *Dunnell's Dig.* 3479. If the charge in the case at bar may, by close analysis, be said to be inaccurate in any substantial respect, we are clear that such inaccuracy was not of a nature to mislead the jury. They were expressly informed that the increase in the price of milk, though made by all the defendants on the same day, was not a violation of the statute, and that no conviction could be had unless it appeared that the defendants jointly entered into an agreement for that purpose. And further that if such agreement was entered into the statute was violated. The rules of law applicable to the issues were clearly stated, and the requests presented by defendant were all sufficiently covered by the general charge. We find no error of a nature to require reversal.

6. The question whether the county attorney was guilty of misconduct in delivering an interview to the newspapers at the close of the trial, of an inflammatory nature, was peculiarly one for the trial court to determine. While the county attorney practically conceded the fact that he made certain statements to newspaper reporters, and that such statements were published and probably reached the jurors, who were not in charge of an officer pending the trial, yet it was for the trial court to determine the effect thereof upon the jurors, and whether prejudice therefrom resulted. The act of the prosecuting attorney in this respect, even though his remarks were not intended for publication, and he so informed the reporters, is not to be commended.

This covers all that need be said. We have considered all the assignments of error not specially treated by the opinion, with the result that no error as to defendant Ruhnke appears, the evidence sustains the verdict, and the order denying his motion for a new trial is affirmed. And since defendant milk company is not subject to the penalty prescribed by § 5168, the court erred in imposing it, and the order denying its motion for a new trial is reversed.

The following *Per Curiam* modification of the opinion was handed down December 15, 1913:

Our attention has been called by the attorney general to the fact that the order remanding the cause is perhaps indefinite and should be corrected. In view of the conclusion that the corporation might be

proceeded against by indictment, and conviction and the judgment rendered thereon made the basis for dissolution proceedings, the order remanding the cause should have been with directions to the court below to modify its judgment by eliminating the fine, leaving the judgment stand as one of conviction of the crime charged. The former order is therefore modified accordingly, and the reversal of the order denying the motion of the corporation for a new trial is withdrawn.

Hallam, J., dissenting:

I cannot concur in the portion of the foregoing opinion which holds that under §§ 5168, 5169, Rev. Laws 1905, domestic corporations offending against the provisions of § 5168 are not liable to the general penal provisions of that section, but that such corporations are liable only to punishment by forfeiture of charter.

It appears to me that the general penal provisions of § 5168, Rev. Laws 1905, apply to corporations to the same extent as to individuals.

Section 5168 makes it an offense to "enter into any pool, trust, agreement, combination, or understanding" in restraint of trade, or to limit, fix, control, maintain, or regulate the price of any article of trade, manufacture, or use, or to limit the production thereof, or to prevent or limit competition in the purchase or sale thereof, and it contains the general penal clause that every person violating any provision of that section shall be punished by fine or imprisonment.

If this section stood alone, it would concededly be broad enough to cover corporations, for the word "person" includes corporations. Rev. Laws 1905, § 4748, ¶ 11. The trouble arises from the language of § 5169. This section provides that every domestic corporation violating any provision of § 5168, "or which shall in any way assist in carrying out any of the purposes of such illegal pool, trust, agreement, combination, or understanding, in addition to the penalties imposed upon the members thereof by said section, shall forfeit all its corporate franchises."

It is contended that the term "members thereof," as here used, means members of the corporation, and that the use of the language quoted, taken in connection with all of the provisions of these sections, indicates an intention to impose punishment by § 5168 only upon natural persons, and by § 5169 to impose upon domestic corporations only the additional punishment of forfeiture of charter, to the exclusion of the

punishment imposed by the general penal provisions of § 5168.

I cannot concur in this construction. It appears to me that § 5168 was intended, as its language imports, to impose the punishment therein prescribed upon all participants in the prohibited combinations, including corporations so participating; that the term "members," used in § 5169, means members of the combination, not members of the corporation; and that the provision of § 5169, imposing the penalty of forfeiture upon domestic corporations participating in any illegal combination, "in addition to the penalties imposed upon the members thereof" by § 5168, means that such punishment is in addition to the penalties imposed upon all members of the combination by that section. This use of the term "members" is consistent with the language of both sections. The preceding section does impose penalties upon the members of the combination. It does not impose penalties upon the members of the corporation as such. It does not impose a penalty upon members of the corporation at all, unless they may be active participants in the combination, and then only as such participants.

If it is not clear that this is the correct view, then it must at least be said that the language is ambiguous, and in such case resort may be had, in interpreting its meaning, to the history of this legislation and to the terms of the statute in force prior to the revision. It is conceded that, under the statute in force prior to the revision, the general penal provisions now embodied in § 5168 did apply to corporations as well as to individuals, and that the penalty of forfeiture of charter imposed upon domestic corporations was in addition thereto. Changes in language made by a revision of statutes are not to be regarded as altering the law, unless it is clear that such was the intention. *Becklin v. Becklin*, 99 Minn. 307, 109 N. W. 243; *Odegard v. Lemire*, 107 Minn. 315, 119 N. W. 1057.

That the construction of the word "members," above indicated, is the correct one, is, it seems to me, made clear by reference to the language of the various statutes which were incorporated in the revision.

The first of these statutes was chapter 10, Gen. Laws 1891. This act made it an offense to "create, enter into, become a member of or a party to," any pool, trust, agreement, combination, or confederation to regulate or fix prices of, or control the output of, certain commodities. This language was carried forward into Gen. Stat. 1894, §§ 6955, 6956.

Chapter 359, Laws 1899, without repealing the act of 1891, covered the same

ground, and more. Instead, however, of using the terms "create, enter into, become a member of or a party to" any such pool, it used only the words "entering into" such combination.

Chapter 194, Laws 1901, prohibits pools, trusts, or combinations, and prohibits the boycott of any other person or corporation because "not a member of or a party to" any such combination.

All of these acts were before the revisers when they compiled the Revised Laws of 1905, and it appears to me that in drafting § 5169, when they used the term "members" in the provision that domestic corporations engaging in any illegal pool, trust, or combination should be subject to forfeiture of charter in "addition to the penalties imposed upon the members thereof," they used it as it was used in the act of 1891, the General Statutes of 1894, and the act of 1901, and that the legislature had the same intent when it adopted their revision. If such is the case, then the prior statute was not changed by the Revised Laws of 1905, and corporations are now, as before, subject to the same penalties as individuals.

It should also be noted that the revisers in their report upon the whole Criminal Code say: "Only one material change has been proposed, and that not a change of law, but of definition," introducing the term "gross misdemeanor" as defining a certain class of offenses. *Revisers' Report*, p. 37. This, while not conclusive, is entitled to some force.

MINNESOTA SUPREME COURT.

C. W. RAYMOND COMPANY, Appt.,
v.
SAM KAHN.

(124 Minn. 426, 145 N. W. 164.)

Sale — condition — effect of reclaiming property.

1. In a so-called conditional sale contract by which the seller retains title to the property and the right to recover it on default of the buyer, when the seller exercises this right and retakes the property, he cannot thereafter maintain an action to recover unpaid instalments of the purchase price.

Headnotes by BUNN, J.

Note. — Sale: right of purchaser on conditional sale to recover payments where the seller retakes the property.

This note is supplemental to *Pfeifer v. Norman*, 38 L.R.A.(N.S.) 891.

The cases considering the question raised since the note referred to sustain the rule

Same — forfeiture of payments.

2. Whether partial payments made by the buyer are forfeited, in the absence of language to that effect in the contract, when the seller recovers the property, is not decided.

Replevin — for property sold on condition — return of payments.

3. It is not a condition precedent to the maintenance by the seller of an action in replevin to recover the property, that he return or tender to the buyer partial payments made or notes given for unpaid instalments.

Same — demand — necessity.

4. Where, in an action of replevin, the answer demands the restoration of the property to defendant, a demand before suit is not necessary.

(January 30, 1914.)

A PPEAL by plaintiff from an order of the District Court for Scott County granting a motion to dismiss, and denying a motion for new trial, in an action

therein stated, that the seller of property on conditional sale, upon default of the buyer, is entitled to retake the property, and by so doing he does not render himself liable to repay the amount received on the purchase price.

Thus, in *Pfeifer v. Norman*, supra, it is held that, in the absence of any statutory provision affecting the matter, where a conditional sale contract provides for the termination thereof on default by the buyer, and the resumption by the seller of the possession of the property wherever situated, and forfeiture of all payments theretofore made upon the purchase price, and the seller retakes the property because thereof, upon the default of the buyer, the latter is not thereafter entitled to maintain an action to recover instalments paid by him on the purchase price.

And in *Bray v. Lowery*, 163 Cal. 256, 124 Pac. 1004, the rule is stated that a defaulting purchaser of property on conditional sale may not usually demand a return of money paid by him on account of the sale.

And where the buyer of property on conditional sale agrees that, upon his default in complying with any of the conditions of the contract, such default shall operate as a rescission of the contract and a forfeiture of any instalment paid by him on the purchase price, such forfeiture will be enforced by the court for the benefit of the seller, where the buyer has made default. *Klock v. Molsons Bank*, Rap. Jud. Quebec 39 C. S. 435.

Where a contract for the sale of personal property contains a reservation of title in the seller, and also a provision that the contract is not binding upon the seller until it has been accepted and approved by him, and it does not appear that he ever accepted or approved it, the contract is not enforceable because lacking in mutuality, and be-

brought to recover possession of certain brick-making machinery. Reversed.

The facts are stated in the opinion.

Messrs. Peck & Moriarty for appellant.
Mr. F. C. Irwin for respondent.

Bunn, J., delivered the opinion of the court:

Action in replevin to recover possession of certain brick-making machinery. At the close of plaintiff's case, the trial court granted a motion of defendant to dismiss the action, and afterwards denied a motion for a new trial. Plaintiff appealed.

The ultimate question here is whether or not the trial court was right in dismissing the action. The facts, as they appeared from the evidence and the admissions of the parties, are as follows: On March 4, 1910, defendant ordered in writing of plaintiff a brick-making machine, dies, and end cutting table, for which he agreed to pay \$850 and freight from the factory. Of this

fore the seller can maintain replevin for the property delivered thereunder, he must show a demand on the purchaser for the property, a refusal of the latter to surrender it, and the refunding of the purchase money paid. *Bent v. Jones*, 172 Ill. App. 62.

Where a contract for the sale of property, reserving title in the seller, contains a provision authorizing the seller to retake the property and resell it on default by the buyer, the seller is liable to the buyer for the amount paid by the latter on the purchase price, where upon default by the latter, the seller retook the property and resold it, but in making the resale did not follow the requirements of the contract. *Sawyer-Massey Co. v. Dagg*, 4 Sask. L. R. 228.

In *Scott v. Vulcan Iron Works Co.* 31 Okla. 334, 122 Pac. 186, it is held that the buyer who is defending an action of replevin for property, brought by the seller thereof on conditional sale, is not entitled to an instruction to the jury requiring as a condition precedent to the right of the seller to maintain replevin for the property, that he shall tender or repay the amount paid by the buyer on the purchase price, where at the time of the commencement of the suit the latter was in default.

Where the seller of property reserves title thereto in himself until payment of the purchase price, and the contract also contains a provision that the buyer shall return and deliver the property to the seller if requested at any time before the sale is completed by payment of the purchase price, where the buyer defaults, it is not a condition precedent to the right of the seller to maintain replevin for the property, that he allege and prove a return of, or tender of the note given by the buyer to represent, the purchase price. *Zederman v. Thomson*, 17 N. M. 56, 121 Pac. 609. A. G. S.

sum, \$200 was to be paid in cash with the order, \$150 in cash at the time of delivery, \$250 in three months from the date of shipment, and \$250 in six months from such date. The last two payments were to be evidenced by negotiable promissory notes made by defendant, and dated on the day of shipment. The order recited that it was agreed that all of the articles specified were to remain the property of plaintiff and subject to its order until paid for in full, and that the giving of notes, or any payments on account, should not divest plaintiff of the title to the property until the purchase price was paid in full. The order further provided that, in default of payment as agreed, the plaintiff might take possession of and remove the property without legal process. Plaintiff accepted the order in writing. The machinery was delivered to defendant in April. He paid the \$200 cash with the order, and the \$150 cash at the time of delivery, and he gave the two notes for \$250 each called for by the contract, payable respectively three and six months from the date of the order. He failed to pay these notes when they became due or thereafter, and this action in replevin was brought in July, 1911, to recover possession of the machinery.

Defendant answered, claiming the right to possession, and damages for breach of warranty. The reply was a general denial. On the trial plaintiff proved the contract, the delivery of the machinery, the giving and nonpayment of the notes, which it was admitted were in the possession of plaintiff, and rested. The motion to dismiss was granted on the ground that plaintiff was not entitled to recover the possession of the machinery, because it had not returned or offered to return to defendant the cash payments he had made, or the two promissory notes.

Was it a condition precedent to plaintiff's right of recovery that it return or tender to defendant the cash payments made and the notes? The question is a new one in this state, and of considerable importance, in view of the great volume of business done under conditional sale contracts like the one here. The contract in this case clearly provided that the title to the property remained in the seller until the notes were paid, and as clearly gave the seller the right to take possession on the default of the purchaser. But it did not provide that the payments made should be forfeited.

1. It is thoroughly well settled in this state that, after retaking or recovering the property under a contract of this kind for a default of the buyer, the seller cannot thereafter maintain an action to recover a balance due on the purchase price, or on notes

given therefor. The seller has the election: (1) To reclaim the property; (2) to treat the sale as absolute and sue to recover the debt; (3) to bring an action to foreclose his lien. But the assertion of either right is the abandonment of the others. When the property is retaken by the seller, no further rights exist under the contract against the purchaser. *Minneapolis Harvester Works v. Hally*, 27 Minn. 495, 8 N. W. 597; *C. Aultman & Co. v. Olson*, 43 Minn. 409, 45 N. W. 852; *Keystone Mfg. Co. v. Cassellius*, 74 Minn. 115, 76 N. W. 1028; *Alden v. W. J. Dyer & Bro.* 92 Minn. 134, 99 N. W. 784; *Nelson v. International Harvester Co.* 117 Minn. 298, 135 N. W. 808. It follows that plaintiff in the case at bar, having elected to retake the property, could not thereafter maintain an action on the notes given by defendant. These notes being negotiable, defendant would be entitled to have them delivered up and canceled. Whether their delivery or tender to defendant is a condition precedent to plaintiff's maintaining an action to recover the property is a different question, which we will determine later.

2. The question whether the vendor, on recovery of the property, must account to the vendee for all or any part of the payments made, is not necessarily involved in this appeal, but it may become involved on the trial of this or some other action between the parties. We do not determine the question, but will refer to some of the authorities.

Mr. Tiffany, in his work on Sales, states that it is generally held that the seller need not, in an action against the buyer in replevin, refund partial payments made, and that, although the seller reclaims the goods, the buyer cannot recover for payments made. *Tiffany on Sales*, 140. It is stated in *Cyc.* that as a general rule the seller need not, in an action to recover the goods, allow for or refund partial payments, such payments being regarded as forfeited. 35 *Cyc.* 704. See also 6 *Am. & Eng. Enc. Law*, p. 438, where this is said to be the prevailing doctrine. The cases supporting this rule of absolute forfeiture are cited in the text-books referred to. But the authors recognize that other authorities hold that the partial payments may be recovered, while still others hold that the buyer, against the amount he has paid, should be charged with the reasonable value of the use of the property and its depreciation in value. We do not decide that all partial payments made by the buyer are forfeited when the seller recovers the property. We do decide that, if not forfeited, the seller should be credited with whatever is determined to be the value of the buyer's

use of the property and the amount of its depreciation.

3. In either case it follows that the return or tender by the seller to the buyer of partial payments made is not a condition precedent to the recovery of the property in an action of replevin. The title is in the seller, and the contract gives him a right to take possession of the goods on default of the buyer. When he does so, he does not, accurately speaking, rescind the contract. He acts under it. The contract is executory, rather a contract to sell than a sale. The rule requiring one who rescinds a contract to put the other party *in statu quo* should not apply. Otherwise, the buyer may have the use of the property for a long time, and it may greatly deteriorate in value, and still the seller, to exercise his undoubted right to retake it for a default of the buyer, must pay back all the payments he has received, as well as cancel the unpaid indebtedness of the buyer. This rule seems as harsh against the vendor, as the rule forfeiting all payments seems harsh against the vendee. The following cases, among others, hold distinctly that the return or tender to the buyer of partial payments made, or of notes given, is not a condition precedent to maintaining an action in replevin: *Fleck v. Warner*, 25 Kan. 492; *Duke v. Shackelford*, 56 Miss. 552; *Tufts v. D'Arcambal*, 85 Mich. 185, 12 L.R.A. 446, 24 Am. St. Rep. 79, 48 N. W. 497; *Kirby v. Tompkins*, 48 Ark. 273, 3 S. W. 363; *National Cash Register Co. v. Ferguson*, 25 Misc. 363, 55 N. Y. Supp. 592; *Latham v. Sumner*, 89 Ill. 233, 31 Am. Rep. 79.

There are cases to the contrary: *Segrist v. Crabtree*, 131 U. S. 287, 33 L. ed. 125, 9 Sup. Ct. Rep. 687, where it is said in the course of the opinion that "the court below properly held that they could not retake the cattle while they retained the notes." *Latham v. Davis* (C. C.) 44 Fed. 862, where it is said that the better rule is that in reclaiming the property the seller rescinds the contract of sale so far as it has been executed, and is therefore bound to restore to the buyer anything he may have received. It is not expressly held that such restoration is a condition precedent. *Ketchum v. Brennan*, 53 Miss. 597, which distinctly so holds, but was overruled in *Duke v. Shackelford*, supra. *Fairbanks v. Malloy*, 16 Ill. App. 278, which is not in line with *Latham v. Sumner*, supra. *Shafer v. Russell*, 28 Utah, 444, 79 Pac. 559, where it is simply stated that it is not correct that the buyer forfeits payments already made. *Deering Harvester Co. v. Donovan*, 82 Minn. 162, 83 Am. St. Rep. 417, 84 N. W. 745, is not at all in point.

We adopt what we conceive to be the 51 L.R.A. (N.S.)

better rule, fairer to both parties; that is, that the return by the vendor, or offer to return, partial payments, is not a condition precedent to retaking the property, or to maintaining an action in replevin for that purpose. And we do not base this on the ground that such partial payments are forfeited. What the rights of the parties are in regard to the adjustment of the accounts between them may be determined, if not in the replevin action, in some other proceeding. As to how these rights affect the final determination of the replevin action, if at all, we do not decide. We call attention to two cases bearing upon the question. *Commercial Pub. Co. v. Campbell Printing Press & Mfg. Co.* 111 Ga. 388, 36 S. E. 756; *Thirlby v. Rainbow*, 93 Mich. 164, 53 N. W. 159.

As to the notes given for the unpaid instalments, it is clear under our decisions, as already stated, that they should be returned to the buyer. But we think such return or offer to return is not a condition precedent to maintaining the replevin action. If defendant demanded it, the court could protect his rights fully by ordering plaintiff to return the notes before judgment.

4. It is claimed that the dismissal of the action can be sustained on the ground that there was no demand before suit for delivery of the property. But the answer demanded the return of the property to defendant. Under our decisions this showed that defendant would not have complied with a demand, and it was therefore unnecessary. *Guthrie v. Olson*, 44 Minn. 404, 46 N. W. 853; *Dunnell*, Dig. § 8409.

Our conclusion is that the trial court should have denied the motion to dismiss, and tried the case on the merits.

Order reversed, and new trial granted.

MINNESOTA SUPREME COURT.

L. H. BENTLEY et al., Appts.,

v.

J. G. EDWARDS et al., Respts.

(125 Minn. 179, 146 N. W. 347.)

Pleading — contract to sell real estate — answer.

1. Plaintiffs and defendants entered into

Headnotes by BUNN, J.

Note. — Right of broker to commission for securing a purchaser for part of the property.

I. Recovery on express contract.

a. In general, 255.

b. When recovery is denied, 255.

c. When recovery is allowed, 257.

a written contract by the terms of which plaintiffs agreed to find a purchaser for a 6,000-acre tract of land, and were to receive as commission all of the price received in excess of \$10 per acre. Plaintiffs introduced a proposed purchaser to defendants, and they sold to such purchaser some 2,500 acres of the tract, at \$13 per acre, the purchaser not being willing to take the entire tract. The issue of whether the contract was entire or severable was properly raised by the answer.

Broker — contract to sell land — divisibility.

2. The contract construed, and held entire, and not to authorize plaintiffs to sell or find a purchaser for any part of the tract less than the whole.

Same — partial performance — commissions.

3. Plaintiffs, not having performed their contract, are not entitled to recover com-

II. Recovery on *quantum meruit*, 258.

III. Miscellaneous, 258.

As to when real estate broker is considered as procuring cause of sale or exchange, see note to *Hoadley v. Savings Bank*, 44 L.R.A. 321.

Generally, as to performance of contract by a real estate broker to find a purchaser or effect an exchange, see note to *Lunney v. Healey*, 44 L.R.A. 593.

And as to effect upon right of real estate broker to commission of fact that owner sells to broker's customer at reduced price, see note to *Ball v. Dolan*, 15 L.R.A. (N.S.) 272.

I. Recovery on express contract.

a. In general.

Most of the actions for commission for procuring a purchaser for part only of the property have apparently been, as in *BENTLEY v. EDWARDS*, on the contract; and the decision in that case that there can be no recovery in such actions because the contract has not been performed is in accord with the weight of authority, where the broker is authorized only to procure a purchaser for an entire tract and procures one willing to buy on the terms offered only a materially smaller portion thereof. In some instances, however, the broker's contract has been held severable, so as to permit recovery on the contract of commission for the part of the property sold; and in other instances recovery has been allowed on *quantum meruit*. On principle, it would appear that where the purchaser procured by the broker is unwilling or unable to buy the entire property on the terms offered, and the broker's contract of employment is entire, there is ordinarily no implied contract to pay the broker the reasonable value of his services, even though the owner thereafter sells a part of the property to the purchaser, and that in such instances there 51 L.R.A. (N.S.)

missions on the sale made on a *pro rata* basis; it not appearing that performance was prevented by defendants, or that the contract was modified.

Contract — services — quantum meruit — pleading.

4. The complaint declaring on the express contract, and there being no pleading or proof of the reasonable value of plaintiffs' services, there can be no recovery on a *quantum meruit*. Whether, under proper pleadings and evidence, plaintiffs could recover the reasonable value of their services, notwithstanding they did not perform the contract, is not decided.

(March 13, 1914.)

A PPEAL by plaintiffs from an order of the District Court for Ramsey County denying a new trial after verdict for defendants in an action brought to recover

should be no recovery on *quantum meruit*. In few cases, however, does this point seem to have been considered.

The question whether a written contract of employment is entire or severable is, of course, one for the court. *Crawford v. Surety Invest. Co.* 91 Kan. 748, 139 Pac. 481.

b. When recovery is denied.

It has been held that a broker authorized to sell an entire tract at a certain price per acre cannot recover commission for procuring a purchaser willing to pay the price per acre for only a part of the tract. *Martin v. Crumb*, 158 App. Div. 228, 142 N. Y. Supp. 1096, motion for reargument denied in 158 App. Div. 939, 143 N. Y. Supp. 1130.

And under the following circumstances it was held that a broker authorized to sell an entire tract could not recover commission where he failed to procure a purchaser willing to take the entire property on terms acceptable to the owner, and the latter subsequently sold to the purchaser part only of the property:

—where a broker having authority to sell a lot at a certain price found a purchaser who made a lower offer, which the owner refused, but the owner subsequently sold the customer for a lower price the half of the lot on which the buildings were located, it being held also that the fact that the portion sold by the owner was the more valuable by reason of having the improvements, and was sold for \$5,250, whereas the price for the entire property was \$6,500, did not render the completed transaction such a substantial performance of the broker's contract as to affect the rule that he was not entitled to commission because he had not made a sale of the entire property. *Yerkes v. Osborne*, 42 Pa. Super. Ct. 253;

—where a broker was authorized to sell a certain tract consisting of two parcels, and a sale was made of only one of the parcels, recovery being denied on the ground that the broker was not the procuring cause

an amount alleged to be due as commissions for procuring a purchaser for certain land. Affirmed.

The facts are stated in the opinion.

Mr. John Ott for appellants.

Messrs. O'Brien, Young, & Stone, for respondents:

The contract was entire for the sale of both tracts, or all of either one of them. No commission could be earned by selling a part only of either tract.

2 Parsons, Contr. 8th ed. 636, 637; Weber v. Clark, 24 Minn. 354; Veatch v. Norman, 109 Mo. App. 387, 84 S. W. 350; Carpenter v. Atlas Improv. Co. 123 App. Div. 706, 108 N. Y. Supp. 547; Mechem, Agency, § 635; Illingsworth v. Slosson, 19 Ill. App. 612.

of the sale, and that the contract was indivisible and there had not been complete performance. Cone v. Keil, 18 Cal. App. 675, 124 Pac. 548;

—where a broker having authority to sell a lot entered into negotiations with a purchaser which failed and were dropped because the terms were too high, and the owner subsequently, without further effort on the part of the broker, sold half of the lot to the purchaser. Frenzer v. Lee, 3 Neb. (Unof.) 69, 90 N. W. 914;

—where a broker was able to find purchasers for only two portions of a tract of land, and after the lapse of a reasonable time the owner, independently of the broker, sold the two portions to the purchasers which the broker had found. Carpenter v. Atlas Improv. Co. 123 App. Div. 706, 108 N. Y. Supp. 547, before court on another point in 132 App. Div. 112, 116 N. Y. Supp. 454.

—where a broker employed by a trustee to sell an entire property, only part of which belonged to the trustee, procured a purchaser, but the deal failed because the owner of the balance of the property refused to sell, and the trustee sold that part of the property which he owned to the broker's customer. Diamond v. Wheeler, 80 App. Div. 58, 80 N. Y. Supp. 416;

—where the agent's contract to sell real estate provided for a commission of a certain per cent on a sale of at least 200 acres, and after procuring a purchaser for 150 acres, the agent with others became joint purchasers of another 150 acres, and paid therefor, but the contract of sale was rescinded and the purchase money returned at the request of the purchasers, including the agent. Shinn v. Boyd, 34 Tex. Civ. App. 151, 77 S. W. 1027;

—where a broker's contract for the sale of four houses entitled him to receive a commission of one third of all realized above \$44,000, and only one of the houses was sold, it being held, however, simply that the broker was not entitled to recover a commission of one third of the amount realized in excess of the \$11,000 received for the sale of the one house, and not that the broker was barred from recovery of any 31 L.R.A.(N.S.)

Bunn, J., delivered the opinion of the court:

This action was brought to recover the sum of \$7,705.60 alleged to be due from defendants as commissions for procuring a purchaser for certain Montana land. At the close of the evidence the trial court directed a verdict for defendants. This appeal is from an order denying a new trial.

The complaint alleged in substance that defendants, who were engaged in the land business at St. Paul, on September 3, 1912, employed plaintiffs to find and procure a purchaser for a certain 6,000-acre tract of land, commonly known as the "Frear Tract," situate in Sweetgrass county, Montana, and agreed with plaintiffs that they should have as their commission all sums

commission. Mayer v. Haaren, 25 Jones & S. 574, 5 N. Y. Supp. 436;

—where a contract entitled the broker to a commission of \$100 if he found a purchaser for a farm of 200 acres, and the broker found a purchaser for only 117 acres. Weber v. Clark, 24 Minn. 354;

—where the contract authorized the broker to sell a certain tract for one fourth of the profit of resale, and only 831 acres out of 1,167 acres had been sold, and another tract of 200 acres, which had been taken in exchange as part of the consideration, was still unsold, it being held that the action for a share of the profits was prematurely brought, as the contract employment was indivisible. Crawford v. Surety Invest. Co. 91 Kan. 748, 139 Pac. 481.

A broker who finds a purchaser for an entire property, to whom the owner sells only a part of the property, is not entitled to recover the stipulated commission as for a sale of the entire property, unless the customer was able and willing to pay the price at which the broker was authorized to sell. Ball v. Dolan, 18 S. D. 558, 101 N. W. 719.

Under a contract entitling the broker to a certain commission upon his procuring for the principal a deed to an undivided half interest in certain land, the broker is not entitled to commission *pro tanto* upon the principal's securing a deed to a one-third interest in the property. Witte v. Taylor, 110 Cal. 224, 42 Pac. 807.

In the headnote to Fletcher v. McMillan, 132 Ga. 477, 64 S. E. 268, the court stated that if one undertook to purchase for another a body of timber including several tracts, to be paid for in an entire amount, and received a certain sum which he agreed to repay if he failed "to procure the timber from the owner," the contract was entire, and was not performed by the procuring only of a portion of the timber.

A contract authorizing a broker to sell land belonging to three parties as tenants in common was construed in Johnson v. Sirret, 153 N. Y. 51, 46 N. E. 1035, as entitling the broker to commission only on a joint sale by all the tenants in common,

in excess of \$10 per acre; that plaintiffs thereafter procured a purchaser for part of the land, and so notified defendants, who thereafter communicated with and sold to such purchaser 2,568.18 acres of said land for \$13 an acre. Judgment was demanded for the excess of \$3 per acre, or \$7,705.60. The defendants answered separately. The answer of defendant Felthous was a general denial, with a specific denial of an allegation of the complaint that he and defendant Edwards were copartners. The answer of defendant Edwards, in addition to such denials, alleged that the contract of employment on which the complaint was based consisted of two letters written by defendant Edwards to plaintiff Cronan, and the latter's assent thereto. These letters,

which admittedly constituted the contract between the parties, were as follows:

August 31, 1912.

Mr. William Cronan,

Palace Building, Minneapolis, Minn.

Dear Sir:—

We herewith hand you checkings and blueprint showing one tract of 6,000 acres and one tract of 9,515 acres of land in Sweetgrass county, Montana. If you have any clients looking for tracts of land of the size of these either one of them will surely suit them. Price of the two tracts together or either separately is \$10 per acre net to us. Whatever commission you desire to make will have to be added to this price.

and not on a transfer by only one of the tenants of an undivided interest in the property.

c. When recovery is allowed.

In some instances it has been held that a contract to sell real estate was severable, so that the broker was entitled to commission upon a sale or exchange of part only of the property. An illustration of a severable contract to exchange real estate is shown in *Goodspeed v. Miller*, 98 Minn. 457, 108 N. W. 817, where a broker offered to exchange hotel property for land, and subsequently wrote a letter to the landowner in which, after referring to the hotel deal, he stated that he had also a stock of dry goods to exchange for land, and that "both deals had to be right now." The deal for the merchandise was never consummated, but recovery was allowed on a note given for an amount which, estimated at the stipulated rate of \$1 per acre, would equal the number of acres exchanged for the hotel property.

Also, under the following circumstances it was held that the broker's contract to sell real estate was severable, so as to entitle the broker to commission upon the sale to one procured by him of a part only of the property:

—where the owner of three parcels of land agreed to pay a broker for his services if he would furnish an acceptable trade, stating in the contract, "I would trade a portion or all," and the broker procured one who agreed to exchange certain property for the three parcels, but the deal as concluded omitted one of the parcels because of a lien on the other party's land. *Blair v. Slosson*, 27 Tex. Civ. App. 403, 66 S. W. 112;

—where the broker's contract to sell certain oil property provided that the negotiations were to be carried on by the owner, and that the broker should receive as commission a certain per cent of the amount received for the property, no price being fixed in the contract. *Bowman v. Hartman*, 27 Ohio C. C. 309;
61 L.R.A.(N.S.)

—where a broker authorized to sell a farm at \$23 per acre, for a commission of 3 per cent, took a purchaser to see the land, but, upon his objecting to the quantity, the landowner offered to reserve 40 acres and sell the remainder for \$25 per acre, to which the purchaser agreed, and the papers were drawn up by the broker in his office, it being held that the modification of the price and terms by the owner had become by substitution a part of the original contract with the broker. *Woods v. Stephens*, 46 Mo. 555;

—where the only condition in the broker's contract to sell certain lands was that the sale in the aggregate should exceed \$26,000, and the broker procured satisfactory purchasers for about half the land, whose contracts amounted to over \$21,000, the best part of the land remaining unsold. *Smith v. Patrick*, — Tex. Civ. App. —, 43 S. W. 535;

—where, after the expiration of several options secured by a purchaser whom the broker had introduced, a small part of the property was sold, but the owner subsequently sold the balance of the property to the purchaser. *Lee v. O'Brien*, 15 B. C. 326;

—where the broker's contract of employment did not state the quantity of land to be included in the deed, but only that if the broker procured a third party to act as sales agent for a tract of land, the broker should receive a commission upon the passing of the deed to the third party. *Thompson v. Sargent*, 66 Or. 384, 134 Pac. 7;

—where the broker procured a purchaser for an entire section of land, but the owner was unable to procure a patent for 102 acres, and the owner and purchaser, having agreed upon a sale of the balance of the land, made an agreement with the broker to pay him a certain sum in discharge of his claim for services, but because of a cloud on the title subsequently discovered, a sale was finally consummated of only 338 acres, it being held that the agreement to pay the broker the sum stated was made for a sufficient consideration and could be enforced. *Brunson v. Blair*, 44 Tex. Civ. App. 43, 97 S. W. 337.

We can show the land at any time, and will be pleased to give you full particulars.

Yours truly,
J. G. Edwards Land Co.,
by J. G. Edwards.

September 3, 1912.

Mr. William Cronan,
Minneapolis, Minn.

Dear Sir:—

In putting the 6,000-acre tract of land in Sweetgrass county, Montana, up at \$10 per acre net to us, it is understood that there is 50 cents per acre to be divided equally between you and ourselves in case you sell at that price. On the 9,515 acres, if you sell it at \$10 net, it is understood that there is \$.40 per acre to be equally divided between us. In addition to this

whatever you get above \$10 per acre you are to retain.

Yours very truly,
J. G. Edwards Land Co.,
by J. G. E.

The reply admitted the writing and delivery of the two letters to plaintiff Cronan. The evidence showed that the letters and acceptance were intended to be the sole evidence of the contract of the parties, and that plaintiffs Bentley and Parsons were jointly interested in the venture with Cronan. Plaintiffs testified that, on the day the letters were delivered, they gave to defendant Edwards the names of certain Montana men who were in the market for a tract of land. The 6,000-acre tract was not owned by Edwards or Felthous; but they or one of them had the exclusive

II. Recovery on quantum meruit.

Where suit was brought by a broker upon the contract, and the proof showed only partial performance by sale of only part of the tract, recovery upon *quantum meruit* was denied in *Veatch v. Norman*, 109 Mo. App. 387, 84 S. W. 350. It was said that, having elected to stand upon a special contract, the broker could not recover upon *quantum meruit*, though the proof might otherwise warrant a recovery upon that theory.

Recovery by a broker of the reasonable value of his services was also denied in *Boyd v. Big Three Ranch Co.* 22 Cal. App. 108, 136 Pac. 623, where a broker was given authority to sell a ranch consisting of a number of separate tracts, and procured a purchaser for only one of the tracts, to whom the owner made a sale.

But a broker employed by the defendant to sell an undivided half interest in real estate was held in *Burdon v. Briquette*, 125 Wis. 341, 104 N. W. 83, entitled to recover on *quantum meruit* the reasonable value of his services, where the price for the property and the amount of commission were not agreed upon in the contract of employment, and the defendant and his cotenant, with whom the broker had had negotiations for the property, made a deal by which the cotenant bought the defendant's interest in the larger part of the tract, and the balance was divided between them.

And where a broker employed to purchase an entire estate was unable at once to obtain title to the whole property, as it belonged to different parties, but there was evidence tending to show that he did obtain a conveyance of an undivided third, which his principal accepted, and that the latter finally obtained the title to the whole estate, it was held in *Giles v. Swift*, 170 Mass. 461, 49 N. E. 737, that the broker was entitled, in an action for commission, to go to the jury on the question whether the principal did not accept partial performance under such circumstances 51 L.R.A.(N.S.)

as to bind him to pay what the broker's services were reasonably worth.

III. Miscellaneous.

A complaint alleging that the defendant employed the plaintiff to sell certain forest land for a commission of 5 per cent in case of a sale of the property for a sum not less than \$500,000, and in addition thereto the excess received for the property over that amount, and that the plaintiff negotiated "a sale of said premises" to a certain party, who, as a result of the negotiations, purchased "the said property," and that the amount to be paid "for the timber alone" was \$550,000, and the "fee of the land with timber removed" was and is worth \$100,000, and that therefor the plaintiff is entitled to \$175,000 commission, is not subject to demurrer on the ground that it alleges a sale only of the timber, whereas the plaintiff's contract was for sale of the entire property. *Ostrander v. Blandin*, 211 Fed. 733.

In *Stiewel v. Lally*, 89 Ark. 195, 115 S. W. 1134, and *Stewart v. Mather*, 32 Wis. 344, on facts not within the scope of this note, it was said that where the terms of sale are fixed by the vendor, in accordance with which the broker produces a purchaser, and in negotiations between the purchaser and the vendor, the latter voluntarily reduces the price or the quantity, the broker is entitled to commission at the rate specified in his contract of employment.

In *Blake v. Stump*, 73 Md. 160, 10 L.R.A. 103, 20 Atl. 788, it was held that where a real estate broker undertook to sell a house and lot, and succeeded only in disposing of the house and leasing the lot upon a reserved ground rent, he was entitled to commission only on the cash actually received, and not on the value of the whole property, unless the owner contracted expressly or by implication to pay more.

R. E. H.

sale thereof under contract with the owner. Plaintiffs told Edwards that the Montana people had been dealing for a 9,000-acre tract for which they were to pay \$60,000 as a down payment, but that the deal had fallen through, and that he thought Edwards could get "about \$30,000 together there;" this sum presumably referring to a down payment.

Late in September, 1912, defendants Edwards and Felthous went to Milbank, Montana. J. C. Felthous & Company, a corporation, had purchased the 6,000-acre tract, and Edwards was equally interested with Felthous in the profits of the transaction. They had negotiations for the sale of the tract to Milbank Montana Land Company, a corporation in which the men whom plaintiffs claimed to have mentioned to Edwards as possible purchasers were interested. These negotiations culminated on October 24th in a sale by the Felthous Company to the Montana Company of 2,568.18 acres of the 6,000-acre tract, at a price of \$13 per acre. The rest of the tract was not sold, and still remains the property of the Felthous Company. Defendants claimed on the trial that plaintiffs were in no way instrumental in procuring the purchaser or purchasers to whom this sale was made; but this question was on the evidence for the jury.

The verdict was directed on the ground that the contract upon which plaintiff seeks to recover was never performed; that is, that plaintiffs agreed to find a purchaser for the 6,000-acre tract as a whole, while the purchaser procured by them was ready, able, and willing to take but a fraction of the tract.

1. Plaintiff contends, in the first place, that the issue of entirety of contract was not raised in the answer of either defendant, and therefore that such a defense was waived. There is nothing in this point. Plaintiff sued on a contract, but did not set it out verbatim. The answer of defendant Edwards set out in full the writings constituting the contract sued on. Whether this contract was entire or severable appeared from the writings themselves, and it was neither necessary nor proper to plead the legal conclusion that defendant drew therefrom. There was nothing by way of new matter in the nature of confession and avoidance, nor was it claimed that the contract alleged in the complaint was invalid by reason of extrinsic facts, or that the services of plaintiff were performed under any other contract.

2. Was the contract entire or severable? That is, were plaintiffs obliged, in order to perform their agreement, to find a purchaser for the entire tract, or would it be 51 L.R.A. (N.S.)

a performance *pro tanto*, if they found a purchaser for any number of acres of the tract less than the whole? This question, one of the intention of the parties, must be determined from the language of the letters, construed in the light of the surrounding circumstances. The first letter (dated August 31st, but written and delivered with the second letter on September 3d) says: "If you have any clients looking for tracts of land of the size of these, either one of them will surely suit them. Price of the two tracts together or either separately is \$10 per acre net to us." The second letter says: "In putting the 6,000-acre tract . . . up at \$10 per acre net to us . . . there is 50 cents per acre to be equally divided between you and ourselves in case you sell at that price. On the 9,515 acres, if you sell it at \$10 net . . . there is 40 cents per acre to be divided equally between us." At the time the contract was entered into, the 6,000-acre tract was owned in its entirety by one individual, and defendants were agents for its sale. It is clear, in our opinion, that the contract was entire, and not severable. The mere fact that the price named was so much per acre is not important, any more than would be the sale of a lot or lots on a city street at so much per front foot. It is quite usual to name the price of a tract of land at so much per acre, whether the precise acreage be known or not, just as it is customary to ascertain the value of a thing sold by weight or measure. "The mere fact that the subject of the contract is sold by weight or measure, and the value is ascertained by the price affixed to each pound or yard or bushel of the quantity contracted for, will not be sufficient to render the contract severable." 2 Parsons, Contr. 8th ed. 636. See also *Johnson v. Fehsefeldt*, 106 Minn. 202, 20 L.R.A. (N.S.) 1069, 118 N. W. 797. We think that the letters contain no authority to plaintiffs to sell any part of either tract less than the whole.

3. The contract being entire, can it be apportioned? On principle there is but one answer to this question. There can be no apportionment of an entire contract. As stated by Parsons, the question of apportionment always addresses itself to a contract which has already been ascertained not to be single and entire. Such question can never arise when it is once determined that the contract is entire. It is pretty well-settled law that, in case of an entire contract, part performance does not entitle a party to *pro rata* compensation, unless full performance is prevented by the other party. And this principle is applicable to a claim of commissions by a broker. Where

his compensation is to be paid by commissions, the whole services or duty must be performed before any right to commissions arises, unless the act of the principal has prevented performance. *Hyams v. Miller*, 71 Ga. 608. See note to *Lunney v. Healey*, 44 L.R.A. 593.

The model opinion of former Chief Justice Gilfillan in *Weber v. Clark*, 24 Minn. 354, seems conclusive of the question here. We quote it in full, as it is impossible to otherwise state the decision: "Defendant owned a farm of 200 acres, and agreed to pay Weber \$100 if he would find a purchaser for it. Weber found a purchaser for 117 acres of the farm, who purchased that quantity from defendant. Weber sued for \$100. Clearly he was not entitled to recover anything. The contract was entire the Weber should find a purchaser for the whole farm, and that for doing so defendant should pay him \$100. Weber was not entitled to anything until he performed his part of the contract, and found a purchaser willing to buy the whole farm. This he did not do. Judgment affirmed."

It is urged that *Weber v. Clark* was wrongly decided and should be overruled. We think the decision is sound and should be followed. The case has been cited with approval by text-books and courts. 1 *Notes on Minn. Rep.* 1156. The principle involved is elementary. A broker is not entitled to compensation until he has performed the undertaking assumed by him. 19 Cyc. 240. The undertaking assumed by plaintiffs was to procure a purchaser for the entire 6,000-acre tract. This they did not do. There was nothing in the contract that authorized a sale of a portion of the tract, nor was there any subsequent modification of the contract either in writing or by parol. The mere fact that defendants sold to the purchaser brought to them by plaintiffs a portion of the tract does not, in the absence of a new contract, or conduct of the parties that would justify the inference that the original contract was modified, show performance by plaintiffs of their agreement. The rule of *Weber v. Clark* was applied in *Illingsworth v. Slosson*, 19 Ill. App. 612; *Carpenter v. Atlas Lumber Co.* 123 App. Div. 706, 108 N. Y. Supp. 547; *Veatch v. Norman*, 109 Mo. App. 387, 84 S. W. 350. Plaintiffs cited *Woods v. Stephens*, 46 Mo. 555, as holding otherwise. The case is distinguishable in that the broker fulfilled his contract so far as he was permitted by the owner, and the contract was modified. They further rely on a class of authorities holding substantially that, where a broker introduces a purchaser, and the seller conducts negotiations with him and finally sells the property for a less sum or on

different terms than named in the contract of employment, the broker is entitled to a commission. *Hubachek v. Hazzard*, 83 Minn. 437, 86 N. W. 426; 19 Cyc. 249, and cases cited; *Ball v. Dolan*, 15 L.R.A. (N.S.) 272 note. But where, as in the case at bar, the broker is to have as his compensation all in excess of a certain named price, and the purchaser he finds is unwilling to pay anything in excess of the price named, a sale to such purchaser at such price or a less sum will not entitle the broker to compensation. *Holcomb v. Stafford*, 102 Minn. 233, 113 N. W. 449; 19 Cyc. 241, note 78. This is because the broker's right to compensation is by the contract made conditional on the price received. In case of a sale at a less price he has not performed his contract, or earned his compensation. The principle of the line of cases of which *Hubachek v. Hazzard* is an example is that the contract does not make the broker's right to compensation dependent upon a sale at a net price to the owner, but leaves the price and terms of the sale subject to modification by the owner. The distinction is obvious. The principle of *Hubachek v. Hazzard* is not in point here, while the rule of *Holcomb v. Stafford* is mainly important as an application of the general rule that, to entitle the broker to compensation, he must perform his agreement.

4. The contention of plaintiffs that has the most merit, as far as natural justice is concerned, is that they should be paid the reasonable value of the services they performed, although they did not perform their contract. Of course, the doctrine of substantial performance or that of part performance has no application here. Defendants did not prevent performance by plaintiffs. So far as appears, plaintiffs might still have earned their commission by finding a purchaser for the rest of the tract. Whether there can be a recovery on a *quantum meruit* except in cases where a recovery is warranted under the principles of substantial performance, or part performance, is a question that is not presented by the pleadings or the evidence, and we do not decide it. Plaintiffs are not seeking to recover on an implied promise or *quantum meruit*. They declare in their complaint upon an express contract, and make no mention of the reasonable value of any services they performed. As a question of pleading, they could not recover on a *quantum meruit* if objection had been made seasonably. 1 *Dunnell*, Dig. § 1904. And no attempt was made to prove the reasonable value of plaintiffs' services.

Our conclusion is that the trial court

was right in directing a verdict for the defendants.

Order affirmed.

NEBRASKA SUPREME COURT.

ANNA SCHMIDT

v.

WILLIAMSBURG CITY FIRE INSURANCE COMPANY OF BROOKLYN,
NEW YORK, Appt.

(— Neb. —, 144 N. W. 1044.)

Trial — directed verdict — propriety.

1. Unless plaintiff and defendant at the close of the evidence each request a directed verdict in his favor, the district court is not authorized to determine disputed questions of fact. If such a request is made by one party alone, it is only when the testimony on behalf of the other party will not support his cause of action or his defense that the court may direct the jury to render a verdict in favor of the moving party.

Headnotes by LETTON, J.

Note. — Does failure of the insurer to speak or act after notice of breach of policy constitute a waiver thereof.

The early cases upon the question considered in the present note are covered in the note to Phenix Ins. Co. v. Grove, 25 L.R.A. (N.S.) 1, and this note is merely supplementary to that.

For a note on return of premium as condition of cancelation of insurance, see Davidson v. German Ins. Co. 13 L.R.A. (N.S.) 885.

As to waiver of return of unearned premium as a condition of cancelation of insurance, see note to Buckley v. Citizens' Ins. Co. 13 L.R.A. (N.S.) 889.

As to right of insured to return of premium where policy is void or voidable because of misrepresentation on his part, see note to Metropolitan L. Ins. Co. v. Freedman, 32 L.R.A. (N.S.) 298.

As to effect of fraud of an applicant for membership in a benefit insurance society on the obligation of the society to return what has been paid as assessments or dues before it can claim the contract unenforceable, see note to Taylor v. Grand Lodge, A. O. U. W. 3 L.R.A. (N.S.) 114.

As to waiver of provision as to change of occupation by continued receipt of dues, see note to Johnson v. Modern Brotherhood, 27 L.R.A. (N.S.) 446.

Knowledge acquired after loss.

Supplementing note in 25 L.R.A. (N.S.)

3. The rule stated in the early note, that where notice of the breach of a condition of a policy before loss does not reach the insurer until after loss, mere silence or non-action on the part of the latter will not 51 L.R.A. (N.S.)

Insurance — vacancy — notice to agent — effect.

2. Notice and knowledge of the existence of a vacancy in the insured premises, or of the occurrence of a fire in the same to such an extent as to make them uninhabitable, communicated to the local agent of the defendant, authorized to issue policies and transact the usual business of a recording agency, is the knowledge of the insurance company.

Same — return of premium — surrender of policy.

3. Where a policy provides the policy "shall be void . . . if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days," and also provides: "If this policy shall . . . become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate"—the company is not bound to return any unearned premium, unless the policy is surrendered.

Same — offer for policy — waiver of surrender.

4. Where, under such policy, the insurer

operate to bind it, has been applied in subsequent cases.

Thus, it has been held that an insurer is not estopped in an action on a fidelity bond from setting up a breach of a condition binding the insured to require its employee to furnish certain reports and statements, because of its failure to return the premiums, where it had no knowledge of the breach of the condition until after the loss. Marion Iron & Brass Bed Co. v. Empire State Surety Co. — Ind. App. —, 100 N. E. 882.

And a forfeiture by reason of a breach of the condition against encumbrances is not waived, nor is the insurer precluded from setting it up in defense of a suit on the policy by the failure to return the premium before suit was instituted, where it had no knowledge of the breach until after the loss occurred. Capital F. Ins. Co. v. Shearwood, 87 Ark. 326, 112 S. W. 878; and to the same effect is Home F. Ins. Co. v. Wilson, — Ark. —, 159 S. W. 1113.

So, where the insurer has no knowledge, prior to the loss, of a violation of the "iron safe" clause, and there is nothing in the contract of insurance requiring a payment of the premium after it ceases to be a continuing insurance by reason of a loss, before it can set up a breach of its conditions, the insurer may claim a forfeiture and at the same time retain the unearned premium. Robinson v. Aetna F. Ins. Co. 135 Ala. 650, 34 So. 18.

And to the same effect is Security Ins. Co. v. Laird, — Ala. —, 62 So. 182, where there was a breach of the additional insurance clause.

And in Benanti v. Delaware Ins. Co. 86 Conn. 15, 84 Atl. 109, Ann. Cas. 1913D, 826, under a policy providing that it should be

has no notice or knowledge of the breach of a condition in the policy making it void in case the premises are vacant or unoccupied for more than ten days, and did not learn until after the premises were totally destroyed that the building had been so damaged by previous fires as to be uninhabitable, and had so remained for several weeks before the loss occurred, the fact that the adjuster for the company, while declaring that the policy was void, and that the insurer was not liable, offered a larger sum than the unearned premium for a surrender of the policy does not of itself constitute a waiver of the forfeiture.

(January 7, 1914.)

A PPEAL by defendant from a judgment of the District Court for Douglass

void if the insured misrepresented his interest in the property, it was held that if the insurer retains the premium prior to a loss after it knows of a breach of the condition, the right to avoid the policy is waived; but that if the knowledge of the breach comes to the insurer after the loss, its retention of the premium after such knowledge will not amount to a waiver.

But in *Rhodus v. Kansas City L. Ins. Co.* 156 Mo. App. 281, 137 S. W. 907, there was held to be a waiver of a provision that the contract should be null and void unless the application was passed upon and the policy delivered during the applicant's lifetime and while in good health, where the insurer's agent, after notice of the applicant's death, received payment of the premium note and forwarded it to the insurer, which received and kept it after knowledge of the facts. (Generally as to waiver of stipulation in policy that it shall not become binding unless delivered to insured while in good health, see notes in 17 L.R.A.(N.S.) 1149, and 43 L.R.A.(N.S.) 727.)

And the insurer is estopped from setting up a violation of a provision that a fire policy shall be void if other insurance is obtained on the property without its consent where its agent, after a loss occurred, with knowledge that there was other insurance in force which the insurer had not consented to, collected and remitted the premium and delivered the policy, and the insurer failed to return the premium. *Rogers v. Connecticut F. Ins. Co.* 157 Mo. App. 671, 139 S. W. 265.

And in *Manning v. Connecticut F. Ins. Co.* 176 Mo. App. 678, 159 S. W. 750, there was held to be a waiver of a breach of the unconditional ownership clause where the insurer received and retained the premium with full knowledge on the part of its agent, on the day of the fire, of the breach.

And the retention of premiums after knowledge of a breach of a condition as to the insured's health, apparently obtained after loss, ratifies the contract, although it provides that it shall be void in case of a breach of such condition, and also provides that the premiums shall be forfeited to the

County in plaintiff's favor in an action on a fire insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. Greene, Breckenridge, Gurley, & Woodrough, for appellant:

The property was totally destroyed.

German Ins. Co. v. Eddy, 38 Neb. 461, 19 L.R.A. 707, 54 N. W. 856; *Insurance Co. of N. A. v. Bachler*, 44 Neb. 549, 62 N. W. 911; *Seyk v. Millers' Nat. Ins. Co.* 74 Wis. 67, 3 L.R.A. 523, 41 N. W. 443.

To render a contract of insurance valid the property must be in existence.

Clark v. Insurance Co. of N. A. 89 Me. 26, 35 L.R.A. 276, 25 Atl. 1008; *Kerr v. Milwaukee Mechanics' Ins. Co.* 54 C. C. A. 616, 117 Fed. 442.

insurer in case the policy becomes void. *McCurrey v. Metropolitan L. Ins. Co.* 168 Ill. App. 625.

In *Brashears v. Perry County Farmers' Protective Ins. Co.* 51 Ind. App. 8, 98 N. E. 889, where a policy provided that vacation of the insured property should suspend the risk, but that it should be revived upon notice of reoccupation, and a by-law required the insurer to affirmatively signify its intention to terminate the policy by giving notice in case of a breach of its conditions, it was held that a breach of the condition mentioned was waived by the insurer's failure upon notice thereof after loss to give notice of its intention to terminate its liability and offer to return the unearned premium.

Knowledge acquired before loss—breaches rendering policy voidable.

Supplementing note in 25 L.R.A.(N.S.) 6.

In *Western Ins. Co. v. Ashby*, — Ind. App. —, 102 N. E. 45, where the policy upon which suit was instituted provided that it should be void if the insured obtained other insurance, and there was a breach of this provision, the court held that the evidence, which showed knowledge of the breach before a loss occurred, warranted a finding of waiver, saying: "The doctrine is well established in this state that a provision in such policy, rendering it void upon certain conditions, means voidable at the option of the insurer; and that to render it void, upon discovery of the facts by which liability may be avoided, it must act with reasonable promptness, must notify the insured of its election to avoid the policy, tender back, or in some appropriate way restore, or offer to restore, the unearned premium received, and upon failure so to do will be deemed to have waived the right to so declare the policy void, and to have elected to treat it as a valid contract of insurance."

And a like result was reached in the following Indiana cases: *State L. Ins. Co. v. Jones*, 48 Ind. App. 186, 92 N. E. 879 (where

Messrs. Albert S. Ritchie and Charles L. Fritscher, for appellee:

There could be no forfeiture of the policy on account of vacancy during thirty days next after the fire of March 20, 1910, during which time the company had a right to exercise its option to repair.

Lancashire Ins. Co. v. Bush, 60 Neb. 116, 82 N. W. 313.

Notice to such an agent as Gibson was binds the company.

Hunt v. State Ins. Co. 66 Neb. 121, 92 N. W. 921; Eagle F. Ins. Co. v. Globe Loan & T. Co. 44 Neb. 380, 62 N. W. 895; Home F. Ins. Co. v. Bernstein, 55 Neb. 260, 75 N. W. 839.

On a violation of the vacancy clause there must be affirmative action on the part

of the company, and it must declare a forfeiture; or, the condition being for its benefit, a failure to declare a forfeiture is a waiver of this condition.

Home F. Ins. Co. v. Kuhlman, 58 Neb. 488, 76 Am. St. Rep. 111, 78 N. W. 936; Hunt v. State Ins. Co. 66 Neb. 121, 92 N. W. 921; Farmers' & M. Ins. Co. v. Bodge, 76 Neb. 31, 106 N. W. 1004, 110 N. W. 1018.

There might be a waiver of conditions after as well as before a loss or destruction of the property.

Billings v. German Ins. Co. 34 Neb. 502, 52 N. W. 397; Brashears v. Perry County Farmers' Protective Ins. Co. 51 Ind. App. 8, 98 N. E. 889.

The offer to give \$150 for the policy,

misstatements in connection with insured's medical examination were claimed); Commercial L. Ins. Co. v. Schroyer, 176 Ind. 654, 95 N. E. 1004, Ann. Cas. 1914A, 968 (where fraudulent statements as to occupation and prior insurance were relied upon); American Cent. L. Ins. Co. v. Rosenstein, 46 Ind. App. 537, 92 N. E. 380 (where misrepresentations as to prior applications for insurance and concerning the sale and use of liquors were alleged).

And in Farmers' Mut. F. Ins. Co. v. Hill, 45 Ind. App. 605, 91 N. E. 361, an answer alleging a violation by the insured of the rules and regulations of the association forbidding the insuring of certain buildings having stoves in them was held insufficient in failing to aver a rescission of the contract, or any tender or offer to return the premiums paid.

And in Shutts v. Milwaukee Mechanics' Ins. Co. 159 Mo. App. 436, 141 S. W. 15, the change of location of the insured property without the insurer's consent was held merely to render the contract voidable, and the insurer's right to declare a forfeiture was held to have been waived where, after knowledge of the removal by its agent, it retained the premium and remained silent until a loss occurred.

So, where a policy stipulates that it shall become void if the property is subsequently encumbered, it has been held that the provision is waived and the policy continued in force where the insurer, before loss, has notice of a breach of the condition, but fails to cancel the policy. Kelley v. People's Nat. F. Ins. Co. — Ill. —, — L.R.A.(N.S.) —, 104 N. E. 188.

And the decision in Phenix Ins. Co. v. Grove, 25 L.R.A.(N.S.) 1, was followed in Hollstrom v. Forest City Ins. Co. 168 Ill. App. 214, where the policy provided that if any encumbrance were executed on the insured property, or any change of title should take place, the contract would be void; a breach of this condition by the insured in mortgaging the property was held to be waived where the insurer's agent had notice of the fact before loss, but took no action to avoid the policy. 51 L.R.A.(N.S.)

And where an insurer, after full knowledge before loss of a breach of a condition as to the insured's health, continues to collect and retain the premiums, it waives the right to take advantage of the breach, although the policy provides that it shall be void in case of such breach, and stipulates that all premiums shall be forfeited to the insurer, the provision that the policy shall be void being construed to mean voidable only. Metropolitan L. Ins. Co. v. Johnson, 49 Ind. App. 233, 94 N. E. 785.

And the receipt for over two years of assessments, and the retention of them after knowledge of the falsity of the insured's statement in his application as to his health, estops the insurer from asserting the falsity as a defense. Kidder v. Supreme Assembly, A. S. E. 154 Ill. App. 489.

There is also a *dictum* in Rogers v. Home Ins. Co. 155 Mo. App. 276, 136 S. W. 743, that if the insurer's agent knows of a violation of a provision that the policy shall become void if additional insurance is obtained, and he makes no move to cancel the policy, but treats it as a subsisting contract, he waives the provision.

—breaches rendering policy void.

Supplementing note in 25 L.R.A.(N.S.) 16.

As stated in the earlier note, where the policy provides that a breach of its conditions shall render it void, and the forfeiture is deemed to be self-executing, mere silence or nonaction will not estop the insurer from taking advantage of the breach.

Thus, in a subsequent case where a policy provided that it should be void if the insured procured other insurance without the insurer's consent, the policy was held to be avoided *ipso facto* by the obtaining of such insurance, and it was held that the mere failure to cancel the policy after knowledge of the breach by the insurer before loss would not justify a conclusion that the insurer had elected to continue the policy in force. Coppoletti v. Citizens' Ins. Co. 123 Minn. 325, 143 N. W. 787.

Under the South Dakota standard pol-

made by Wilken, would be some evidence of a waiver.

Billings v. German Ins. Co. supra; *German Ins. Co. v. Stiner*, 2 Neb. (Unof.) 308, 96 N. W. 122.

The ownership and title to the property remain in the mortgagor, and she is the proper party to bring the action on the policy.

Minnock v. Eureka F. & M. Ins. Co. 90 Mich. 236, 51 N. W. 367; *Wunderlich v. Palatine F. Ins. Co.* 104 Wis. 395, 80 N. W. 471, 38 N. J. L. 140, 20 Am. Rep. 372; *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568, 29 Am. Rep. 271; *Anthony v. German American Ins. Co.* 48 Mo. App. 65.

The mortgagor may sue along with the consent of the mortgagee.

Patterson v. Triumph Ins. Co. 64 Me. 500; *Graves v. American Live-Stock Ins. Co.* 46 Minn. 130, 48 N. W. 684; *Jackson v. Farmers' Mut. F. Ins. Co.* 5 Gray, 52; *Turner v. Quincy Mut. F. Ins. Co.* 109 Mass. 568.

Consent that the mortgagor bring the action in his own name, given after suit commenced and tried in a municipal court, is sufficient to enable the mortgagor to maintain the action.

Green v. Star F. Ins. Co. 190 Mass. 586, 77 N. E. 649.

The defect of parties, or want of capacity, if any, was apparent on the face of the petition, and, not having been objected to before trial, is waived.

Taylor v. Weckerly, 69 Neb. 739, 96 N.

icy prescribed by the Laws of 1905, providing that a policy shall be void if, without the insurer's consent, the property is materially altered, and stipulating that the insurer shall be deemed to have waived a breach of its conditions unless it promptly cancels the policy, there is a waiver of a breach resulting from an encumbrance placed upon the insured property, where the insurer, after knowledge of the breach before loss, fails to promptly cancel the policy. *Lawver v. Globe Mut. Ins. Co.* 25 S. D. 549, 127 N. W. 615.

But the provision requiring the insurer to promptly cancel the policy upon notice of a breach of a condition was omitted from the standard policy prescribed by Laws of 1909, and in *Hronish v. Home Ins. Co.* — S. D. —, 146 N. W. 588, where the policy provided that it should be void if the insured procured other insurance, and stipulated that no agent had power to waive any condition of the policy except as provided by its terms, there was held to be no waiver of a breach of the above condition because the insured's agent, after knowledge thereof, did not promptly have the policy canceled.

—special circumstances affecting duty of insurer.

Supplementing note in 25 L.R.A.(N.S.) 23.

It is held that, on receipt of notice from the insured of the vacancy of the insured premises, and a request for a vacancy permit, the insurer is bound to act with reasonable despatch and either issue a permit or cancel the policy and return the unearned premium; and that a failure to do so waives a forfeiture under a provision of the policy that, in the event of the premises becoming vacant, the policy shall be null and void. *Patterson v. American Ins. Co.* 164 Mo. App. 157, 148 S. W. 448.

Under art. 3096bb, Rev. Stat. 1895, providing that an insurer shall not avail itself of any defense based upon misrepresentations in the application unless, within a reasonable time after discovering the fal-

sity, it gives notice that it refuses to be bound by it, and fixing ninety days as a reasonable time, an insurer who fails to give such notice cannot set up the falsity of statements in the application as to prior applications for insurance and as to medical attendance as a defense. *National Life Asso. v. Hagelstein*, — Tex. Civ. App. —, 150 S. W. 353.

Where a statute requires the examination of books, invoices, etc., at the place where the fire occurred, and there is no evidence of a demand by the insurer for the production and examination of the insured's books and inventories at the place of loss, there is a waiver of a provision of the policy requiring the insured to make certain inventories and keep his books in an iron safe, and in case of loss to produce all books and inventories, and stipulating that a failure to do so shall render the policy null and void. *Culver v. Williamsburgh City F. Ins. Co.* 141 Mo. App. 205, 124 S. W. 540.

—what constitutes reasonable notice of forfeiture.

Supplementing note in 25 L.R.A.(N.S.) 23.

The question as to what is a reasonable time in which to act upon the discovery of a breach of the insurance contract is ordinarily one of fact, but where the facts have been ascertained or are undisputed, it becomes a question of law. *American Cent. L. Ins. Co. v. Rosenstein*, 46 Ind. App. 537, 92 N. E. 380.

It has been held that an offer to rescind was not made within a reasonable time where the insurer had knowledge of a breach of the insured's warranties as to prior applications for insurance and medical attendance two months after the insured's death, and suit was instituted against the insurer three months later, but the insurer did not tender the premium until the suit had been pending more than four months, and it had answered the complaint on the theory of no contract. *Ibid.*

J. T. W.

W. 618; *Jobst v. Hayden Bros.* 84 Neb. 735, 50 L.R.A.(N.S.) 501, 121 N. W. 957.

Letton, J., delivered the opinion of the court:

Action to recover upon an insurance policy for the total destruction of a house in South Omaha on April 17, 1910. The defense relied upon is that the premises were vacant or unoccupied at the time of the fire, and had been so for more than ten days, and a provision in the contract that the policy "shall be void if the building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days." The reply pleads that the property was partially destroyed by fire within thirty days before April 17, 1910, avers that this rendered the premises uninhabitable; that defendant had the option within thirty days to rebuild or to repair; that it had knowledge of the fire of March 20, 1910, and had not, on April 17th, exercised the option. It further pleads that defendant had not declared a forfeiture of the policy on account of the vacancy, nor returned or tendered the unearned premiums. It also pleads an offer of \$150 for the surrender of the policy, and in payment of the loss before suit, and that by this offer defendant waived any breach of the conditions of the policy.

The insured property was occupied as a rooming house. A fire occurred on March 20, which damaged the property to some extent. On March 30, another fire occurred. In extinguishing these fires the contents of the building were materially damaged, and the occupants moved out, leaving one or two old mattresses and a portion of a bedstead in the basement and lower floor. The testimony on behalf of plaintiff is to the effect that the local agent who wrote the policy was notified of the loss by the fire of March 20th, within a day or two after it happened, and that he said he "would look after the matter." The agent, however, unequivocally denies that he had any knowledge or notice of this fire. Nothing was done by the insurance company with respect to repairs, and the plaintiff's agents, Gallagher & Nelson, procured repairs to be made which were finished on the 10th day of April. Proofs of loss were sent in after the fire of April 17th, and soon afterwards Mr. Wilken, the adjuster for the defendant, went to the office of Gallagher & Nelson. Wilken testifies that he then told Gallagher & Nelson the building had been vacant nineteen days or more; that the policy was void, and the company not liable thereon. The policy contained a mortgage clause "loss or damage, if any . . . payable to

Lion Bond & Surety Company . . . as interest may appear."

Defendant objected all through the trial that plaintiff was not the real party in interest. The petition alleged that the surety company had given its consent to the action being brought in the plaintiff's name, and the president of that company testified to the same effect. This, we think, was sufficient to show authority to bring the suit. At the close of plaintiff's case, and after the testimony of defendant had been received, defendant moved the court for a directed verdict: First, because from the pleadings judgment must be for the defendant; second, because the action is not brought by the real party in interest; third, because the vacancy condition of the policy was violated, and the policy was not in force on April 17, 1910. The court overruled this motion. Apparently upon its own motion the court then instructed the jury, in substance, that the defendant was not in a condition to claim that the policy had become without force until it had returned or tendered the return of the unearned premium, and therefore the insurance contract was still in force, and recognized at all times afterwards, as being in force, between the parties, and further directed it to return a verdict in favor of plaintiff for \$844.38, being the face of the policy, with interest.

The plaintiff argues that the judgment of the district court was right for two reasons: First, that where one party moves for a directed verdict, the district court is thereby invited to settle and determine any questions of fact in the case necessary to a determination of the motion, relying upon certain cases in the state of New York; second, that, having determined that the company had notice of the fire of March 20th and failed to exercise its option to repair, it could not take advantage of the fact that the house was vacant and uninhabited by reason of the damage caused by the former fire. In the latter contention she relies upon the opinion in the case of *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, 82 N. W. 313. The principle of that case cannot apply unless the court was entitled to decide, as a matter of fact, that proper notice was given to the company on the occurrence of the former fire, so that it might exercise the option of either paying the amount of the loss or making the repairs itself, and that such a fire rendered the building untenable. We have decided that where plaintiff and defendant each request the court to direct a verdict, this amounts to a submission of the case to the court upon the questions of both law and fact. *Davison v. Land*, 89 Neb. 58, 130

N. W. 848; *Adler v. Royal Neighbors*, 90 Neb. 56, 132 N. W. 716, Ann. Cas. 1912D, 974. We have never held that a request for a directed verdict by one party alone has the effect of submitting all questions of fact in the case to the court for its determination. On the contrary, we have uniformly held that, "if there be any testimony before the jury by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it, and direct a verdict against him. And the converse of this is true." *Grant v. Cropsey*, 8 Neb. 205; *Hunt v. State Ins. Co.* 66 Neb. 125, 92 N. W. 921, and cases cited. And also, that this "court will regard as conclusively established every fact favorable to the unsuccessful party which the evidence proves or tends to establish." *Preston v. Stover*, 70 Neb. 632, 97 N. W. 812. We prefer to adhere to the rule adopted in this state rather than to announce a new one. It seems clear that it was the province of the jury to determine whether the testimony of the witness Dickey that he notified Mr. Gibson, the local agent who issued the policy, of the fire of March 20th, established the giving of the notice, or whether the absolute denial by Gibson of the giving of any such notice proved that no notice was ever given. Unless, therefore, the case is determined upon other grounds, we think this question should have been submitted to the jury. Of course this error would not be prejudicial if we should take the view the learned district court did, that since no offer was made to return the unearned premium, the policy was still in force at the time of the fire, although the company had no notice or knowledge that the property was vacant.

Plaintiff argues that it was the duty of the company, in order to avoid liability, to declare a forfeiture, and that a failure to do this waived the condition. Plaintiff relies upon the cases of *Home F. Ins. Co. v. Kuhlman*, 58 Neb. 488, 76 Am. St. Rep. 111, 78 N. W. 936; *Hunt v. State Ins. Co.* supra, and *Farmers' & M. Ins. Co. v. Bodge*, 76 Neb. 31, 106 N. W. 1004, 110 N. W. 1018. In the *Hunt Case* "the evidence tended to show that the local recording agent of the defendant had full notice and knowledge of the change of occupants and of the vacancy at the time of such change, long prior to the loss, and that after he had such notice the defendant treated the policy as in force by indorsing a mortgage clause thereon. With respect to the alleged vacancy at the time of the loss, the evidence showed that the tenant in possession of the premises had been ordered to move, and had moved out the day of the loss; the fire occurring at night, not many hours thereafter." The 51 L.R.A. (N.S.)

court held that under these circumstances notice to the local agent was notice to the insurer, and that the indorsement of the mortgage clause upon the policy with such notice was inconsistent with an intention to insist upon a forfeiture.

In the *Kuhlman Case* the facts were that the fire occurred on April 11th, and on April 13th the secretary of the insurance company sent a letter to Mrs. Kuhlman, inclosing a draft for the return premium under the policy, reciting: "Said policy being this day canceled on our books, and our liability terminating thereunder from and after this date." This letter being written after the fire, the court held "it was written for the express purpose of terminating the contract, and on the assumption that the contract was then in full force and effect," and sustained the recovery. Of course, if the policy was not canceled until two days after the fire, it was in force on that day, and was so recognized by the company in this correspondence.

In the *Bodge Case* the insurance company became aware of the vacancy after the loss; it thereupon returned the unearned premium and canceled the policy. The court first held (76 Neb. 31, 106 N. W. 1004, 110 N. W. 1018) that under a vacancy provision the policy does not become absolutely void upon a violation of the conditions, unless the insurer chooses to take advantage of the forfeiture, and where, after loss, the insurer, with information of the loss, as well as breach of the conditions, cancels the policy and retains the premium, it will be held to be a waiver of the breach. On rehearing (76 Neb. 35, 110 N. W. 1018), however, this opinion was vacated, and it was held that "the cancellation of a policy of insurance after loss and notice of facts occurring before loss, constituting a forfeiture, coupled with the return of unearned premium from date of forfeiture, does not constitute a waiver of the forfeiture." In that case, as in this, at the time the policy was issued the building covered by the insurance was occupied by a tenant. It later became vacant, and was vacant at the time of the loss. The court cited *Sexton v. Hawkeye Ins. Co.* 69 Iowa, 99, 28 N. W. 462, and *Republic County Mut. F. Ins. Co. v. Johnson*, 69 Kan. 146, 105 Am. St. Rep. 157, 76 Pac. 419, 2 Ann. Cas. 20.

In *Eagle Fire Co. v. Globe Loan & T. Co.* 44 Neb. 380, 62 N. W. 895, also relied upon by plaintiff, the insured violated the policy by procuring additional insurance without the knowledge or consent of the insurer. The court held that the insurer was entitled on discovering the violation to cancel the policy, the cancellation to take effect from and after the date of the viola-

tion. "But the insurance company did not do this. By its own act it canceled the policy on the 24th of November, . . . the day after the date of the loss." The facts, it will be seen, are substantially the same as in the Kuhlman Case, and hence the company was properly held to have waived the conditions. We hold, therefore, that any insurance company, if without knowledge of the breach of a condition against vacancies until after a fire has occurred, may, if it has not waived the forfeitures, insist upon the same.

Plaintiff's argument that it was never intended the policy should become void by the premises standing vacant for a reasonable time for change of tenants, we think is not tenable. The policy does not show the property was to be occupied by a tenant, and it is provided that the policy shall be void, whether intended for occupancy by the owner or tenant, if remaining vacant or unoccupied for ten days. That empty dwellings are ordinarily extrahazardous—to use an insurance term—as compared with those occupied either by owners or tenants is a matter of common knowledge, and conditions avoiding the policy if such vacancy continues for more than ten days may be enforced at the election of the insurer. The clause relating to the tenancy was evidently inserted to cover the very point contended for by the plaintiff. Moreover, the vacancy was not caused by a change of tenants, but by the premises being out of repair.

As to the contention that the company recognized the policy as being in force by failing to return the unearned premium. We held, in *Farmers' Mut. Ins. Co. v. Home F. Ins. Co.* 54 Neb. 740, 74 N. W. 1101, in a case where the insured had violated the provisions of the policy by procuring additional insurance without the knowledge or consent of the insurer, and the action was brought to recover unearned premiums for the unexpired term of the policy, that the insurance company had the right to treat the policy as void when it ascertained the breach, "but Penner's violation of his insurance contract did not invest him with a right of action against the home company to recover the premium which he had paid the company therefor, or any part of that premium. The contract of insurance did not provide that, if the insurer declared it to be at an end because of Penner's violation of its provisions in procuring additional insurance on the insured property without the consent of the home company, it would repay Penner the unearned premium: nor is this the meaning of the statute constructively incorporated into and made a part of the policy."

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Perhaps as clear a statement of the legal principles as we have found is the case of *Pearlstine v. Westchester F. Ins. Co.* 70 S. C. 75, 49 S. E. 4, in which that court says: "Where, however, the premium is paid, and in consideration of it the company contemporaneously issues its policy, which is a contract to insure on certain conditions therein mentioned, and the insured violates those conditions in a material particular without the knowledge of the insurer, in case of loss the insurer is not bound to return the consideration of the policy before standing upon its terms. The consideration has been paid, not for an absolute promise, but for a promise of the insurer to hold itself liable for loss on certain conditions. The company does not fail in its promise by insisting on its conditions; not having broken its contract, it has a right to retain the consideration. The insured has received all he contracted and paid for,—conditional insurance,—and he has no right to demand a return of the price paid from the insurer, on pain of liability for unconditional insurance. After the loss occurs as to the property destroyed, the policy is no longer current, but has become matured by reason of the fire, and no question of good faith is involved in retaining the premium, because the rights of the parties are then fixed." The following cases are in accordance with the principles announced: *Phoenix Ins. Co. v. Stevenson*, 78 Ky. 150; *Robinson v. Ætna F. Ins. Co.* 135 Ala. 650, 34 So. 18; *Smith v. Continental Ins. Co.* 6 Dak. 433, 43 N. W. 810; *Houdeck v. Merchants' & B. Ins. Co.* 102 Iowa, 303, 71 N. W. 354; *Harris v. Royal Canadian Ins. Co.* 53 Iowa, 236, 5 N. W. 124; *A. M. Todd Co. v. Farmers' Mut. F. Ins. Co.* 137 Mich. 188, 100 N. W. 442; *Alabama State Mut. Assur. Co. v. Long Clothing Sign & Shoe Co.* 123 Ala. 667, 26 So. 655; *Shuggart v. Lycoming F. Ins. Co.* 55 Cal. 408; 2 Clement, Fire Ins. rule, 52, p. 431.

Braschars v. Perry County Farmers' Protective Ins. Co. 51 Ind. App. 8, 98 N. E. 880, cited by plaintiff, relates to a farmers' mutual company. The vacancy condition in the policy did not by its terms render the policy absolutely void, and the ruling of the court seems to be based upon the existence of a by-law requiring affirmative notice of the cancellation to be given by the insurer. We think it is not an authority in opposition to the above cases.

Mr. Gallagher testifies that Mr. Wilken, the plaintiff's adjuster, came to his office and said that he had viewed the property and made an offer of \$150; "that he would give \$150 if we would surrender the policy to him. I told him we would not consider

it; that the policy was not then in our possession; held by the Lion Bonding Company." Mr. Wilken testifies with reference to this conversation with Gallagher and Nelson: "I told them that I had investigated the loss, and had found that the property was vacant at the time the fire occurred, and had been for something over nineteen days, and that the company was not liable, but that it would probably cost—I don't know exactly what we figured it—from \$125 to \$250 to have it determined by the courts, and that I preferred to pay it to the insured." We are unable to see that this conversation amounted to a waiver of the condition of the policy, especially considering the fact that the policy itself contains the provision, "if this policy shall . . . become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate."

A similar contention was made in the case of *Norris v. Hartford F. Ins. Co.* 55 S. C. 450, 74 Am. St. Rep. 765, 33 S. E. 566. That court said: "Nor can we ascribe any potency to the position that defendant is estopped from raising its defense because no part of premium was restored. It is time enough to do this when policy is returned for cancellation; such is the language of the policy itself."

It is contended that the proofs of loss informed the company before it sent the adjuster that the premises were "not occupied pending change of tenants." This is a fact, but the proofs of loss failed to show that the premises had been unoccupied since shortly after the fire of March 20th until April 17th, and less than ten days' vacancy, without the knowledge of the company, would not be a breach of the conditions of the policy. We think no waiver could be based upon knowledge of this statement in the proofs.

We think the case should have been sent to the jury to pass upon the question of fact, presented as to whether notice of the former fire was given to the agent of the defendant. We are also of opinion that the district court erred in instructing the jury as a matter of law that "the insurance contract . . . was still in force, and recognized at all times afterward as being in force between the parties," and in directing it to return a verdict for the plaintiff.

The judgment of the District Court is reversed.

Rose, Sedgwick, and Barnes, JJ., not sitting.
51 L.R.A.(N.S.)

TEXAS SUPREME COURT.

RIGHT OF WAY OIL COMPANY et al.,
Plffs. in Err.,

v.

GLADYS CITY OIL, GAS, & MANUFACTURING COMPANY et al.

(— Tex. —, 157 S. W. 737.)

Railroad — right of way — right to take oil.

1. Where an easement only is conveyed by a grant of right of way, the insertion in a right of way deed of a provision permitting the grantee to take and use all timber, earth, stone, and mineral that may be found within the right of way, does not include the right to take oil found there.

Damages — conversion of oil — cost of production.

2. The owner of the fee from which mineral oil is taken by the owner of a right of way across property may recover what the latter receives from a sale of the oil, in the absence of any evidence showing the cost of bringing it to the surface.

(June 11, 1913.)

ERROR to the Court of Civil Appeals for the First Supreme Judicial District to review a judgment reversing a judgment of the District Court for Jefferson County in defendants' favor in a suit for the possession of a certain tract of land for the title and possession of oil produced therefrom, and for an injunction to restrain defendants from drilling oil wells on the land, and from asserting any right or claim thereto. Affirmed.

The facts are stated in the opinion.

Messrs. Parker, Orgain, & Butler and Baker, Botts, Parker, & Gardwood, with Messrs. W. D. Gordon and Oswald S. Parker, for plaintiffs in error:

The deed in controversy conveyed a base fee with the express right to mine, and is not a mere license or easement, and the estate thereby conveyed cannot be limited by construction.

Calcasieu Lumber Co. v. Harris, 77 Tex. 18, 13 S. W. 453; *Olive v. Sabine & E. T. R. Co.* 11 Tex. Civ. App. 208, 33 S. W. 139.

The right of use and enjoyment of a fee simple determinable are precisely coincident and identical with the fee simple absolute.

United States Pipe Line Co. v. Delaware, L. & W. R. Co. 62 N. J. L. 254, 42 L.R.A. 572, 41 Atl. 759; *Webster Lumber Co. v. Keystone Lumber & Min. Co.* 51 W. Va. 545, 66 L.R.A. 36, 42 S. E. 632; *Smith v. Furbish*, 68 N. H. 123, 47 L.R.A. 237, 44

Note. — For right of railroad company to material or mineral within right of way, see note to *Cleveland, C. C. & St. L. R. Co. v. Hadley*, 45 L.R.A.(N.S.) 796.

Atl. 398; *State, Morris Canal & Bkg. Co., Prosecutors, v. Brown*, 27 N. J. L. 13; *Re Mechanics' Soc.* 31 La. Ann. 627; *Warren v. Syme*, 7 W. Va. 474, 13 Cys. 603; *Abraham v. Oregon & C. R. Co.* 37 Or. 495, 64 L.R.A. 391, 82 Am. St. Rep. 779, 60 Pac. 899; *St. Louis, K. C. & C. R. Co. v. Wabash R. Co.* 81 C. C. A. 643, 152 Fed. 849.

Limitations and reservations must be expressed.

13 Cys. 683e; *Mahoning County v. Young*, 8 C. C. A. 27, 16 U. S. App. 253, 50 Fed. 96; *Avery v. United States*, 44 C. C. A. 161, 104 Fed. 711.

The ordinary rules governing construction of similar instruments apply in general to the construction of deeds and contracts for a railroad right of way.

2 *Elliott, Railroads*, § 948; *Sellers v. Texas C. R. Co.* 81 Tex. 460, 13 L.R.A. 657, 17 S. W. 32; *Wellman v. Churchill*, 92 Me. 193, 42 Atl. 352; *Stadler v. Missouri River Power Co.* 71 C. C. A. 438, 139 Fed. 305; *Calcasieu Lumber Co. v. Harris*, 77 Tex. 18, 13 S. W. 453; *New Jersey Zinc & I. Co. v. Morris Canal & Bkg. Co.* 44 N. J. Eq. 398, 1 L.R.A. 133, 15 Atl. 227; *Olive v. Sabine & E. T. R. Co.* 11 Tex. Civ. App. 203, 33 S. W. 139.

If the railway holds the right of way by voluntary grant, for a consideration, then the words "right of way" are used as descriptive of the land conveyed, and the conveyance serves to vest a fee simple title, subject to whatever limitations and conditions as may be shown in the paper title.

New Mexico v. United States Trust Co. 172 U. S. 171-182, 43 L. ed. 407-411, 19 Sup. Ct. Rep. 138; *Keener v. Union P. R. Co.* 31 Fed. 128; *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243; *Missouri, K. & T. R. Co. v. Roberts*, 152 U. S. 114, 38 L. ed. 377, 14 Sup. Ct. Rep. 496.

The term "minerals" includes those parts of the earth which are capable of being gotten from underneath the surface for the purpose of profit.

Williams v. South Penn. Oil Co. 52 W. Va. 181, 60 L.R.A. 795, 43 S. E. 214; *Murray v. Alfred*, 100 Tenn. 100, 39 L.R.A. 249, 66 Am. St. Rep. 740, 43 S. W. 355, 19 Mor. Min. Rep. 169; 15 Am. & Eng. Enc. Law, 500; *State v. Parker*, 61 Tex. 265.

Inasmuch as the term "mineral" includes oil, and the grant gives the right to take and use all mineral, there seems to be no ambiguity, and hence no occasion for construction.

Canterberry v. Miller, 76 Ill. 357; *Hoyt v. Ketcham*, 54 Conn. 62, 5 Atl. 606; *Dwight v. Germania L. Ins. Co.* 103 N. Y. 347, 57 Am. Rep. 729, 8 N. E. 654. 51 L.R.A. (N.S.)

Restrictions or limitations in a grant are not favored.

Hutchinson v. Ulrich, 145 Ill. 336, 21 L.R.A. 391, 34 N. E. 556; *Mitchell v. Leavitt*, 30 Conn. 587; *Abbott v. Curran*, 98 N. Y. 665; *Olcott v. Gabbit*, 86 Tex. 121, 23 S. W. 985; *Newpoint Lodge v. Newpoint*, 138 Ind. 141, 37 N. E. 650; *Heaston v. Randolph County*, 20 Ind. 402; *Seebold v. Shitler*, 34 Pa. 133; *Vail v. Long Island R. Co.* 106 N. Y. 283, 60 Am. Rep. 449, 12 N. E. 607; *McKelway v. Seymour*, 29 N. J. L. 321; *United States Pipe Line Co. v. Delaware, L. & W. R. Co.* 62 N. J. L. 254, 42 L.R.A. 572, 41 Atl. 759.

The purpose of the grant, whether recited in the instrument or not, will not, in the absence of express provision to that effect, limit or restrict the right granted, or the right to make other use of the subject-matter of the grant.

Tinker v. Forbes, 136 Ill. 221, 26 N. E. 503; *Brown v. Chicago & N. W. R. Co.* 102 Wis. 137, 44 L.R.A. 587, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255; *Gage v. Cameron*, 212 Ill. 146, 72 N. E. 204; *Bishop, Contr. § 384*; *Misch v. Russell*, 136 Ill. 22, 12 L.R.A. 125, 26 N. E. 528.

Messrs. D. Edward Greer, Chenault O'Brien, and George Chilton, for defendants in error:

The deed conveys only a right of way or easement over the land, and passes the right to use such surface minerals only as would be useful in constructing and maintaining the railway.

O'Neal v. Sherman, 77 Tex. 182, 19 Am. St. Rep. 743, 14 S. W. 31; *Calcasieu Lumber Co. v. Harris*, 77 Tex. 21, 13 S. W. 453; *Lyon v. McDonald*, 78 Tex. 71, 9 L.R.A. 295, 14 S. W. 261; *Muhle v. New York, T. & M. R. Co.* 86 Tex. 461, 25 S. W. 607; *Couch v. Texas P. R. Co.* 90 Tex. 468, 90 S. W. 860; *Olive v. Sabine & E. T. R. Co.* 11 Tex. Civ. App. 208, 33 S. W. 139; *Clutter v. Davis*, 25 Tex. Civ. App. 532, 62 S. W. 1107; 23 Am. & Eng. Enc. Law, 702, 703; 3 *Elliott, Railroads*, § 938; *Uhl v. Ohio River R. Co.* 51 W. Va. 106, 41 S. E. 340; *Lockwood v. Ohio River R. Co.* 43 C. C. A. 202, 103 Fed. 243; *Blakely v. N. W. 972*; *Fitchburg R. Co. v. Frost*, 147 Chicago, K. & N. R. Co. 46 Neb. 272, 64 Mass. 118, 16 N. E. 773; *Stuyvesant v. Woodruff*, 21 N. J. L. 136, 47 Am. Dec. 156; *Williams v. Western Union R. Co.* 50 Wis. 76, 5 N. W. 482; *Oswald v. Wolf*, 126 Ill. 542, 19 N. E. 28; *Nashville. C. & St. L. R. Co. v. Karthaus*, 150 Ala. 633, 43 So. 791; *Vermilya v. Chicago, M. & St. P. R. Co.* 66 Iowa, 606, 55 Am. Rep. 279, 24 N. W. 234; *Smith v. Holloway*, 124 Ind. 329, 23 N. E. 886; *Dubuque v. Benson*, 23 Iowa, 248; *Hamby v. Dawson Springs*, 126 Ky.

451, 12 L.R.A.(N.S.) 1164, 104 S. W. 259; Wright v. Austin, 143 Cal. 236, 65 L.R.A. 949, 101 Am. St. Rep. 97, 76 Pac. 1023; District of Columbia v. Robinson, 180 U. S. 92, 45 L. ed. 440, 21 Sup. Ct. Rep. 283; Robert v. Sadler, 104 N. Y. 229, 58 Am. Rep. 498, 10 N. E. 428; Rich v. Minneapolis, 37 Minn. 423, 5 Am. St. Rep. 861, 35 N. W. 2; Smith v. Rome, 19 Ga. 89, 63 Am. Dec. 298, 7 Mor. Min. Rep. 306; Viliski v. Minneapolis, 40 Minn. 304, 3 L.R.A. 831, 41 N. W. 1050; Leadville v. Coronado Min. Co. 37 Colo. 234, 86 Pac. 1034; Leadville v. Bohn Min. Co. 37 Colo. 248, 8 L.R.A.(N.S.) 422, 86 Pac. 1038, 11 Ann. Cas. 443; Armstrong v. Lake Champlain Granite Co. 147 N. Y. 495, 49 Am. St. Rep. 683, 42 N. E. 186, 18 Mor. Min. Rep. 279.

Where a deed is shown to have been prepared by the grantee, and is on a printed form used by the grantee in securing rights of way for a railroad, the ordinary rule in construing deeds, that the same will be construed to pass the greatest estate that the language is susceptible of, to the grantee, does not obtain.

Uhl v. Ohio River R. Co. 51 W. Va. 106, 41 S. E. 340; Lockwood v. Ohio River R. Co. 43 C. C. A. 202, 103 Fed. 243.

Where a deed or instrument of writing of any kind makes use, first, of terms which are evidently confined and limited to a particular class of a known species of things, and then, after such specific enumeration, subjoins a term of very extensive significance, this term, however general and comprehensive in its possible import, yet, when thus used, embraces only things *ejusdem generis*, that is, of the same kind or species with those comprehended by the preceding limited and confined term.

Ex parte Leland, 1 Nott & M'C. 460; Spalding v. People, 172 Ill. 40, 49 N. E. 993; Benton v. Benton, 63 N. H. 289, 56 Am. Rep. 512; Endlich, Interpretation of Statutes, § 400.

The title to the fee remained in the grantor, and his right to enjoy the property was impaired only to the extent necessary to the full exercise by the grantee of the rights acquired by it under the conveyance.

Olive v. Sabine & E. T. R. Co. 11 Tex. Civ. App. 208, 33 S. W. 139.

A railroad company, having only a right of way over a tract of land, has no right to drill for oil, or make a lease and allow its lessee to drill for oil, on the right of way.

Lyon v. McDonald, 78 Tex. 71, 9 L.R.A. 295, 14 S. W. 261; O'Neal v. Sherman, 77 Tex. 182, 19 Am. St. Rep. 743, 14 S. W. 31; Calcasieu Lumber Co. v. Harris, 77 Tex. 22, 13 S. W. 453; Muhle v. New York, 51 L.R.A.(N.S.)

T. & M. R. Co. 86 Tex. 461, 25 S. W. 607; Gulf, C. & S. F. R. Co. v. Richards, 11 Tex. Civ. App. 95, 32 S. W. 96; Clutter v. Davis, 25 Tex. Civ. App. 532, 62 S. W. 1107; Couch v. Texas P. R. Co. 99 Tex. 468, 90 S. W. 869; 23 Am. & Eng. Enc. Law, pp. 702, 703; Cincinnati, I. St. L. & C. R. Co. v. Geisel, 119 Ind. 77, 21 N. E. 470; Brown v. Young, 69 Iowa, 625, 29 N. W. 941; Blakeley v. Chicago, K. & N. R. Co. 46 Neb. 272, 64 N. W. 972; Douglass v. Thomas, 103 Ind. 187, 2 N. E. 562; Fitchburg R. Co. v. Frost, 147 Mass. 118, 16 N. E. 773; Lockwood v. Ohio River R. Co. 43 C. C. A. 202, 103 Fed. 243; Stuyvesant v. Woodruff, 21 N. J. L. 136, 47 Am. Dec. 156; Williams v. Western Union R. Co. 50 Wis. 76, 5 N. W. 482; Oswald v. Wolf, 126 Ill. 542, 19 N. E. 28; Bodfish v. Bodfish, 105 Mass. 317; Uhl v. Ohio River R. Co. 51 W. Va. 106, 41 S. E. 340; Nashville, C. & St. L. R. Co. v. Karthaus, 150 Ala. 633, 43 So. 791; Vermilya v. Chicago, M. & St. P. R. Co. 66 Iowa, 606, 55 Am. Rep. 279, 24 N. W. 234; Smith v. Holloway, 124 Ind. 329, 24 N. E. 886.

A municipality, or persons in control of highways, cannot use minerals and material, or dig into the highway for water or minerals.

O'Neal v. Sherman, 77 Tex. 182, 19 Am. St. Rep. 743, 14 S. W. 31; Dubuque v. Benson, 23 Iowa, 250; Hamby v. Dawson Springs, 126 Ky. 451, 12 L.R.A.(N.S.) 1164, 104 S. W. 259; Wright v. Austin, 143 Cal. 236, 65 L.R.A. 949, 101 Am. St. Rep. 97, 76 Pac. 1023; District of Columbia v. Robinson, 180 U. S. 92, 45 L. ed. 440, 21 Sup. Ct. Rep. 283; Turner v. Rising Sun & L. Turnp. Co. 71 Ind. 547; Kelly v. Donahoe, 2 Met. (Ky.) 482; Robert v. Sadler, 104 N. Y. 229, 58 Am. Rep. 498, 10 N. E. 428; Rich v. Minneapolis, 37 Minn. 423, 5 Am. St. Rep. 861, 35 N. W. 2; Smith v. Rome, 19 Ga. 89, 63 Am. Dec. 298, 7 Mor. Min. Rep. 306; Macon v. Hill, 58 Ga. 595; Ladd v. French, 24 N. Y. S. R. 952, 6 N. Y. Supp. 56; Anderson v. Bement, 13 Ind. App. 248, 41 N. E. 547; Cuming v. Prang, 24 Mich. 514; Viliski v. Minneapolis, 40 Minn. 304, 3 L.R.A. 831, 41 N. W. 1050; Small v. Danville, 51 Me. 359; Leadville v. Coronado Min. Co. 37 Colo. 234, 86 Pac. 1034; Leadville v. Bohn Min. Co. 37 Colo. 248, 8 L.R.A.(N.S.) 422, 86 Pac. 1038, 11 Ann. Cas. 443; Kister v. Reeser, 98 Pa. 1, 42 Am. Rep. 608; Coverdale v. Charlton, L. R. 4 Q. B. Div. 104, 48 L. J. Q. B. N. S. 128, 40 L. T. N. S. 88, 27 Week. Rep. 257; People v. Kerr, 27 N. Y. 188.

The rule that courts, in construing a deed, will confer the greatest estate upon the grantee the language will permit, is subordinate to the rule that all parts of

the deed must be considered and harmonized and given effect, if possible.

Hancock v. Butler, 21 Tex. 806; *Risien v. Brown*, 73 Tex. 141, 10 S. W. 661; *Smith v. Westall*, 76 Tex. 511, 13 S. W. 540; *Calder v. Davidson*, — Tex. Civ. App. —, 59 S. W. 302; *Pugh v. Mays*, 60 Tex. 192; *Simonton v. White*, 93 Tex. 54, 77 Am. St. Rep. 824, 53 S. W. 339; *Peterson v. Machado*, 5 Cal. Unrep. 273, 43 Pac. 611; *Dunham v. Kirkpatrick*, 101 Pa. 36, 47 Am. Rep. 696.

The word "mineral," as used in this deed, would be confined at least to solid minerals, on the principle of *ejusdem generis*.

Ex parte Leland, 1 Nott & M'C. 460; *Spalding v. People*, 172 Ill. 40, 49 N. E. 993; *Benton v. Benton*, 63 N. H. 289, 56 Am. Rep. 512; *Murray v. State*, 21 Tex. App. 620, 57 Am. Rep. 623, 2 S. W. 757; *Ex parte Muckenfuss*, 52 Tex. Crim. Rep. 467, 107 S. W. 1131; *Alabama v. Montague*, 117 U. S. 602, 29 L. ed. 1000, 6 Sup. Ct. Rep. 911; *Hermance v. Ulster County*, 71 N. Y. 487.

Brown, Ch. J., delivered the opinion of the court:

This statement will be sufficient for the decision of the question submitted to this court:

The plaintiffs in error are the Right of Way Oil Company, the Texas & New Orleans Railroad Company, and Oswald S. Parker, trustee. The Gladys City Oil, Gas, & Manufacturing Company, the J. M. Guffey Petroleum Company, and the Gulf Pipe Line Company are defendants in error.

We copy from the well-prepared application for writ of error the following clear and comprehensive statement of the case:

"This suit was filed in the district court of Jefferson county, Texas, November 24, 1909, by the Gladys City Oil, Gas, & Manufacturing Company and J. M. Guffey Petroleum Company, as plaintiffs, against the Right of Way Oil Company, Texas & New Orleans Railroad Company, the Gulf Pipe Line Company, and Oswald S. Parker, trustee, being a suit by plaintiffs to establish their ownership and right of possession of a tract of land part of the John A. Veatch survey in Jefferson county, Texas, and for the title and possession of all oil produced therefrom, and for an injunction restraining the defendants, Texas & New Orleans Railroad Company, Right of Way Oil Company, and Oswald S. Parker, trustee, from drilling oil wells on said land and taking oil therefrom, and from asserting any right or claim thereto, and against the Gulf Pipe Line Company for the oil taken from said land by the other defendants and by them run into its pipe line. Pleadings of the

parties are voluminous, and are contained in transcript, pages 2 to 40, inclusive; but it was alleged by both plaintiffs and defendants below, and admitted, that defendants below, plaintiffs in error here, held under a deed from S. H. Veatch to East Texas Railway Company, the Texas & New Orleans Railroad Company having succeeded to the title conveyed by said deed to East Texas Railway Company, and having made an operating contract for the developing of oil on the tract of land conveyed by said deed, with Oswald S. Parker, trustee, and the Right of Way Oil Company having developed oil upon said land under the assignment of said operating contract. The effect of said deed is controlling in the case; plaintiffs in error contending that, under said deed, they have the right to develop, take, and use oil from the strip of land described in said deed, and defendants in error contending that no such right exists, but that the title and right to said oil is in them. The facts, as well as the pleadings, are quite fully stated in the opinion filed herein by the court of civil appeals, and will not be restated here; however, the case depending upon the meaning of the deed from S. H. Veatch to East Texas Railway Company, we deem it proper to set same out in full, same being as follows: 'State of Texas, Sabine county. Know all men by these presents: That I, being the owner in fee of the following described tract of land lying in Jefferson county, Texas, to wit: An equal undivided one third of a tract of land containing 19,481,003 square varas, originally granted and titled by the government of Mexico to John A. Veatch as a colonist of Zavalla's Colony, near a place called Sour Springs in said county, and lying between the J. W. Bullock and Pelham Humphries league surveys, except 177 acres in the N. W. corner of said Veatch survey heretofore conveyed by my father, John A. Veatch. For the consideration of \$1 to me in hand paid, and the further consideration of the benefits and advantages that will accrue to me by the construction of a railway over said tract of land, have and do hereby grant, sell, and convey unto the East Texas Railway Company, for the purpose of constructing, operating, and maintaining its railroad, the right of way, 200 feet in width, over and upon the above-described tract of land; together with the right to take and use all the timber, earth, stone, and mineral existing, or that may be found, within the right of way hereby granted. To have and to hold to said East Texas Railway Company and its successors, so long as the same or any part thereof may be occupied and used for the purpose of constructing, operat-

ing, or maintaining its said railway. In witness whereof, I hereby sign my name, the 29th day of July, 1881. S. H. Veatch. Witness: James B. Nerrew.' (Acknowledgment follows.)

"Trial was had before the court without a jury, and judgment rendered on January 12, 1910, in the district court of Jefferson county in favor of the defendants, who are plaintiffs in error here, quieting them in their title and possession of the 200-foot right of way strip of land described in the above deed, in accordance with the terms thereof, and establishing their right to take and appropriate all of the minerals, including oil, extracted therefrom, etc. (Tr. pp. 40 to 42.) Plaintiffs in the court below appealed to, and the judgment of the trial court was reversed by, the court of civil appeals for the first supreme judicial district at Galveston, and judgment therein rendered, as set forth on pages 25 to 26 in the opinion of the court of civil appeals, as follows, to wit: 'First, that the Texas & New Orleans Railway Company have a right of way across the Veatch survey of 100 feet in width, except that part thereof through the Gladys City tract, as to which it has a right of way 200 feet in width. Second, that the Gladys City Oil, Gas, & Manufacturing Company has the fee simple title to this land, subject to the easement, as aforesaid, of the Texas & New Orleans Railway Company, so long as the same may be used by it as and for railway purposes. Third, that the Texas & New Orleans Railway Company has no right to the oil or other minerals beneath the surface of said strip comprising its right of way as aforesaid, nor to sink wells and extract the same, but that such oil is the property of the Gladys City Oil, Gas, & Manufacturing Company, and of its lessee, the J. M. Guffey Petroleum Company. Fourth, that the said Gladys City Oil, Gas, & Manufacturing Company and the said J. M. Guffey Petroleum Company have no right to go upon said right of way, and occupy the same, for the purpose of sinking wells and extracting the oil. Fifth, that the said appellants recover of the appellees the value, as found by the trial court, of the oil extracted by the Right of Way Oil Company through the well bored by it on the right of way aforesaid. And, sixth, that the Gulf Pipe Line Company have judgment over against the Right of Way Oil Company for whatever amount it may be required to pay under judgment against it. Let the judgment be so entered. Reversed and rendered. [Signed] Reese, Associate Justice.'

"Motion for a rehearing was duly filed in said court by the appellees therein, who are plaintiffs in error here, which motion

was overruled by said court of civil appeals on, to wit, May 4, 1911.

"First Ground of Error.

"The honorable court of civil appeals erred, to the prejudice of appellees, in sustaining the first assignment of error of appellants, and in holding, in effect, that the deed from S. H. Veatch to East Texas Railway Company, set out in that court's findings of fact, on page 7 of its opinion, granted merely a right of way for railroad purposes, and did not convey any right to take and use oil or other minerals within said right of way and beneath its surface, and in the adoption and application of the principles of law upon which such conclusion is based, same being the principal issue in this case, and embodied particularly in that part of said court's opinion found on pages 12 to 19, inclusive."

The following articles of the Revised Statutes of 1895 are in these words:

"Art. 4445. If any railroad corporation shall at any time be unable to agree with the owner for the purchase of any real estate or the material thereon required for the purposes of its incorporation or the transaction of its business, for its depots, station buildings, machine and repair shops, or for the right of way, or any other lawful purpose connected with or necessary to the building, operating or running its road, such corporation may acquire such property in the manner provided in this chapter.

"Art. 4446. No railroad company shall enter upon, except for a lineal survey, any real estate whatever, the same being private property, for the purpose of taking and condemning the same or any material thereon, for any purpose whatever, until the said company shall agree with and pay the owner thereof all damages that may be caused to the lands and property of said owner by the condemnation of said real estate and property, and by the construction of such road."

Article 4447 provides the procedure for condemnation. It will be seen, however, that the initiative is placed upon the corporation, and the manner prescribed by law is an agreement with the owner, which necessarily means that the law requires the corporation to proceed by offer to agree upon and pay the damages, and, if the parties cannot agree, then condemnation may be resorted to.

We copy article 4473: "The right of way secured or to be secured to any railroad company in this state, in the manner provided by law, shall not be so construed as to include the fee simple estate in lands, either public or private, nor shall the same

be lost by the forfeiture or expiration of the charter, but shall remain subject to an extension of the charter or the grant of a new charter over the same way without a new condemnation."

"The manner provided by law" is either by agreement with the owner or condemnation; therefore, if the owner by agreement conveys the "right of way," it is secured to the railroad company in the manner provided by law, and will be governed by the statute, and cannot be construed to confer a fee simple title to the land.

There are but these questions presented: (1) Did the deed convey the railroad company the oil beneath the surface? (2) If plaintiff is entitled to recover for the oil taken from the ground, did the court err in giving judgment for the value of the oil after it was delivered from the well, or should the cost of producing it have been deducted?

The granting clause of the deed reads, "have and do hereby grant, sell, and convey unto the East Texas Railway Company, for the purpose of constructing, operating, and maintaining its railroad, the right of way, 200 feet in width, over and upon the above-described tract of land." The interest granted in the land is the right of way. What right did the railroad company acquire? As we have seen, by the use of the terms, "right of way," a "grant of the right of way," the company did not acquire the fee in the land. It got but an easement, which would have been the effect of the deed independently of article 4473, copied above. In *Calcasieu Lumber Co. v. Harris*, 77 Tex. 23, 13 S. W. 453, this court said: "When, therefore, the railroad company under its charter, and the promoter of the private railroad under the act of 1832, were authorized to take private property for the use of their roads, the rights they acquired were a right of way and facilities necessary to the efficient use of that right. They were not empowered to use the exclusive right of way granted to each for any other independent purpose than that for which it was granted. The fee remained in the private owner, and outside of the authorized use, which must be public or incidental to the public use, the proprietary right is in the original owner. . . . The words 'right of way,' if not defined, are expressive of the very nature of the right ordinarily held by railway companies in the lands over which their roads run—a right to use the land only for railway purposes—an easement." The extract clearly defines the terms "right of way," which is but an easement in the land. The authorities are unanimous on this proposition. 3 Elliott, Railroads § 938; *Stuyvesant v. Woodruff*, 51 L.R.A. (N.S.)

21 N. J. L. 133, 57 Am. Dec. 156; *Olive v. Sabine & E. T. R. Co.* 11 Tex. Civ. App. 208, 33 S. W. 139. All authorities agree that the grant of a "right of way" confers only an easement in the land. But land to be used as a right of way may be conveyed in fee; therefore the character of the title conveyed must be determined by the words used and the attending facts and circumstances.

Under article 6484, Revised Statutes 1911 (article 4425, Rev. Stat. 1895), a railroad company might appropriate for right of way not exceeding 200 feet in width, of any tract of land, and might appropriate the timber, earth, stone, or other materials on adjoining lands. The same effect is given by the statute whether the land be condemned or conveyed by deed, and in neither case is the "right of way" over the land to be so construed as to secure the fee simple estate in the lands, either "public or private." Rev. Stat. 1911, art. 6532. Thus, it is by statute declared that the railroad company by condemnation could have acquired all that this deed expresses, except what might be derived from the word "mineral." It is significant, and tends to show that the deed was intended to take the place and have the effect of condemnation conferring the same rights under like limitations. The term "right of way" has a definite meaning, which is clearly expressed by Chief Justice Stayton in *Calcasieu Lumber Co. v. Harris*, supra.

If the word "mineral" be omitted from the deed, there could be no doubt that it vested in the railroad company only an easement, which would not include the mineral,—oil beneath the surface. We must therefore inquire as to the proper construction of the clause with that word in its connection with the other language. The intention of the grantor must prevail, for which we must seek in the language used by him, with any light which may be shed upon the terms used by a full consideration of the entire transaction as shown by the attending facts, giving to the language the construction most favorable to the grantee. We concede this in the present case for the sake of this argument, but we are doubtful of the correctness of its application under the facts in this record.

The rule of construction, *ejusdem generis*, is thus stated: "General words following particular words will not include things of a superior class." There is this further restriction of general words following particular words, that the general words will not include any of a class superior to that to which the particular words belong.

The sole reliance of the railroad company and the defendant in error for title to the

oil is in the use of the words, "and mineral." The particular words, "timber, earth, stone," designate the most common minerals, and are followed by the general word, "mineral," and the latter word should be applied to the same class; that is, such as may be found upon or near the surface, as gravel and the like. It is contrary to all precedent to give it the effect to include the superior class, "mineral oil," which is to be found at great depth and is of much greater value.

That construction is made more certain by the purpose for which the grant was made, which is thus expressed: "For the purpose of constructing, operating, and maintaining its railroad, the right of way, 200 feet in width, over and upon the above-described tract of land; together with the right to take and use all the timber, earth, stone, and mineral existing, or that may be found, within the right of way hereby granted." The "timber, earth, and stone" would be useful in constructing, operating, and maintaining the railroad, and the "mineral," being given for the same purpose, must be construed to include only the same class, and cannot possibly mean petroleum oil.

We conclude that the court of civil appeals properly rendered judgment for the Gladys City Oil, Gas, & Manufacturing Company.

It is claimed by the plaintiffs in error that the burden was upon the plaintiffs to prove the cost of bringing the oil to the surface, in order to establish the sum for which they were entitled to judgment. This is an ingenious argument, but not sound. If it were the law that the plaintiff in such case was entitled to recover only the value of the oil less the cost of producing it, there would be more force in the contention. But the law is that the owner of the soil owned the oil beneath the surface as a part of the land, and his title was made more definite when the oil was lifted to the surface. *Bender v. Brooks*, 103 Tex. 329, 127 S. W. 168, Ann. Cas. 1913A, 559.

If, however, the person who produced the oil acted in good faith, he would be entitled to have deducted the cost of bringing it to the surface and to the market. The contention of plaintiff in error is in effect that the owner must concede the good faith of the trespasser, and prove that which is known only to his adversary, the cost of producing the oil. The contention is unsound. In the case cited above this court said: "The law will determine the rights of the parties, but equity will adjust the account between them upon the doctrine which applies to innocent purchasers in good faith who make improvements upon
51 L.R.A.(N.S.)

land which add to its value. The owner gets his property, and the innocent occupant is remunerated for his labor and money expended in making the improvements."

There was neither pleading nor evidence to authorize the court to deduct the cost of bringing the oil to market; therefore the Court of Civil Appeals did not err in rendering judgment for the sum that defendant received by the sale of the oil, and the judgment of the Court of Civil Appeals is affirmed.

Petition for rehearing denied.

WASHINGTON SUPREME COURT. (Department No. 2.)

NORTHERN PACIFIC RAILWAY COMPANY, Appt.,

ADAMS COUNTY, Resp't.

(78 Wash. 53, 138 Pac. 307.)

Constitutional law — requiring destruction of weeds in highway.

Requiring a landowner to cut, or pay for cutting, the noxious weeds in the abutting highway to the center thereof, does not deprive him of his property without due process of law.

(February 6, 1914.)

APPEAL by plaintiff from a judgment of the Superior Court for Adams County in defendant's favor in an action for the cancellation of an alleged illegal tax, and to enjoin defendant from attempting to collect the same. Affirmed.

The facts are stated in the opinion.

Messrs. George T. Reid, J. W. Quick, and L. B. da Ponte, for appellant:

So far as the statute requires one to

Note. — Right to impose on abutting owner the duty or expense of removing weeds, snow, ice, etc., in the street or highway.

This note deals only with the question of the constitutionality of statutes or ordinances requiring abutting owners to remove weeds, snow or ice, etc., in the street or highway. The question is, of course, different from the one whether owners of abutting property can be required to repair sidewalks, or to make or pay for other improvements of a more permanent character in streets or highways. Such cases are not within the scope of the note. Cases where owners of abutting property are required to pay the cost of street sprinkling or street sweeping are distinguishable, and are not included herein. But for cases of

abate the weed pest on his own lands, or lands of which he has control, its constitutionality cannot be now questioned.

Missouri, *K. & T. R. Co. v. May*, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; *Wedemeyer v. Crouch*, 68 Wash. 14, 43 L.R.A.(N.S.) 1090, 122 Pac. 367; *Los Angeles County v. Spencer*, 126 Cal. 670, 77 Am. St. Rep. 217, 59 Pac. 202, 385; *Shafford v. Brown*, 49 Wash. 307, 95 Pac. 270; *State v. Boehm*, 92 Minn. 374, 100 N. W. 95; *Balch v. Glenn*, 85 Kan. 735, 43 L.R.A.(N.S.) 1080, 119 Pac. 67, Ann. Cas. 1913A, 406; *State v. Tucker*, 56 S. C. 516, 35 S. E. 215.

Mr. W. O. Miller, for respondent:

If the act under consideration has a legitimate and proper end, beneficial to the state, and does not arbitrarily or unduly

oppress any person, then it is clearly within the legislative power.

Kansas P. R. Co. v. Mower, 16 Kan. 573; *People v. King*, 110 N. Y. 418, 1 L.R.A. 293, 6 Am. St. Rep. 389, 18 N. E. 245; *Freund, Pol. Power*, § 20; *Barbier v. Connolly*, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; *Camfield v. United States*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864; *Karasek v. Peier*, 22 Wash. 419, 50 L.R.A. 345, 61 Pac. 33; *Smith v. Spokane*, 55 Wash. 222, 104 Pac. 249, 19 Ann. Cas. 1220; *McGehee, Due Process of Law*, pp. 306, 308; *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; *McLean v. Arkansas*, 211 U. S. 547, 53 L. ed. 319, 29 Sup. Ct. Rep. 206; *Atkin v. Kansas*, 191 U. S. 223, 48 L. ed. 158, 24

this kind, see notes to *Chicago v. Blair*, 24 L.R.A. 412, and *Owensboro v. Sweeney*, 18 L.R.A.(N.S.) 181.

Although the cases are numerous which deal with the question as to the power to compel a landowner to cut weeds upon his own premises, no case has been found similar to *NORTHERN P. R. CO. v. ADAMS COUNTY*, as to the validity of a statute or ordinance requiring an abutting owner to cut weeds in the street or highway. Cases of the former class are collected in a note to *Wedemeyer v. Crouch*, 43 L.R.A.(N.S.) 1090, on validity and construction of statutes in relation to noxious weeds.

As to validity and construction of statutory regulations as to infected orchards, trees, or crops, see note to *Balch v. Glenn*, 43 L.R.A.(N.S.) 1080.

Generally, as to municipal power over nuisances affecting highways, see note to *Hagerstown v. Witmer*, 39 L.R.A. 649.

As to liability of owner or occupant of land for spread of weeds or noxious vegetation to adjoining premises, see note to *Gulf, C. & S. F. R. Co. v. Oakes*, 52 L.R.A. 293.

In *Osborne v. Kingston*, 23 Ont. Rep. 382, it was held that the city was not an "owner" or "occupant," and that a street or highway was not "land," within the meaning of a statute requiring the owner or occupant of land to cut noxious weeds growing thereon.

Compelling removal of ice and snow from sidewalks.

The right to require owners of abutting property to remove snow and ice from the sidewalk has been denied in Illinois and New Hampshire. But in New York, Massachusetts, Connecticut, Montana, and Rhode Island, statutes or ordinances enacted for this purpose have been upheld. The earlier cases on the question are collected in a note in 24 L.R.A. 413. The right to require owners of abutting property to remove snow and ice from the sidewalk is sustained in the following cases, decided since the preparation of the earlier note: 61 L.R.A.(N.S.)

State v. McMahon, 76 Conn. 97, 55 Atl. 591; *Clinton v. Welch*, 166 Mass. 133, 43 N. E. 1116; *Helena v. Kent*, 32 Mont. 279, 80 Pac. 258, 4 Ann. Cas. 235; *State v. McCrillis*, 28 R. I. 165, 9 L.R.A.(N.S.) 635, 66 Atl. 301, 13 Ann. Cas. 701.

In distinguishing the Illinois and New Hampshire cases denying the constitutionality of statutes requiring owners of abutting property to remove snow and ice from sidewalks, the court in *State v. McMahon*, supra, said that the Constitutions of those states contained provisions not in the Connecticut Constitution, adopting as a fundamental maxim the theory of uniformity and equality in taxation; and that the principle that taxation must be equal and uniform was not so embodied in the United States Constitution as to restrict the power of taxation vested in the state.

To the same effect is *State v. McCrillis*, supra, where the court distinguished the Illinois and New Hampshire decisions denying the constitutionality of such ordinances, on the ground that those decisions were controlled by constitutional provisions not found in the Constitution of Rhode Island, requiring equality and uniformity in taxation; and held that constitutional provisions that the burdens of state should be fairly distributed, and that private property should not be taken without compensation, were not violated by an ordinance requiring owners of abutting property to keep sidewalks clear of snow and ice.

In *Clinton v. Welch*, 166 Mass. 133, 43 N. E. 1116, it was contended that a by-law requiring the owner or tenant of an estate abutting upon a brick, concrete, or other curbed or finished sidewalk, to remove or cover the ice or snow thereon, was invalid, in that its operation was partial, and imposed a burden upon particular classes of persons arbitrarily designated, there being but few sidewalks of this kind in the town, while there were many gravel sidewalks, to which the by-law did not apply. But the court regarded the decision in *Re Goddard*, 16 Pick. 504, 28 Am. Dec. 259, cited in the earlier note on this question, as controlling. The theory apparently was that the by-law

Sup. Ct. Rep. 124; *McDaniels v. J. J. Connolly Shoe Co.* 30 Wash. 554, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37.

It is the purpose of the law not to raise revenue, but to regulate relative rights, privileges, and duties of individuals.

2 Cooley, Taxn. 3d ed. p. 1125; *Re Goddard*, 16 Pick. 504, 28 Am. Dec. 259; *Carthage v. Frederick*, 122 N. Y. 288, 10 L.R.A. 178, 19 Am. St. Rep. 490, 25 N. E. 480; *State v. McCrillis*, 280 R. I. 165, 9 L.R.A. (N.S.) 635, 66 Atl. 301, 13 Ann. Cas. 701; *Helena v. Kent*, 32 Mont. 279, 80 Pac. 258, 4 Ann. Cas. 235; *Flynn v. Canton Co.* 40 Md. 312, 17 Am. Rep. 603; *State v. McMahon*, 76 Conn. 97, 55 Atl. 591; *State, Van Wagoner, Prosecutor, v. Patterson*, 67 N. J. L. 455, 51 Atl. 922; *State, Van Tassel, Prosecutor, v. Jersey City*, 37 N. J. L. 128; *State, Robins, Prosecutrix, v. Street & Sewer Comrs.* 44 N. J. L. 116.

Mount, J., delivered the opinion of the court:

The lower court sustained a demurrer to the complaint in this action. The plaintiff

operated equally upon persons in the same class, in that it affected each person as he became the owner of a particular kind of estate, and ceased to affect him when he no longer owned or occupied the property.

It was also held in *Clinton v. Welch*, supra, that the by-law was not rendered invalid by reason of imposing a fixed penalty for failure to comply therewith, and that the penalty fixed was the maximum allowed by statute.

On the other hand, the earlier Illinois cases, cited in the former note on this question, to the effect that a city cannot compel the owner or occupant of abutting property to remove snow and ice from a sidewalk, were approved in *Chicago v. McDonald*, 111 Ill. App. 436, an action against the city for injuries sustained by falling on an icy sidewalk.

And in *State v. Jackman*, 69 N. H. 318, 42 L.R.A. 438, 41 Atl. 347, 11 Am. Crim. Rep. 607, an ordinance requiring owners of abutting property to remove snow from sidewalks was held unconstitutional because imposing unequal burdens upon citizens, denying them the equal protection of the laws, and taking private property for public use without just compensation.

The Illinois courts, however, distinguish between ordinances requiring an abutting owner to clean sidewalks of snow and ice, and those requiring a street railway company to keep the surface of the street between its outer rails clear of dirt and other accumulations, an ordinance enacted for the latter purpose being held valid. *Chicago v. Chicago Union Traction Co.* 199 Ill. 259, 59 L.R.A. 667, 65 N. E. 243.

A statute requiring the removal of snow or ice from sidewalks by owners or tenants of abutting property was held unconstitutional in *McGuire v. District of Columbia*, 24 App. D. C. 22, 65 L.R.A. 430; but the ground of the decision was the inequality and uncertainty of the particular statute, rather than the lack of constitutional power of Congress to pass such a law.

electd to stand on the allegations of the complaint, and the action was dismissed. The plaintiff appeals.

The complaint alleges in substance: That the plaintiff owns and operates a line of railroad in the state of Washington extending through Adams and other counties, and occupies therewith a right of way generally of the width of 200 feet. In the year 1912 the defendant, acting through its road supervisor, gave due notice to the plaintiff to cut down and destroy certain noxious weeds growing on one of the public highways in the defendant county parallel to and abutting upon that part of the plaintiff's right of way over and across the N. E. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of section 13, township 19 N., of range 35 E. W. M. That the plaintiff having failed and refused to destroy said noxious weeds within ten days, the road supervisor procured the necessary assistance and destroyed the noxious weeds, and thereby incurred the necessary and reasonable expense of \$20.80, and has mailed a statement thereof, including a description of the land, to the plaintiff, requiring it to

operated equally upon persons in the same class, in that it affected each person as he became the owner of a particular kind of estate, and ceased to affect him when he no longer owned or occupied the property.

In *People v. Mattimore*, 45 Hun, 448, 10 N. Y. S. R. 133, the validity of an ordinance requiring owners of abutting property to remove snow and ice from the sidewalk was upheld, but the question raised was merely as to the legality of the ordinance under the particular city charter. It was said, however, that the ordinance was reasonable as a means to promote the usefulness and safety of the sidewalks, and to protect the city from legal liability for damages.

And in *Lincoln v. Janesch*, 63 Neb. 707, 56 L.R.A. 762, 93 Am. St. Rep. 478, 89 N. W. 280, a provision of a city charter making it the duty of owners and occupants of abutting property to keep sidewalks in repair and free from snow and ice and other obstructions was held valid. The particular part of the statute in question, however, was that relating to repairs. But the language of the court indicated that it regarded the part relating to removal of snow and ice also as valid.

In *Com. v. Cutter*, 156 Mass. 52, 29 N. E. 1146, an ordinance was held valid which prohibited under penalty an owner or occupant of land abutting on a private passageway to allow filth or waste matter to remain on that part of the passageway adjoining his premises. It was said that it was for the benefit of the owners and occupants of land abutting on said passageway, as well as to the advantage of the public health, that the way should be kept free from filth; and the fact that, in order

pay the same within thirty days. The plaintiff having refused to pay such sum, the claim was presented by the proper officer to the county commissioners, and the same was examined, found correct, allowed, and Adams county paid to the road supervisor the sum claimed, and made an order that such sum should be taxed against the plaintiff's right of way. The county treasurer thereupon entered such sum on the tax rolls of Adams county as a tax for the year 1912 against the right of way, which sum, together with penalties, interest, and costs, now stands as a tax on the rolls of Adams county for the year 1912 against the plaintiff's right of way. That the defendant now claims and pretends that this sum is justly due and owing, that it is a valid lien and tax against the plaintiff's right of way, and it will, unless restrained, endeavor to collect the same by process of law, as prescribed by the general laws of Washington relating to the collection of delinquent taxes. It is also alleged that §§ 3038 et seq., Rem. & Bal. Code, as amended by chapter 60, p. 327, of the Laws of 1911,

particularly §§ 3039 and 3040, as so amended, in so far as the same undertake to and do impose a duty upon a landowner to cut noxious weeds growing upon public highways in the state, and in so far as they undertake to make the cost of cutting the same a lien upon lands bordering upon highways, and in so far as they authorize the levy of a tax upon lands bordering on such highways for the cost of cutting weeds thereon, and the sale of such lands for and on account of the cost of cutting such weeds so incurred, are in violation of article 1, § 3, and article 7, § 2, of the Constitution of the state of Washington, and are in violation of the 14th Amendment to the Constitution of the United States, and are null and void. The complaint also alleges that the plaintiff has paid all taxes justly due, including all charges for cutting weeds upon its own land or right of way. The prayer is that the illegal tax be canceled and removed as a cloud on the plaintiff's title to its right of way, and that the defendant be enjoined from attempting to collect the same.

to keep it free, owners and occupants might be obliged to remove matter which they had no agency in depositing, or to do that which they would not be compelled to do if they did not own land abutting thereon, did not render the ordinance unreasonable, or impose duties which could not lawfully be imposed. The ordinance was said to be analogous to one requiring the removal of snow from abutting sidewalks.

The validity of a by-law of a town requiring the tenant or owner of property abutting on a street to remove snow and ice from the sidewalk within a certain time was apparently assumed in *Easthampton v. Hill*, 162 Mass. 302, 38 N. E. 502, where the owner of a house divided into two tenements, one of which was occupied by a tenant and the other vacant, was held liable for failure to remove snow from the sidewalk in front of the vacant tenement. See also *Com. v. Watson*, 97 Mass. 562, apparently assuming the validity of an ordinance requiring the tenant or occupant or owner of a building abutting on a street to remove snow from the sidewalk, and construing the ordinance as to liability when there were several tenants of a building, and the owner as a boarder rented and occupied one of the rooms.

And among possibly other cases construing statutes or ordinances requiring the removal of snow and ice from sidewalks by owners of abutting property are the following: *Holtzman v. United States*, 14 App. D. C. 454 (holding that mere real estate agents having property for sale or rent, without funds of any kind to be used in connection with the property, were not within the provisions of a statute requiring the "owner, agent, or tenant" to remove snow or ice from sidewalks in front of his 51 L.R.A. (N.S.)

property); *State v. McMahon*, 76 Conn. 97, 55 Atl. 591 (holding that a by-law providing that whenever a sidewalk should be "wholly or partially covered" with snow or ice, it should be the duty of the owner or occupant of abutting property to clear the sidewalk within a certain time, or, in the case of ice, to cover with sand "or other suitable substance," was not invalid as vague and indefinite); *New York v. Brown*, 27 Misc. 218, 57 N. Y. Supp. 742 (defining the term "flagging" as applied to a statute requiring removal of snow and ice by owners of property abutting on "flagged" sidewalks); *Moran v. New York*, 98 App. Div. 301, 90 N. Y. Supp. 596 (holding that an ordinance making it the duty of persons to see that no snow or ice is permitted to "remain on the sidewalks . . . in front of any house, building, or lot occupied by him," does not apply to cross walks, as for instance a walk in front of an alleyway).

A distinction should be noted between the question as to the constitutionality of statutes and ordinances such as those included in this note, and the question as to the constitutionality of laws enacted for the purpose of requiring abutting owners of property to keep sidewalks or highways free from obstructions which such owners have themselves placed thereon. For instance, in *Weed v. Township Committee*, — N. J. L. —, 85 Atl. 329, a resolution of a township committee requiring an abutting owner to remove an accumulation of sand from the gutter in front of his premises was held valid; but in that instance, apparently the sand was an obstruction maintained by the owner on the highway. Cases of this kind are not within the scope of the note.

R. E. H.

The appellant first contends that, while §§ 3038, 3040, and 3041 seem to contemplate that the cost of cutting weeds to the center of abutting highways shall be taxed to the abutting land, § 3042, which deals specifically with the matter of assessing the cost, does not so provide; that it merely provides that the county commissioners shall make an order that the amount paid shall be "a tax on the land on which said work was done;" and that § 3039, which provides that the failure to cut noxious weeds on any road or highway to the center thereof shall constitute a misdemeanor, is the only remedy in cases of this kind. But we think the whole chapter should be construed together, and, when so construed, indicates quite plainly that it was the intention of the legislature that the money so paid should be a lien upon the land abutting upon the highway, and that the criminal statute is merely a cumulative remedy.

The principal contention of the appellant is that the statutes above referred to are violative of the constitutional sections above mentioned, for the reason that compelling property owners to cut noxious weeds to the center of the highway is a taking of private property for a public use without compensation; and also is a taking of property without due process, contrary to the Federal Constitution.

It is conceded by the appellant that the statutes referred to, in so far as they impose a duty upon the citizen to keep his own premises clear of noxious weeds, are valid statutes. This court has so held in *Wedemeyer v. Crouch*, 68 Wash. 14, 43 L.R.A.(N.S.) 1090, 122 Pac. 366. See also *Los Angeles County v. Spencer*, 126 Cal. 670, 77 Am. St. Rep. 217, 59 Pac. 202, 385; *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638. So far as we are advised, no state, except this one, has gone to the extent of providing that the owner of land abutting upon a public highway must cut noxious weeds to the center thereof. Other states have only gone to the extent of requiring the owner of land to cut noxious weeds upon his own premises. But this state has required that such owner shall cut noxious weeds to the center of the highway. We said in *Wedemeyer v. Crouch*, supra, that these statutes are "a strictly police regulation." And it seems to us there can be no doubt upon this question. Requiring the destruction of noxious weeds is a provision for the general welfare of the community, and must rest for validity upon the principle of po-

lice regulation. The validity of these statutes, which were considered in *Wedemeyer v. Crouch*, supra, was based upon the maxim that "one must not so use his own as to injure his neighbor." -

While no cases directly in point have been called to our attention, we think the same principle must govern this case as controls those cases where property owners have been required to remove snow and ice from sidewalks in front of their premises. If the legislature of the state may authorize a municipal corporation by ordinance to require property owners to remove snow and ice from sidewalks in front of their property, then it seems clear that upon the same principle the legislature may require property owners within the state to cut noxious weeds to the center of highways in front of their property. We see no reasonable distinction between these classes of cases. While the courts of various states are in conflict on the question of the validity of city ordinances requiring owners or occupants of property to remove snow and ice from sidewalks abutting thereon, we are of the opinion that the better rule is as declared by those states which hold to the rule that such ordinances are a valid police regulation. This rule has been followed in Connecticut, in *State v. McMahon*, 76 Conn. 97, 55 Atl. 591; in Massachusetts, in *Re Goddard*, 16 Pick. 504, 23 Am. Dec. 259, and in Clinton v. Welch, 166 Mass. 133, 43 N. E. 1116; in New York, in *Carthage v. Frederick*, 122 N. Y. 268, 10 L.R.A. 178, 19 Am. St. Rep. 490, 25 N. E. 480, affirming 44 Hun, 625; in Montana, in *Helena v. Kent*, 32 Mont. 279, 80 Pac. 258, 4 Ann. Cas. 235; and in Rhode Island, in *State v. McCrillis*, 28 R. I. 165, 9 L.R.A.(N.S.) 635, 66 Atl. 301, also reported in 13 Ann. Cas. 701. The opposite has been held in Illinois, in *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640; in New Hampshire, in *State v. Jackman*, 69 N. H. 318, 42 L.R.A. 438, 41 Atl. 347, 11 Am. Crim. Rep. 607, and in the District of Columbia, in *McGuire v. District of Columbia*, 24 App. D. C. 22, 65 L.R.A. 430. An interesting note to the Montana case will be found in 4 Ann. Cas. 238. In *State v. McCrillis*, 28 R. I. 165, 9 L.R.A.(N.S.) 635, 66 Atl. 301, 13 Ann. Cas. 701, the authorities both for and against the constitutionality of statutes of this kind are collected and reviewed, and the court concludes, we think rightly, that measures of this kind are regarded as a police regulation, and are not, strictly speaking, laws levying a tax, the direct or principal object of which is to raise reve-

nue, but impose a duty upon a large class of persons directly to their benefit, and are regarded as a police regulation, and are not in conflict with any constitutional provision, either state or Federal, on the ground of inequality of burdens resulting from the operation of the law. We think this is the most reasonable rule, and should control in this state. In *Carthage v. Frederick*, 122 N. Y. 268, 10 L.R.A. 178, 19 Am. St. Rep. 490, 25 N. E. 480, affirming 44 Hun, 625, the court said: "But how is it possible for the authorities of a large city, with many hundred miles of streets, to remove the snow in time to prevent injury to those who have the right to travel upon the sidewalks, unless they can require the owners and occupants of adjacent property to remove it? Every man can conveniently and promptly attend to that which is in front of his own door, and it is both reasonable and necessary that he should be compelled to do so. We think that the ordinance under consideration is valid, that it conflicts with no provision of the Constitution, and that it is the duty of the courts to enforce it."

So in this case, with many miles of highways in a county, it would be utterly impossible for the county authorities to keep noxious weeds from the highways. It is a comparatively easy matter for the owners of land abutting thereon to destroy these noxious weeds. Their destruction is a benefit principally to the property owners, because, if the property owners are required to destroy the noxious weeds upon their lands, and such weeds are permitted to grow in the highways, the destruction of the weeds upon their lands is of no practical benefit. It is necessary that the weeds upon the highways be destroyed as well as those upon the adjoining lands. It is reasonable, we think, that the owners of lands may be required to destroy noxious weeds to the center of the highways abutting thereon, as a special benefit to their own lands. While, as we have said, no case has been cited or found by us directly in point upon the question under consideration, we are satisfied that the rule relating to snow and ice upon sidewalks is of the same general character as that relating to noxious weeds in highways, and that the rule which permits the abatement of the one nuisance will also permit the abatement of the other.

We think the judgment of the lower court was right, and it is therefore affirmed.

Crow, Ch. J., and Morris and Fullerton, JJ., concur.
51 L.R.A.(N.S.)

WASHINGTON SUPREME COURT. (Department No. 2.)

CHARLES CORNELL, Appt.,
v.

E. P. EDSEN, Respnt.

(78 Wash. 662, 139 Pac. 602.)

Limitation of actions — wrongful dismissal of suit — effect of concealment.

1. A cause of action against an attorney for wrongful dismissal of an action which he is retained to prosecute is not, although he conceals his act from his client, within a limitation statute relating to actions for relief upon the ground of fraud, which provides that the action shall not be deemed to have accrued until discovery of the facts constituting the fraud, but the time begins to run from the commission of the act.

Attorney and client — wrongful dismissal of action — liability.

2. Fraud is not necessary to render an attorney liable for wrongfully dismissing his client's action.

(March 26, 1914.)

APPEAL by plaintiff from an order of the Superior Court for King County granting a motion for judgment on the pleadings in an action brought to recover damages for wrongful dismissal of plaintiff's action. Affirmed.

The facts are stated in the opinion.

Note. — When statute of limitations begins to run against attorney for negligence or misconduct in performance of professional duties.

Upon this subject, see the notes to *Fortune v. English*, 12 L.R.A.(N.S.) 1005, and *Goodyear Metallic Rubber Shoe Co. v. Carpenter*, 17 L.R.A.(N.S.) 667. The search here made has been for subsequent cases within the scope of the former notes.

Action for negligence or misconduct in performance of professional duties.

The earlier cases on this question will be found in the note to *Fortune v. English*, supra.

Maloney v. Graham, 171 Ill. App. 409, was an action against an attorney, brought to recover damages alleged to have been sustained by his negligence in passing upon the title to certain real estate. The attorney had subsequently defended his client's title in litigation which arose, and had been successful in the lower court; but several years later the decision was reversed upon appeal. It was contended that the cause of action first arose when the damage accrued as a result of the decision of the court of last resort, in ousting the client from possession; but, referring to *Fortune v. English*, 226 Ill. 262, 12 L.R.A.(N.S.) 1005, 117 Am. St. Rep. 253, 80 N. E. 781,

Mr. R. E. Thompson, Jr., for appellant:

The action is not barred by the statute of limitations.

Wilder v. Secor, 72 Iowa, 161, 2 Am. St. Rep. 236, 33 N. W. 448; *Irwin v. Holbrook*, 26 Wash. 89, 66 Pac. 116.

Mr. Frank E. Hammond, with Mr. E. P. Edsen, for respondent:

When the acts which are claimed to constitute the fraud are evidenced by public record or by judicial proceedings, it cannot be claimed that there was such concealment as would prevent the operation of the statute.

19 Am. & Eng. Enc. Law, 251; Wood, Limitations, 3d ed. p. 661, § 276; *Norris v. Haggin*, 136 U. S. 386, 34 L. ed. 424, 10 Sup. Ct. Rep. 942; 25 Cyc. 1190; *Laird v. Kilbourne*, 70 Iowa, 83, 30 N. W. 9; *Gebhard v. Sattler*, 40 Iowa, 152; *Bishop v. Knowles*, 53 Iowa, 268, 5 N. W. 139; *Gardner v. Cole*, 21 Iowa, 205; *Francis v. Wallace*, 77 Iowa, 373, 42 N. W. 323; *Hecht v. Slaney*, 72 Cal. 363, 14 Pac. 88; *Smith v. Talbot*, 18 Tex. 774; *Nudd v. Hamblin*, 8 Allen, 130; *Manning v. San Jacinto Tin Co.* 7 Sawy. 418, 9 Fed. 726; *Morgan v. Morgan*, 10 Wash. 99, 38 Pac. 1054; *Wickham v. Sprague*, 18 Wash. 466, 51 Pac. 1055.

Mr. Edward Judd also for respondent.

9 Ann. Cas. 253, and *Wilcox v. Plummer*, 4 Pet. 172, 7 L. ed. 821, the court held that the cause of action was complete when the opinion of title was given, and the statute of limitations began to run from that time, rather than when the damage accrued, as contended.

And so it is held that an action to recover assets paid over to the wrong person by mistake accrues at the time the payment was made. *Re Croyden*, 55 Sol. Jo. 632 (see *Butterworth's Dig.* 1911, Limitation of Actions, 329, ¶ 7).

In *Kruegel v. Porter*, — Tex. Civ. App. —, 136 S. W. 801, affirmed in — Tex. —, 155 S. W. 174, it was held that a cause of action for collusion with the client's adversaries, and for negligent, wilful, and treacherous failure to prosecute a case with due care and good faith, is founded upon a breach of contract, which occurs at the time of the trial and determination of the case in question; and that the period of limitation begins to run from that time.

Action to recover money collected by attorney.

The earlier cases on this question will be found in the note to *Goodyear Metallic Rubber Shoe Co. v. Carpenter*, supra.

In *Ott v. Hood*, 152 Wis. 97, 44 L.R.A. (N.S.) 524, 139 N. W. 762, the court held that as to an action to recover money collected upon a note, the statute of limita-

Morris, J., delivered the opinion of the court:

Appeal from an order granting judgment on the pleadings. The complaint recites that the respondent is an attorney, and that on December 1, 1904, appellant, having a good cause of action against an insurance company for loss sustained under one of its policies, employed respondent to commence an action against the insurance company; that respondent, as such attorney, commenced such action, and that on May 15, 1905, the same came on to be heard in the superior court for King county; that the trial judge, after hearing the cause upon its merits, continued the same for further advisement, and that while said cause was so being held by the trial judge, and before any decision had been announced, the respondent, without the knowledge or consent of appellant, did on July 20, 1905, dismiss the cause of action with prejudice; that appellant did not obtain knowledge of such dismissal until four weeks prior to the commencement of this action, but at all times believed, as he was led by respondent to believe, that the trial judge had decided his cause of action adversely to him; that his cause of action against the insurance company is now barred by lapse of time: and that, on account of the misrepresentation of respondent, he has suffered a loss

tions begins to run from the expiration of a reasonable time within which to pay over the money after its collection; or, if the client has been notified of the collection of the money, then from the time a demand is made; and that, in the absence of a specific statutory provision, ignorance of the cause of action, whether by reason of fraudulent concealment or otherwise, does not postpone the time from which the statute begins to run. But it was also held that where the attorney at some time previous has made false representations that the money is not yet collected, and in reliance upon such representations the client takes no action until the statute has barred his recovery in an action on contract, there is then a good cause of action for deceit, which accrues upon the destruction of the first claim by the expiration of the period of limitation. In the case under consideration, however, a cause of action for false representations was not sufficiently pleaded, and the demurrer was sustained with some pertinent remarks as to the ethics of pleading the statute in such cases, and an observation that "upon a charge of unfitness there is no statute of limitations." The further suggestion was offered that, upon the return of the record, there would be opportunity both for defendant to meet the claim upon the merits and for the plaintiff to amend the complaint to set out a cause of action for the false representations.

C. F. L.

of his cause of action, to his damage in the sum of \$560, for which judgment is demanded.

Two defenses were set up by answer, but it is evident that the one given effect in the ruling complained of is that which pleads the statute of limitation. Appellant seeks to avoid the statute by asserting that the cause of action is based upon fraud, and the statute would not begin to run until after its discovery, founding his argument upon § 150, subdiv. 4, Rem. & Bal. Code, providing that actions for relief upon the ground of fraud are barred within three years, but that the cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. This provision has no application to the case presented, because it is not "an action for relief upon the ground of fraud." We have held that this provision "has reference to suits by parties to contracts who are asking to be relieved from contracts that they were fraudulently induced to make; as where a deed has been fraudulently obtained, and suits of that character where fraud is the substantive cause of the action." *Wagner v. Law*, 3 Wash. 500, 28 Am. St. Rep. 56, 15 L.R.A. 784, 28 Pac. 1109. To the same effect is *Morgan v. Morgan*, 10 Wash. 99, 38 Pac. 1054, citing authorities interpreting like statutes. The appellant is not here seeking to relieve himself of the burden of some obligation or liability he was induced to assume or undertake by reason of some fraudulent act on the part of respondent, and which he would not have assumed or undertaken except for such fraudulent act. There is here no prayer addressed to a court of equity for relief because of fraud or misrepresentation. It is cases of this character that come within the meaning of the statute. It is said in *Brown v. Cloud County Bank*, 2 Kan. App. 352, 42 Pac. 593, in referring to the bar of this statute: "This limitation applies in express terms to 'an action for relief on the ground of fraud.' This cannot be held to apply to every case wherein a fraudulent transaction may be, either directly or incidentally, inquired into. It must be a case where the party against whom the statute is urged as a bar is seeking relief to which he claims himself entitled because of the fraud of the opposite party. In other words, the fraud must be a part of the substantive cause of action on which the right to relief is founded, and without which no cause of action exists."

All that appellant is here seeking is dam-

ages claimed to have been suffered because of the wrongful act of respondent. The action is plainly one based upon a breach of duty growing out of the relation existing between the parties,—a contractual relation which calls for a full disclosure; and when by reason of the failure to make a full and complete disclosure, or the withholding or concealment of facts which should have been disclosed, loss is suffered, there is a breach of duty, and for such breach an action will lie. But, like any other action founded upon a breach of duty imposed either by law or contract, the action arises out of the breach, and the statute of limitations begins to run from the time of the breach, and not from the time of its discovery. No action lies for speaking an untruth, unless, by virtue of the relation between the parties, the law imposes the duty of speaking the truth. No action lies for concealment, unless the law imposes the duty of disclosure. In this case the duty is one growing out of the relation between the parties, and that relation is one based upon contract. The relation, it is true, is fiduciary, but that does not disturb the fact that it is contractual, and that a cause of action based upon the breach of the contract accrues when the contract is violated, and not when the violation is discovered.

The supreme court of Kansas, in reviewing an action to recover for the violation of a verbal agreement containing a stipulation against discrimination in transportation rates, where it was sought to treat the action as one for relief upon the ground of fraud, in order to avoid the statute of limitations, says, in *Atchison, T. & S. F. R. Co. v. Atchison Grain Co.* 68 Kan. 585, 75 Pac. 1051, 1 Ann. Cas. 639: "In some of the states fraudulent concealment of a cause of action is made to extend the time of bringing the action for the period of limitation after the discovery that a cause of action exists; but the Code of this state makes no such provision, except as to actions for relief on the ground of fraud. So far as actions founded upon agreements or contracts are concerned, the operation of the statute depends upon the nature of the cause of action, and not upon the time that a plaintiff discovers that he has a right of action. The action accrues when the contract is violated, and not at the time when the plaintiff learns that it has been violated. In the absence of a statute making concealment an exception to the statute of limitations, the courts cannot create one, however harsh and inequitable the enforcement of the statute may be." This being

the true nature of appellant's cause of action, it added nothing to it to characterize respondent's action as fraudulent.

"When the gravamen of the bill is for a breach of duty, and the action is thereby brought within the adverse effect of the influence of the statute of limitations, the addition of bare averments which call the same acts fraudulent do not convert it into a bill both for a fraud and a breach of duty, or for fraud alone. The alleged acts constituted negligence, and it is useless to escape from the legal consequences of an action to recover damages for such acts by affixing to them the adjective 'fraudulent.' The bill is what it was originally, and the rider in regard to fraud has not altered its character." *Frishmuth v. Farmers' Loan & T. Co.* 46 C. C. A. 222, 107 Fed. 169.

Neither is it necessary to aver that respondent's action was fraudulent, for an attorney is liable to his client for his failure to perform his professional duty, whether such failure was intentional and fraudulent or not. The charge of fraud or the absence of such a charge neither adds to nor takes from the right of action, since it exists independent of the fraud, and is based upon a breach that gives the right of action, whether that breach was intentional or unintentional, with or without fraud. We find this statement of the rule in 25 Cyc. 1182: "It is generally held that, in order for the running of the statute to be postponed until the fraud is discovered, fraud must be the gravamen of the action; that is, the action must be based on fraud. This is especially true under the statutes which embody the equitable rule, as the greater number of them expressly apply to 'actions for relief on the ground of fraud.' Thus, the running of the statute is not postponed, where the purpose of the action is merely to enforce a contract or recover damages for its breach, . . . or in an action based on a violation of duty imposed by contractual relations, . . . or in cases where the fraud is merely collateral to the cause of action, or where the cause of action is complete without fraud, notwithstanding unnecessary averments of fraud in the complaint. Fraud must be the principal ground on which relief is asked."

For these reasons, we believe the judgment is sustained by the law, and it is affirmed.

Crow, Ch. J., and Fullerton, Mount, and Parker, JJ., concur.
51 L.R.A. (N.S.)

WEST VIRGINIA SUPREME COURT OF APPEALS.

SAMUEL H. HUFF

v.

LILLIAN M. HUFF, Appt.

(— W. Va. —, 80 S. E. 846.)

Divorce — violence — sufficiency.

1. Actual violence, to constitute ground for divorce, must be attended with danger to life, limb, or health, or be such as to cause reasonable apprehension of such danger.

Same — vulgar and indecent conduct.

2. Vulgar, indecent, and unnatural conduct on the part of a wife, and her solicitation of the husband to engage in such conduct with her, showing viciousness and degeneracy on her part, are not sufficient grounds for divorce, nor do they justify the husband in breaking off cohabitation with her and treating her as having abandoned or deserted him.

Evidence — adultery — sufficiency.

3. Though circumstantial evidence is admissible and sufficient to prove adultery in a suit for divorce, it must be so clear and strong as to carry conviction of the truth of the charge, and, if it does no more than raise a suspicion of chastity, it is insufficient.

Alimony — allowance without divorce.

4. A wife who has been abandoned and denied support by her husband may have a decree for alimony without a divorce, and such relief may be granted her in a suit for divorce brought by a husband, on a prayer in her answer therefor as affirmative relief.

(December 2, 1913.)

APPEAL by defendant from a decree of the Circuit Court for McDowell County in plaintiff's favor in a suit for a divorce. Reversed.

The facts are stated in the opinion.

Messrs. Warth & McCullough, for appellant:

The allegations were insufficient to show cruelty that would amount to grounds for a divorce *a mensa et thoro*.

Carr v. Carr, 22 Gratt. 168; *Latham v. Latham*, 30 Gratt. 307; *Martin v. Martin*, 33 W. Va. 699, 11 S. E. 12.

Headnotes by POFFENBARGER, P.

Note. — Degeneracy as ground for divorce.

This note is confined to cases wherein a divorce has been sought on the ground that one of the parties has been guilty of such degrading and revolting conduct as acts of bestiality, acts against nature, and the

Scandalous and impertinent matter in the record should have been removed.

14 Cyc. 609; *Wood v. Wood*, 141 Mass. 495, 55 Am. Rep. 491, 6 N. E. 541.

The hearsay evidence and neighborhood report permitted to be introduced for the purpose of proving the charge of adultery is not sufficient upon which to base a decree for divorce.

Martin v. Martin, 33 W. Va. 695, 11 S. E. 12; *Reynolds v. Reynolds*, 68 W. Va. 19, 69 S. E. 381, Ann. Cas. 1912A, 889; *Bacon v. Bacon*, 68 W. Va. 749, 70 S. E. 762.

The decree for divorce is not substantiated by depositions or proof.

Alkire v. Alkire, 33 W. Va. 519, 11 S. E. 11; *Latham v. Latham*, 30 Gratt. 321.

Messrs. Sanders & Crockett, for appellee:

The decree appealed from is based upon conflicting oral testimony; and where this

is so, the appellate court will not reverse the decree except for very cogent reasons.

Smith v. Yoke, 27 W. Va. 639; *Bartlett v. Cleavenger*, 35 W. Va. 719, 14 S. E. 273; *Richardson v. Ralphsnyder*, 40 W. Va. 15, 20 S. E. 854; *Burrows v. Fitch*, 62 W. Va. 116, 57 S. E. 283.

A party in whose favor a decree is rendered cannot claim the benefit of it and at the same time object that it is erroneous.

2 Cyc. 651; *Garner v. Garner*, 38 Ind. 139; *Clark v. Ostrander*, 1 Cow. 437, 13 Am. Dec. 546; *Rariden v. Rariden*, 33 Ind. App. 284, 104 Am. St. Rep. 252, 70 N. E. 398.

The allowance of alimony was improper, the decree having been rendered against the appellant.

Harris v. Harris, 31 Gratt. 13; *Martin v. Martin*, 33 W. Va. 695, 11 S. E. 12; *Cariens v. Cariens*, 50 W. Va. 113, 55 L.R.A. 930, 40 S. E. 335.

like. Vulgar, abusive, and obscene language, sexual excesses, impotency, and drunkenness, as grounds of divorce, are treated in other notes. See Index to L.R.A. Notes, "Divorce and Separation."

As stated in *HUFF v. HUFF*, acts of mere degradation and degeneracy in one of the parties to the marriage contract are not grounds of divorce unless made so by statute.

It is held in *Wood v. Wood*, 141 Mass. 495, 55 Am. Rep. 491, 6 N. E. 541, that the practice of masturbation in the presence of the wife, but without compelling her to remain present, which injures her health by its effect upon her feelings, is not within a statute making "cruel and abusive treatment" a ground for divorce. The court said: "The words 'cruel and abusive treatment' seem to import on their face conduct directed towards the other party and with a malevolent motive. Without deciding that a case could not be imagined which would fall within the meaning of the words without such a motive, it is enough to say that purely self-degrading conduct, not forced upon even the knowledge of the wife otherwise than by the usual intimacy of matrimony, does not constitute the offense, merely because its folly, its disgusting character, or its wickedness disturbs her nerves or conscience, and thus affects her health."

So, lewd and indecent conduct by a stepfather toward his stepdaughter is not a personal indignity to the mother within the meaning of a statute allowing a divorce for "cruel and inhuman treatment or personal indignities rendering life burdensome." *Cline v. Cline*, 10 Or. 474.

But while the act of sodomy committed by a husband with a beast does not constitute adultery under the laws of Ohio in regard to marriage and divorce, it does constitute extreme cruelty. Anonymous, 3 Ohio S. & C. P. Dec. 450, 2 Ohio N. P. 342, 51 L.R.A. (N.S.)

The court in the above case said that "the act of sodomy charged is legal cruelty within the terms of our statute. Unnatural practices of the kind charged are an infamous indignity to the wife, and would make the marriage relation so revolting to her that it would become impossible for her to discharge the duties of wife, and defeat the whole purpose of the relation. In the natural course of things they would cause mental suffering to the extent of affecting health, and would give rise to serious apprehension of communication to her of disease in case of the continuance of cohabitation."

So it is stated in Bishop, on Marriage, Divorce, & Separation, Vol. 1, § 1831, that at present in England, this offense (sodomy) is an independent ground for divorce,—a heavier matrimonial wrong than adultery. For the statute of 20 and 21 Vict. chap. 85, § 27, while permitting the wife a dissolution of her marriage for the husband's adultery only when committed under aggravated circumstances, or coupled with cruelty or desertion, allows it to her for his mere "sodomy or bestiality."

And according to Bishop, § 1832, sodomy or buggery is in two or three states by name made ground for divorce.

So, evidence that plaintiff had seen her husband in the act of carnal intercourse with a cow was, in *Prather v. Prather*, 99 Iowa, 393, 68 N. W. 806, held sufficient to justify a divorce on the ground of cruel and inhuman treatment.

So, the crime of pederasty, whether restricted to sodomy or bestiality, is, in *Crutcher v. Crutcher*, 86 Miss. 231, 38 So. 337, held to be cruel and inhuman treatment within the meaning of the divorce statute.

And in *Mogg v. Mogg*, 2 Addams, Eccl. Rep. 292, a divorce was granted where a wife charged her husband with cruelty and unnatural practices. J. D. C.

On Petition for Rehearing.

Messrs. Anderson, Strother, & Hughes, also for appellee:

Legal cruelty may consist of other than actual violence.

Goff v. Goff, 6 W. Va. 9, 53 S. E. 769, 9 Ann. Cas. 1083; Myers v. Myers, 83 Va. 810, 6 S. E. 630; Latham v. Latham, 30 Gratt. 321; Gardner v. Gardner, 104 Tenn. 410, 78 Am. St. Rep. 924, 58 S. W. 342; Mosher v. Mosher, 16 N. D. 269, 12 L.R.A. (N.S.) 820, 125 Am. St. Rep. 654, 113 N. W. 99; Grow v. Grow, 134 Ky. 816, 135 Am. St. Rep. 440, 121 S. W. 654; Hooker v. Hooker, 65 Fla. 53, 43 L.R.A. (N.S.) 984, 61 So. 121.

Society will be destroyed if the courts hold to the old, immoral, narrow view that vulgar, indecent, and unnatural conduct and degeneracy cannot constitute cruelty. This is not the present rule.

McMahon v. McMahon, 9 Or. 525; Smith v. Smith, 40 N. J. Eq. 566, 5 Atl. 109; McClung v. McClung, 40 Mich. 493; Kelly v. Kelly, 18 Nev. 49, 51 Am. Rep. 732, 1 Pac. 194; Prather v. Prather, 99 Iowa, 393, 68 N. W. 806; 9 Am. & Eng. Enc. Law, 764; Anonymous, 3 Ohio S. & C. P. Dec. 450, 2 Ohio N. P. 342; Stewart, Marr. & Div. § 253; Whitmore v. Whitmore, 49 Mich. 417, 13 N. W. 800; Harding v. Harding, 36 Colo. 106, 85 Pac. 423; Pierce v. Pierce, — Miss. —, 38 So. 46; Benfield v. Benfield, 44 Or. 94, 74 Pac. 495; Crutcher v. Crutcher, 86 Miss. 231, 38 So. 337.

Poffenbarger, P., delivered the opinion of the court:

On this appeal from a decree of divorce from bed and board, the appellant, the wife, relies upon her demurrer to the bill and each charge made therein, and insufficiency of the evidence to sustain the decree in favor of her husband. The fourth paragraph charges wilful desertion, and the sixth adultery on the part of the wife, specifying the party with whom the act is alleged to have been committed, and the time and place. It is useless to consume time in the demonstration of the sufficiency of these two paragraphs.

As to the fifth and seventh paragraphs, the demurrer should have been sustained. The former makes a general charge of extreme and repeated cruelty, but specifies no facts sufficient to warrant the conclusion set forth. The specifications are that the defendant repeatedly struck and assaulted the plaintiff, used violent and abusive language toward him, falsely charged him with having committed adultery, endeavored to get his employer to discharge him, and resorted to legal proceedings to com-

pel him to support her. These acts do not amount to cruel and inhuman treatment, as it is defined in the law. No imminence or even probability of personal injury by violence or loss of health by reason of annoyance and vexation is in any form alleged. "What merely wounds the feelings, without being accompanied by bodily injury or actual menace, does not amount to legal cruelty." Latham v. Latham, 30 Gratt. 307; Goff v. Goff, 60 W. Va. 9, 16, 53 S. E. 769, 9 Ann. Cas. 1083. "Actual violence to constitute ground for divorce must be attended with danger to life, limb, or health, or be such as to cause reasonable apprehension of danger. It is not every slight violence committed against the wife by the husband, even in anger, which will authorize a divorce. Much less will slight acts of violence by a wife from which the husband can easily protect himself constitute cruelty entitling him to a divorce." 14 Cyc. 602.

The seventh paragraph, charging vulgar, indecent, and unnatural conduct of the defendant, and her solicitation of the husband to engage in such conduct with her, obviously fail to set forth any ground of divorce. Acts of mere degradation and degeneracy in one of the parties to the marriage contract are not grounds of divorce, unless made so by statute, and those charged in this paragraph are not mentioned in it. To obtain a divorce in this state, a party must bring his case within a statutory ground. Chapman v. Parsons, 66 W. Va. 307, 24 L.R.A. (N.S.) 1015, 135 Am. St. Rep. 1033, 66 S. E. 461, 19 Ann. Cas. 453; Cariens v. Cariens, 50 W. Va. 113, 55 L.R.A. 930, 40 S. E. 335.

The charge of desertion is wholly unsustained by proof. The plaintiff himself admits his refusal to cohabit and live with his wife for reasons and causes not constituting grounds for a divorce,—those already described in the disposition of the demurrer to the fifth and seventh paragraphs of the bill. Under some circumstances, the innocent party may, by leaving the other, put the latter in the position of having abandoned him in the legal sense of the term. In other words, the conduct of one of the parties may justify separation from him by the other, and confer right upon the leaving party to obtain a divorce upon the ground of wilful desertion. But, to justify such separation, the conduct of the guilty party must be such as to afford ground for a divorce *a mensa et thoro*. Alkire v. Alkire, 33 W. Va. 517, 11 S. E. 11; Martin v. Martin, 33 W. Va. 695, 11 S. E. 12.

Nor is there any proof of the charge of adultery. The plaintiff introduced as a wit-

ness the party with whom the bill alleges the defendant committed it, and he admitted the failure of his efforts to obtain her consent to sexual intercourse with him, though he does testify that she went with him on two occasions to a secluded place in which the act might have been performed, and with evident intent on her part to engage in it with him. On the first occasion, there was no effort to induce her to do so because of the presence of a third party. On the second occasion, he says she emphatically refused, giving as the reason her belief that he was endeavoring to put her husband in a position to obtain a divorce from her. He charges her with conduct highly improper, lascivious, but not criminal, and was obviously not unfriendly in his testimony to the plaintiff. The defendant emphatically denies the conduct imputed to her by him, and explains her association with him on the occasion to which he refers. She says he had told her on a former occasion he had information to give her, and she met him on the evening to which she refers while walking along the railroad track, and asked him to tell her what it was. Then, for the ostensible purpose of communicating to her some secret, he induced her to walk a short distance up the hill into the woods from the railroad, and, when there, he had nothing to tell her and made an improper proposal which she indignantly rejected. This is the only effort on the part of the plaintiff to prove any act of adultery. Other evidence charges her with having associated with lewd women. She admits having left the two places successively provided for her by her husband, one because the landlady had closed her house, and the other because the inmates of the house had made it unpleasant for her, and gone to a boarding house where she associated more or less with two women of bad repute, but she says she had been so degraded by the conduct of her husband as to make it impossible for her to associate with more desirable persons. The testimony of the manager of the restaurant at which she had a room and where she is said to have associated with the two lewd women, was taken, and, while he testified as to the bad character of the two women and the association of the defendant with them, he does not give any instance of the association of the defendant with men, and he says he never saw anything suspicious in or about her room. He further says the plaintiff was taking his meals at his place when the defendant became an inmate of the house, and shortly thereafter paid his bill and went elsewhere. In view of the persistent efforts of the defendant to renew

conjugal cohabitation with the plaintiff, it is not too much to say she probably went there in the first instance because he frequented the place. However that may be, there is no proof of any adultery on her part at that place or elsewhere. If her association with the two women who are said to have been of bad character raises a suspicion of evil-mindedness on her part, that is not enough to prove the charge of adultery. *Martin v. Martin*, and *Latham v. Latham*, cited; *Throckmorton v. Throckmorton*, 86 Va. 768, 11 S. E. 289. To establish it, direct and positive evidence of the criminal act is not required, but the circumstantial evidence must be sufficient to establish it clearly.

In support of the decree, it is said the finding of the trial court rests upon conflicting oral testimony. But there is no conflict in the evidence offered to prove desertion or justification of the act of the plaintiff in separating himself from his wife. As to this, the facts are admitted. The only conflict found in the testimony introduced to prove the charge of adultery relates to the reputation of the defendant for chastity. There is no direct evidence of any adulterous act, as has been shown, and there is conflict as to her reputation. Several witnesses say she obtained a bad reputation by her association with two evil-minded women, but perhaps an equal number deny the aspersion upon her character and reputation. Thus the conflict in the testimony narrows down to facts and circumstances which, if established, do no more than raise a suspicion. The defendant's conflicting evidence as to these matters may be rejected, and still there is lack of sufficient evidence of adultery. Moreover, the trial court evidently did not find her guilty of adultery, since the decree was from bed and board, and adultery would have authorized one *a vinculo*.

The denials of the answer, putting in issue all the material allegations of the bill, are followed by matter upon which there is predicated a prayer for an allowance of alimony by way of affirmative relief, and the trial court, notwithstanding the decree of divorce in favor of the plaintiff, required him to pay the defendant alimony in the sum of \$25 per month for two years. In view of his unjustifiable desertion of her and refusal to support her, she is entitled, upon principles declared in *Purcell v. Purcell*, 4 Hen. & M. 507, and *Almond v. Almond*, 4 Rand. (Va.) 662, 15 Am. Dec. 781, to an allowance of alimony for her maintenance, until such time as a reconciliation may be effected, or until the right to it may be barred in some legal way. In our opinion, the monthly allow-

ance decreed by the trial court is large enough under the circumstances. The plaintiff seems to have little or no estate. He is a railroad engineer making good wages, out of which he ought to be able to pay the \$25 per month without embarrassment. The defendant herself has considerable property and is not wholly dependent upon her husband for support.

The decree for alimony is erroneous in two respects, however. It limits the period of payment to the 7th day of February, 1912. It further provides that the acceptance by the defendant of any portion thereof shall be an acquiescence in the decree of divorce and bar and preclude her right to an appeal from it, and that an application for an appeal from the decree shall render the provision for alimony ineffectual, inoperative, and void. The latter provisions are coercive in their operation and effect, and unduly restrain the liberty and right of the appellant as a litigant. After the appeal was allowed, the error of the court in the insertion thereof in the decree was confessed here.

As the decree is clearly erroneous in almost every respect, it will be reversed, and a decree will be entered here upon the prayer in the answer for cross relief, requiring the plaintiff to pay to the defendant the sum of \$25 per month from the 14th day of September, 1910, the date of the decree appealed from, until the parties become reconciled and renew cohabitation, or the allowance becomes in some way barred by the conduct of the defendant, or until the further order of the circuit court of McDowell county, and the cause will be remanded for execution of the decree.

Petition for rehearing denied February 12, 1914.

KANSAS SUPREME COURT.

STATE OF KANSAS

v.

WALTER MOUNKES, Appt.

(01 Kan. 653, 138 Pac. 410.)

Criminal law — new trial — perjury.

In a criminal action, where it is shown

Headnote by PORTER, J.

Note. — Perjury as ground for new trial.

As to the effect of parties changing testimony on second trial to supply defects in the case made on the first trial, see note to Smith v. Boston Elev. R. Co. 37 L.R.A. (N.S.) 429.
51 L.R.A. (N.S.)

on a motion for a new trial that false and perjured testimony which the defendant had no fair opportunity to rebut at the trial probably influenced the jury to find him guilty, it is the duty of the court to set the conviction aside, and grant a new trial.

(February 7, 1914.)

APPPEAL by defendant from a judgment of the District Court for Lyon County convicting him of assault with a deadly weapon with intent to kill. Reversed.

The facts are stated in the opinion.

Messrs. Huggins & Riddle, H. E. Ganse, and W. S. Kretsinger for appellant.

Messrs. John S. Dawson, Attorney General, S. N. Hawkes, Assistant Attorney General, O. S. Samuel and W. N. Smelser for the State.

Porter, J., delivered the opinion of the court:

The defendant appeals from a judgment convicting him of the crime of assaulting one Ernest Van Sickle with a deadly weapon with intent to kill. A former conviction was reversed and a new trial ordered on account of error in the instructions. State v. Mounkes, 88 Kan. 193, 127 Pac. 637. The facts out of which the prosecution arose are quite fully stated in the former opinion.

On both trials the defendant testified that his brother Arthur, a boy sixteen years of age, was assaulted by a number of young men in the schoolhouse yard, and was overtaken and thrown down, and that he called to the defendant for help and said, "They are killing me." He testified that he started to go to his brother's aid, and took a knife out of his pocket for the purpose of protecting and defending his brother; that he struck Van Sickle, because the latter attempted to prevent his going to his brother, and had stooped to pick up a rock, and was in a threatening attitude, and had used a vile epithet; that he struck to defend himself, and to enable him to go to his brother's assistance. Van Sickle testified that he had said nothing and done nothing to cause the appellant to strike him.

At both trials the defendant testified that on the schoolhouse ground, near the place where the fight occurred, there was

For perjury as ground for relief against judgment, see notes to Graves v. Graves, 10 L.R.A. (N.S.) 216; Reeves v. Reeves, 25 L.R.A. (N.S.) 574, and South Haven & E. R. Co. v. Culver, 23 L.R.A. (N.S.) 564.

As to inconsistent testimony in another suit as ground for a new trial, see note to Guth v. Bell, 42 L.R.A. (N.S.) 692.

a flower bed encircled by pieces of rock, and that when Van Sickle stooped down the defendant believed he had picked up a rock from the ground. On the second trial, at the close of the defendant's testimony, and late in the afternoon, the prosecuting witness, Van Sickle, and one other witness, were called in rebuttal, and both positively denied the existence of any flower bed on the school grounds, or that there were any rocks on the ground near where the encounter took place. The existence of the flower bed surrounded by stones was not disputed at the first trial; and the defendant claims that he was wholly surprised by the rebuttal testimony and was unprepared to meet it. At the former trial the prosecuting witness himself had testified

that such a flower bed was there; but this fact was not remembered by the attorneys for the defendant, and in the few minutes that elapsed before the close of the case they were unable to produce any witnesses who knew the truth of the matter, except a sister of the defendant, whom the court permitted to testify in surrebuttal. In the argument of the case the attorneys for the state commented upon the testimony showing that there were no rocks at the place of the encounter, and argued to the jury that the defendant had testified falsely for the purpose of establishing his plea of self-defense, and dwelt upon the fact that another wholly disinterested witness had denied the existence of any flower bed near the place of the encounter.

Many cases in point with this note are included in the notes on perjury as ground for relief against judgment, referred to supra, and so have not been repeated. This note is confined to the question whether perjury, conceded or assumed for the purposes of the question to be such, is ground for new trial. Cases which merely discuss the question whether a new trial should be granted because of newly discovered evidence are not in point, even though the new evidence, if credited, necessarily shows that some of the evidence given on the trial was perjured.

Many elements enter into the right of a new trial on the ground of perjury. It is a general rule that the perjury must be as to a material point, also that the complainant was not negligent in meeting at the trial perjury which he was bound to have anticipated, or, if surprised at its introduction, could have contradicted by diligent effort on his part. Where, however, there was no reason to suspect the testimony to be perjured, and no laches is shown, the courts generally will grant a new trial if, after the trial, evidence of its perjured character is discovered, and it is as to a material issue, or the verdict is based principally on such testimony.

If judgments predicated upon false swearing remained undisturbed, if the whim, caprice, or desire of a witness can marshal the forces of law and order to the aid of a litigant, regardless of the sanctity of an oath, then, not only will the power and respect of the court be impaired, but the very strength of the government be destroyed. *Bernstein v. Schneider*, 72 Misc. 479, 131 N. Y. Supp. 340.

And in *Serwer v. Serwer*, 71 App. Div. 415, 75 N. Y. Supp. 842, in holding that the trial court should set aside a verdict when in its opinion it was secured by perjury, the court said: "Weight of evidence is not to be adjudged by the language of witnesses alone. It shocks the sense of legal morality to argue that if a trial justice is convinced from his observations of the witnesses, and from the atmosphere of the trial, that a case has been presented and a

verdict secured by perjured testimony, he is bound to receive and approve the verdict, and may not set it aside. Such a rule would make the judge a consenting party to a fraud upon the administration of the law. There is no doubt that a trial justice not only has, but is bound to exercise, the power of setting aside a verdict which, in his opinion, has been secured by perjury."

So, a new trial should be granted where it is shown that judgment was obtained on perjured testimony. *Seward v. Cease*, 50 Ill. 228; *Chapman v. Delaware, L. & W. R. Co.* 102 App. Div. 176, 92 N. Y. Supp. 304.

Also, a verdict predicated almost wholly upon the false testimony of a party in interest should be set aside and a new trial granted. *Wehrkamp v. Willet*, 1 Daly, 4.

And in *McCarthy v. Christopher Tenth Street R. Co.* 10 Daly, 540, the court set aside a verdict for plaintiff because he thought that perjury had been committed, saying that he did so with the firm confidence that he was arresting, for the time at least, a most iniquitous proceeding.

So, also in *Munro v. Callahan*, 55 Neb. 75, 70 Am. St. Rep. 366, 75 N. W. 151, it was held that equity will vacate a judgment at law and grant a new trial where it is shown that the judgment was obtained on the perjured testimony of the successful party, and that the adverse party has not been negligent or guilty of laches, and has exhausted all his legal remedies for obtaining a vacation of such judgment.

Also, a judgment obtained by perjury and subornation of perjury will be vacated on motion of the defeated party. *Nugent v. Metropolitan Street R. Co.* 46 App. Div. 105, 61 N. Y. Supp. 476 (in this case plaintiff and all his witnesses, four in number, were, in the opinion of the court, conclusively shown to have committed perjury).

Nor, it was held, was laches a ground for denying such motion, the motion not having been made until after an appeal was taken to the court of appeals from the judgment of the appellate division affirming the judgment so obtained. *Ibid.* The court stated that the court is organized to enforce legal rights and redress legal wrongs, and more-

After the trial four persons who had heard the evidence went to the schoolhouse for the purpose of making an examination, and found the flower bed surrounded by rocks as testified to by the defendant. Their affidavits were used upon the motion for a new trial, and the evidence of the prosecuting witness at the first trial was produced, in which he testified to the existence of the flower bed. In addition, affidavits of three former school teachers who had taught there were introduced, to the effect that a flower bed surrounded with rocks was in the yard at the time of the alleged offense; and much additional testimony to the same effect was produced, including photographs showing the flower bed and the stones surrounding it. The exist-

ence of the flower bed there surrounded by rocks at the time the fight occurred is established beyond any doubt, from which it necessarily follows that the testimony of the witness to the contrary was false.

The court, however, refused to set aside the conviction and grant a new trial, upon the theory that it was not a vital issue whether there were in fact any rocks or stones at the place, and that if the jury found from the evidence that the defendant believed, or had reasonable grounds for believing, that the prosecuting witness was about to assault him in that way, the defendant had a right to rely on the plea of self-defense, "whether," as the court expressed it, "there was a stone within a mile of the place or not." We think a new

over, whenever it is made to appear, as in this case, that a wrong has been perpetrated, it never hesitates to exercise the power which it has, unless to do so would do a greater injury than to refuse to exercise it.

But in *Millman v. Drake & S. Co.* 119 Minn. 124, 137 N. W. 300, a motion for a new trial on the ground of wilful false testimony given by one of plaintiff's witnesses was denied defendants because, as stated by the court, no suggestion appeared that plaintiff was in any way responsible for, or implicated in, the giving of the testimony, except in so far as the witness was produced by him, and it did appear that defendants knew that the testimony was false when given, and they produced witnesses who contradicted it on the trial, and the court fully complied with defendants' request that the jury be instructed particularly concerning this witness and his testimony.

It is not ground for a new trial that an accomplice the principal witness against one convicted of murder in the first degree, falsely swore that he had never been convicted of a felony. *People v. Sullivan*, 40 Misc. 308, 17 N. Y. Crim. Rep. 270, 81 N. Y. Supp. 989.

Nor can perjured testimony in one suit be relied upon as showing fraud practised in obtaining judgment in another suit, to support a petition for a new trial under a statute authorizing a new trial in case of a judgment obtained by fraud. *Guth v. Bell*, 153 Iowa, 511, 42 L.R.A.(N.S.) 692, 133 N. W. 883, Ann. Cas. 1913E, 142.

And where the court has no control over a judgment of conviction after the term at which it was rendered has passed, it has no power to set aside such a judgment and grant a new trial because of the perjury of a witness for the prosecution. *State v. Williams*, 147 Mo. 14, 47 S. W. 891.

Failure to meet perjury on trial.

Where the party could have shown the perjured character of his adversary's testimony at the time of trial, a new trial has 51 L.R.A.(N.S.)

generally been denied, on the ground that there must be an end of litigation.

Thus, in *Powers v. St. Joseph*, 91 Mo. App. 55, an action for injuries by reason of falling into an opening, false testimony that the shadow of a telephone pole fell across the opening and thus shut off the light from an electric light was held not to be ground for a new trial, as that the opening was sufficiently lighted or guarded was one of the main matters urged by defendant at the trial, and the electric light and the intervening pole were matters of evidence given by each side, and so there was no surprise at the evidence.

And in *Sullivan v. Herrick*, — Iowa, —, 140 N. W. 359, where, for all that appeared, petitioner for a new trial knew of the false testimony as well at the close of the trial as at the time the petition was filed, the court said that it was committed to the doctrine that a new trial cannot be awarded on petition because of perjured evidence having been resorted to in the trial, which could have been met.

And it would seem from the decision in *Pepin v. Lautman*, 28 Ind. App. 74, 62 N. E. 60, that perjured testimony offered at the trial would not be ground for a new trial when it was known at the time to be false, but no effort to meet it was made, nor time requested, but the case was submitted with the false testimony at the risk of obtaining judgment.

So, also, in *Thiele v. Citizens' R. Co.* 140 Mo. 319, 41 S. W. 800, 3 Am. Neg. Rep. 215, it was said that a party cannot be surprised that his adversary introduces testimony in support of the issues made by the pleadings, even though such testimony is false, and it was stated that the rule is thus forcibly stated by Phillips, P. J., in *Bragg v. Moberly*, 17 Mo. App. 221: "If a party be surprised by an unforeseen occurrence at the trial, he should make his misfortune known to the court instantly, and ask for a reasonable postponement to enable him to produce the countervailing proof. 'If he can relieve himself from his embarrassment by any mode, either by a nonsuit or a continuance or the introduction of other testi-

trial should have been granted. Manifestly the false testimony must have influenced the jury unfavorably to the defendant's contention. The jury had been instructed that, if they believed that a witness had wilfully testified falsely to a material fact, they might entirely disregard his testimony, that they were the judges of whether the defendant was acting honestly and fairly and with the apprehension of danger, and that, in determining whether he reasonably or honestly believed himself to be in great danger of bodily harm, they might take into consideration all acts and circumstances shown in the evidence. If the jury had believed that there were stones on the ground near where the encounter took place, and that defendant knew this, they

might the more readily have concluded that he acted reasonably in believing himself to be in danger of great bodily harm. It is difficult to conceive why the testimony was not prejudicial to the defendant.

It is said that new trials are not granted on the ground of newly discovered evidence which is merely cumulative. But this was more than cumulative; it was conclusive evidence of a fact that had been disputed at the trial, and which, though collateral to the main issue, became more or less material. In a survey and boundary case (*Dent v. Simpson*, 81 Kan. 217, 105 Pac. 542) the controversy turned upon the true location of the government corner, about which the evidence was conflicting. The surveyor was unable to find the govern-

mony, or otherwise, he must not take the chances of a verdict, but must at once fortify his position by resorting to all available modes of present relief."

And one who has paid a claim sued on, and knows that a judgment can be obtained only on false testimony, which he is able to rebut, but refuses to produce the evidence or defend the action, is not entitled to a new trial. *Heathcote v. Haakins*, 74 Iowa, 566, 38 N. W. 417. The court said: "That the production upon the trial of false testimony to establish a cause of action or defense would in many cases amount to such a fraud as would entitle the adverse party to a new trial, or the vacation of the judgment, is certainly true. This would be so if the fact of its falsity or the evidence by which the fact could be established was not discovered until after the trial or the rendition of the judgment. But it would be trifling with the law to permit a party who, being advised in advance that testimony of that character would be resorted to on the trial, and who knew also of the existence of evidence by which the false testimony could be rebutted, but who neglected to either produce that evidence or assert his defense, to afterwards question the judgment because it was founded on that testimony; for, while it is the policy of the law to afford the parties to litigation the fullest opportunity for the establishment of their rights, it is equally its policy to maintain and enforce the judgments pronounced by the courts after those opportunities have been enjoyed by the parties."

But perjured testimony upon a material issue, offered by the prevailing party to the action, which could not be contradicted at the trial, is ground for a new trial. First *Nat. Bank v. Wabash, St. L. & P. R. Co.* 61 Iowa, 700, 17 N. W. 48; and to the same effect, see *Ricker v. Horn*, 74 Me. 289, and *Nudd v. Home Ins. & Bkg. Co.* 25 Minn. 100.

And, so, false testimony by a party to the action, where the adverse party is taken by surprise, was held in *Seely v. Purdy*, 3 N. S. 414, to be a ground for a new trial, as the surprise was not only on a material

point, but on a point to which the complaining party's attention was not drawn, and which he had no notice that he was to meet, and on which testimony could be supplied only by one whose knowledge thereof was not known to complaining party at the time of the trial.

And in *Pettine v. New Mexico*, 119 C. C. A. 581, 201 Fed. 489, trial of indictment for murder, first degree, which resulted in conviction of second degree murder and sentence of forty-five years, it was held a gross abuse of its discretion for the trial court to submit the case to the jury upon the false testimony of a witness whose evidence was given too late for accused to demonstrate its falsity, inasmuch as, the court stated, until this testimony was given, the evidence as to the accused's guilt was conflicting, with little, if any, preponderance against him, and there was not a fair trial when such false testimony was thrown into the waivering balance at the close of the trial, too late for its falsity to be demonstrated, nor was it clear beyond doubt that this testimony did not turn the scales against him, or remove from the mind of some juror a reasonable doubt of his guilt.

So, also, in *Zettel v. Taylor*, 129 App. Div. 642, 114 N. Y. Supp. 467, where defendant in a personal injury action did not appear, because not informed of the time of the trial, and the plaintiff's evidence was uncontroverted, it was held that a new trial should be granted as plaintiff clearly committed deliberate perjury in his testimony as to the extent of his injuries.

And wilful perjury of the successful party, who was the only witness, was held in *Laithe v. McDonald*, 12 Kan. 340, to be a good ground for a new trial, although the adverse party was absent from the trial, he having been shown to have exercised reasonable diligence to be ready to defend the action. The court said: "Of course, a defendant failing to defend cannot have the judgment vacated on account of any innocent mistake or want of recollection on the part of the plaintiff or other witness, nor even on account of the perjury of the other witnesses, provided the plaintiff himself is

ment stone, and established the corner some distance from where plaintiff claimed it should be. After a judgment approving the surveyor's report, plaintiff produced a witness who testified that he knew the true location of the corner, that he had been road overseer twenty years before, and in grading the road had plowed up and covered over the government stone; that after the trial he went to the place, dug down, and found the original stone in the exact location that it was when he graded the road. The newly discovered evidence was

wholly guiltless. Nor can he have the judgment vacated on account of any mistake or error on the part of the court or jury, unless the record affirmatively shows such mistake or error. All such mistakes and errors each party is bound to anticipate, and to prepare for by extraordinary diligence. But no party is bound to anticipate or to suppose that the other party will commit wilful and corrupt perjury; and no party is bound to exercise extraordinary diligence in preparing to meet such perjury."

A case which would seem to be at variance with the rule that failure to meet perjured testimony at the trial, where possible, defeats the right to a new trial, is *Klinger v. Markowitz*, 54 App. Div. 299, 66 N. Y. Supp. 1135, 65 N. Y. Supp. 369, an action to recover for wrongful discharge under an alleged special contract of hiring for a specified time. Defendant denied the alleged contract, claiming that the hiring was by the week only, and called two witnesses who testified that they were in defendant's employ, were present when the plaintiff was employed, and that the hiring was by the week only, whereupon plaintiff called a witness who testified that he was in defendant's employ at the time, and that neither of the two witnesses called by defendant was, nor was either present when plaintiff was employed, and could not have been present when the contract was concluded. A verdict for plaintiff was had, and a new trial was granted on the ground that plaintiff's witness had committed wilful and corrupt perjury, as it was conclusively shown by twenty-seven affidavits that defendant's witnesses were in his employ at the time stated. The court said that the witness's testimony evidently had great weight with the jury, for he appeared in the role of a disinterested witness, from whom the truth was naturally to be expected. Upon a new trial his evidence will be entitled to no credence whatever, and it will be reasonably safe to assume that a different result may follow. Courts cannot sustain verdicts obtained by perjured evidence without encouraging perjury, the most dangerous of crimes. Perjury should be denounced whenever it appears, and driven, if possible, out of the sanctuary of justice. But in a dissenting opinion, Judge Ingraham said: "The court below granted a new trial of this action upon the ground that one of the witnesses called by the plaintiff in rebuttal testified

held not to be cumulative, and the judgment was reversed for error in refusing to grant a new trial. But manifestly, where a defendant has been convicted of a crime, his right to a new trial should not depend upon the technical question of whether certain evidence is or is not cumulative. He is entitled to a fair trial; and where it appears that perjured testimony which he had no fair opportunity to rebut at the trial probably influenced the jury to find him guilty, it is the duty of the court to set the conviction aside, and grant a new

falsely. His testimony was contradicted by other witnesses upon the trial, and the questions of fact were submitted to the jury. The court on a motion for a new trial, upon the affidavits of several persons which tended to show that the evidence of this witness called by the plaintiff was false, granted a new trial. I know of no principle upon which such an order can be sustained. When the issues in such an action are tried by a jury, their verdict should, I think, be final, and if they may be retried upon affidavit by the special term, it seems to me that it would be better to have the case originally tried upon affidavits, rather than to go through the useless formality of submitting the question to a jury."

After-discovered evidence tending to prove that a material part of plaintiff's testimony was false was held, in *Struthers v. Wagner*, 6 Phila. 262, to entitle the defendant to have the case submitted to another jury. And to the same effect are *Cleslie v. Frerichs*, 95 Iowa, 83, 63 N. W. 581, and *Raphaelsky v. Lynch*, 43 How. Pr. 157, 12 Abb. Pr. N. S. 224, 2 Jones & S. 31.

And there is a *dictum* in *State v. Foster*, 91 Iowa, 164, 59 N. W. 8, that under a provision that the court may grant a new trial in criminal cases when, from any other cause than those previously named, the defendant has not received a fair and impartial trial a new trial might be granted when false testimony of a material character had been given in the case, and the proof of its falsity had not, and by diligence could not have, been ascertained until after the trial.

So, in *Bernstein v. Schneider*, 72 Misc. 479, 131 N. Y. Supp. 340, two witnesses for the successful litigant testified that they were not related to him, and, subsequently to the trial, it was learned that one was a brother-in-law and the other a cousin, and it was held that, as the testimony was as to a material point at issue, a new trial should be granted.

And in *Hansen v. Vogelsang*, 139 App. Div. 759, 124 N. Y. Supp. 437, action for breach of warranty on sale of a cow, testimony of plaintiff that he killed the cow by order of the commissioner of agriculture, which was afterward found to be false, was held to entitle the defendant to a new trial on the ground of newly discovered evidence.

A new trial should be granted where

trial. *State v. Tyson*, 56 Kan. 686, 44 Pac. 609; *State v. Keleher*, 74 Kan. 631 at page 643, 87 Pac. 738. In the last case it was said in the opinion: "A jury should have the opportunity to hear all of this testimony, and to determine what should be believed. Where the probable effect of the newly discovered evidence is doubtful, or impossible to determine, a new trial should be granted. *Dennis v. State*, 103 Ind. 142, 2 N. E. 349, 5 Am. Crim. Rep. 469; 14 Enc. Pl. & Pr. 842; *Lindley v. State*, 11 Tex. App. 283." p. 643.

testimony is clearly falsified by affidavits, *Lister v. Mundell*, 1 Bos. & P. 427. In this case affidavits were produced that certain testimony on a material point was false, and the adverse party admitted that he could not contradict the affidavits.

—confession.

In *Dennis v. State*, 103 Ind. 142, 2 N. E. 349, 5 Am. Crim. Rep. 469, where defendant was convicted of murder, first degree, upon the testimony of one who afterward confessed that he had perjured himself, a new trial was granted on the ground that defendant ought not to be permitted to suffer the extreme penalty of death where conviction was obtained upon confessedly false and perjured testimony.

And in *State v. Powell*, 51 Wash. 372, 98 Pac. 741, where prosecutrix in a prosecution for rape made affidavit that her testimony at the trial was false, and testified at the hearing on motion for new trial to the same effect, also testifying that her testimony was coerced, it was held an abuse of discretion to refuse to grant a new trial.

So, also, in *Bussey v. State*, 69 Ark. 545, 64 S. W. 268, where there was a conviction of rape and sentence to death, it was held error to refuse a new trial upon the ground of newly discovered evidence, where, after the trial, the prosecuting witness upon whose testimony the prosecution and conviction were based, almost entirely retracted her testimony, and there was every reason to believe that the retraction, and not the testimony, was true.

In *State v. Moberly*, 121 Mo. 604, 26 S. W. 364, it was held that where the principal witness for the prosecution on the trial of an indictment for a felonious assault confesses, after the trial, that his testimony was false, and makes affidavit to that effect, a new trial should be granted on the ground of newly discovered evidence.

And affidavits that perjured testimony was given as to a crucial point relied upon for conviction of one charged with assault entitle one to a new trial when there is every presumption that the matters stated in the affidavits are correct. *Piper v. State*, 57 Tex. Crim. Rep. 605, 124 S. W. 661.

Also, in *Great Falls Mfg. Co. v. Mathes*, 5 N. H. 574, a conviction of a witness, for perjury on his own confession, was held to be ground for a new trial, although the 51 L.R.A. (N.S.)

While it cannot be said in the present case, as was said in the *Keleher Case*, that the newly discovered evidence, if believed, entirely obliterates the evidence of the witness upon which the conviction was based, still it is true that it seriously affects his credibility as a witness, and also the credibility of the defendant; and their testimony was directly conflicting with respect to a material matter of defense.

The judgment is reversed, and a new trial ordered.

court stated that an indictment for perjury was not a ground, nor perhaps would conviction founded upon the testimony of those interested in the case be a ground.

And in *Benda v. Keil*, 34 Misc. 396, 69 N. Y. Supp. 655, where a material witness repudiated almost his entire testimony, it was held that, as there was doubt as to whether omitting the perjured testimony would produce a different result, a new trial should be granted.

But confession of perjury on the part of a material witness does not necessarily call for a new trial, if, eliminating such evidence, there is still other evidence sufficient to support the judgment. *Bussey v. State*, 69 Ark. 545, 64 S. W. 268; *United States v. Raymundo*, 14 Philippine, 416.

Thus, also, in *United States v. Biena*, 8 N. M. 99, 42 Pac. 70, although a witness for the prosecution subsequently confessed to perjury, and was convicted and sentenced therefor, a new trial was denied, as there was sufficient evidence to sustain the verdict.

Conviction — as essential to new trial.

Conviction of the perjurer, or his death rendering conviction impossible, is necessary to the setting aside in a court of equity on account of perjury, of a verdict obtained in a court of law. *Dyche v. Patton*, 56 N. C. (3 Jones, Eq.) 332.

And *Dexter v. Handy*, 13 R. I. 474, in effect holds that conviction of a perjurer is essential to the granting of a new trial on the ground of perjury.

In *Richardson v. Roberts*, 25 Ga. 671, it was held that as, under the Code, the court cannot lawfully set aside a verdict or judgment because of perjury, unless the person charged with perjury shall have been duly convicted thereof, and unless it shall appear to the court that the verdict or judgment could not have been obtained or entered up without such perjured evidence, a new trial could not be granted, though a witness was guilty of perjury, where it was not shown that the verdict could not have been obtained without such evidence.

And, also, in *Munro v. Moody*, 78 Ga. 127, 2 S. E. 688, the court refused to set aside a verdict on the ground of perjury, as there had been no conviction of perjury, and, admitting the perjury, the verdict

could have been obtained without such evidence.

And in *Brown v. State*, 60 Ga. 210; *Gant v. State*, 115 Ga. 205, 41 S. E. 698, it was held that under the Code there must first be a conviction of perjury in order that the verdict may be set aside on that ground.

—as ground for new trial.

If the witness be convicted of perjury, it is a good cause for a new trial. *Tilly v. Wharton*, 2 Vern. 378.

And in *Chappell v. State*, 6 Okla. Crim. Rep. 398, 119 Pac. 139, it was held that a new trial should be granted one convicted of crime on the self-confessed perjury of the main witness for the state.

But it was held in *Davies v. Bricknell*, L. R. 3 Prob. & Div. 88, that the fact that plaintiff had been convicted of perjury as to his evidence was not of itself sufficient to justify the granting of a new trial after an application for a new trial on the ground that the verdict was against the weight of evidence had been denied. The court said: "It is indeed *prima facie* a striking thing, that a man who has been convicted of perjury should remain in possession of a victory apparently obtained by the very evidence for which the jury has found him guilty of perjury. But in deciding this question, I must bear in mind what had previously taken place. At the first trial a set of witnesses told their story, and on the other hand the plaintiff made his statement, and the jury, having heard and seen both sides, were unable to agree to a verdict. A second trial was had, the same witnesses were called and examined, and this man, who was afterwards convicted of perjury, told his story and was believed by the jury. On application for a new trial, Lord Penzance stated that he was not dissatisfied with the previous one, and refused the application. So that both the judge and jury who had seen the witness and heard him give his evidence held that he was entitled to credit. The other party, taking advantage of the machinery of the criminal law, indicted this man, who when he was heard in this court had been believed, for perjury, and on that indictment, the mouth of the prisoner and of his wife being closed, those witnesses who were not believed in this court had it all their own way, and he was convicted. As no new witnesses were called in the criminal court, and no new facts have been brought before me, I think I ought to accept the finding of the jury in this court, sanctioned and approved as it was by Lord Penzance."

And a new trial will not be granted upon conviction of a witness of perjury, where the plaintiff in the trial at which the perjured testimony was given was incompetent as a witness therein, and was the principal witness against him in the criminal action, and made the motion for a new trial. *Horne v. Horne*, 75 N. C. 101. The court said: "It is not denied that a new trial

may be granted where the witnesses upon whose testimony the verdict was obtained have since been convicted of perjury. . . . But in exercising the discretion to grant or refuse a new trial, the court will distinguish between a conviction of the witness procured by the oath of a convicted and deeply interested plaintiff, and a conviction procured by disinterested testimony. If a party to an action, who is an incompetent witness, after his trial and conviction, can thus by his own evidence break down the character and credibility of the adverse witness, and thus relieve himself of the consequences of the verdict by obtaining another trial, in which the convicted witness would be disqualified or discredited, not only would a wide door be opened to perjury, but the party would obtain indirectly what he is debarred from directly, to wit, the benefit of his own evidence in his own behalf. The plaintiff . . . in the divorce suit is not a competent witness in his own behalf, . . . but after a verdict against him, he can avoid the consequences and obtain another trial by convicting the witness against him of perjury, by his own oath; and upon the second trial can offer this conviction in discredit of the witness. The mischiefs which would result from such an adjudication are too great to be overlooked. How it would be, had the adverse witness been convicted by disinterested evidence, we are not called upon to say. As the case now stands, it is clear that Horne, as a witness against Rickets upon the indictment for perjury, had more motives to commit perjury himself than had Rickets to commit perjury in the divorce suit."

Indictment.

Indictment for perjury of a witness on whose testimony the verdict was obtained is not ground for a new trial (*Seeley v. Mayhew*, 4 Bing. 561; *Hampshire v. Harris*, 3 Jur. 980); a probable cause must be laid to show that the verdict was obtained by perjury (*Benfield v. Petrie*, 3 Dougl. K. B. 24; *Macpherson v. Petrie*, 3 Dougl. K. B. 26; *Petrie v. Milles*, 3 Dougl. K. B. 27).

Under statute.

In *Laithe v. McDonald*, 7 Kan. 254, in construing a statute providing that a judgment may be vacated for "fraud practised by the successful party in obtaining judgment," the court said that the giving or using of false testimony, though it may operate to the injury of the unsuccessful party, is not necessarily fraud practised by the successful party. The rule is that when the party, being himself a witness, commits wilful perjury, or makes use of false testimony which he knows to be false, and thereby obtains a judgment, he practises fraud within the meaning of the statute quoted, for which the judgment may be vacated.

In *Rickroad v. Martin*, 43 Mo. App. 597,

and Ridge v. Johnson, 129 Mo. App. 546, 107 S. W. 1103, it was held that, as a statute provided that a new trial may be granted "where the court is satisfied that perjury has been committed by a witness, and is also satisfied that an improper verdict or finding was occasioned by it, and that the party has a just cause of action or defense," perjury is a separate and independent ground upon which the court may award a new trial, and the effect of the perjury need not be a surprise,—distinguishing cases where the application for a new trial because of perjury is granted upon surprise.

See also Georgia cases supra, under "Conviction."

Effect of other evidence to support verdict or judgment.

But where there is other evidence to support the judgment, perjured testimony by the prevailing party is not such fraud as authorizes the judgment to be vacated. McDougall v. Walling, 21 Wash. 478, 75 Am. St. Rep. 849, 58 Pac. 669, distinguishing Laithe v. McDonald, supra, and Munro v. Callahan, 55 Neb. 75, 70 Am. St. Rep. 366, 75 N. W. 151, as cases where judgment was based solely upon the perjured testimony of the prevailing party.

So, also, where there was other evidence to sustain a verdict, it has been held that a new trial should be denied, in United States v. Biena, 8 N. M. 99, 42 Pac. 70; Bussey v. State, 69 Ark. 545, 64 S. W. 268; United States v. Raymundo, 14 Philippine, 416; Richardson v. Roberts, 25 Ga. 671; Munro v. Moody, 78 Ga. 127, 2 S. E. 888 (the last two cases being under statute).

J. H. B.

KENTUCKY COURT OF APPEALS.

OLIVER COMPANY, Appt.,
v.

LOUISVILLE REALTY ASSOCIATION.

(156 Ky. 628, 161 S. W. 570.)

Corporation — action on contract — failure to comply with statute as defense.

1. It is a good defense to an action brought by a foreign corporation upon a contract made in the prosecution of its business within the state, that it has not complied with a statute which expressly provides that it shall not be lawful for any corporation to carry on any business in the state until it shall have filed a statement

giving the location of its place of business within the state, and the name of an agent thereat upon whom process may be served, and which further subjects to a penalty any corporation undertaking to transact any business in the state without complying with such requirements, although such statute does not in terms declare that any contract made by a corporation before complying with the statute shall be void or not enforceable.

Estoppel — stare decisis — fundamental principle of.

2. The rule of *stare decisis*, stated in simple form and considered in relation to its effect upon private affairs, is really nothing more than the application of the doctrine of estoppel to court decisions. It finds its support in the sound principle that when courts have announced, for the guidance and government of individuals and the public, certain controlling principles of law, or have given a construction to statutes upon which individuals and the public have relied in making contracts, they ought not, after these principles have been promulgated and after these constructions have been published, to withdraw or overrule them, thereby disturbing contract rights that had been entered into, and property rights that had been acquired, upon the faith and credit that the principle announced or the construction adopted in the opinion was the law of the land.

Same — who may invoke doctrine.

3. When it appears that a party was not misled to his prejudice by reliance on a decision that the court rendering it subsequently concluded was erroneous, the court will not feel estopped to overrule it by the insistence of the party claiming to have acted under it that it will overturn contracts and engagements that he has entered into on the faith of it.

Same — right of corporation not complying with statutory requirements to invoke.

4. A corporation which subjects itself to a fine by prosecuting its business within the state without complying with statutory requirements is not in a position to invoke the doctrine of *stare decisis* to induce the court not to overrule an earlier decision to the effect that the other contracting party is estopped from setting up as a defense the failure of the corporation to comply with such requirements.

Same — limitations of doctrine.

5. A court of last resort will not feel bound to adhere to an earlier decision that a party entering into a contract with a corporation is estopped, in an action thereon, from setting up as a defense the failure of

Note. — As to statutory provision for penalty as affecting validity or enforceability of contract made by a foreign corporation without complying with conditions of doing business, see notes to Tri-State Amusement Co. v. Forest Park Highlands Amusement Co. 4 L.R.A.(N.S.) 688, and 61 L.R.A.(N.S.)

Fruin-Colnon Contracting Co. v. Chatterson, 40 L.R.A.(N.S.) 857.

For effect of change of judicial decisions to impair the obligation of a contract, see notes to Swanson v. Ottumwa, 5 L.R.A.(N.S.) 860, and Crigler v. Shepler, 23 L.R.A.(N.S.) 500.

the corporation to comply with a statute, enacted pursuant to the Constitution, for the purpose of carrying out a wise public policy, which provides that it shall not be lawful for any corporation to carry on any business in the state until it shall have filed a statement giving the location of its place of business within the state, and the name of an agent thereat upon whom process may be served.

Constitutional law — change of decision — impairing obligation of contracts.

6. The doctrine that if a contract when made was valid by the laws of the state, as then administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent decision of the courts of the state, altering the construction of the law, does not apply where the making of the contract is in itself a violation of law; and therefore has no application where a corporation which has failed to comply with a statute subjecting to a penalty any corporation undertaking to transact any business in the state without filing a statement of the location of its place of business within the state and the name of an agent thereat, upon whom process may be served, seeks to enforce a contract entered into subsequently to an earlier decision of the court to the effect that failure to comply with such statutory requirements will not prevent the enforcement of a contract.

(Hobson, Ch. J., dissents. Nunn, J., dissents in part.)

(December 19, 1913.)

A PPEAL by plaintiff from a judgment of the Chancery Branch, First Division, of the Circuit Court for Jefferson County, in defendant's favor in an action to enforce the collection of an amount due on a contract. Affirmed.

The facts are stated in the opinion.

Messrs. Bruce & Bullitt, for appellant:

Although a corporation may have failed to file with the secretary of state a statement showing its place of business and name of an agent for receipt of process, as required by statute, nevertheless a contract between such corporation and a third party, which has been performed by the corporation, and under which the other party to the contract has received and retained benefits, is enforceable as between the parties to it.

Johnson v. Mason Lodge, 106 Ky. 838, 51 S. W. 620; Hallam v. Ashford, 24 Ky. L. Rep. 870, 70 S. W. 197; Aultman & T. Co. v. Mead, 109 Ky. 583, 60 S. W. 294; Fruin-Colnon Contracting Co. v. Chatterson, 146 Ky. 504, 40 L.R.A.(N.S.) 857, 143 S. W. 6; Vanmeter v. Spurrier, 94 Ky. 22, 21 S. W. 337; McConnell v. Kitchens, 20 S. C. 430, 47 Am. Rep. 845; Franklin Ins. 51 L.R.A.(N.S.)

Co. v. Louisville & A. Packet Co. 9 Bush, 590; Cincinnati Mut. Health Assur. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; Randall v. Tuell, 89 Me. 443, 38 L.R.A. 143, 36 Atl. 910; Vannoy v. Patton, 5 B. Mon. 248; Smith v. Robertson, 100 Ky. 472, 45 L.R.A. 510, 50 S. W. 852; Model Heating Co. v. Magarity, 2 Boyce (Del.) 459, — L.R.A.(N.S.) —, 81 Atl. 394; Galletley v. Strickland, 74 S. C. 394, 54 S. E. 570; Chattanooga R. & C. R. Co. v. Evans, 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 809; Chattanooga Nat. Bldg. & L. Asso. v. Denson, 189 U. S. 408, 47 L. ed. 870, 23 Sup. Ct. Rep. 630; Diamond Glue Co. v. United States Glue Co. 187 U. S. 611, 47 L. ed. 328, 23 Sup. Ct. Rep. 206; Delaware River Quarry & Constr. Co. v. Bethlehem & N. Pass. R. Co. 204 Pa. 25, 53 Atl. 533; Pittsburgh Constr. Co. v. West Side Belt R. Co. 11 L.R.A.(N.S.) 1145, 83 C. C. A. 501, 154 Fed. 929; Dunlop v. Mercer, 86 C. C. A. 435, 156 Fed. 545.

And no change in that law can be made by legislative act or judicial decision, subsequent to the making and performance of the contract, so as to affect it.

McChesney v. Hager, 31 Ky. L. Rep. 1038, 104 S. W. 714; Farrior v. New England Mortg. Secur. Co. 92 Ala. 180, 12 L.R.A. 856, 9 So. 532; Haskett v. Maxey, 134 Ind. 191, 19 L.R.A. 382, 33 N. E. 360; Vermont & C. R. Co. v. Vermont C. R. Co. 63 Vt. 23, 10 L.R.A. 565, 3 Inters. Com. Rep. 488, 21 Atl. 267, 731; Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520; Long v. Walker, 105 N. C. 90, 10 S. E. 858; Eau Claire Nat. Bank v. Benson, 106 Wis. 624, 82 N. W. 604; Opinion of Justices, 58 N. H. 625; Whaley v. Gaillard, 21 S. C. 560; Hall v. Wells, 54 Miss. 301.

Even if the contract sued on should be void, nevertheless defendant should be required to pay the reasonable value of the materials furnished and labor performed for it by plaintiff, as "the obligation to do justice rests upon all persons, natural and artificial."

Rankin v. Emigh, 218 U. S. 27, 54 L. ed. 915, 30 Sup. Ct. Rep. 672; Citizens' Nat. Bank v. Appleton, 216 U. S. 196, 54 L. ed. 443, 30 Sup. Ct. Rep. 364.

Defendant, by five years of dilatory motions aimed at the form of the petition, and without ever suggesting its purpose to defend on the ground of plaintiff's failure to file the statement required by statute, waived the right to make such defense.

Louisville Bridge Co. v. Louisville & N. R. Co. 116 Ky. 258, 75 S. W. 285.

Messrs. Trabue, Doolan, & Cox, for appellee:

The contract is illegal and unenforceable. Fruin-Colnon Contracting Co. v. Chatter-

son, 146 Ky. 504, 40 L.R.A.(N.S.) 857, 143 S. W. 6; Smith v. Robertson, 106 Ky. 472, 45 L.R.A. 510, 50 S. W. 852; Franklin Ins. Co. v. Louisville & A. Packet Co. 9 Bush, 590; Hudnall v. Watts Steel & Iron Syndicate, 20 Ky. L. Rep. 1211, 49 S. W. 21; Campbell v. Offutt, 151 Ky. 229, 151 S. W. 403; Chattanooga Nat. Bldg. & L. Asso. v. Denson, 189 U. S. 408, 47 L. ed. 870, 23 Sup. Ct. Rep. 630; Denson v. Chattanooga Nat. Bldg. & L. Asso. 46 C. C. A. 634, 107 Fed. 777; Diamond Glue Co. v. United States Glue Co. 187 U. S. 611, 47 L. ed. 328, 23 Sup. Ct. Rep. 206, 103 Fed. 838; Swing v. Weston Lumber Co. 205 U. S. 275, 51 L. ed. 799, 27 Sup. Ct. Rep. 497, 140 Mich. 344, 103 N. W. 816; Cooper Mfg. Co. v. Ferguson, 113 U. S. 733, 28 L. ed. 1138, 5 Sup. Ct. Rep. 739; Pittsburgh Constr. Co. v. West Side Belt R. Co. 11 L.R.A. (N.S.) 1145, 83 C. C. A. 501, 154 Fed. 929; Thomas v. Birmingham R. Light & P. Co. 195 Fed. 340; Re Conecuh Pine Lumber & Mfg. Co. 180 Fed. 249; Cyclone Min. Co. v. Baker Light & P. Co. 165 Fed. 996; Re Comstock, 3 Sawy. 218, Fed. Cas. No. 3,078; Cary-Lombard Lumber Co. v. Thomas, 92 Tenn. 587, 22 S. W. 743; G. Heileman Brewing Co. v. Peimeisl, 85 Minn. 121, 88 N. W. 441; Thomas Mfg. Co. v. Knapp, 101 Minn. 432, 112 N. W. 989; E. A. Strout Co. v. Howell, — Del. —, 85 Atl. 666; Levinson v. Boas, 12 L.R.A.(N.S.) 575, and note, 150 Cal. 185, 88 Pac. 825, 11 Ann. Cas. 661.

It is the duty of the courts to enforce the legislative will.

Eastern Kentucky Coal Lands Corp. v. Com. 127 Ky. 717, 106 S. W. 260, 108 S. W. 1138; Metropolis Theatre Co. v. Chicago, 228 U. S. 69, 57 L. ed. 733, 33 Sup. Ct. Rep. 441; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 201, 57 L. ed. 187, 33 Sup. Ct. Rep. 44; Engel v. O'Malley, 219 U. S. 137, 55 L. ed. 136, 31 Sup. Ct. Rep. 190; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425.

Defendant is not estopped to plead the illegality of the contract upon which plaintiff seeks to recover.

Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 265, 53 L. ed. 506, 29 Sup. Ct. Rep. 280; Coppel v. Hall, 7 Wall. 559, 19 L. ed. 248; Cyclone Min. Co. v. Baker Light & P. Co. 165 Fed. 996; Re Comstock, 3 Sawy. 218, Fed. Cas. No. 3,078; Delaware River Quarry & Constr. Co. v. Bethlehem & N. Pass. R. Co. 204 Pa. 22, 53 Atl. 537.

The doctrine of *stare decisis* is not applicable.

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Montgomery County Fiscal Ct. v. Trimble, 104 Ky. 639, 42 L.R.A. 738, 47 S. W. 773; The Genesee Chief v. Fitzhugh, 12 How. 456, 13 L. ed. 1064; State ex rel. George v. Aiken, 42 S. C. 222, 26 L.R.A. 349, 20 S. E. 221; Crigler v. Shepler, 79 Kan. 834, 23 L.R.A.(N.S.) 506, 101 Pac. 619; Evansville v. Senhenn, 151 Ind. 42, 41 L.R.A. 730, 68 Am. St. Rep. 218, 47 N. E. 634, 51 N. E. 88.

Carroll, J., delivered the opinion of the court:

The question for decision in this case is this: Is it a good defense, to an action brought in a state court by a foreign corporation to enforce the collection of the amount due on a contract entered into in the execution of its business here engaged in, that it has not complied with § 571 of the Kentucky Statutes reading: "All corporations except foreign insurance companies formed under the laws of this or any other state, and carrying on any business in this state, shall at all times have one or more known places of business in this state, and an authorized agent or agents thereat, upon whom process can be served; and it shall not be lawful for any corporation to carry on any business in this state, until it shall have filed in the office of the secretary of state a statement, signed by its president or secretary, giving the location of its office or offices in this state, and the name or names of its agent or agents thereat upon whom process can be served; and when any change is made in the location of its office or offices, or in its agent or agents, it shall at once file with the secretary of state a statement of such change; and the former agent shall remain agent for the purpose of service until statement of appointment of the new agent is filed; and if any corporation fails to comply with the requirements of this section, such corporation, and any agent or employee of such corporation, who shall transact, carry on or conduct any business in this state, for it, shall be severally guilty of a misdemeanor, and fined not less than \$100 nor more than \$1,000 for each offense"? The Oliver Company is a Tennessee corporation, and entered into a contract with the Louisville Realty Association to do certain work for it in the construction of a building by the latter company in the city of Louisville, Kentucky. The contract fixed the compensation that should be paid to the Oliver Company for the work it agreed to do, but during the progress of the work certain changes were made in the specifications, and as a result of differences arising between the parties to the contract as to the amount that should be paid, this

suit was brought by the Oliver Company to recover from the realty company the sum it claimed was due it on the contract.

To this suit several defenses were made going to the merits of the claim asserted by the Oliver Company, but the issues arising on the merits of the controversy we do not find it necessary to discuss. The only question that we need concern ourselves with is the sufficiency of the defense relied on by the realty company that the Oliver Company could not maintain the action because it had failed to comply with the statute quoted. The lower court ruled that the failure of the Oliver Company to observe the requirements of this statute denied it the right to maintain the action, and dismissed its suit, and in the correctness of this decision we concur.

It will be observed that this statute expressly provides that it shall not be lawful for any corporation to carry on any business in this state until it shall have observed the requirements of the section, and further subjects to a penalty any corporation undertaking to transact, carry on, or conduct any business in this state without observing the section, although it does not in terms declare that any contract made by a corporation before complying with the statute shall be void or not enforceable. The fact, however, that the statute does not expressly declare that contracts made before complying with the section shall be void or not enforceable does not weaken the effect of the statute as a prohibition against the enforcement of contracts made by a corporation in violation of the statute. In other words, the declaration of the statute that it shall not be lawful for any corporation to carry on any business in this state until it shall have observed the requirements of the statute, and the imposition of a penalty for engaging in business in violation of it, has the same effect and accomplishes the same end as if the statute had expressly declared the invalidity of contracts made without observing its conditions.

Upon this point we may repeat what was said in the case of *Fruin-Colnon Contracting Co. v. Chatterson*, 146 Ky. 504, 40 L.R.A.(N.S.) 857, 143 S. W. 6, where this question was discussed: "The statute does not provide that contracts, entered into before it has been complied with, shall be void or nonenforceable, nor does it use any language in reference to the contract; but, when a statute makes it unlawful to do business under certain conditions, it seems to necessarily and logically follow that the doing of the business under the prohibited conditions is in itself unlawful. When the doing of the act is made unlawful, there is

no reason why the statute should also declare that contracts made in violation of it should also be unlawful. When the law prohibits a thing, it is unlawful to do it, and the courts should not lend their aid to the enforcement of prohibited contracts. Courts are established to afford remedies to litigants who seek relief growing out of lawful transactions, and not to aid those who would invoke their assistance to enforce contracts made in violation of law. Their chief purpose is to secure the observance of laws enacted for the safety and protection of life and property and the general well-being of the people, and it would be a startling departure from this purpose if they should also give relief to parties who were seeking to enforce contracts made in violation of law. Such a course of procedure would be a perversion of justice, and convert the courts into instruments to aid lawbreakers in place of punishing them." The principle thus announced is supported by abundant authority, for it is a generally prevailing rule that a contract is void if prohibited by statute, though the statute only inflicts a penalty and does not in terms declare illegal contracts made in violation of it. *Lindsey v. Rutherford*, 17 B. Mon. 246; *Vanmeter v. Spurrier*, 94 Ky. 22, 21 S. W. 337; *Harris v. Runnels*, 12 How. 79, 13 L. ed. 901; *Wilson v. Spencer*, 1 Rand. (Va.) 76, 10 Am. Dec. 491; *Harrison v. Berkley*, 1 Strobb. L. 525, 47 Am. Dec. 578; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Columbia Bank & Bridge Co. v. Haldeman*, 7 Watts & S. 233, 42 Am. Dec. 229; *Roby v. West*, 4 N. H. 285, 17 Am. Dec. 423, and *Levinson v. Boas*, 150 Cal. 185, 12 L.R.A.(N.S.) 575, 88 Pac. 825, 11 Ann. Cas. 661.

But passing this, a vigorous assault is made on the decision of the lower court denying to the Oliver Company the right to maintain the action it had instituted, and it is earnestly pressed on our attention that the statute should not be so construed as to prohibit a corporation that had failed to comply with the statute from bringing suit to enforce contracts made in the prosecution of its business in this state. The argument is made that persons who make otherwise valid contracts with foreign corporations should be estopped to deny the right of the corporation to enforce them. It is, of course, at once apparent that the effect of such a construction of this statute would be to destroy the life and vigor of the feature of it now under consideration. So construed, it would virtually have no meaning or effect at all. It would be to say, in substance, to a corporation: "It is true the statute expressly prohibits you

from doing business in this state until you have complied with its simple provisions, but if it does not suit your convenience or your interest to do so, your failure will not prejudice any rights that you may have. If you choose to observe these requirements, well and good, but if you don't, you can yet carry on any business you please and make as many contracts as you wish, and the courts of the state are open to your pleas, and, notwithstanding your dereliction of duty and your violation of law, will afford you all the remedies that could be afforded if you had seen proper to observe the statute." If corporations may thus lightly treat the laws of this state, if they may ignore them at their pleasure and comply with them or not, as suits their convenience, free from any of the civil disabilities imposed by the statute, the legislature of the state might as well cease the enactment of laws intended to protect the people of the state in their dealings with corporations.

The statute, as may be readily seen, does not impose any harsh or unreasonable conditions. A literal compliance with its simple requirements is both easy and inexpensive, and no good reason can be assigned why a corporation undertaking to do business in the state should not be obliged to observe its provisions. It is a useful statute, and was intended as a police regulation for the protection of the people of the state, who have a right to know whether the party they are dealing with is an individual, or a corporation. It is a notorious fact that the country is full of corporations engaged in every imaginable line of business, with their agents going here and there and everywhere, and many of the people dealing with them do not know where the home of the corporation is, or, if they do know, would find it impracticable to seek relief by suits in foreign jurisdictions. Except for this statute they would not, in many instances, know on whom process could be served, or in what county a suit against the corporation could be brought, and thus in many cases would be left virtually remediless. To relieve in a measure the disadvantages our citizens, as a result of this condition, were placed under in their dealings with corporations, the legislature undertook in this statute to say that when a corporation, whether foreign or domestic, desired to engage in business in this state, it should at all times have an agent at a known place of business in this state upon whom process could be served, and to whom the citizens of the state might look if it became necessary to seek redress in the courts of the state, so that any citizen desiring to institute an

action against a corporation might, by writing to the secretary of state, learn who and where its agent was, and where its place of business was, and thus be able to secure such relief as the circumstances of the case seemed to demand.

So universally recognized is the wisdom and propriety of this character of legislation that every state in the Union, save possibly two, have adopted statutes in substance the same as ours, and the courts of these different states, as we will presently point out, have, with few exceptions, given to these salutary statutes the same construction and the same meaning and effect that we have.

As said by the United States circuit court of appeals in Pittsburgh Constr. Co. v. West Side Belt R. Co. 11 L.R.A.(N.S.) 1145, 83 C. C. A. 501, 154 Fed. 929, in speaking of a like statute: "This act is a salutary one, for the protection of persons transacting business with foreign corporations. The facility with which irresponsible corporations are created, frequently with no assets within the jurisdiction where business is transacted, would frequently leave creditors without any chance whatever of collecting their claims, were it not for acts requiring registration where business is transacted. This enables the creditors to bring the foreign corporation within the jurisdiction of the courts where the obligations are created; and, in order that the provisions of these laws may be complied with, it is necessary that they should receive a reasonably strict enforcement."

The purpose of the statute is also well expressed by the supreme court of Pennsylvania in Delaware River Quarry & Constr. Co. v. Bethlehem & N. Pass. R. Co. 204 Pa. 22, 53 Atl. 533, where the court said: "The purpose of the act is to bring foreign corporations doing business in this state within the reach of legal process. This purpose is not accomplished by a registration of the corporation at the pleasure of its officers, or when it may be to their interest to appeal to our courts. The act is for the protection of those with whom it does business, or to whom it may incur liability by its wrongful acts, and nothing short of a registration before the contract that it seeks to enforce is made can give it a right of action. Any other construction of the act would violate its plain words, and wholly defeat its object by affording protection to the corporation and denying it to the public."

It may further be observed that the effect of allowing the plea of estoppel would be to defeat one of the chief purposes of the statute. For example, if every person

who made a contract with a corporation should be denied the right to set up, when sued by the corporation, the defense that when making the contract it acted in violation of law, instances would be very rare in which the statute could be effectively interposed, and the corporation punished for failing to observe it. There are few cases in which business transactions are not directly conducted between the parties affected, or others acting for them, and it is manifest that if the party within the law should be estopped to make the defense that the other party was without the law, the party who was guilty of violating the law would feel assured that his violation would not subject him to any disadvantage. In short, if the statute is to be given effect, the doctrine of estoppel should not be applied. So apparent is the fact that the adoption of the doctrine of estoppel would virtually nullify the purpose of the statute that the authorities generally refuse to assent to it, although the failure to apply this rule may, in some cases, work a hardship on the delinquent corporation.

It is equally plain that the fact that the enforcement of the statute may work hardships on corporations that fail to obey it, and sometimes prevent them from collecting just debts, cannot, without ignoring the legislative intent, be allowed to defeat the object sought to be accomplished by the enactment of the law. Every person who violates the law puts himself in the attitude of being required to pay the penalty for the infraction; but, although the delinquency may subject him to punishment, civil or criminal, this of course furnishes no reason why the statute should not be enforced. The individual who violates a penal statute may expect to pay the penalty, and so a corporation that violates the civil features of a statute is not in any position to complain if it, too, must pay the penalty.

These views in different forms of expression have been frequently announced. Thus, in *Thompson on Corporations*, 2d ed. vol. 5, § 6712, it is said: "Such statutes are intended for the protection of the citizens of the state who deal with such foreign corporation, and there are many reasons why a person, after dealing with such a corporation, should have the right to insist on compliance with the statute, when the corporation sues to enforce the contract. The effect of the cases holding otherwise is to make such a statute an instrument of fraud as against persons whom it was intended to protect, and the doctrine of estoppel cannot be extended so far as to aid a foreign corporation in doing what was forbidden by statute."

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In *Cyclone Min. Co. v. Baker Light & P. Co.* (C. C.) 165 Fed. 996, the court, in answering the argument that the doctrine of estoppel should be applied, said: "Nor are the defendants estopped, by reason of their contractual relations with the plaintiff, from insisting that the contract is void, and the plaintiff without legal right or capacity to sue for the breach thereof, because if so estopped, the plaintiff would be permitted to take advantage of its own offending acts done in derogation and even in defiance of the law. It would be a revolting doctrine, fraught with inconceivable, deleterious results, if a foreign corporation could come into a state not its own, and there carry on a business in direct defiance of the provisions of law by which it may capacitate itself for the transaction of business therein, and then validate its acts because, forsooth, parties had dealt with it; for but few others have cause for suit except those having contractual relations in some form with such corporations."

Out of a large number of cases illustrating the rule that a corporation or an individual that has made a contract for carrying on a business in violation of law or without having complied with statutory requirements cannot enforce the collection of his or its demands created in carrying on the business, and that the defendant, although the beneficiary of the unlawful transaction, when sued is not estopped to raise the question of the disability of the plaintiff to maintain the suit, we may select the following: *Smith v. Robertson*, 106 Ky. 472, 45 L.R.A. 510, 50 S. W. 852; *Franklin Ins. Co. v. Louisville & A. Packet Co.* 9 Bush, 590; *Bull v. Harragan*, 17 B. Mon. 349; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *G. Heileman Brewing Co. v. Peimeisl*, 85 Minn. 121, 88 N. W. 441; *Delaware River Quarry & Constr. Co. v. Bethlehem & N. Pass. R. Co.* 204 Pa. 22, 53 Atl. 533; *United Lead Co. v. Reedy Elevator Mfg. Co.* 222 Ill. 199, 78 N. E. 567, 6 Ann. Cas. 637; *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743; *Seamans v. Temple Co.* 105 Mich. 400, 28 L.R.A. 430, 55 Am. St. Rep. 457, 63 N. W. 408; *Commonwealth Mut. F. Ins. Co. v. Hayden Bros.* 60 Neb. 636, 83 Am. St. Rep. 545, 83 N. W. 922; *Tri-State Amusement Co. v. Forest Park Highlands Amusement Co.* 192 Mo. 404, 4 L.R.A.(N.S.) 688, 111 Am. St. Rep. 511, 90 S. W. 1020, 4 Ann. Cas. 808; *State Bank v. Lawrence*, 177 Ind. 515, 42 L.R.A.(N.S.) 326, 96 N. E. 947; *E. A. Strout Co. v. Howell*, — Del. —, 85 Atl. 666.

Another argument advanced by counsel for the Oliver Company is rested on the

doctrine of *stare decisis*. In support of this contention, our attention is called to the fact that in *Johnson v. Mason Lodge*, 106 Ky. 838, 51 S. W. 620, decided in 1899, this court held that a person who contracted with a corporation that had failed to comply with the statute here in question would be estopped, when sued by the corporation, to set up as a defense the illegality of the transaction, and it is said that the principle announced in this case was followed in *Aultman & T. Co. v. Mead*, 109 Ky. 583, 60 S. W. 294, and *Hallam v. Ashford*, 24 Ky. L. Rep. 870, 70 S. W. 197, and therefore, following the rule of *stare decisis*, this court should now adhere to these opinions. In other words, the effect of the argument is this: That the Oliver Company felt authorized to violate this statute because this court said in *Johnson v. Mason Lodge* that it might do so with impunity, and repeated this assurance of protection in the *Ashford* and *Mead* Cases subsequently decided. It might here be noted that *Johnson v. Mason Lodge* and the two cases that follow it were virtually overruled in *Fruin-Colnon Contracting Co. v. Chatterton*, 146 Ky. 504, 40 L.R.A. (N.S.) 857, 143 S. W. 6; but as this case was decided subsequent to the transaction of the business out of which this litigation arose, it cannot be said to deprive the Oliver Company of the right to rely on the doctrine of *stare decisis*, if the invocation of that doctrine saves it from the penalty of the statute. Before, however, taking up directly the question of *stare decisis*, it may be well to notice with more care the decision in *Johnson v. Mason Lodge*. The opinion in that case discloses that *Mason Lodge* was a Kentucky corporation and a branch of the Independent Order of Odd Fellows. It sued *Johnson* to recover a sum of money it had loaned him. In defense of the suit, he set up that the corporation was not legally organized, and, furthermore, that it had not complied with § 571 of the statute, and for these reasons could not enforce collection of the debt. The court, after discussing at length the proposition that *Johnson* was estopped to deny the legality of the corporate existence of the *Mason Lodge*, took up the question of the nonenforceability of the contract because the corporation had failed to comply with § 571 of the statute, and disposed of it in a few words adversely to the contention of *Johnson*. The opinion makes it perfectly apparent that the entire reasoning of the court was devoted to consideration of § 566 of the statutes, providing that "no corporation organized under this chapter shall be permitted to set up or rely upon the want of legal organization as a

defense to any action against it; nor shall any person transacting business with such corporation, or sued for injury done to its property, be permitted to rely upon such want of legal organization as a defense;" and that little or no attention was given to the effect on the contract of § 571. But, nevertheless, it is fair to say that the court held in this opinion that the failure of this corporation to comply with § 571 did not defeat its right to enforce the collection of the contract sued on. In the *Ashford* Case all that was said on the point under consideration is this: "In *Johnson v. Mason Lodge* it was held that one who is sued upon a contract made with a corporation is estopped from relying upon the failure of the corporation to comply with the provisions of § 571. As this question was very thoroughly considered in that case, and has been followed in quite a number of subsequent decisions of this court, it is unnecessary for us to again consider the question." In the *Mead* Case the only reference to this question is this: "The objection that appellants did not comply with § 571 of the Kentucky Statutes is fully answered in the opinion of the court in the case of *Johnson v. Mason Lodge*, and it will therefore be unnecessary for us to again consider that question."

It will thus be seen that while in three opinions it was held that § 571 of the statute did not obstruct the right of a delinquent corporation to enforce a contract made with it, in no one of these opinions was the question examined with any degree of care. In the *Johnson* Case we think the court fell into the error of confusing an *ultra vires* contract with an unlawful contract, and treating § 571 as a companion section to § 566, and this error seems to have been followed in the two subsequent cases. It is, of course, plain that § 566 and § 571 relate to entirely distinct subjects. They have not the remotest connection with each other except in so far as they relate in a general way to corporations. They were enacted for different reasons and to accomplish different purposes. Section 566 relates to defects in the organization of a corporation, and so states, while § 571 relates exclusively to the matter of a corporation doing business in this state without having an agent and a place of business in this state. *Fruin-Colnon Contracting Co. v. Chatterton*, 146 Ky. 504, 40 L.R.A. (N.S.) 857, 143 S. W. 6. As said in the *Johnson* Case, it has been repeatedly decided, both by this court and others, that a person dealing with a corporation will not be permitted to raise the question that it was not legally organized, and § 566 merely put into the form of a statute

a rule that a long line of court decisions had made a part of the law of the state.

On the other hand, the subject-matter of § 571 first made its appearance in the history of the state in 1893, when it was adopted as a part of the statute law of the state, and it was put into the statute in obedience to § 194 of the Constitution, providing that "all corporations formed under the laws of this state, or carrying on business in this state, shall, at all times, have one or more known places of business in this state, and an authorized agent or agents there, upon whom process may be executed, and the general assembly shall enact laws to carry into effect the provisions of this section."

Under these circumstances the question now before us, put in simple form is, Shall § 571 of the statute, enacted pursuant to § 194 of the Constitution of the state, stand or shall the decision of this court in *Johnson v. Mason Lodge* stand? The decision and the statute are in conflict, and if the doctrine of *stare decisis* as sought to be applied is to control, the decision must prevail and a valuable part of the statute be in effect expunged.

We are not unmindful of the importance of courts of last resort adhering to rules of law announced in long-established decisions that have become a part of the jurisprudence of the state, and on the faith of which people have transacted business, entered into contracts, and conducted in a general way their affairs, and we should be slow to overrule any opinion that might unsettle property rights acquired on the faith of the opinion overruled, or that might prejudice the rights or interests of persons who had entered into engagements in reliance upon the fact that the opinion assailed was the law of the land.

As said in *Kent's Commentaries*, vol. 1, *476: "When a rule has been once deliberately adopted and declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law." To the same effect are *Farrior v. New England Mortg. Secur. Co.* 92 Ala. 176, 12 L.R.A. 856, 9 So. 532; *Haskett v. Maxey*, 134 Ind. 182, 19 L.R.A. 379, 33 N. E. 358; *Vermont & C. R. Co. v. Vermont C. R. Co.* 63 Vt. 23, 10 L.R.A. 562, 3 Inters. Com. Rep. 488, 21 Atl. 262, 731, and many other cases referred to in these opinions.

But the rule of *stare decisis*, stated in simple form and considered in relation to its effect upon private affairs, is really 51 L.R.A. (N.S.)

nothing more than the application of the doctrine of estoppel to court decisions. It finds its support in the sound principle that when courts have announced, for the guidance and government of individuals and the public, certain controlling principles of law, or have given a construction to statutes upon which individuals and the public have relied in making contracts, they ought not to, after these principles have been promulgated and after these constructions have been published, withdraw or overrule them, thereby disturbing contract rights that had been entered into and property rights that had been acquired upon the faith and credit that the principle announced or the construction adopted in the opinion was the law of the land. In the correct application of the rule of *stare decisis* we fully concur, and do not propose in this opinion to announce any views that would impair or overthrow its efficiency when properly understood and applied. Later in the opinion we will again advert to the necessity for an adherence to the rule of *stare decisis*, when properly invoked, to protect contract or property rights.

It, however, seems to us apparent that the doctrine of *stare decisis*, giving to it what may be called a personal application, cannot be relied on by a party who has not, in good faith, been deceived by the decision under which he claims to have acted; and, when it appears that a party was not misled to his prejudice by reliance on a decision that the court rendering it subsequently concluded was erroneous, the court will not feel estopped to overrule it by the insistence of the party claiming to have acted under it that it would overturn contracts and engagements that he had entered into on the faith of it.

Let us see now for a moment if the Oliver Company is in a position to assert that, relying on *Johnson v. Mason Lodge*, it did not observe this statute. It will be observed that the statute not only subjects the offending corporation to the civil disability of denying it the right to maintain an action, but it also subjects it to a fine under the criminal law of the state; and, if it should be said that the civil disability was removed by construction in *Johnson v. Mason Lodge*, the penal features of the statute remained undisturbed, and furnished full notice to the corporation that it must comply with the statute or subject itself to the penalty imposed. Under these circumstances it does not lie in the mouth of the Oliver Company to say that, acting on the faith and credit of the *Johnson Case*, it did not know it was necessary that it should observe this statute. In entering

into this contract the Oliver Company was undeniably guilty of violating a law of this state that has been enforced in many cases, and it is not in a position to set up that this court ought not now to overrule the Johnson Case.

We have examined a large number of cases on the subject of *stare decisis*, and in no one of them can there be found an attempted application of it to a state of facts such as are here presented. In every instance, so far as our investigation goes, where the doctrine has been applied, the decisions relied on furnished in themselves a line of authority that left no notice that anything else was required.

But aside from this, the doctrine of *stare decisis* is not without its limitations. A court of last resort is not irrevocably bound to follow opinions that, in the light of present circumstances and conditions, seem to be erroneous, and this case furnishes a good illustration of the necessity for a departure from the rule. Here we have a statute of the state, enacted pursuant to the Constitution, for the purpose of carrying out a wise public policy, an important feature of which was eliminated by the decision in Johnson v. Mason Lodge, and upon mature consideration we do not feel bound to follow this decision. In overruling it we are not without ample precedents furnished, not only by the decisions of other courts, but of this court. This court in the course of its history has deemed it wise and proper to overrule many cases, numbers of them relating to property rights, as may be seen by an examination of volumes 2 and 4 of Barbour's Digest, under the head of "Overruled Cases." A few of them may be mentioned:

In Montgomery County Fiscal Ct. v. Trimble, 104 Ky. 629, 42 L.R.A. 738, 47 S. W. 773, in overruling several previous cases, we said: "When a question involving important public or private rights, extending through all coming time, has been passed upon on a single occasion, and such decision can in no just sense be said to have been acquiesced in, it is not only the right, but the duty, of the court, when properly called upon, to re-examine the questions involved, and again subject them to judicial scrutiny. We are by no means unmindful of the salutary tendency of the rule of *stare decisis*; but at the same time we cannot be unmindful of the lessons furnished by our own consciousness, as well as by judicial history, of the liability to error and the advantages of review."

In Hall v. Martin, 89 Ky. 9, 11 S. W. 953, and Breathitt Coal, Iron, & Lumber Co. v. Strong, 106 Ky. 699, 51 S. W. 189, the case of Hamilton v. Fugett, 81 Ky. 51 L.R.A. (N.S.)

366, was in effect overruled, although the overruling opinions unsettled extensive property rights acquired on the faith of the Fugett opinion. True it was not expressly overruled, but it was effectually disposed of by being explained away in the cases mentioned, a process of elimination sometimes adopted to remove undesirable opinions.

Another case affecting property rights was Sheets v. Grubbs, 4 Met. (Ky.) 339, decided in 1863; but this case, after standing for many years and being followed in several cases, was overruled in Chenault v. Chenault, 88 Ky. 83, 11 S. W. 424. Yet another example is found in the bank tax cases reported in 102 Ky. 174, 44 L.R.A. 825, 39 S. W. 1030.

In Victor Cotton Oil Co. v. Louisville, 149 Ky. 149, 148 S. W. 10, the case of Mengel Box Co. v. Louisville, 117 Ky. 735, 79 S. W. 255, was overruled, although, on the faith of the exemption from taxation it afforded, the Victor Cotton Oil Company was, as it claimed, induced to establish its plant in the city of Louisville. Having thus been induced to act on the authority of the Mengel Case, the Cotton Oil Company insisted that its right to the exemption ought not to be defeated, but Chief Justice Hobson, speaking for the court, said: "It is insisted, however, that the facts here shown bring the case directly within the doctrine laid down in Mengel Box Co. v. Louisville, 117 Ky. 735, 79 S. W. 255. This seems to be true, but that case is out of line with the subsequent cases, and with what seems to us the proper construction of the Constitution and the statute." To the same effect is Pratt v. Breckinridge, 112 Ky. 1, 65 S. W. 136, 66 S. W. 405.

In 26 Am. & Eng. Enc. Law, p. 183, we find this sensible statement of the limitations upon the rule of *stare decisis*: "This doctrine is not an arbitrary rule of positive law which forbids the questioning, under any circumstances, of all decisions, or the exercise of judicial discretion in relation thereto, but is subject to reasonable limitations. . . . No prior decision is to be reversed without good and sufficient cause, yet the rule is not in any sense ironclad, and the future and permanent good of the public is to be considered rather than any particular case or interest. Even if the decision affects real estate interests and titles, there may be cases where it is plainly the duty of the court to interfere and overrule a bad decision. Precedent should not have an overwhelming or despotic influence in shaping legal decisions. . . . The benefit to the public in the future is of greater moment than any incorrect de-

cision in the past. Wherever a correction can be made without working more harm than good, it should be done. . . . Where vital and important public or private rights are concerned, and the decisions regarding them are to have a direct and permanent influence in all future time, it becomes the duty, as well as the right, of the court to consider them carefully, and to allow no previous error to continue if it can be corrected. The foundation of the rule of *stare decisis* was promulgated on the ground of public policy, and it would be an egregious mistake to allow more harm than good to accrue from it."

It is further insisted by counsel for the Oliver Company that this court, in construing § 571 in *Johnson v. Mason Lodge*, declared that a failure to comply with this statute did not affect the validity of a contract made by the delinquent corporation, or prohibit it from enforcing the contract, and that, as the contract between the Oliver Company and the Louisville Realty Association was entered into subsequent to this opinion, and while it was standing unaffected as the law of the land, this court is not now at liberty, without impairing the obligations of a contract, to overrule the *Johnson Case* so as to affect the validity of the contract here in question.

In support of this position our attention is called to *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520. In that case the court said: "The sound and true rule is that if the contract, when made, was valid by the laws of the state, as then expounded by all departments of the government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation or decision of its courts, altering the construction of the law."

And to *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968, where the court said: "As a rule we treat the construction which the highest court of a state has given a statute of the state as part of the statute, and govern ourselves accordingly. . . . The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment." To the same effect 51 L.R.A. (N.S.)

fect is *Havemeyer v. Iowa County*, 3 Wall. 204, 18 L. ed. 38; *Pine Grove Twp. v. Talcott*, 19 Wall. 666, 22 L. ed. 227.

We entirely concur in the right and justice of the rule announced in these cases, and fully agree to its soundness when properly applied, but we think it should have no application to the facts of this case. In the cases mentioned, and the others we have examined, it was used to protect innocent and law-observing parties who in good faith had made investments in securities upon the faith and credit of opinions of courts of last resort. The parties invoking the protection of the rule did not, in making the contracts sought to be declared void by subsequent decisions, violate any law of the state. They appeared before the court with clean hands, asking relief from decisions the effect of which was to deprive them of property in which they had been invited to invest, not only by the laws of the state, but by the opinions of its highest court in construing them. Here the situation is quite different. The Oliver Company comes before the court a confessed violator of the laws of the state. It is asking relief from a condition resulting from its deliberate and wilful violation of a penal statute. It is not in a position to ask the protection of beneficial rules of law intended to save from loss law-observing citizens. We put our decision, that the Oliver Company, is not entitled to the protection afforded by the principle announced in these cases and invoked in its behalf, upon the ground that it brought upon itself all the trouble it seeks to escape by making the contract now in question, in violation of an express penal statute of the state that was in full force and effect at the time the contract was made, and that it was fully advised of, if its other pleas heretofore noticed are true, and that it was obliged to take notice of, whether it had actual notice or not.

For the reasons stated the opinion in *Johnson v. Mason Lodge* and the others that follow it are overruled, and the judgment appealed from is affirmed, whole court sitting.

Hobson, Ch. J., and Nunn, J., dissenting:

Hobson, Ch. J., dissenting:

Two questions arise in this case: (1) Did the court err in its conclusion as to the construction of § 566, Ky. Stat. in *Johnson v. Mason Lodge*, 106 Ky. 838, 51 S. W. 620; *Aultman & T. Co. v. Mead*, 109 Ky. 583, 60 S. W. 294, and *Hallam v. Ashford*, 24 Ky. L. Rep. 870, 70 S. W. 197? (2) Can the court now, under its own rule

ings, properly depart from the construction of the statute it then adopted, the legislature having acquiesced in that construction?

1. In *Johnson v. Mason Lodge*, the corporation had not complied with § 571, Ky. Stat. *Johnson* had borrowed the money from it, and when sued for the money relied on the violation of § 571 by the corporation in bar of a recovery. The circuit court sustained a demurrer to his answer, which was practically the same as the answer in this case. In the opinion delivered by this court, after stating the facts, the court quotes § 194 of the Constitution and §§ 571 and 566, Ky. Stat. It then proceeds, in a lengthy opinion, to show that under § 566 a person, by executing a note to a corporation, "is estopped to deny its existence or authority to do business at that time." The other two cases follow and reaffirm this decision; and in the list of cases it is stated that the question has been repeatedly before the court, and had been decided the same way, though it would seem that it was not noticed in the opinions, being deemed settled by the previous adjudications. These cases being based upon § 566, Ky. Stat. in no manner conflict with *Lindsey v. Rutherford*, 17 B. Mon. 245; *Franklin Ins. Co. v. Louisville & A. Packet Co.* 9 Bush, 590; *Vanmeter v. Spurrier*, 94 Ky. 22, 21 S. W. 337; or *Smith v. Robertson*, 106 Ky. 472, 45 L.R.A. 510, 50 S. W. 852, or other like cases, for the reason that the statute under which those cases were decided contained no such provision as is set out in § 566. The opinion proceeds on the ground that the equitable doctrine of estoppel does not apply. This may be conceded, but the question turns on § 566, and not on equitable estoppel. So the question recurs, Was the court right in the construction it then gave § 566? That section and § 571 are parts of the same act, the work of the same legislature, and the two must, of course, be read together.

Section 566 is as follows: "No corporation organized under this chapter shall be permitted to set up or rely upon the want of legal organization as a defense to any action against it; nor shall any person transacting business with such corporation, or sued for injury done to its property, be permitted to rely upon such want of legal organization as a defense." It is now insisted that the words "want of legal organization" refer only to the filing of the articles of incorporation, the election of officers, and the like. Is this the natural meaning of the words in the connection in which they are used in this section? In *Words and Phrases*, vol. 6, defining the 51 L.R.A. (N.S.)

words "organize" and "organization" in reference to corporations, it is said: "'Organize' or 'organization,' as used in reference to corporations, has a well-understood meaning, which is the election of officers, providing for the subscription and payment of the capital stock, the adoption of by-laws, and such other steps as are necessary to endow the legal entity with the capacity to transact the legitimate business for which it was created." It will be observed that this is precisely the definition of the terms which this court adopted in the cases referred to; and, if we insert this definition in § 566, it will read as follows: "No corporation organized under this chapter shall be permitted to set up or rely upon its want of capacity to transact the legitimate business for which it was created, as a defense to any action against it, nor shall any person transacting business with such corporation, or sued for injury done to its property, be permitted to rely upon such want of capacity to transact the legitimate business for which it was created."

In *Black's Law Dictionary*, the word "organization" is not given, but among the definitions of "organize" are these: "To put into working order; to arrange in order for the normal exercise of its appropriate functions." A corporation is not put into working order until it has capacity to do business. It is not arranged in order for the normal exercise of its appropriate functions until it is lawful for it to make contracts. It is true that appellant is a foreign corporation, but as such it had no legal existence outside of the state creating it. The exercise of any power in another state depends upon the will of that sovereignty. *Lathrop v. Commercial Bank*, 8 Dana, 114, 33 Am. Dec. 481. By § 202 of our Constitution foreign corporations coming into this state must do business on conditions not more favorable than are prescribed by law to similar corporations organized under the laws of the commonwealth. So, when foreign corporations come into the state, they must comply with our laws, and have no right to do business or legal existence here except by virtue of our laws. When they do this, as has been frequently held, they stand on the same plane as similar corporations created under the laws of the state. If, as is uniformly held, appellant had no legal existence as a corporation in this state until it complied with our laws giving it a right to do business here, how can it be maintained, under any meaning of the word "organization," that it is not within the provisions of § 566?

Under § 571 it was not "lawful for any

corporation to carry on any business in this state" until it complied with that section; and therefore no corporation had capacity to do business in this state until it complied therewith. The defense here made is simply that the corporation had not capacity to do business because it had not complied with § 571; and this defense under § 566, a person transacting business with the corporation cannot make.

Section 460, Ky. Stat. which is the work of the same legislature regulating the construction of statutes, provides as follows: "All words and phrases shall be construed and understood according to the common and approved usage of language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such meaning." The word "organization" having acquired a peculiar and appropriate meaning in the law, the court in the cases referred to properly gave it that meaning.

But, looking beyond the letter of the statute to its purpose and intent, what reason could the legislature have had for making § 566 apply only to irregularities in the steps taken prior to the filing of the papers in the office of the secretary of state, as required by § 571, and not including this step also? By § 460, Ky. Stat. it is also provided as to this revision that its "provisions are to be liberally construed with a view to promote its objects."

In *Bailey v. Com.* 11 Bush. 691, this court said that "every statute ought to be expounded, not according to the letter, but according to the meaning." In *Sams v. Sams*, 85 Ky. 400, 3 S. W. 593, it is said that "the reason for the enactment must enter into its interpretation, so as to determine what was intended to be accomplished by it."

Can anyone believe that a body of practical men intended by § 566 to protect a corporation that had not the necessary number of incorporators or the necessary stock subscription, or that had not paid its organization tax, and did not intend it to protect a corporation that was not qualified to do business because it had not filed a certain paper in the office of the secretary of state? Section 571 applies alike to domestic as well as foreign corporations, and § 566 must also apply to all alike. Much of the business of the state is now done by corporations. Mistakes are sometimes made by the most careful men; papers sent by mail sometimes do not reach the secretary of state, and sometimes one officer is under the impression that another has performed this duty or that required by the statute. So § 566 was inserted for

the protection of the capital invested in these enterprises. It only validates the contract as between the parties to it. When we construe the statute liberally with a view to promote its objects, how can it be thought that § 566 only refers to defects in the articles of incorporation and the like? What was its purpose? Manifestly to prevent injustice, and to prevent those who had done business with the corporation for taking advantage of the corporation's want of capacity to do business. The words employed in § 566 show the legislature had this in mind. In the first place it provides that the corporation shall not make this defense. If we turn this case around, and the owner of the house was here suing the contractor for not building the house properly, would there be any doubt that under § 566 the corporation could not make this defense, although both parties made the contract knowing the facts? And if the first part of the section would cut off the corporation from making that defense, upon what principle can it be maintained that the last clause of the sentence is narrower in its application than the first clause? Not only so, but the second clause deals with the person who has transacted business with the corporation, and in that clause manifestly the legislature has in mind business done by the corporation, and provides that this defense shall not be allowed in favor of the men who have done business with the corporation. There may be cases in which the word "organize" is given a narrower meaning, where only the life of the corporation is in issue; but this section is dealing with the transaction of business by the corporation, and manifestly uses the words "legal organization" in the sense of capacity to do business. The court entirely overlooks, in § 566, the words "or sued for injury done to its property." Can anybody believe that the legislature intended this protection to the property of a corporation only in cases where there was some defect in the steps taken to form the corporation? Is there any reason why the property of such a corporation should be protected from wanton injury that would not apply to a corporation that had not complied with § 571? Would anybody hold that a trespass committed upon the property of a corporation before it had complied with § 571 would be without redress when it complied with the section before bringing suit? Does anybody believe that the legislature intended that the defendant here could, with impunity, have appropriated to its own use the property of the plaintiff because it had not complied with § 571? The plain purpose of § 566 was not to leave corpo-

rations without remedy in the two classes of cases indicated, although they had failed to comply with some provision of the statute, and could not lawfully do business as a corporation.

The Kentucky cases above referred to are cited in Thompson on Corporations, vol. 5, § 6710, where he says: "Not a few courts have applied the general doctrine of estoppel to persons dealing with foreign corporations. And the rule established by these courts is that a person who has contracted with a foreign corporation that has not complied with the statute authorizing it to transact business in the state will be estopped, in any action by it on such contract, from setting up the fact that it had not complied with the statute."

In 19 Cyc. 1297, after showing that in some states where they had no such statute as § 566 the contracts of the corporation have been held not enforceable, it is said: "In some states the courts have held, contrary to the doctrine hereinbefore stated, that where a person enters into a contract with a foreign corporation, and receives the benefit of such contract, he is estopped to set up the fact that the corporation had not complied with a statute of the state, imposing conditions upon its right to do business therein, for the purpose of avoiding liability on the contract." In support of this statement, decisions are cited from Arkansas, Colorado, Idaho, Iowa, Massachusetts, Missouri, Montana, New Hampshire, Ohio, Rhode Island, Washington, West Virginia, Kentucky, North Dakota, South Dakota, and in the annotations for 1914 a number of other cases to the same effect are cited.

Section 194 of the Constitution requires all corporations carrying on business in this state to have one or more known places of business in this state, and an authorized agent upon whom process may be executed. But this has no application to the case at bar, for a violation of this section is not shown. The general assembly, to carry into effect the constitutional provision, enacted §§ 566 and 571. What regulations should be made was a legislative question.

It is said that the construction of the statute adopted by the court makes it vain and elusive. Other penal statutes are not vain and elusive because the penalties affixed for their violation are the means relied on for their enforcement. If experience has shown that the statute as construed by the court is vain or elusive, it must be presumed that the legislature, coming biennially from the people, would have afforded a remedy. When they have not done this and no officer of the state has complained, by what authority is it

said that the statute is vain and elusive? The general assembly met in the year 1900, a few months after the decision in the Johnson Case was rendered, and when the matter was fresh in everybody's mind. It not only took no action, but the subsequent general assemblies, meeting biennially, have acquiesced likewise in the court's construction of the statute. The dockets of this court show that the statute is not vain and elusive; for the officers of the state have not been remiss in prosecutions under the statute to obtain the fines it provides for. It is a highly penal statute. Not only the corporation may be fined, but every officer or agent doing any business, and the corporation can enforce no civil right by action except as provided by § 566. The Chatterson Case, 146 Ky. 504, 40 L.R.A.(N.S.) 857, 143 S. W. 6, where a contractor who had built a street was refused relief, illustrates the fact that the statute is not vain and elusive. Must it not strike any justice-loving man as a travesty on justice that a person may borrow of a corporation \$20,000, and, when asked to pay it, snap his fingers in the creditor's face, and say, "I will keep your money, because you did not file a statement in the office of the secretary of state, as required by law, before you lent me the money, and took my note for it?" Must it not strike any justice-loving man as a travesty on justice when the owner of property, who, as here, is sued by the contractor for \$20,000 for building him a house, says, "I have the house and you can do without your money because you have not complied with § 571, Ky. Stat.?" Is it any wonder that the representatives of a justice-loving constituency like the people of Kentucky put such a section as 566 in the statutes to prevent such injustice as this? And is it any wonder that when the statute they made was thus construed by the court, the representatives of such a people acquiesced in the construction of the court and made no effort to change the statute? A change of the statute by the legislature and a change of its construction by the court are very different things. When changed by the legislature the change operates only on the future, and the people have notice of it; a change by the court, as in this case, operates on the past, and destroys rights contracted innocently upon the faith of the decisions of the court.

It is true that in some states, where the statute expressly provided that contracts made in violation of it should be void, and in others, where the contract was simply declared unlawful, the courts have enforced the statute while acknowledging its hardship, saying that it was a legislative ques-

tion. Such is the rule in Pennsylvania, Alabama, Tennessee, Wisconsin, Michigan, Minnesota, and Oregon. But in no case has this been done where the court did not recognize that justice had been defeated. In view of these things, how can it be maintained that the construction which is now given § 566 construes the statute liberally with a view to promote its purposes?

2. The second question comes to this: Is the construction of a statute settled by a line of decisions of this court, or is it never settled until settled right in the eyes of those who are judges of this court when the case reaches here? Does the obligation of contracts depend upon the law as officially promulgated at the time the contract was made, and may it be impaired by a subsequent change in those laws by judicial construction?

The purpose of establishing this court is primarily that justice may be administered, and that the laws of the state may have a uniform operation. To this end the opinions of this court are published as the authoritative exposition of the laws. When the court has construed a statute, and that construction has been adhered to in a line of cases, it has been the settled policy of the court not to depart from it. In *South v. Thomas*, 7 T. B. Mon. 62, where the court was urged to overrule previous decisions construing a statute, it said: "It has been often said that it is not so important that the law should be rightly settled as that it should remain stable after it is settled. This is true, for attempts to change the course of judicial decision, under the pretext of correcting error, are like experiments by the quack on the human body."

In *Tribble v. Taul*, 7 T. B. Mon. 455, where members of the court differed in opinion as to the correctness of the previous decisions construing a statute, the court said: "If we were convinced that on this point the law was settled wrong originally, we should not feel ourselves at liberty to depart from it; aware that it is of greater importance to society that the rule should be uniform and stable than that it should be the best possible rule that could be adopted. In the supreme court of a state, as this is, possessing, with but few exceptions, appellate judicial power coextensive with the state, the influence which its decisions must have is evident. Its mandates are conclusive, and even its *dicta* are attended to in all the inferior courts. No sooner is a decision published than it operates as a pattern and standard in all other tribunals, and as a matter of course, all other decisions conform to it. 51 L.R.A. (N.S.)

If in this court a settled course of adjudication is overturned, then the trouble and confusion of reversing former caures succeeds in the inferior tribunals; and even the credit and respect due to this court is shaken by the phenomenon that A has lost his cause on the same ground that B gains his. And not only do these consequences follow, but some still more serious may ensue. For perhaps no court may strike the vitals of society with a deeper wound than a capricious departure in this court from one of its established adjudications."

In *Maddox v. Graham*, 2 Met. (Ky.) 56, where a like question was passed upon, the court said: "If this court were now to overrule its former decision, it would be an inconsistency as gross in form and manifestation as unjust in its consequences."

In *McChesney v. Hager*, 31 Ky. L. Rep. 1041, 104 S. W. 715, the court, after pointing out that if the question was a new one, it would give the statute a different interpretation, said: "But we do not feel disposed to overrule the opinion of this court in the case supra. Since that case was handed down, there have been four regular sessions of the legislature, and if the construction given to these statutes was not the one intended by the legislative department, it is fair to assume that the statute would have been so amended as to make effective the purpose of the legislature in the enactment of these laws, and give to the secretary of state the additional salary now insisted upon." Further on in the opinion the court said that "in construing the statutes interpreted, they must be read in connection with the opinion of the court; and in fact, the opinion becomes, in effect, a part of the statute, binding upon all persons asserting rights under it, or whose interests are affected by it."

These rules are of universal application. In *Inland Revenue Comrs. v. Harrison*, 7 H. L. 9, Lord Cairns said: "I think that, with regard to statutes . . . it is desirable, not so much that the principle of the decision should be capable at all times of justification, as that the law should be settled, and should, when once settled, be maintained without any danger of vacillation or uncertainty."

In *Sutherland on Statutory Construction*, vol. 2, § 485, it is said: "A judicial construction of a statute becomes a part of it, and as to rights which accrue afterwards it should be adhered to for the protection of those rights. To devest them by a change of the construction is to legislate retroactively."

It is now nearly fifteen years since the decision of this court in the *Johnson Case* was rendered. In the meantime, and while

that decision was acquiesced in by all three departments of the state government, a large part of the business of the state has been done by corporations. Thousands of dollars have been lent or invested in the building of railroads or other structures upon the faith of these decisions, under contracts which were valid under the law as then expounded, and which are now declared invalid under a different construction of the statute.

The Chatterson Case is rested on the ground that there was no estoppel; the defendant there not being a party to the contract. The point decided is not inconsistent with the prior cases. While the court has often overruled a single case, especially where it was inconsistent with subsequent decisions, it has never overruled two reported cases on the construction of a statute after they "had been followed in quite a number of subsequent decisions." None of the cases cited go as far as the decision now made, and none of them in the slightest degree sustain the action of the court in this case.

It is submitted that nothing so unwarranted has ever been done by this court before as to overrule repeated decisions construing a penal statute and adding greatly to its penalties, when those decisions have been acquiesced in by the legislature. It is to the interests of all that the law should be settled. The uncertainty of the law has passed into a proverb, but how infinitely more uncertain it must be when reliance cannot be placed upon the decisions of the highest court in the state. Our docket is now overburdened with cases in which this or that precedent is sought to be overruled; and certainly it is a sound principle that the law as settled shall remain settled.

Manifestly, if the legislature, after the decision of the cases referred to, had amended § 571 and provided, as in a number of other states, that contracts made in violation of it should be void, this act could not have the effect to invalidate contracts made before it was passed, and which were valid under the statute as it then stood. Can a court of justice consistently, if it has the power, by a retroactive decision, invalidate contracts which were valid under the law as it stood when they were made? Aside from the Federal question, it is submitted that no court, in administering justice, can consistently do such injustice.

In 26 Am. & Eng. Enc. Law, 179, it is said: "But after a statute has been settled by judicial construction, the construc-

tion becomes, as far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment; and contract obligations entered into or vested rights acquired while the former decision was in force cannot be impaired."

A number of decisions of the United States Supreme Court and the state courts are cited in support of the text, and a number of other cases are given in the brief for appellant. It is said that these cases have no application for the reason that it was unlawful for the corporation to do business, and that it cannot avail itself of the constitutional provision in an illegal act. But it will be observed that a number of cases cited were just such cases as this. If the contract was valid under the law in existence as it stood when it was made, and is invalid under the law as it is now declared, has not the obligation of the contract been impaired? In *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 416, 14 L. ed. 997, the United States Supreme Court said: "The sound and true rule is that, if the contract when made was valid by the laws of the state, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state, or decision of its courts, altering the construction of the law."

The argument that the obligation of the contract may be impaired by a change in the court's ruling because the transaction was unlawful assumes the point in issue. To illustrate: The court by its former decisions read § 566 into § 571, so that that section, when read with § 566, meant that contracts made in violation of it might be enforced against the party doing business with the corporation. If these words had been inserted by the legislature in § 571, and a subsequent act had stricken them out, would it be contended that the effect of the subsequent act was to invalidate contracts already made? And if the legislature could not do this, how comes it that the court has any greater power when the limitation of the Federal Constitution is that the state shall not impair the obligation of a contract? Certainly it must be admitted that a contract that was valid under the law as it stood when it was made, according to the construction then given it by this court, is now held

invalid. If this is not to impair the obligation of a contract, what is it?

For these reasons I dissent from the opinion of the court.

Nunn, J., concurs in this dissent on the second question.

KENTUCKY SUPREME COURT.

CINCINNATI, NEW ORLEANS, & TEXAS
PACIFIC RAILWAY COMPANY, Appt.,

v.

G. W. STEPHENS, Admr., etc., of C. B.
Wilson, Deceased.

(157 Ky. 480, 163 S. W. 493.)

Parent and child — status of child begotten after divorce of parents.

A child begotten after the divorce of its parents is not kin to children of its father and his second wife within the meaning of the Federal employers' liability act, and therefore such children cannot recover under that statute for the wrongful death of such child, although he contributed toward their support.

(February 17, 1914.)

APPPEAL by defendant from a judgment of the Circuit Court for Whitley County in plaintiff's favor in an action under the Federal employers' liability act to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Note. — Status of child begotten after divorce between parents.

Research has disclosed no case other than CINCINNATI, N. O. & T. P. R. Co. v. STEPHENS, passing upon the status of a child begotten after an absolute divorce between its parents. In several cases the courts have passed upon the status of a child begotten after the granting of a mere judicial separation, which did not absolutely annul the marriage relation. But the question therein is, of course, different from that involved in the above case.

For instance, in *Re Parishes of St. George & St. Margaret*, 1 Salk. 123, the rule was laid down that children begotten after a divorce *a mensa et thoro* are presumptively bastards; for it was said the court would "intend a due obedience to the sentence unless the contrary be showed." But it was said that if the husband and wife without sentence parted and lived separate, the children were presumptively legitimate. And the same rule was apparently approved in *Sidney v. Sidney*, 3 P. Wms. 269. 51 L.R.A. (N.S.)

Messrs. Edward Colston, John Galvin, and Tye & Siler, for appellant:

The decedent, Wilson, being a bastard, had no next of kin at common law.

Stover v. Boswell, 3 Dana, 233; 1 Bl. Com. 459; 5 Cyc. 639.

The recovery authorized under the Federal employers' liability act is for the benefit of certain persons designated therein, and if no beneficiary is left belonging to either of the three classes, then there can be no recovery.

Illinois C. R. Co. v. Doherty, 153 Ky. 369, 47 L.R.A. (N.S.) 31, 155 S. W. 1119; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192; American R. Co. v. Didricksen, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806.

The Federal employers' liability act is exclusive of, and not supplementary to, the laws of the states covering the same field.

Illinois C. R. Co. v. Doherty, 153 Ky. 363, 47 L.R.A. (N.S.) 31, 155 S. W. 1119; South Covington & C. Street R. Co. v. Finan, 153 Ky. 340, 155 S. W. 742; Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703.

Messrs. Stephens & Steely and H. C. Gillis for appellee.

Carroll, J., delivered the opinion of the court:

C. B. Wilson was employed as a fireman

And in *Hetherington v. Hetherington*, L. R. 12 Prob. Div. 112, 56 L. J. Prob. N. S. 78, 57 L. T. N. S. 533, 36 Week. Rep. 12, 51 J. P. 119, 294, where a judicial order was made authorizing the wife to refuse to cohabit with the husband, directing the husband to pay her a stated sum weekly, and giving the wife the custody of the children, it was said that the order was equivalent to a judicial separation and the ancient divorce *a mensa et thoro*, and that if a child was born more than nine months after the separation, it was presumed to be illegitimate, unless it was shown by evidence to be otherwise.

As to right to recover for negligent killing of illegitimate, or to maintain an action for the benefit of illegitimate, for negligent killing of relative, see note to *McDonald v. Southern R. Co.* 2 L.R.A. (N.S.) 640.

As to who can maintain action for death under Federal employers' liability act, see subdiv. XI. p. 73, of note to *Lamphere v. Oregon R. & Nav. Co.* 47 L.R.A. (N.S.) 1.

R. E. H.

by the appellant company, and at the time of his death the company was engaged in interstate commerce, and he was employed by it in such commerce, and his death resulted from its negligence. In a suit brought by his administrator under the Federal employers' liability act to recover damages for his death, there was a trial and verdict and judgment against the company, and it appeals, asking a reversal upon the ground that Wilson did not leave any kin, or, if he did, they were not dependent upon him.

The record shows, without contradiction, that Wilson was begotten and born out of lawful wedlock; that his parents did not, after his birth, marry; that he was an unmarried man, and that both of his parents are dead. It further appears that his parents, many years before his birth, had been married, and, as a result of this marriage, several children were born, two of them being alive at the time of Wilson's death, and married women, living with their respective husbands; and that two other of these children died, leaving children who were infants at the time of Wilson's death; that before the birth of Wilson his parents were divorced from the bonds of matrimony, and, after living apart several years, had illicit relations with each other, as a result of which Wilson was begotten and born.

We do not find it necessary in disposing of this case to consider at all the question whether the children of Wilson's mother begotten and born in lawful wedlock while she was the lawful wife of his father are kin to Wilson, within the meaning of the Federal employers' liability act, because there is no evidence whatever that he at any time contributed to the support and maintenance of these children, or the children left by the children of this marriage who died, or that any of these persons were dependent upon him. The nearest approach to persons dependent upon him arises out of his contribution to the support and maintenance of the widow and infant children of his father, but, of course, neither the widow nor these children were of kin to him, and, this being so, his contribution to their support did not have the effect of bringing the case within the scope of the Federal statute that controls it. This act provides that, when any person is employed in interstate commerce by a carrier engaged in such commerce, and is killed by the negligence of the carrier while so engaged, a cause of action to recover damages for his death arises, and the carrier "shall be liable . . . to his or her personal representative for the benefit of the surviving widow or husband and children of such 51 L.R.A.(N.S.)

employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee. . . ." [35 Stat. at L. 65, chap. 149, § 1, U. S. Comp. Stat. Supp. 1911, p. 1322.]

As this act limits a recovery in cases like this to the surviving kin of the deceased, and as Wilson left no kin, it would seem to inevitably follow that there could be no recovery in favor of his administrator. This we understand to be the ruling of the Supreme Court of the United States in cases like this. It was said by that court in *American R. Co. v. Didricksen*, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224, and in *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806, that "the cause of action which was created in behalf of the injured employee did not survive his death nor pass to his representatives. But the act, in case of the death of such an employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss thus sustained." And such was the ruling of this court in *Illinois C. R. Co. v. Doherty*, 153 Ky. 363, 47 L.R.A.(N.S.) 31, 155 S. W. 1119.

Wherefore the judgment is reversed, with direction to dismiss the petition.

KENTUCKY COURT OF APPEALS.

CHARLES M. F. STRIGER, Admr., etc., of
Mary Stephens, Deceased, Appt.,
v.

THEODORE DEICKMAN et al.

(158 Ky. 337, 164 S. W. 931.)

Highway — ice on sidewalk — liability of abutting property owner.

A property owner who, for a period of two weeks, knowingly permits ice formed

Note. — Liability of abutting owner for injury caused by ice formed from water artificially turned across sidewalk.

The earlier cases on this question may be found in notes to *Brown v. White*, 58 L.R.A. 328; *Hynes v. Brewer*, 9 L.R.A. (N.S.) 598; and *Maloney v. Hayes*, 28 L.R.A.(N.S.) 200.

As to liability of landlord to third persons for such conditions, see note to *Cer-*

from water discharged by a leader from his building, to remain in ridges and lumps upon the adjoining sidewalk, is liable for injury to a pedestrian who falls in attempting to pass over it.

(March 27, 1914.)

APPEAL by plaintiff from an order of the Circuit Court for Kenton County sustaining a demurrer to a complaint filed to recover damages for the death of plaintiff's intestate, alleged to have resulted from a fall on ice negligently left by defendants on the walk. Reversed.

The facts are stated in the opinion.

Messrs. Charles M. F. Striger and Richard H. Gray for appellant.

Messrs. John E. Shepard and Stephens L. Blakely, for appellees:

An abutting property owner is not liable for injuries sustained by one who slips on an icy sidewalk.

Jaegar v. Newport, 155 Ky. 110, 159 S. W. 671; Varney v. Covington, 155 Ky. 662, 160 S. W. 173; Webster v. Chesapeake & O. R. Co. 32 Ky. L. Rep. 404, 105 S. W. 945; Covington Saw Mill & Mfg. Co. v. Drexilius, 120 Ky. 493, 117 Am. St. Rep. 593, 87 S. W. 266; 28 Cyc. 1434, 1438, 1505; Leahan v. Cochran, 178 Mass. 566, 53 L.R.A. 891, 86 Am. St. Rep. 506, 60 N. E. 382; Wenzlick v. McCotter, 87 N. Y. 122, 41 Am. Rep. 358; Midway v. Lloyd, 24 Ky. L. Rep. 2448, 74 S. W. 195; Newport v. Mil-

chione v. Hunnewell, 50 L.R.A.(N.S.) 300.

The liability of municipality for injuries caused by the freezing of water accumulation on walks by reason of artificial conditions is the subject of a note to Holbert v. Philadelphia, 20 L.R.A.(N.S.) 201.

As to the liability of a municipal corporation for injuries from rough or uneven snow or ice accumulated from natural causes on a street or sidewalk not otherwise defective, see notes to Bull v. Spokane, 13 L.R.A.(N.S.) 1105, and Jackson v. Grand Forks, 45 L.R.A.(N.S.) 75.

As appears from the earlier notes, the prevailing rule is that when the abutting property owner creates a condition which artificially turns water across a sidewalk in such a way as to freeze and render the walk unsafe, he is liable for injury to pedestrians thereby caused.

Thus, one who so constructs or maintains a structure upon his own premises as to cause an artificial discharge or accumulation of water upon a public way, which by freezing makes the use of the way dangerous, will be held liable to one who, being rightfully upon the way and in the exercise of due care, is injured in consequence of such dangerous condition. Marston v. Phipps, 209 Mass. 552, 95 N. E. 954.

In Shipley v. Proctor, 177 Mass. 498, 59 N. E. 119, 9 Am. Neg. Rep. 304, overruling exceptions to a judgment in favor of plaintiff, it was held that the question whether the result of the arrangement of conductors on defendant's building in such a way that water from them formed ridges of ice upon the sidewalk was a public nuisance was a question of fact. A statute providing that no city or town shall be liable for any injury on a highway suffered by reason of snow or ice was held to have no application to an action against the owner.

An abutting owner was held liable in Adlington v. Viroqua, — Wis. —, 144 N. W. 1130, for injuries to a pedestrian because of the icy condition of the sidewalk as a result of water being artificially turned thereon through a conveyer pipe leading from a building. The court said that if one discharges water through a spout

directly onto a sidewalk, causing ice to form thereon so as to render the way defective, he is guilty of actionable negligence. The fact that the water was discharged from defendant's conveyer pipe a few feet from the edge of the sidewalk is of little consequence as long as the natural and probable result was that it would reach the sidewalk with substantially the same consequences as if discharged at or on the walk. "It is said that it was the duty of the city, not of the abutting owner, to clear out the culvert. If that be conceded, it would count for very little under the circumstances. The liability of the culvert to become useless was well known to appellants. The fact that it was useless at the time in question, and had been for a long time, was well known to them, as the jury found. Except for the artificial condition created by them, the walk was not defective even when the culvert was closed. Therefore, it may well be said they created the defect. They deposited water from their premises near the walk, knowing, as the jury found, that a nuisance would result rendering the walk unsuitable for public use. It is a familiar principle that if an abutting owner by his own fault renders a sidewalk defective, he is liable, regardless of the concurrent liability of the city. Such is the effect of the statute."

So, where water leaked from a spout onto the sidewalk, causing ice to form, whereby a pedestrian was injured by falling, the person owning and having control of the building was held liable in Davis v. Rich, 180 Mass. 235, 62 N. E. 375, where he knew or ought to have known that the spout was defective.

The rule is stated in Cavanagh v. Block, 192 Mass. 63, 6 L.R.A.(N.S.) 310, 116 Am. St. Rep. 220, 77 N. E. 1027, 20 Am. Neg. Rep. 379, that the owner of a house on a private way used by occupants of adjoining houses to gain access to the street is under obligation not to construct his gutters in such a manner that they will create a dangerous accumulation of ice in the way; that the owner of property who looks after the conductor pipe, and pays the bills for

ler, 93 Ky. 23, 18 S. W. 835; Fugate v. Somerset, 97 Ky. 50, 29 S. W. 970.

Miller, J., delivered the opinion of the court:

This action for damages for the death of Mary Stephens, alleged to have resulted from injuries sustained in a fall upon a sidewalk in the city of Covington, was filed against the city of Covington, Theodore Deickman (the owner of the abutting property), and George and Bernard Strotman (the lessees thereof). The petition alleged, in substance, that Deickman owned the lot and building at the southwest corner of Fifteenth and Holman streets; that said building was 80 feet long and more than 30 feet wide, with a 4-inch metal down

spout from the roof, which emptied the water gathered on the roof directly upon the cement sidewalk in front of the building, where said water, by alternately freezing and thawing, formed a covering of ice which spread out and upon the sidewalk in great and dangerous quantities; that by repeated thawing and freezing the ice accumulated in ridges and lumps, and in such quantities as to cause a dangerous obstruction upon the sidewalk, and over which Mary Stephens stumbled and fell, causing the injuries which resulted in her death; and that said slick, slippery, and dangerous condition had existed and continued for more than two weeks before the accident, and was known to the defendants, or they by the exercise of ordinary diligence could

repairing and cleaning them, and not his tenant, may be found responsible for their creating a dangerous accumulation of ice in an adjoining way, to the injury of a passer-by. Plaintiff was injured by falling upon an accumulation of ice on a walk at the side of a private way. A gutter was constructed under the eaves in front, with a conductor which extended down from near the end of the gutter on the side of the house, and emptied water on the sidewalk.

In Aull v. Lee, 84 N. J. L. 155, 85 Atl. 1018, the plaintiff in her declaration averred that the defendant, for his own convenience, removed from the sidewalk of a public street adjoining his premises a large quantity of snow which had naturally fallen there, and deposited it upon his adjoining premises, and there permitted it to remain for a long time; that, as a consequence, the snow melted and the water therefrom ran upon the sidewalk, where it was congealed into ice; and that the plaintiff, as she was walking along the sidewalk, stepped upon this ice and was thereby thrown and injured. It was held that a cause of action was set out, and the declaration not subject to a demurrer. The court was of the opinion that a party is responsible for the results flowing from the artificial accumulation of snow upon his premises adjoining a sidewalk, and there left to discharge water at times when the natural result would be to form ice upon the sidewalk. "While a party would not be responsible at all times for conditions resulting from natural causes, still if, for his own convenience or benefit, he undertakes to store snow which has fallen in another place upon his own property, he is responsible for any injury which might reasonably be expected to result therefrom. It seems to be well settled that where one maintains upon his own property buildings which collect and temporarily hold snow and ice, so that it may be reasonably expected that it will fall from such building to the sidewalk, or upon adjacent buildings of other property owners, and injury results therefrom, a cause of action exists.

Manifestly, if one should cart upon

his lot large quantities of snow and leave it there to melt and discharge water over the sidewalk, at a time when it might reasonably be expected that such water would congeal on the sidewalk and render it a dangerous place for the public to travel over, he would have created a condition from which he might reasonably anticipate that persons who used the sidewalk would be thrown and injured, and if so, he would be chargeable with the injuries that resulted from his conduct."

So, a railroad company having no license from the city is liable to a person injured by falling on ice formed on the sidewalk from water flowing from its tanks. McGoldrick v. New York C. & H. R. R. Co. 49 N. Y. S. R. 566, 20 N. Y. Supp. 914, affirmed without opinion in 142 N. Y. 640, 37 N. E. 567.

In Canfield v. Chicago & W. M. R. Co. 78 Mich. 356, 44 N. W. 385, where a young woman fell on the ice on a sidewalk near defendant's water tank, the court stated that as the icy condition of the walk was not the result of neglect to remove naturally accruing ice and snow, but was caused by the action of defendant in throwing water on the place where it froze, the case was a proper one for the jury.

In Rohling v. Eich, 23 App. Div. 179, 48 N. Y. Supp. 892, where the gravamen of the complaint was that the dangerous condition of the street which caused the injury to the plaintiff was occasioned by defendant's wrongful act in sweeping out snow from his own lot onto the sidewalk, where it accumulated and formed an obstruction which imperiled the safety of persons lawfully using the street for purposes of public travel, the court stated that there was no doubt that an individual is liable for thus interfering with the safety of persons using the highway, if injury results to them from the condition thus created, but to make out a case, the plaintiff must show not only that the defendant swept out the snow, or caused it to be swept out, but that it was allowed to remain upon the sidewalk; and that the plaintiff has failed to sustain that burden.

J. D. C.

have known it, all of said time. The circuit court sustained the demurrers of Deickman and his tenants to the petition; and from an order dismissing the petition upon plaintiff's failure to further plead, the plaintiff prosecutes this appeal.

The suit against the city is not here; this appeal relates solely to the case against Deickman and his tenants, and presents but one question, to wit, the liability of the owner of abutting property, and his tenants, for injuries sustained by a pedestrian in walking upon ice formed on a sidewalk in front of his property in the manner above set forth, and as the result of water carried from the roof by the owner's gutters and pipes. It is not alleged that the down spout, of itself, constituted an obstruction upon the sidewalk; neither is there any allegation as to the thickness of the ice; and, as the petition charges that said ice was caused to spread out upon the sidewalk, it is clear the injury received by Mrs. Stephens was caused by her slipping upon the ice.

As the question is one of first impression in this jurisdiction, appellant relies, by way of analogy, upon *Covington Saw Mill & Mfg. Co. v. Drexilius*, 120 Ky. 493, 117 Am. St. Rep. 593, 87 S. W. 266, claiming that the principle there announced supports the petition in this case. In the *Drexilius* Case the sawmill company, without the permission of the city, and entirely for its own convenience, constructed a covered wooden sewer across a public alley; and the court held it was the company's duty to maintain the sewer in such a reasonably safe condition as would not interfere with the public's superior use of the alley for any purpose for which it might have been properly used, and that its failure to keep the sewer in such repair made it a nuisance. While not directly in point, the principle there announced, that one who uses a public easement for his own purposes must keep it in a reasonably safe condition for the use of the public, is applicable to the case at bar.

In the same way appellee relies upon *Webster v. Chesapeake & O. R. Co.* 32 Ky. L. Rep. 404, 105 S. W. 945; *Jaegar v. Newport*, 155 Ky. 110, 159 S. W. 671, and *Varney v. Covington*, 155 Ky. 662, 160 S. W. 173, in support of the proposition that the property owner is not liable. While those suits were against the municipality, it is insisted the principle which excepted the city from liability in those cases applies equally to the case of an abutting property owner.

In the *Jaegar* Case the accident happened at the intersection of an alley with a street. There had been snow, and as the snow melted the water ran down the alley

and was frozen at the point where the sidewalk crossed the alley. The ice had accumulated until it was about even with the sidewalk,—perhaps 6 inches high, with a large ridge on it. When Mrs. Jaeger stepped on the ice, she fell and was injured, although she fell before she reached the ridge of ice. In that case this court held the city was not liable; and it is argued that, if the city was not liable under such circumstances, surely the property holder would not be liable, or bound to a greater degree of care than the city itself. In the course of the opinion, however, the court said: "While, due to the operation of the statutes there in force, municipalities in the New England states are held to a stricter degree of liability, the decided weight of authority elsewhere, as well as the tendency of the more recent decisions, is to hold that a city is not ordinarily liable for mere slipperiness of its sidewalks, occasioned by snow and ice. Where, however, the sidewalk itself is defective, or the snow or ice amounts to an obstruction, or its natural condition has been changed by artificial means, liability may attach; or where it is customary to treat the removal of snow and ice as a regular part of highway management, a failure to do so may become wrong or negligent." (Cases cited.)

The same rule was announced in *Varney v. Covington*, supra, and the language above quoted from the *Jaegar* Case was repeated with approval. It will be noticed, however, that the exemption from liability was based upon the fact that the city had done nothing to change the natural condition of the surroundings. That fact is clearly shown by the closing paragraph in the opinion in the *Varney* Case, where it is said: "As it was not made to appear by the proof that the injury sustained by the appellant was the result of any defect in the construction of the sidewalk, or the changed natural condition of the ice by artificial means, or that the city had undertaken the duty of removing the snow and ice from its sidewalks, there is no ground for our holding that the trial court erred in directing a verdict in favor of the appellee."

We are not, however, without abundant authority from other jurisdictions which is directly in point.

In *Reedy v. St. Louis Brewing Asso.* 161 Mo. 523, 53 L.R.A. 805, 61 S. W. 859, the court, in discussing the question of the joint liability of the city and the abutting property owner for negligently suffering rain water to be discharged from defective pipes from his roof, so that it freezes and forms a dangerous condition of the sidewalk, said: "It is argued upon the author-

ity of *Norton v. St. Louis*, 97 Mo. 537, 11 S. W. 242; *St. Louis v. Connecticut Mut. L. Ins. Co.* 107 Mo. 92, 28 Am. St. Rep. 402, 17 S. W. 637; *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921, and other cases cited, that the abutting owner is not responsible for the condition of the sidewalk in his front, but that the duty to look after that is on the city alone. It does not, however, impair the doctrine laid down in those cases, to say that an individual may become liable and jointly liable with the city for an unsafe condition of the sidewalk. This liability does not arise from the fact that he is owner of property abutting the sidewalk, but from the fact that he is instrumental in causing the condition, either by his wilful act or negligent omission to perform a duty which the law imposes on him. If he is allowed an extraordinary use of the sidewalk for his private convenience, as, for example, to place in it a manhole for the reception of coal (*Benjamin v. Metropolitan Street R. Co.* 133 Mo. 274, 34 S. W. 590), a water meter (*Carvin v. St. Louis*, 151 Mo. 334, 52 S. W. 210), or an excavation in close proximity to the sidewalk for a foundation for a new building (*Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528), the law imposes on him the exercise of reasonable care to guard the public from injury in such use. And it may be said that if the individual neglect to perform any duty that the law imposes on him in particular, and a dangerous condition of the sidewalk results, then a new duty on him in relation to that condition arises, and, of course, with greater force, it would be so if that condition was the result of his wilful act." Again, in the same opinion, we find the following language: "It is said by this defendant that there is no law requiring it to have gutters and down spouts on its buildings at all. There is no statute on the subject that we are aware of, but the principle of the common law is that, whilst the owner of adjoining property is not responsible for the natural flow of water across his land onto the land of his neighbor, yet he is liable if he collects it in a quantity by artificial means and discharges it in a flood on his neighbor's land, and that principle underlies that feature of this case. Water accumulated on a large roof and directed to a single point may cause a nuisance for which the owner of the house would be liable. If, therefore, the petition is to be construed into stating a case in which the brewing association was negligent in suffering the water to be discharged on the sidewalk, where it became frozen and formed a dangerous condition (and that seems to have been the construction put upon it by 51 L.R.A.(N.S.)

both parties and the trial court), then it showed a condition of the sidewalk for the continuance of which for an unnecessary period both defendants would be liable; the joint wrong being the neglect to remove the obstruction."

The same rule has long maintained in Massachusetts. In *Maloney v. Hayes*, 206 Mass. 1, 28 L.R.A.(N.S.) 200, 91 N. E. 911, 3 N. C. C. A. 137, the court said: "The plaintiff, while lawfully using the street as a traveler, was injured by falling on an accumulation of ice which had been formed from water collected and discharged upon the sidewalk through a spout attached to a conductor leading from the roof of the defendant's house. A landowner or occupier of land cannot lawfully collect surface water into a definite channel and discharge it upon a highway, making it unsafe for the use of travelers. The act creates a public nuisance, and a traveler who suffers injury therefrom can sue the wrongdoer. *Hynes v. Brewer*, 194 Mass. 435, 9 L.R.A.(N.S.) 598, 80 N. E. 503." Again, in *Field v. Gowdy*, 199 Mass. 570, 19 L.R.A.(N.S.) 237, 85 N. E. 385, the court said: "A landowner has a right to change the surface of his lot, or improve it by the construction of buildings or by other means, in any lawful manner, and, if the natural course of surface water is thereby altered, no liability is imposed on him. But he has no right to collect water into a definite channel by a spout or otherwise and pour it upon a public way. If he does this, and through the operation of natural causes the water freezes, he is the efficient cause in the creation of a nuisance, and is liable for whatever damage ensues as a probable consequence. *Cavanagh v. Block*, 192 Mass. 63, 6 L.R.A.(N.S.) 310, 116 Am. St. Rep. 220, 77 N. E. 1027, 20 Am. Neg. Rep. 379; *Hynes v. Brewer*, supra; *Leahan v. Cochran*, 178 Mass. 566, 53 L.R.A. 891, 86 Am. St. Rep. 506, 60 N. E. 382. There was evidence tending to show that from two spouts on the defendant's house, one about 11 feet from the street line and the other nearer by the width of a piazza, water was collected from the roof and turned upon his concrete walk, and by the natural grade of the walk flowed to the sidewalk, where it froze in a ridge across the width of the public walk about 3 inches in thickness in the middle. This was sufficient to warrant a finding that the defendant collected the surface water in an artificial course and poured it upon the public way in such a manner as to create a nuisance."

In *Tremblay v. Harmony Mills*, 171 N. Y. 599, 64 N. E. 501, 12 Am. Neg. Rep. 132, the court, distinguishing, if it did not overrule, *Wenzlick v. McCotter*, 87 N. Y. 122,

41 Am. Rep. 358, and *Moore v. Gadsden*, 87 N. Y. 84, 41 Am. Rep. 352, said: "Assuming the sufficiency of the appellant's exception to raise the point, which may well be doubted, the question presented on this appeal is whether the trial court erred in instructing the jury that, if the defendant was negligent in maintaining a leader from the roof of a building so as to discharge water on the sidewalk, by which ice was accumulated thereon and the walk rendered dangerous, the plaintiff was entitled to recover. 'At common law any act or obstruction which unnecessarily incommodes or impedes the lawful use of a highway by the public is a nuisance.' Angell, *Highways*, § 223. And any party who sustains a private or peculiar injury therefrom may maintain an action to recover the damages sustained. *Wakeman v. Wilbur*, 147 N. Y. 657, 42 N. E. 341. This is unquestionably the general rule. That the jury could have found that the discharge of water and drippings from the leader in winter weather, when the water so discharged was liable to freeze and form ice, rendered the sidewalk dangerous and constituted an obstruction, and that the defendant was negligent in not carrying his leader under the sidewalk to the carriage way seems to me quite plain. To exonerate the defendant from liability, it must establish one of two propositions: First, that it had the lawful right to discharge the water which it had collected on the roof of its building upon the highway regardless of the effect of that action upon the highway; or, second, that because the municipality was liable to anyone injured by the defective character of its highway, no action could be maintained against the abutting owner, though his act may have created the danger or defect. I think that neither proposition can be sustained." See also *Loois v. Eureka Club*, 37 App. Div. 628, 56 N. Y. Supp. 66; *Macauley v. Schneider*, 9 App. Div. 279, 41 N. Y. Supp. 519; *New York v. Dimick*, 49 Hun, 241, 2 N. Y. Supp. 46; *McConnell v. Bostelmann*, 72 Hun, 238, 25 N. Y. Supp. 390; *Thuringer v. New York C. & H. R. R. Co.* 82 Hun, 33, 31 N. Y. Supp. 419—to the same effect.

The supreme court of Pennsylvania recognized the same rule in *Brown v. White*, 202 Pa. 307, 58 L.R.A. 324, 51 Atl. 963, where the court said: "The testimony of the plaintiff showed that on the morning of the accident there was a continuous ridge of ice extending from the mouth of the archway across the pavement to the curb. In the center of the ridge it was from 3 to 5 inches thick and sloped to the sides. It is claimed by the plaintiff, and her evidence tended to show, that this accumulation of ice was

produced by the water which passed through the defendant's drainpipe and thence through the archway to the pavement, where it froze. This action was brought by the plaintiff to recover damages for the injuries she sustained by the alleged negligence of the defendant in causing the pavement to be obstructed by ice. . . . The second, third, and fourth assignments complain of the court's refusal to admit testimony to show that in the borough of Chambersburg it is customary to drain water from lots, roofs, and waste pipes for domestic use in the houses of the borough, over and through uncovered drains across pavements to the gutters in the street, in the same manner as was done in the case on trial. The learned trial judge very properly sustained the objection to the offers and excluded the testimony."

Benard v. Woonsocket Bobbin Co. 23 R. I. 581, 51 Atl. 209, is to the same effect.

The rule above announced is nothing more than an application of the older rule, which declares that an owner of land has no right to rid his land of surface water by collecting it in artificial channels and discharging it through or upon the land of an adjoining proprietor, laid down by *Gould on Waters*, § 271 and recognized by this court in *Pickerill v. Louisville*, 125 Ky. 213, 100 S. W. 873, and in *Johnson v. Marcum*, 152 Ky. 630, 153 S. W. 959.

The only case we have found which seems to be out of harmony with the prevailing doctrine is *Jessup v. Bamford Bros. Silk Mfg. Co.* 66 N. J. L. 641, 58 L.R.A. 329, 88 Am. St. Rep. 502, 51 Atl. 147. The case is not directly in point, and five justices dissented.

From these authorities it follows that the property holder, in conducting the water from the roof of his house to the sidewalk, must use ordinary care not to cause an obstruction or nuisance by which persons lawfully using the sidewalk, and in the exercise of ordinary care upon their part, may be injured; and in case such an obstruction or nuisance should arise suddenly or unexpectedly, it is the landlord's duty to remove the obstruction or nuisance as soon as he has knowledge of its existence, or could have had such knowledge by the exercise of ordinary care. In the case at bar the petition alleges the ice had remained upon the sidewalk for more than two weeks before the accident, and to the knowledge of the appellees. Clearly, it stated a case of actionable negligence, and the demurrer to the petition should have been overruled.

Since the petition equally charges all of the defendants with the negligent acts complained of, and it has not yet been made to appear that the landlord did not

have complete control over his premises, the demurrers of all the appellees to the petition should have been overruled. *Lee v. McLaughlin*, 86 Me. 410, 26 L.R.A. 197, 30 Atl. 65.

Judgment reversed for further proceedings consistent with this opinion.

MASSACHUSETTS SUPREME JUDICIAL COURT.

WHITTAKER CHAIN TREAD COMPANY
v.
STANDARD AUTO SUPPLY COMPANY.

(216 Mass. 204, 103 N. E. 695.)

Accord and satisfaction — acceptance of amount acknowledged to be due — payment.

Cashing a check sent in payment of the portion of an account which is admitted to be due does not prevent enforcement of the balance, although the tender is on condition that it shall be received in full payment.

(December 13, 1913.)

R EPORT by the Superior Court for Suffolk County for determination by the Supreme Judicial Court of an action brought to recover a balance claimed to be due on an account for certain goods sold and delivered by plaintiff to defendant. Judgment for plaintiff.

The facts are stated in the opinion.

Mr. Ralph M. Smith for plaintiff.

Mr. John E. Crowley for defendant.

Loring, J., delivered the opinion of the court:

The plaintiff sold and delivered to the defendant goods to the amount of \$80.03. The defendant undertook to return a part of the goods sold, of the value of \$50.02. The plaintiff disputed its right to do so and refused to receive the goods from the teamster through whom the defendant undertook

to make the return. While matters were in this condition the defendant sent the plaintiff a check for \$30.01, which was admittedly due, and which the defendant stated was in full settlement of the account. The plaintiff cashed the check and on the following day notified the defendant that it had done so, and demanded payment of \$50.02, the balance claimed by it to be due after crediting the amount of the check as a payment on account. The judge found that the defendant had no right to return the goods which it attempted to return, and that the plaintiff was entitled to recover the \$50.02 due from it unless it was barred by cashing the check.

Cases in which debtors have undertaken to force a settlement upon their creditors by sending a check in full discharge of a disputed account have given rise to more than one question upon which there is a conflict in the authorities.

In *Day v. McLea*, L. R. 22 Q. B. Div. 610, 58 L. J. Q. B. N. S. 293, 60 L. T. N. S. 947, 37 Week. Rep. 483, 53 J. P. 532, it was decided by the court of appeal in England that a creditor who cashes a check sent in full settlement is not barred from contending that he did not agree to take it on the terms on which it was sent if at the time he accepts it he says that he takes it on account. The ground of that decision was that to make out the defense of accord and satisfaction the debtor must prove an agreement by the creditor to take the sum paid in settlement of the account, and that if the creditor, in taking the check, notifies the debtor that he accepts it on account, and that he refuses to accept it in full settlement, the debtor, as matter of law, has not proved an agreement on the part of the creditor to accept the check in satisfaction of the claim, but that that question must be decided by the jury. This doctrine is upheld in 17 *Harvard Law Review*, at page 469, and in the case of *Goldsmith v. Lichtenberg*, 139 Mich. 163, 102 N. W. 627. See also in this connection *Krauser v. McCurdy*, 174 Pa. 174, 34 Atl.

Note. — The question whether the acceptance of a remittance of part of an unliquidated or disputed claim, accompanied with a statement that it is "in full," operates as an assent to its receipt in full payment, is considered in the notes to *Canadian Fish Co. v. McShane*, 14 L.R.A.(N.S.) 443, and *Barham v. Bank of Delight*, 27 L.R.A.(N.S.) 439; and see later cases in this series: *Matheny v. Eldorado*, 28 L.R.A.(N.S.) 980; *Scheffenacker v. Hoopes*, 29 L.R.A.(N.S.) 205; *Seeds Grain & Hay Co. v. Conger*, 32 L.R.A.(N.S.) 380; and *Bassick Gold Mine Co. v. Beardsley*, 33 L.R.A.(N.S.) 852.

The question whether a payment of a

part of a liquidated and undisputed debt is a consideration for the discharge of the whole is considered in the notes to *Fuller v. Kemp*, 20 L.R.A. 785; *Melroy v. Kemmerer*, 11 L.R.A.(N.S.) 1018; and *Ex parte Zeigler*, 21 L.R.A.(N.S.) 1005.

For acceptance of partial allowance of claim by public body as an accord and satisfaction, see note to *Paulson v. Ward County*, 42 L.R.A.(N.S.) 111; and later case, *Wolfe v. Humboldt County*, 45 L.R.A.(N.S.) 762.

For acceptance of principal sum as affecting right to interest, see note to *Bennett v. Federal Coal & Coke Co.* 40 L.R.A.(N.S.) 588.

518; *Kistler v. Indianapolis & St. L. R. Co.* 88 Ind. 460.

But the true rule is to the contrary. The true rule is put with accuracy in *Nassoioy v. Tomlinson*, 148 N. Y. 326, 331, 51 Am. St. Rep. 695, 42 N. E. 715, 716, in these words: "The plaintiff could only accept the money as it was offered, which was in satisfaction of his demand. He could not accept the benefit and reject the condition, for if he accepted at all it was *cum onere*. When he indorsed and collected the check referred to in the letter asking him to sign the inclosed receipt in full, it was the same, in legal effect, as if he had signed and returned the receipt, because acceptance of the check was a conclusive election to be bound by the condition upon which the check was offered." And to that effect is the weight of authority. *Nassoioy v. Tomlinson*, 148 N. Y. 326, 51 Am. St. Rep. 695, 42 N. E. 715; *Washington Natural Gas Co. v. Johnson*, 123 Pa. 576, 10 Am. St. Rep. 553, 16 Atl. 799, 16 Mor. Min. Rep. 165; *T. M. Partridge Lumber Co. v. Phelps-Burruss Lumber & Coal Co.* 91 Neb. 396, 136 N. W. 65; *Neely v. Thompson*, 68 Kan. 193, 75 Pac. 117; *Hull v. Johnson*, 22 R. I. 66, 46 Atl. 182; *Cunningham v. Standard Constr. Co.* 134 Ky. 198, 119 S. W. 765; *Canton Union Coal Co. v. Parlin & O. Co.* 215 Ill. 244, 106 Am. St. Rep. 162, 74 N. E. 143; *Petit v. Woodlief*, 115 N. C. 120, 20 S. E. 208; *Pollman & Bros. Coal & Sprinkling Co. v. St. Louis*, 145 Mo. 651, 47 S. W. 563; *Potter v. Douglass*, 44 Conn. 541; *Cooper v. Yazoo & M. Valley R. Co.* 82 Miss. 634, 35 So. 162; *Barham v. Kizzia*, 100 Ark. 251, 140 S. W. 6; *Thomas v. Columbia Phonograph Co.* 144 Wis. 470, 129 N. W. 522; *Sparks v. Spaulding Mfg. Co.* — Iowa, —, 139 N. W. 1083. See also in this connection *McDaniels v. Bank of Rutland*, 29 Vt. 230, 70 Am. Dec. 406; *Hutton v. Stoddart*, 83 Ind. 539; *Creighton v. Gregory*, 142 Cal. 34, 75 Pac. 569.

Indeed, the decision in *Day v. McLea*, *ubi supra*, was explained by the court of appeal in the recent case of *Hirachand Punamchand v. Temple* [1911] 2 K. B. 330, 80 L. J. K. B. N. S. 1155, 105 L. T. N. S. 77, 27 Times L. R. 430, 55 Sol. Jo. 519, and made to rest not on the lack of agreement, but on the lack of consideration.

But in cases (like the case at bar) where there is a dispute as to the amount due under a contract, and payment of an amount which he (the debtor) admits to be due (that is to say, as to which there is no dispute) is made by the debtor in discharge of the whole contract, further and other questions arise.

The question whether the creditor who, 51 L.R.A. (N.S.)

under these circumstances, accepts such a payment, protesting that he takes it on account, is or is not barred, is a question upon which again the authorities are in conflict. It was held in the following cases that a creditor in such a case is barred: *Nassoioy v. Tomlinson*, 148 N. Y. 326, 51 Am. St. Rep. 695, 42 N. E. 715; *Ostrander v. Scott*, 161 Ill. 339, 43 N. E. 1089; *Tanner v. Merrill*, 108 Mich. 58, 31 L.R.A. 171, 62 Am. St. Rep. 687, 65 N. W. 664; *Neely v. Thompson*, 68 Kan. 193, 75 Pac. 117; *Treat v. Price*, 47 Neb. 875, 66 N. W. 834; *Hull v. Johnson*, 22 R. I. 66, 46 Atl. 182; *Cunningham v. Standard Constr. Co.* 134 Ky. 198, 119 S. W. 765; *Pollman & Bros. Coal & Sprinkling Co. v. St. Louis*, 145 Mo. 651, 47 S. W. 563. See also in this connection *Chicago, M. & St. P. R. Co. v. Clark*, 178 U. S. 353, 44 L. ed. 1099, 20 Sup. Ct. Rep. 924. But in the following cases it was held that he was not barred: *Demeules v. Jewel Tea Co.* 103 Minn. 150, 14 L.R.A. (N.S.) 954, 123 Am. St. Rep. 315, 114 N. W. 733; *Seattle, R. & S. R. Co. v. Seattle-Tacoma Power Co.* 63 Wash. 639, 116 Pac. 289; *Prudential Ins. Co. v. Cottingham*, 103 Md. 319, 63 Atl. 359. See also in this connection *Chrystal v. Gerlach*, 25 S. D. 128, 125 N. W. 633; *Robinson v. Leatherbee Tie & Lumber Co.* 120 Ga. 901, 48 S. E. 380; *Walston v. F. D. Calkins Co.* 119 Iowa, 150, 93 N. W. 49; *Weidner v. Standard Life & Acci. Ins. Co.* 130 Wis. 10, 110 S. W. 246; *Louisville, N. A. & C. R. Co. v. Helm*, 109 Ky. 388, 59 S. W. 323.

The decision in most of these cases was made to turn upon the question whether payment of the amount admitted to be due without dispute did or did not constitute a valid consideration for the discharge of the balance of the debt about which there was a dispute. If that were the only question involved in the case at bar, it would be necessary to consider whether *Tuttle v. Tuttle*, 12 Met. 551, 46 Am. Dec. 701, is in conflict with the well-settled law of the commonwealth that a promise to pay one for doing that which he was under a prior legal duty to the promise to do is not binding for want of a valid consideration. The cases are collected in *Parrot v. Mexican C. R. Co.* 207 Mass. 184, 194, 34 L.R.A. (N.S.) 261, 93 N. E. 590.

Tuttle v. Tuttle, *ubi supra*, was a case in which the holder of a note made an express agreement to forego a claim which he had made to interest on the note in consideration of payment of the balance of the principal, then unpaid. It was a question whether he was entitled to interest, but there was no question of his right to the principal. It was held that this agreement was a bar to any claim for interest on the

note. There was no discussion in the opinion as to the lack or validity of a consideration. But the point was involved in the decision.

In the case at bar there was no express agreement by the creditor to forego the balance of his claim on receiving payment of the amount admitted without dispute to be due. The only way in which such an agreement can be made out in the case at bar is on the ground that the plaintiff had to take the check sent him on the condition on which it was sent, and that by cashing the check he elected to accept the condition, and so took the part admittedly due in full discharge of the whole debt. But while the doctrine of election is sound where a check is sent in full discharge of a claim no part of which is admitted to be due, it does not obtain where a debtor undertakes to make payment of what he admits to be due, conditioned on its being accepted in discharge of what is in dispute. Such a condition, under those circumstances, is one which the debtor has no right to impose, and for that reason is void. In such a case the creditor is not put to an election to refuse the payment or to take it on the condition on which it is offered. He can take the payment admittedly due free of the void condition which the debtor has sought to impose. Take an example: Suppose the defendant had agreed to deliver to the plaintiff a stipulated quantity of iron for a stipulated price during each month of the year, and after six months the market price of iron was double that stipulated for in the contract. Suppose further that the defendant, on the seventh month, sent the stipulated amount of iron, but on condition that the plaintiff should pay double the stipulated price, can there be any doubt of the plaintiff's right to retain the iron without paying the double price? That is to say, can there be any doubt that the condition which required the plaintiff to pay double the contract price for the instalment sent was void, and that the plaintiff, under those circumstances, is not put to an election, but can keep the iron under the contract? There can be no doubt on that question in our opinion; and in our opinion the principle of law governing that case governs the case at bar, where the debtor undertook without right to impose upon a payment of what admittedly was due a void condition that it be received in full discharge of what was in dispute.

It follows that in accepting the check in the case at bar as a payment on account, the plaintiff was within its rights, and that it has not agreed to accept it in full settlement of the balance of the account. By 51 L.R.A.(N.S.)

the terms of the report judgment is to be entered for the plaintiff in the sum of \$50.02, with interest from the 20th day of October, 1911; and it is so ordered.

MICHIGAN SUPREME COURT.

CATHERINE L. ERNST

v.

PETER ERNST, Appt.

(— Mich. —, 144 N. W. 513.)

Estoppel — quitclaim — after-acquired title.

1. A quitclaim deed by a woman of land held by herself and her husband by entireties does not pass the property when the title vests in her by the death of her husband.

Lien — quitclaim of land held by entireties.

2. A quitclaim deed by a woman of land held by herself and her husband by entireties creates no lien on the property in favor of the grantee.

Cloud on title — removal — retention of consideration.

3. A quitclaim deed by a woman of land held by herself and her husband by entireties will not be canceled as a cloud on title after the title vests in her by her husband's death until she returns the consideration which she received for the conveyance.

(December 20, 1913.)

A PPEAL by defendant from a decree of the Circuit Court for St. Clair County in favor of complainant in a suit to remove a cloud from the title of lands owned by complainant and her husband as tenants by entirety. Modified.

The facts are stated in the opinion.

Messrs. Walsh & Walsh and C. L. Benedict, for appellant:

A court of equity has power to decree an equitable lien upon the land in question for the amount paid by Peter Ernst to Mrs. Ernst as consideration for the deed thereof.

Rhead v. Hounson, 46 Mich. 243, 9 N. W. 267; Walker v. Cady, 106 Mich. 21, 63 N. W. 1005; G. F. Sanborn Co. v. Alston, 153 Mich. 456, 116 N. W. 1099, 117 N. W. 625; Leary v. Corvin, 181 N. Y. 222, 106 Am.

Note. — As to effect of quitclaim deed upon after-acquired title, see note to Mosier v. Carter, 35 L.R.A.(N.S.) 1182.

As to effect of one spouse joining in the execution of the other's deed or mortgage, to convey the former's separate property included in the deed, see note to W. F. Taylor Co. v. Sample, 28 L.R.A.(N.S.) 289.

St. Rep. 542, 73 N. E. 984, 2 Ann. Cas. 664; *Smith v. Smith*, 51 Hun, 164, 4 N. Y. Supp. 669; *Hughes v. Mullaney*, 92 Minn. 485, 100 N. W. 217; *Kelly v. Kelly*, 54 Mich. 48, 19 N. W. 580; *Van Zandt v. Brantley*, 16 Tex. Civ. App. 420, 42 S. W. 617; *Phelps v. Kuntz*, — N. J. Eq. —, 76 Atl. 237; *Foster v. Eoff*, — Tex. Civ. App. —, 47 S. W. 399; *North v. Bunn*, 128 N. C. 196, 38 S. E. 814; *Glass v. Hampton*, — Ky. —, 122 S. W. 803; *Nixdorf v. Blount*, 111 Va. 127, 68 S. E. 258; *Greer v. Vaughan*, 96 Ark. 524, 132 S. W. 456; *Gilmore v. O'Neil*, — Tex. Civ. App. —, 139 S. W. 1162; *McKinney v. Minnehaha County*, 17 S. D. 407, 97 N. W. 15; *Asher v. Brock*, 95 Ky. 270, 24 S. W. 1070; *Pass v. Brooks*, 125 N. C. 129, 34 S. E. 228; *Myers v. Myers*, 47 W. Va. 487, 35 S. E. 868; *Chandler v. Ward*, 188 Ill. 322, 58 N. E. 919; *Bollnow v. Roach*, 210 Ill. 364, 71 N. E. 454; *Leach v. Leach*, 4 Ind. 628, 58 Am. Dec. 642; *Everett v. Mansfield*, 78 C. C. A. 188, 148 Fed. 374, 8 Ann. Cas. 956; *Selkir v. Klein*, 50 Misc. 194, 100 N. Y. Supp. 449; *Occidental Realty Co. v. Palmer*, 117 App. Div. 505, 102 N. Y. Supp. 648; *Gayle v. Troutman*, 31 Ky. L. Rep. 718, 103 S. W. 342; *Eltzman v. Hyman*, 192 N. Y. 113, 127 Am. St. Rep. 862, 84 N. E. 937, 15 Ann. Cas. 819; *DeLano v. Saylor*, — Ky. —, 113 S. W. 888; *Elliott v. Walker*, 145 Ky. 71, 140 S. W. 51; *Hough v. Fink*, — Tex. Civ. App. —, 141 S. W. 147; *Cleland v. Clark*, 123 Mich. 179, 81 Am. St. Rep. 161, 81 N. W. 1086; *Pom. Eq. Jur.* § 380.

The court should not grant the relief asked for by the complainant, except upon the condition that she do equity by refunding to defendant the amount he paid her, with interest. When she asks that this deed be canceled and set aside without tendering a return of the consideration therefore, she does not come with clean hands.

Jenkinson v. Auditor General, 104 Mich. 34, 62 N. W. 163; *Connecticut Mut. L. Ins. Co. v. Wood*, 115 Mich. 444, 74 N. W. 656; *Aztex Cooper Co. v. Auditor General*, 128 Mich. 615, 87 N. W. 895.

The court should enter a decree determining that the complainant owes the defendant the sum paid as consideration for the deed, with interest.

Koch v. Bird, 174 Mich. 594, 140 N. W. 919.

Mr. Elmer E. Stockwell, for appellee:

At the time complainant gave the deed to defendant, she had no title she could convey by her sole act, neither could she encumber it in any way.

Vinton v. Beamer, 55 Mich. 559, 22 N. W. 40; *Re Lewis*, 85 Mich. 340, 24 Am. St. Rep. 94, 48 N. W. 580; *Naylor v. Minock*, 96 Mich. 182, 35

Am. St. Rep. 595, 55 N. W. 664.

A purchaser under a quitclaim deed obtains no better title than that held by his grantor.

Hughes v. Jordan, 118 Mich. 27, 76 N. W. 134.

A quitclaim deed does not convey the land itself, but merely the grantor's interest therein; and therefore, a subsequently acquired title does not pass to the grantee.

9 Am. & Eng. Enc. Law, 2d ed. 106; *Frost v. Missionary Soc.* 56 Mich. 69, 22 N. W. 189; *Fay v. Wood*, 65 Mich. 394, 32 N. W. 614; *Gadsby v. Monroe*, 115 Mich. 282, 73 N. W. 367.

Kuhn, J., delivered the opinion of the court:

The bill of complaint is filed in this cause for the purpose of removing a cloud from the title of lands which, on the 9th day of December, 1881, were owned by the complainant and her husband, Frederick W. Ernst, as tenants by entirety. On that day the complainant executed to the defendant and cross complainant, her stepson, a quitclaim deed of the land, for which he gave her \$175. Mrs. Ernst and her husband occupied the land up to the date of her husband's death, January 26, 1910, and she is still in possession through a tenant. She claims that she obtained the \$175 as a loan, for which she gave the deed as security, and that she repaid the loan in 1893 by conveying other property to the defendant. It is the claim of the defendant and cross complainant that he purchased the interest of Mrs. Ernst in the land described in the quitclaim deed, and as a consideration gave her the \$175. In his cross bill he asks the court to decree that this deed placed him in the same position as to the title to the land as that in which Mrs. Ernst stood before the deed was given, and that on the death of Frederick W. Ernst he became the sole owner. He further asks that, if the deed did not convey legal title to the land, the court find that it created an equitable lien which became enforceable on the death of Frederick W. Ernst. The circuit judge held that, under the decisions of this court, "the quitclaim deed of December 9, 1881, . . . conveyed no present title, because Mrs. Ernst had no title that she could convey by her sole act. Neither could she create an encumbrance in this way." *Vinton v. Beamer*, 55 Mich. 559, 22 N. W. 40; *Re Lewis*, 85 Mich. 340, 24 Am. St. Rep. 94, 48 N. W. 580; *Naylor v. Minock*, 96 Mich. 182, 35 Am. St. Rep. 595, 55 N. W. 664. He made the following supplementary findings of facts, which an examination of this record

shows are fully warranted by the evidence: "First, that the quitclaim deed from Catherine L. Ernst to Peter Ernst, executed in December, 1881, was intended by the parties as a conveyance of the interest Catherine L. Ernst had in the land herein described to Peter Ernst; second, at the time of the execution of the quitclaim deed described in the first paragraph of this finding, Peter Ernst paid Catherine L. Ernst the sum of \$175, as a consideration for the interest which they supposed the deed conveyed, which sum has not been repaid to Peter Ernst." The circuit judge held the deed void, and made a decree granting the prayer of complainant's bill. Counsel for defendant and cross-complainant concede in this court that the deed is void, but contend that an equitable lien for the amount paid by the defendant to the complainant should be decreed, and, in the event that this cannot be done, that the payment of this sum by the complainant to the defendant be made a condition precedent to granting relief to the complainant.

The quitclaim deed did not convey the land itself, but merely the interest which the grantor had therein, and the purchaser under this deed did not obtain any better title than that held by the grantor. *Hughes v. Jordan*, 118 Mich. 27, 76 N. W. 134. And it necessarily follows that a subsequently acquired title did not pass to the grantee. *Frost v. Missionary Soc.* 56 Mich. 62, 22 N. W. 189; *Fay v. Wood*, 65 Mich. 390, 32 N. W. 614; *Gadsby v. Monroe*, 115 Mich. 282, 73 N. W. 367.

The complainant, at the time she gave the deed, had no right, title, or interest in the land which she could, by her sole act, encumber in any way; and to hold that the defendant obtained an equitable lien at the time of taking the deed would, in effect, be giving him a mortgage, which it is clear she could not do. He does not claim that he was defrauded or deceived, and, according to his own version, he knew the kind of deed he received and was willing to accept it. The circuit judge was correct in holding that no equitable lien was established.

The complainant, however, has come into a court of equity for relief, and under the familiar axiom that he who seeks equity must do equity, it does seem that relief should not be granted complainant without requiring her to repay what has been paid her. We are satisfied that she received the \$175, and has not repaid the sum to the defendant, as found by the circuit judge. The relief she prays for should be made conditional upon repayment by her to the defendant of the \$175 and interest thereon at the legal rate from the time of the payment.

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The decree of the court below will be modified accordingly, with costs to the defendant.

MISSISSIPPI SUPREME COURT.

UNDERWRITERS AT LLOYD'S INSURANCE COMPANY, Appt.,

v.

VICKSBURG TRACTION COMPANY.

(— Miss. —, 63 So. 455.)

Judgment — separate suits for injury to person and property.

An insurer of an automobile who had, in accordance with a provision of the policy, become subrogated to the claim of the owner for damages thereto against a street railway company before the institution by such owner of a suit for personal injuries growing out of the same accident, in which a judgment has been recovered, is not precluded thereby from maintaining an action.

(December 8, 1913.)

Note. — Injury both to person and to property at the same time as constituting more than one cause of action.

The question here considered was treated in the notes to *King v. Chicago, M. & St. P. R. Co.* 50 L.R.A. 161, and *Ochs v. Public Service R. Co.* 36 L.R.A.(N.S.) 240. A search has disclosed but one later case.

In *Schermerhorn v. Los Angeles P. R. Co.* 18 Cal. App. 454, 123 Pac. 351, where the plaintiff had suffered personal injuries and damage to his automobile through a collision with defendant's car, it was argued that where damage has been caused to the person and property of an individual by the same tortious act of another, separate actions cannot be brought to recover for the different damages resulting; but it was held that the fact that the plaintiff had previously recovered a judgment which had been satisfied, for the injury to his automobile, did not preclude him from maintaining an action to recover for his personal injuries, it being held that § 427 of the Code of Civil Procedure, providing that the plaintiff may unite several causes of action where they arise out of "(6) injuries to person, (7) injuries to property," and providing further that "the causes of action so united must belong to one only of these classes," although it authorizes several causes of action for injuries to the person to be united, or several causes for injuries to property, does not authorize the uniting of actions for injuries to the person and to property.

See also *Kimball v. Louisville & N. R. Co.* 94 Miss. 396, 48 So. 230, set out by the court in *UNDERWRITERS AT LLOYD'S INS. Co. v. VICKSBURG TRACTION Co.*

J. T. W.

A PPEAL by plaintiff from a judgment of the Circuit Court for Warren County, overruling a demurrer to the answer in an action brought to recover damages for injuries to an automobile which had been insured by plaintiff under a policy providing for subrogation. Reversed.

The facts are stated in the opinion.

Mr. N. Vick Robbins for appellant.

Messrs. Hirsh, Dent, & Landau for appellee.

Reed, J., delivered the opinion of the court:

F. E. O'Neil, on September 5, 1909, while driving his automobile along the streets of Vicksburg and crossing the tracks of the Vicksburg Traction Company, was struck by an electric car. His automobile was damaged and he was injured in his person. He held a policy of insurance on the automobile in the appellant company, dated August 2, 1909. Pursuant to this policy, on November 26, 1909, in consideration of the payment by appellant of the amount of the policy, as required thereby, Mr. O'Neil executed to appellant an article of subrogation, in accordance with the terms of the policy, whereby he assigned to appellant all of his right, claim, and interest against appellee for damages to his automobile. In the policy is the following provision: "In case of payment of loss under this policy, these assurers shall be subrogated, to the amount of such payment, to all rights of recovery for such loss by the assured against persons, corporations, or estates; and the assured shall execute all papers required, and shall co-operate with these assurers to secure these assurers such rights."

On December 16, 1909, Mr. O'Neil brought suit against appellee for personal injuries sustained by him in the collision, and recovered a judgment. Appellant, as assignee of O'Neil, afterward brought the present suit against appellee to recover for damages to the automobile. Appellee pleaded as a bar to the action that appellant's claim for damages was *res judicata* because of the recovery by O'Neil from appellee in the suit for injuries to his person sustained in the collision, claiming that all injuries from the collision constituted only one cause of action, and could not be split so that separate suits could be brought for the injuries to his person and for damages to his automobile. A demurrer interposed by appellant to appellee's plea was overruled by the court, and from such action this appeal is taken.

51 L.R.A. (N.S.)

It is contended by appellee that this case is controlled by the decision of this court in the case of *Kimball v. Louisville & N. R. Co.* 94 Miss. 396, 48 So. 230. Therein Kimball recovered a judgment against the railroad company for damages done to his horse and wagon while he was attempting to drive across a track of the company at a public crossing in Biloxi. After judgment had been fully satisfied, he brought suit to recover for injuries sustained to his person in the same collision. The court decided that he could not maintain the second action; that the injury to himself and his property was by the same tortious act, and gave rise to but a single cause of action; that the different injuries were merely separate items of damages; and that he was not permitted to split up his cause of action.

We see a difference between this case and the Kimball Case. Mr. Kimball brought both suits against the railroad company. The entire cause of action was in him when he filed his first suit for damages done his personal property, and when he sued to recover for injuries to his person. He himself split his cause of action, which all along was wholly in him. This is not so in the case now before us. Mr. O'Neil had assigned all of his right and interest against the traction company for damages to his automobile before he filed suit for personal injuries. When the suit was entered by him, he had no cause of action against the company for damages to the automobile. This disposition by him of his right to damages to the automobile was in pursuance of a policy of insurance written for him by appellant company. It was in accordance with an agreement executed by him to make such transfer, whereby appellant would be subrogated to all of his rights to recover.

Appellant had an equitable interest in the automobile at the time of the collision by reason of having written the policy of insurance. When it was damaged, then, by virtue of the contract of insurance and the article of subrogation, appellant had such an interest in the claim for damages. This interest became a right to sue at law when appellant paid to Mr. O'Neil the amount owing him for loss under the policy and received from him assignment of his claim and was subrogated to his right to recover for damages. Therefore, when the suit was filed by Mr. O'Neil on December 16, 1909, against appellee, the cause of action for recovery for injuries sustained to his person was in Mr. O'Neil, and the cause of action to recover for damages to the automo-

bile was in appellant. There were then two distinct causes of action, two separate rights to recover, in two different persons.

In delivering the opinion of the court in the case of *Kimball v. Louisville & N. R. Co.* supra, Judge Mayes cited the case of *King v. Chicago, M. & St. P. R. Co.* 80 Minn. 83, 50 L.R.A. 161, 81 Am. St. Rep. 238, 82 N. W. 1113, and made the following quotation from the opinion in that case: "That rule of construction should be adopted which will most speedily and economically bring litigation to an end, if at the same time it conserves the ends of justice. There is nothing to be gained in splitting up the rights of an injured party as in this case, and much may be saved if one action is made to cover the subject." We note, upon examination of the report of the *King Case*, that both suits were brought by King. The first suit was for personal injuries suffered in a collision with a train of the railroad company, and the second was for damages done to his wagon, horse, and harness. The court decided that he could not split his cause of action.

In the *Kimball Case*, as well as in the *King Case*, we can see that the ends of justice were conserved by requiring the parties to bring one suit for their one cause of action. But it does not seem to us that the ends of justice would be conserved in the present case by deciding that the appellant had no cause of action for damages to the automobile, because Mr. O'Neil had brought his suit for personal injuries suffered by him,—the only cause of action he had against appellee when the suit was filed. It would not "conserve the ends of justice," but would work an injustice, to hold that Mr. O'Neil could, as claimed, destroy the right of appellant, vested in the manner above shown, to sue for damages to the automobile by bringing suit for injuries to his person. Appellant could not control Mr. O'Neil's course in entering suit. Appellant had no interest in his cause of action for personal injuries, but owned absolutely the right to recover for damages to the automobile.

We do not intend to disturb the rule announced in the *Kimball Case*. As applied in that case we approve it. We do not think it should be stretched to include the case before us. It is not applicable here. We distinguish that case from this. Appellant's right to recover in this case should not be defeated by Mr. O'Neil's suit. The ends of justice, the public welfare, will be conserved by holding that appellant, under the facts of this case, has a cause of action against appellee.

Reversed and remanded.

51 L.R.A.(N.S.)

NEBRASKA SUPREME COURT.

MATTIE SHEETS, Appt.,

v.

CITY OF McCOOK.

(— Neb. —, 145 N. W. 252.)

Municipal corporation — obstruction of sidewalk — health measure — liability.

Neither the city nor the officers of its board of health are liable for damages sustained by reason of acts committed in the exercise of police power for the benefit of the public health and safety; but if, in the exercise of such powers, such officers place a rope barrier across a public walk or street, which becomes and remains in a defective and dangerous condition, and the city either has actual notice of the defect, or it has existed for such a length of time as that notice will be presumed, the city may, if the facts in the case warrant, be held liable for its negligence in leaving the walk in an unsafe and dangerous condition.

(January 30, 1914.)

A PPEAL by plaintiff from a judgment of the District Court for Red Willow County sustaining defendant's motion for a directed verdict in an action brought to recover damages for personal injuries alleged to have been caused by its negligence. Reversed.

The facts are stated in the opinion.

Mr. C. D. Ritchie, for appellant:

It is the duty of a city to keep and maintain its streets and sidewalks in repair and safe for public use.

Lincoln v. Walker, 18 Neb. 244, 20 N. W. 113; *Omaha v. Jensen*, 35 Neb. 68, 37 Am. St. Rep. 432, 52 N. W. 833; *Davis v. Omaha*, 47 Neb. 836, 66 N. W. 859; *Tewksbury v. Lincoln*, 84 Neb. 571, 23 L.R.A.(N.S.) 282, 121 N. W. 994; *Aurora v. Cox*, 43 Neb. 727, 62 N. W. 66; *Lincoln v. Pirner*, 59 Neb. 634, 81 N. W. 846, 7 Am. Neg. Rep. 279; *Beatrice v. Reid*, 41 Neb. 214, 59 N. W. 770; *Lincoln v. Walker*, 18 Neb. 244, 20 N. W. 113.

The city cannot negligently permit obstructions in its streets, to the injury of travelers.

Barnesville v. Ward, 85 Ohio St. 1, 40

Headnote by *LETTON, J.*

Note. — As to liability for injury by obstruction placed in street or highway to stop travel, see note to *Lawrenceburg v. Lay*, 42 L.R.A.(N.S.) 480, and also *Case of Nessen v. New Orleans*, post, 324. The liability of a municipal corporation for permitting obstructions to be placed by others is considered in the note to *Tepfer v. Wichita*, 49 L.R.A.(N.S.) 844.

L.R.A.(N.S.) 94, 96 N. E. 937, Ann. Cas. 1912D, 1234; *Shreve v. Ft. Wayne*, 176 Ind. 347, 96 N. E. 7; *McDonald v. St. Paul*, 92 Minn. 308, 83 Am. St. Rep. 428, 84 N. W. 1022, 9 Am. Neg. Rep. 318; *Paducah v. Simmons*, 144 Ky. 640, 139 S. W. 851; *Thunborg v. Pueblo*, 18 Colo. App. 80, 70 Pac. 148, 12 Am. Neg. Rep. 220; *Burnes v. St. Joseph*, 91 Mo. App. 489; *Shinnick v. Marshalltown*, 137 Iowa, 72, 114 N. W. 542; *Kleopfert v. Minneapolis*, 93 Minn. 118, 100 N. W. 669, 16 Am. Neg. Rep. 456.

Mr. O. E. Eldred, for appellee:

A municipal corporation when it is not engaged in the management of its private or corporate affairs, but is exercising governmental functions, such as guarding the health and welfare of the public, is not liable for the negligence or nonfeasance of its officers, agents, or employees.

Whitfield v. Paris, 84 Tex. 431, 15 L.R.A. 783, 31 Am. St. Rep. 69, 19 S. W. 566; *Wyatt v. Rome*, 105 Ga. 312, 42 L.R.A. 180, 70 Am. St. Rep. 41, 31 S. E. 189; *Simpson v. Whatcom*, 33 Wash. 392, 63 L.R.A. 815, 99 Am. St. Rep. 951, 74 Pac. 577; 4 Am. & Eng. Enc. Law, 2d ed. 607, 608; *Prichard v. Morganton*, 126 N. C. 908, 78 Am. St. Rep. 679, 36 S. E. 353; *Love v. Atlanta*, 95 Ga. 129, 51 Am. St. Rep. 64, 22 S. E. 29; *Bartlett v. Clarksburg*, 45 W. Va. 393, 43 L.R.A. 295, 72 Am. St. Rep. 817, 31 S. E. 918, 5 Am. Neg. Rep. 492; *Higgins v. Superior*, 134 Wis. 264, 13 L.R.A.(N.S.) 994, 114 N. W. 490; *Dill. Mun. Corp.* 5th ed. 1661; *Valentine v. Englewood*, 76 N. J. L. 509, 19 L.R.A.(N.S.) 262, 71 Atl. 344, 16 Ann. Cas. 731; *Denver v. Maurer*, 47 Colo. 209, 135 Am. St. Rep. 210, 106 Pac. 875; *Park Comrs. v. Prinz*, 127 Ky. 460, 105 S. W. 948; *Caldwell v. Boone*, 51 Iowa, 687, 33 Am. Rep. 154, 2 N. W. 614; *Kempster v. Milwaukee*, 103 Wis. 421, 79 N. W. 411; *Watson v. Atlanta*, 136 Ga. 370, 71 S. E. 664; *Evans v. Kankakee*, 231 Ill. 223, 13 L.R.A.(N.S.) 1190, 83 N. E. 223; *Hill v. Charlotte*, 72 N. C. 55, 21 Am. Rep. 451; *Prime v. Yonkers*, 192 N. Y. 105, 84 N. E. 571.

Letton, J., delivered the opinion of the court:

In June and July, 1910, there was an epidemic of scarlet fever in McCook. A number of houses were quarantined, and, in order to prevent the further spread of the disease, the city authorities caused ropes to be stretched, extending from the porch of one of the quarantined houses across the sidewalk to posts or stakes driven at the edge of the curb, a distance of about 22 or 23 feet. Two ropes were placed at each side of the house; the lower being about 30 inches, and the upper about 4 feet, high. 51 L.R.A.(N.S.)

The witnesses for the city testify that the ropes were stretched tight when put up, and were afterwards tightened twice; but it is shown that the stakes or posts at the curb were not in any manner braced. On Saturday, July 18, 1910, the plaintiff, a young married woman twenty-four years old, then about six months gone in pregnancy, while walking on the sidewalk about 8 o'clock in the evening, tripped and fell over one of the ropes. She testified that it struck her about half way between the ankle and knee, and that she did not know what tripped her until after she had fallen, when she discovered the rope. She makes no mention of seeing two ropes at that point. She finished her errand, and returned to her home. Some time on Sunday or Sunday night, under peculiar circumstances, she gave premature birth to a stillborn child. In the petition she alleges that the city knowingly and negligently permitted the sidewalk at the place where she fell to remain obstructed with full knowledge of the dangerous condition, that it neglected to place a light upon the rope or any warning to passers-by, and that the sidewalk had remained in that condition for a long time. The defendant's answer is a general denial and a plea of contributory negligence. At the close of the testimony defendant moved the court for a directed verdict in its favor, which was sustained, and judgment of dismissal rendered. Plaintiff appeals.

The testimony showed that the ropes were placed across the sidewalk in the latter part of June or early in July by one of the city policemen, at the direction of Dr. Hare, who was a member of the board of health and city physician.

The plaintiff's position is that the city negligently failed to perform its duty to exercise reasonable care in keeping its sidewalks free from danger, both by the act of commission in placing the rope across the walk, and by its omission to warn foot passengers either by lights, barrier, or otherwise, and by suffering the rope to sag so as to make it dangerous. The city asserts that the stretching of the ropes was performed by officers of the board of health in the exercise of the police power, for the protection of public health and safety, and that it is not responsible for negligent acts on the part of the board of health or of any of its officers or employees.

The ordinances of the city provide that the mayor, the city physician, the president of the city council, and the city treasurer shall constitute the board of health. They are empowered to make all needful rules and regulations relating to matters of health and sanitation in the city, and to

enforce the laws of the state and the ordinances of said city in relation to such matters. The city marshal is created the health officer, with the usual powers of such official.

The board of health of the city and its officers had the right, under the health ordinance, to erect barriers to prevent the approach of others than the physician within nearer than 30 feet of the house. The plaintiff, while conceding that no damages are recoverable from the city which were caused by the quarantine itself, contends that the injuries which plaintiff suffered were not caused by or derived from the quarantine, but from the neglect of the city to see that its sidewalks were kept reasonably safe. The defendant insists that the rule is broader, and that the city is not liable for any negligent acts on the part of health officers, and that their act was the cause of the injury. We have held that no damages can be recovered against a city or village arising from the placing of a quarantine, for the reason that the acts of the health officer are public and governmental, and are not corporate in character. *Verdon v. Bowman*, 5 Neb. (Unof.) 38, 97 N. W. 229, 15 Am. Neg. Rep. 110. The same principle is laid down in *Murray v. Omaha*, 66 Neb. 279, 103 Am. St. Rep. 702, 92 N. W. 299, 13 Am. Neg. Rep. 138, where the facts were that certain old buildings were torn down by employees of a board of building inspection, and the city was held not liable. Perhaps as clear a statement of the principle as we have seen may be found in the case of *Love v. Atlanta*, 95 Ga. 129, 51 Am. St. Rep. 64, 22 S. E. 29. The facts were that a small negro boy, driving a fractious mule, was employed by the city in the removal of garbage under the direction of the board of health; that the mule ran away, collided with the plaintiff's buggy, and caused serious injuries. The court says: "In the discharge of such duties as pertain to the health department of the state, the state is acting strictly in the discharge of one of the functions of government. If the state delegate to a municipal corporation, either by general law or by particular statute, this power, and impose upon it within its limits the duty of taking such steps and such measures as may be necessary to the preservation of the public health, the municipal corporation likewise, in the discharge of such duty, is in the exercise of a purely governmental function, affecting the welfare, not only of the citizens resident within its corporation, but of the citizens of the commonwealth generally, all of whom have an interest in the prevention of infectious or contagious diseases at any point within the state, and in 51 L.R.A.(N.S.)

the exercise of such powers is entitled to the same immunity against suit as the state itself enjoys;" and humorously ends the opinion with the remark: "However incongruous it may appear to be to say that this diminutive dorky and this refractory mule were engaged in the performance of some of the functions of government, it is nevertheless true, and illustrates how even the humblest of its citizens, under the operation of its laws, may become in Georgia an important public functionary." *Watson v. Atlanta*, 136 Ga. 370, 71 S. E. 664; *Evans v. Kankakee*, 231 Ill. 223, 13 L.R.A.(N.S.) 1190, 83 N. E. 223; *Valentine v. Englewood*, 78 N. J. L. 509, 19 L.R.A.(N.S.) 262, 71 Atl. 344, 16 Ann. Cas. 731; *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499.

This principle requires no further discussion. The city, however, is charged with the duty of exercising reasonable care to keep its sidewalks in reasonably safe condition for public travel. This is a duty which it must perform regardless of the person by whom the dangerous condition of the sidewalk is created. Neither the city nor the officers of its health department are liable for the negligent acts of such officers committed in the enforcement of the provisions for the public health; but, while the city may not be liable on account of these acts, it may be liable for its neglect of an undelegable duty committed to it. Can it with reason be said that, if a trap had been set upon a sidewalk, and had been maintained there for such a length of time that the city authorities must be presumed to have notice of it, the city would not be guilty of negligence in failing to remove the trap, even though it had been placed there by a person for whose act it could not be held responsible? In this case the ropes had extended across the walk for several weeks before the plaintiff fell, and apparently long enough for the city authorities to have acquired knowledge of the existence of the unsafe condition, by whomsoever placed. No effective barrier was placed against travel on the sidewalk, and no lights or other warnings were so displayed as to bring the rope to the knowledge or notice of one passing in the dusk or dark. We think it would be unreasonable to hold that a city might with impunity allow such obstructions to remain upon its walks. This view seems to be in accordance with that of other courts where an almost identical question was presented.

In *Barnesville v. Ward*, 85 Ohio St. 1, 40 L.R.A.(N.S.) 94, 96 N. E. 937, Ann. Cas. 1912D, 1234, the facts were that the plaintiff tripped over a low hanging wire

placed between the sidewalk and the curb for the purpose of protecting the grass and trees upon the parking. The court held that the city might properly for the public good maintain park strips between the sidewalk and the curb, and might construct proper barriers to prevent travel thereon, and that one could not complain if he had collided with a tree or a proper barrier, but that this would not authorize the city to maintain a wire in such a condition as to become dangerous; that "if a pedestrian, in the exercise of due care for his own safety, is injured by reason of the dangerous or defective condition of the barrier, the municipality is liable in damages for such injury, if it be shown that it knew, or, in the exercise of ordinary care, should have known, the dangerous condition thereof." To the same effect is *Paducah v. Simmons*, 144 Ky. 640, 139 S. W. 851, where the facts were substantially identical; *Covington v. Whitney*, 30 Ky. L. Rep. 659, 99 S. W. 337; *Glasgow v. Gillenwaters*, 113 Ky. 140, 67 S. W. 381.

In *McDonald v. St. Paul*, 82 Minn. 308, 83 Am. St. Rep. 428, 84 N. W. 1022, 9 Am. Neg. Rep. 318, where the facts were similar to *Barnesville v. Ward*, supra, the court held that the city is not bound to use due care to keep the parked portion of the street free from obvious obstructions, although they may endanger the safety of travelers thereon, but that, "while this is true, yet the municipality has no right to maintain, or permit others to do so, on its boulevards, and especially on those at the street corners, anything in the nature of a dangerous pitfall or trap, or snare, or like obstruction, whereby the traveler, yielding to the impulse of the average person to cut across the corner when in a hurry, may be injured."

In *Carrington v. St. Louis*, 89 Mo. 208, 58 Am. Rep. 108, 1 S. W. 240, in a case where a police officer negligently left an obstruction in a street, the court, after stating the rule of nonliability for acts of officers exercising governmental or police functions, says: "But we do not see how these principles of law can aid the defendant here, for it is the unquestioned duty of the city to keep its streets and sidewalks in a reasonably safe condition for persons traveling thereon, and it is liable in damages to one injured by reason of negligence in this behalf." *Shinnick v. Marshalltown*, 137 Iowa, 72, 114 N. W. 542. Temporary obstructions in a street are often lawful or permissible; but, as said by Judge Dillon, "this will never justify the leaving of the street or way in an unsafe and dangerous condition, or its use in an unreasonable manner, or for an unreasonable 51 L.R.A. (N.S.)

time." 3 Dill. Mun. Corp. 5th ed. § 1168.

Plaintiff was not engaged in an unlawful act at the time she fell, because she had no knowledge of the existence of the quarantine or of the obstruction to the walk. If the barrier had been seen, or had it been effective and sufficient, the accident could not have happened as she testifies.

There is no doubt that the original obstruction of the street by the ropes was authorized, and not unlawful; but it is equally free from doubt that the city had a continuing duty to protect travelers upon the walk from hidden obstructions, if such existed, by means of a light or other warning. The liability of the city, if any, is not by reason of the placing of the ropes, but it is by reason of its negligence in failing to warn pedestrians of the dangerous situation created by the sagging rope. Nothing that is said here is to be taken as expressing any opinion upon the facts in the case, but only upon the legal questions presented. We think the questions whether the city had or was charged with notice of the defect in the barrier, and whether it was negligent with respect to the care of its sidewalk, together with all the other issues in the case, should have been submitted to the jury under proper instructions, and that it was erroneous to direct a verdict for the defendant.

The judgment of the District Court, therefore, is reversed, and the cause remanded for further proceedings.

Hamer, Rose, and Sedgwick, JJ., not sitting.

LOUISIANA SUPREME COURT.

MRS. FLORENCE NESSEN, widow of
William Martin, et al.,
v.

CITY OF NEW ORLEANS, Appt.

(— La. —, 64 So. 286.)

Highway — defect — Liability of municipality.

1. Section 14 of act No. 45 of 1896 requires the city of New Orleans "to keep open and free from obstructions all streets." The right of the citizen to recover damages for injuries sustained by reason of the failure of a municipal corporation to discharge

Headnotes by LAND, J.

Note. — As to liability for injury by obstruction placed in street or highway to stop travel, see *Sheets v. McCook*, ante, 321, and annotation referred to in footnote thereto.

the mandatory duty thus imposed is beyond question.

Municipal corporation — lighting obstruction in street.

2. The ordinances of the city of New Orleans require excavations and obstructions in public streets to be indicated by red lights during the night, in order to prevent accidents liable to otherwise happen.

Highway — rope in street — notice.

3. The stretching of wire ropes along a public thoroughfare a few feet above the level of the pavement creates, especially at night, a dangerous obstruction, of which the public should have timely notice and warning by proper danger signals.

Same — use by pedestrian.

4. A citizen has the right to assume that the street is in a reasonably safe condition for travel, and is not, as a matter of law, guilty of negligence in attempting to run across the street in the usual manner in order to catch a car.

Same — injury — liability of municipality.

5. The city of New Orleans is responsible in damages for the death of a citizen who, at night, without notice or knowledge of the existence of the obstruction, ran against a wire rope placed in the street by direction of the municipal authorities, and was thereby mortally injured.

Trial — negligence — question for jury.

6. In such a case, the question of contributory negligence on the part of the deceased is one peculiarly within the province of the jury.

(January 19, 1914.)

APPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans in plaintiffs' favor in an action brought to recover damages for the alleged negligent death of their intestate. **Affirmed.**

The facts are stated in the opinion.

Messrs. John J. Reilley and I. D. Moore, for appellant:

If the contention of plaintiff is correct, that the officials of the city acted beyond their powers in causing to be erected wire ropes along the principal streets of the city during the carnival season, then and in that event the municipality cannot be held in damages for the torts of any of its officers in the prosecution of said work.

Mechem, Pub. Off. § 852; Throop, Pub. Off. § 21.

The right of the people to the free use of streets or highways is subject to limitations, and while it is true that the primary use for which streets are dedicated is free and unobstructed passage over them, this use may be modified or temporarily obstructed under municipal authority for

other necessary and appropriate municipal purposes.

Ingersoll, Pub. Corp. § 131; 3 Dill. Mun. Corp. 5th ed. p. 1851; Abbott, Mun. Corp. § 1004; Jones, Neg. of Mun. Corp. § 202; Simon v. Atlanta, 67 Ga. 618, 44 Am. Rep. 739.

Messrs. E. M. Stafford and H. W. Robinson, for appellees:

The city of New Orleans can place no obstruction in the streets without legislative sanction. Its charter requires it to keep all streets "open and free from obstruction."

McCormack v. Robin, 126 La. 594, 139 Am. St. Rep. 549, 52 So. 779.

The pedestrian may assume that his way is safe and unobstructed.

Rock v. American Constr. Co. 120 La. 833, 14 L.R.A.(N.S.) 653, 45 So. 741.

When a street contractor stretched a rope across a highway at night, the city was liable unless it took the proper precautions by proper guards, signals, lights, or other warnings, to warn persons of the impassable condition of the street.

Baltimore v. O'Donnell, 53 Md. 110, 36 Am. Rep. 395.

A wire, even when it travels for most of its course over the heads of the people, is an obstruction and a nuisance.

Wheeler v. Ft. Dodge, 131 Iowa, 566, 9 L.R.A.(N.S.) 146, 108 N. W. 1058.

A wire obstruction on the edge of a sidewalk should be marked in such a manner as to warn the public.

Arthur v. Charleston, 51 W. Va. 132, 41 S. E. 171.

It is not negligence for a person to run across a sidewalk and a paved street for a car; or to keep his eyes on the approaching car.

Weber v. Union Development & Constr. Co. 118 La. 77, 42 So. 652, 12 Ann. Cas. 1012; Mahnke v. New Orleans City & L. R. Co. 104 La. 414, 29 So. 52.

Where a municipality has itself caused the nuisance, it is liable to the same extent as an individual.

Mahnke v. New Orleans City & L. R. Co. supra.

Land, J., delivered the opinion of the court:

William Martin, about 8:15 P. M. on February 12, 1912, left his place of business near the corner of Carondelet and Canal streets, and, while hurrying to catch a car, ran against a small wire rope which had been strung on posts along the outer edge of the sidewalk in Canal street, at the instance of the municipal authorities of the city of New Orleans.

The wire rope was stretched several feet

above the level of the sidewalk. Martin fell over the rope, and struck the pavement with such force as to cause a dislocation of the bones of his neck. Martin expired in a taxicab while on his way to his home.

Martin's widow and minor children instituted this suit to recover damages in the amount of \$25,000.

Petitioners represent that the wire rope was intended to keep back crowds of persons while the carnival processions were passing along Canal street; that the city was grossly negligent in erecting said barrier four days before any of the expected parades; that the said rope was made of galvanized wire of neutral tint, difficult to see by day, and impossible to see in the dusk or at night; that obstructions of streets are prohibited by city ordinance, unless distinctly marked so as to indicate danger; that the obstruction in question could have been made distinguishable by placing on it cloths of bright color, which was done later in the same week; and that neither the city council nor any of its officers or agents had the power to obstruct said street.

The defendant, after pleading the general issue, specially averred as follows: "Respondent avers that in the exercise of its police power it did cause to be constructed a wire rope along the principal streets of the city of New Orleans on or about the 12th day of February, 1912; that the stretching of this wire rope during the Mardi Gras season was in the interest of the general public, in which the city of New Orleans had no pecuniary interest, and, instead of being a negligent act, the officials of the city of New Orleans had every reason to believe it was a wise and prudent forethought to protect the general public and preserve the order and discipline of the Mardi Gras parades." "Respondent further shows that, being an old resident of the city, the decedent should have anticipated meeting with the temporary obstruction in question, and that his failure, at the time, to exercise care and attention contributed to the accident, and bars his right to recover."

The case was tried before a jury, which found a verdict for \$10,000 in favor of the plaintiffs. The defendant filed a motion for a new trial, which was overruled, and judgment was rendered pursuant to the verdict. The defendant has appealed; and the plaintiffs have answered, praying for an increase in the amount awarded by the verdict and judgment.

It was admitted that the diameter of the wire rope was $\frac{1}{4}$ of an inch, and that it was placed 41 inches above the sidewalk, and was made of galvanized steel wire of 51 L.R.A. (N.S.)

a grayish color. This wire was strung along the edges of the neutral ground in Canal street and along the edges of the sidewalks, for the purpose of keeping the street open for the usual parades during the Mardi Gras season. The street intersections were left open for the convenience of the public. This custom of wiring the streets commenced in the year 1906, and has continued down to the present time.

The mayor testified as follows:

Q. Why was it done?

A. Because there were a great many accidents. I have lived here all my life, and I was identified with it and had the experience to see that there were a great many accidents occurring every year. People were trampled upon by the horses prancing in the parade, and there was a demand that something be done to control the crowds that appeared on the principal streets. . . . Well, we found it was absolutely necessary to do it. The carnival is one of the institutions of the city of New Orleans. It had to be carried on with the least detriment to the people. You could not successfully, with the growing population of the city, and the tremendous crowds that come here every year, hope to carry out these parades without a roping of the streets. . . . The city is put to an expense of between \$700 and \$800 per year to do it, and it does not get anything out of it, except the protection of its citizens."

The mayor further testified that he had seen crowds checked and controlled by means of wire ropes in Washington, District of Columbia, and in the city of New York; and that this system in the city of New Orleans had caused no serious accident prior to the death of Martin, in 1912.

The city electrician testified that the wiring of the streets since 1905 has been done under his supervision; that the wiring in 1912 commenced on February 11th, and it was absolutely necessary to commence the work on that day in order to complete the wiring in time for the first parade on February 15th; and that it took about five days to wire the principal thoroughfares. The same witness testified that openings were left at all the street intersections, which are always well lighted at night.

Martin, on the evening in question, was seen by two of his witnesses standing in front of the cigar store corner of Carondelet and Canal streets, with an overcoat on his arm. Martin's intention was to take a Dauphine street car operating on the neutral ground in Canal street. The witnesses observed Martin start and run forward, as if to catch a car passing along the neutral ground. The witnesses did not

see Martin strike the wire, but saw him prone on the pavement immediately beyond the wire. The circumstantial evidence shows that Martin ran against the wire with sufficient momentum to throw him over the obstruction and head foremost on the pavement. The coroner found on Martin's chest a bruised mark, some 4 or 5 inches long and half an inch or more wide, evidently caused by his impact with the wire. Martin was 39 years old, weighed about 200 pounds, and was in vigorous health at the time of the accident. The wire was placed on the edge of the sidewalk while Martin was engaged in his daily work in his place of business on Carondelet street very near its intersection with Canal. There is not a tittle of evidence to suggest that Martin had any knowledge of the wire obstruction in the latter street. He surely would not have run against the wire if he had received any notice of its existence. The late B. R. Forman, Esq., a distinguished member of the bar, testified that the wire even in daylight was difficult to perceive, and that he himself, on the day of the accident, had struck against the wire on three different occasions. The same witness further testified that his sight was good. It did not need the testimony of this witness to prove that it was far more difficult to see the wire at night.

Martin, if he had not been stopped by the wire obstruction, would have passed from the sidewalk to the intersection, a very short distance. In a similar case, this court held that a pedestrian is not confined to the regular crossing, but may use any part of the street, and may run to catch his car. *Weber v. Union Development & Constr. Co.* 118 La. 77, 42 So. 652, 12 Ann. Cas. 1012. A pedestrian has the right to assume that the street is reasonably safe for passage. *Ibid.*; *McCormack v. Robin*, 126 La. 598, 139 Am. St. Rep. 549, 52 So. 779. On the facts of the case, we would not be justified in setting aside the verdict on the issue of contributory negligence.

The remaining question is whether the defendant city was negligent in the premises. In *McCormack v. Robin*, supra, the court said: "The charter of the city of New Orleans requires it to 'keep open and free from obstruction all streets.' Act 45 of 1896, § 14. The right of the citizen to recover damages for injuries sustained by reason of the failure of a municipal corporation to discharge the mandatory duty thus imposed on it is beyond question." The court cited a number of text writers and of Louisiana cases to sustain the rule of law thus announced.

The city ordinance requires all persons 51 L.R.A.(N.S.)

and corporations making excavations in the public thoroughfares, or depositing in any street or on any sidewalk heaps of brick, dirt, rubbish, or materials whatsoever, proceeding from the construction or demolishing of any building, or from any other cause whatsoever, to place a lamp with red light every night in the center of said excavation at every point of probable danger, and at the summit of said heap, which lamp must remain lighted during the night, so as to shed a sufficient light to make the encumbrance visible, in order to prevent accidents liable to otherwise happen. Flynn's Dig. art. 1439.

It is hardly necessary to cite authorities to show that the stretching of wires or ropes along or across public thoroughfares low enough to strike passing pedestrians or vehicles constitutes an unauthorized and dangerous obstruction to public travel. Cases similar to the one at bar have come before courts of other jurisdictions. In *Arthur v. Charleston*, 51 W. Va. 132, 41 S. E. 171, the supreme court of West Virginia held that the defendant was liable in damages for an injury to the plaintiff because of his having been tripped up by a rope stretched across the pavement of a street and fastened to a pole for the purpose of holding a wharf boat during a flood in the Kanawha river. The court held that the officials of the city were negligent in not barricading the street, or marking the obstruction in such manner as would have warned the public of the situation, and said: "The negligence of the officials was not in allowing the rope to be placed there, but in permitting it to remain without proper warning to or protection of the traveling public. . . . The city has the right temporarily to allow obstructions on the streets and sidewalks for any lawful purpose; but while they remain there the traveling public should have notice and warning thereof."

In the case of *Kleopfert v. Minneapolis*, 90 Minn. 158, 95 N. W. 908, 14 Am. Neg. Rep. 381, and 93 Minn. 118, 100 N. W. 669, 16 Am. Neg. Rep. 456, the court held that the defendant was liable for the negligent acts of a servant of the board of park commissioners in stretching a rope across a boulevard, whereby a bicycle rider, in attempting to avoid the same, collided with a team and was injured.

In *Baltimore v. O'Donnell*, 53 Md. 110, 36 Am. Rep. 395, the syllabus reads as follows: "A city employed an individual upon contract to repair one of its streets. The contractor's servants stretched a rope across the street and hung a lighted lantern upon the rope at night. The lantern was broken and extinguished by boys. The

plaintiff, in driving a hack at night, came in contact with the rope and was injured. The city authorities and the contractor had no notice of the rope. Held, that the plaintiff could recover against the city." We make the following extract from the text of the opinion: "The court properly instructed the jury . . . that it was the duty of the defendant to take proper precaution, by proper guards, signals, lights, or other warnings, to warn persons of the impassable condition of the street, so as to prevent injuries to persons passing along said street, and if the jury further find that the defendant, and those employed by it in repairing and recurbng said street, did not use ordinary care in providing such precautions, and that the plaintiff, in consequence of such neglect to provide such precautions, was thrown from his hack while driving with ordinary care along said street, then the plaintiff is entitled to recover."

The case of *Wheeler v. Ft. Dodge*, 131 Iowa, 566, 9 L.R.A.(N.S.) 146, 108 N. W. 1057, contains a valuable citation of authorities on the subject-matter of obstructions in public streets, and the liability of municipalities for permitting their existence. In that case the defendant, on the occasion of a Fourth of July celebration, permitted the erection of a wire over a street for the purposes of a tight-rope performance. The exhibitor fell and injured the plaintiff, and the city was held liable in damages. The court, *inter alia*, said: "The fact that the wire in most of its course passed through the air above the heads of the people using the walks and carriage way below does not remove its character as an obstruction of the street. The public right goes to the full width of the street, and extends indefinitely upward and downward so far at least as to prohibit encroachment upon said limits by any person by any means by which the enjoyment of said public right is or may be in any manner hindered or obstructed or made inconvenient or dangerous."

Counsel for the defendant cites the case of *Simon v. Atlanta*, 67 Ga. 618, 44 Am. Rep. 739, as holding that, as stated in the syllabus, to temporarily obstruct passage by stretching ropes across a street during a parade or practice of the fire department does not furnish any ground for damages against a city. The syllabus is too broad. The facts were that a rope was stretched sufficiently above the pavement as not to interfere with the free use of the street, and that from some cause, not traceable to the municipal authorities or the fire department, the rope fell upon and injured the plaintiff.

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In the case at bar, the municipal authorities obstructed the street by wire ropes stretched a few feet above the pavement. The placing of these ropes commenced on the fifth day before the date of the first Mardi Gras procession, and no precautions were taken to warn the public of the existence of these obstructions. These ropes were so small that it was very difficult for ordinary persons to perceive them at night, even in a well-lighted thoroughfare. Martin evidently did not see them, and, assuming that the street was safe, rushed to his death. Having created this obstruction in a public street, it was the plain duty of the municipal authorities to have warned the traveling public of its existence by lights or other proper signals.

As to the quantum of damages, we see no good reason to disturb the verdict.

It is therefore ordered that the judgment below be affirmed, and that defendant and appellant pay costs of appeal.

NORTH DAKOTA SUPREME COURT.

EX PARTE FRANK HENDERSEN.

(27 N. D. 155, 145 N. W. 574.)

Process — privilege of suitor — criminal proceeding.

1. The common-law privilege exempting suitors and witnesses, residents of a foreign state, in civil cases, on their claim of privilege, from service of civil process while in attendance as civil suitors or witnesses in the courts of this state, until after a reasonable opportunity afforded them to return to their abode, does not include nonresident defendants in criminal proceedings, temporarily here to defend in the criminal action against them, when the criminal proceedings are prosecuted in good faith, and not fraudulently instituted merely for the purpose of procuring the presence of the foreign resident that he might be here served with civil process.

Same — service and arrest.

2. To a nonresident defendant in a criminal case, the law extends no such privilege, and he may, while here, be served with a summons and complaint, and arrested under bail and arrest proceedings, an incident

Headnotes by Goss, J.

Note. — Right of nonresident to exemption from service of process while within jurisdiction pursuant to condition of bail bond.

This note is supplementary to the one appended to *Netograph Mfg. Co. v. Scrugham*, 27 L.R.A.(N.S.) 333.

Generally as to exemption of nonresident party from service of civil process while in

to such civil action, and held to civil bail, without there being afforded him any opportunity to return to his home in the foreign state.

(February 17, 1914.)

APPPLICATION for a writ of habeas corpus to secure petitioner's release from custody to which he had been committed in default of bail upon his arrest for embezzlement while in attendance upon a trial. Writ denied.

The facts are stated in the opinion.

Messrs. Wolfe & Schneller and E. S. Cary for petitioner.

Mr. W. S. Lauder and Messrs. Purcell, Divet, & Perkins, for respondent:

The service of process on petitioner was as good and valid as the service of any other process, until set aside.

State ex rel. Mears v. Barnes, 5 N. D. 350, 65 N. W. 688; Mullen v. Sanborn, 25 L.R.A. 734, note; Worth v. Norton, 76 Am. St. Rep. 542, note.

It is only the jurisdiction of the court to issue the process that can be questioned.

State ex rel. Peterson v. Barnes, 3 N. D. 131, 54 N. W. 541; State ex rel. Mears v. Barnes, 5 N. D. 350, 65 N. W. 688; State ex rel. Styles v. Beaverstad, 12 N. D. 527, 97 N. W. 548; State v. Floyd, 22 N. D. 183, 132 N. W. 662; Ex parte McCullough, 35 Cal. 97; State v. Pratt, 20 S. D. 440, 107 N. W. 538, 11 Ann. Cas. 1049.

The remedy of habeas corpus can only be invoked when there is no other remedy.

21 Cyc. 285 et seq.; Ex parte Walpole, 85 Cal. 362, 24 Pac. 657; State ex rel. Nixon v. Second Judicial Dist. Ct. 14 Mont. 396, 40 Pac. 66; Re Lancaster, 137 U. S. 393, 34 L. ed. 713, 11 Sup. Ct. Rep. 117; Bass v. Hightower, 94 Ga. 602, 21 S. E. 592; State v. Pratt, 11 Ann. Cas. 1051, note; Ex parte Wilson, 6 Cranch, 52, 3 L. ed. 149.

A person is not privileged from arrest while in custody under criminal process, or while attending or returning from his trial on a criminal charge.

3 Cyc. 923, subdiv. B; 1 Am. & Eng. Enc. Law, 724; Williams v. Bacon, 10 Wend.

state in connection with case, see note to Long v. Hawken, 42 L.R.A. (N.S.) 1101.

In State ex rel. Hattabaugh v. Boynton, 140 Wis. 89, 121 N. W. 887, 17 Ann. Cas. 618, it was held that where one was brought into the state on extradition proceedings and released on bail, his arrest upon attachment for contempt in a civil suit, issued to enforce a civil right of relator, before he had an opportunity to return to the state from which he had been extradited, was a violation of his privilege, and the attachment was discharged. To the contrary, see

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636; Lucas v. Albee, 1 Denio, 666; Moore v. Green, 73 N. C. 394, 21 Am. Rep. 470; Scott v. Curtis, 27 Vt. 762; Wood v. Boyle, 177 Pa. 620, 55 Am. St. Rep. 747, 35 Atl. 853; Browning v. Abrams, 51 How. Pr. 172; Reid v. Ham, 54 Minn. 305, 21 L.R.A. 232, 40 Am. St. Rep. 333, 56 N. W. 35; Rutledge v. Krauss, 73 N. J. L. 397, 63 Atl. 988; White v. Underwood, 125 N. C. 25, 46 L.R.A. 706, 74 Am. St. Rep. 630, 34 S. E. 104; Re Walker, 61 Neb. 803, 86 N. W. 513, 12 Am. Crim. Rep. 343; Netograph Mfg. Co. v. Scrugham, 197 N. Y. 377, 27 L.R.A. (N.S.) 333, 134 Am. St. Rep. 886, 90 N. E. 962.

Goss, J., delivered the opinion of the court:

One Frank Henderson has petitioned this court for a writ of habeas corpus. As grounds for the writ, proof by affidavits has been submitted, establishing: That from August 1st to December 25th last Henderson was a resident of Richland county in this state, and an employee of the Fairmount & Veblen Railway Company, a corporation. That on December 10th a criminal complaint charging embezzlement, a felony, was laid before a magistrate of said county, charging Henderson with the commission of said crime, upon which a warrant for his arrest was duly issued. He was arrested thereon, and pending examination was held in \$4,500 bail, which he furnished. That on December 25th Henderson changed his residence to Minneapolis, Minnesota. This is proven by his own affidavit and those of residents of Minneapolis. That on said date he rented apartments in that city, to which he has moved his personal belongings, and where he has taken up his abode, and at which place he claims to be actually residing. Although the opponents to the granting of this writ claim this residence to be merely colorable, and for the purpose of gaining some temporary advantage in these legal proceedings, and have offered affidavits tending in part to contradict the defendant's statements as to residence, and to impeach his good faith, we find in favor of the petitioner on this

And in Rogers v. Rogers, 138 Ga. 803, 76 S. E. 48, while defendant was not in the state pursuant to the condition of a bail bond, he was there voluntarily, to defend a criminal action for abandonment of his children, and it was held that he was not exempt from service of civil process in a suit for divorce and alimony, the court saying that the exemption from service of process extended only to witnesses, and therefore not to a defendant in a criminal case, inasmuch as he cannot be a witness in his own case, under the laws of the state.

R. L. S.

question of fact under proof and presumptions of law thereto applying, and find that on December 25th last the petitioner did change his residence from North Dakota to Minneapolis, Minnesota, and that on the date of this petition he was and now is a bona fide resident of Minnesota. Petitioner has returned from Minnesota without extradition for the sole purpose of defending the criminal charge of embezzlement so pending against him in the courts of this state since December 10, 1913, at all times until January 17, 1914, on which last date, after a preliminary examination lasting over two weeks, defendant was held for trial before the district court upon a charge of felony, which trial, according to the showing made, will probably take place at the coming term of district court to be held in June of this year. In holding defendant for trial, the examining court has found the existence of probable cause to believe that felony has been committed, and that the defendant is guilty thereof. He was so held in \$4,500 bail pending trial, and has furnished a cash deposit in lieu of and as a bond in said amount for his appearance to answer said charge at the next term of the district court for Richland county.

After issuance of an order discharging him on bail approved, and about one minute after his release on bail, and while he was still in the courtroom of the magistrate taking bail, he was served with a summons, complaint, and order for arrest on bail and arrest proceedings in an action wherein the corporation procuring his arrest for embezzlement is plaintiff, and the petitioner is defendant. The order upon arrest and bail issued out of the district court of Richland county, directing that this petitioner be held in custody until he shall give bail on said order in the sum of \$5,000, as provided by law. The proceedings upon bail and arrest are in proper form, and the order of arrest and bail issuable in such an action. Petitioner is imprisoned in default of bail. Without moving to vacate the service or the proceedings, he made application to the district judge of the district in which he was confined for the issuance of a writ of habeas corpus, which was denied after full hearing on the merits. He here contends to be illegally restrained of his liberty, alleging that, as a citizen of Minnesota, he is privileged from arrest in attending upon trial of the criminal action against him pending in the courts of this state, and not subject to interference by arrest upon mesne process during the time of his attendance and until a reasonable time afforded him to return to Minnesota. This is the issue presented. 51 L.R.A.(N.S.)

We have no statute bearing upon or controlling this situation. Had petitioner been in attendance as a witness or suitor in the civil courts of this state, as a citizen of Minnesota or any foreign state, he would be privileged, and therefore exempt upon his claim of privilege from legal service in a civil suit (*Hicks v. Besuchet*, 7 N. D. 429-435, 66 Am. St. Rep. 665, 75 N. W. 793), or from arrest in arrest and bail proceedings, which are merely ancillary to the civil action of which the arrest and bail is but an incident. Of the existence of this general privilege there is no question. Under the common law, to avail, such privilege must be claimed.

But petitioner is before us in a case in which the reasons for this common-law privilege so applying in civil cases are entirely absent. As a suitor or witness in a civil case he could not be compelled to attend or to submit himself to the jurisdiction of our courts. And his entering the state must be voluntary, either to aid others by voluntarily appearing or testifying in their behalf, or to defend his own interests, and voluntarily submit his cause to our courts for arbitration. In either case the common law, on grounds of public policy, has privileged him from harassment of civil proceedings, the interests of justice and public policy demanding it, and has thus encouraged the voluntary appearance of the nonresident who is under no compulsion to appear, to disclose, or to litigate in a civil case in our courts. In either or any event he is voluntarily aiding in the administration of justice. But where the party served has been brought under extradition proceedings, or by force of criminal process, from the foreign state into ours, to here answer for crime committed within our boundaries, if at all, the defendant is not voluntarily here. He has no choice in the matter. He is rendering organized society no service. Instead, he is here charged with being a menace to it. While presumed innocent, he is not fulfilling any office of good citizenship nor voluntarily promoting justice. And except in sham criminal proceedings wherein the criminal process is made a mere pretense upon which to perpetrate a fraud upon a defendant by procuring his involuntary attendance, not with the bona fide intent of his being criminally prosecuted, but instead to secure service of a summons or process in a civil suit upon him, the criminal proceedings being but an instrument used for the collection of a debt, the reasons upon which the common-law exemption is given to a civil suitor or witness are mostly, if not altogether, absent. The question before us is whether such privilege accorded the civil suitor or

witness shall be extended, regardless of nonexistence of reason, to cover the case of this petitioner, who, when served, was here as a criminal defendant, and as such, on principle, should have no privilege.

Such proceedings are often discussed in connection with the law applying to extradition. This petitioner is to be treated in all respects as though he had been extradited, and the fact that he is here without having been extradited is no circumstance against him. Assuming that he had been extradited, instead of appearing voluntarily to protect his bail, he could have been prosecuted for any criminal offense other and wholly independent of the alleged crime on which he was extradited, provided that such extradition was from another state of this union, and not from a foreign country, in which latter case an immunity guaranteed by treaty would then be violated. *Knox v. State*, 164 Ind. 226, 108 Am. St. Rep. 291, 73 N. E. 255, 3 Ann. Cas. 539, and note. As between the states of this union there is no such immunity. *Lascelles v. Georgia*, 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687, affirming 90 Ga. 347, 35 Am. St. Rep. 216, 16 S. E. 945. The object of our extradition laws, as between states, is not to afford any refugee or fugitive any personal privilege or immunity whatever; neither is it their intention nor purpose that any state shall, as to the extraditing state, be considered as an asylum for a fugitive from justice. Thus, theories of personal immunity or privilege because of this defendant's residence in another state, as appear in the reasoning of some courts as a foundation for so-called public policy invoked by petitioner, or wherein extradition between states is treated as analogous to extradition from a foreign country under treaty rights, should not on principle be considered. Such precedent, exaggerating the rights of a defendant in extradition, consistently announces generally a rule contrary to our conclusions on the merits. From a standpoint of number of cases alone, petitioner would be entitled to the writ prayed for; but the early precedent seems to have applied the common-law privilege of suitors and witnesses in civil cases indiscriminately to criminal defendants, without distinguishing or apparently observing the want of grounds therefor. There seems to be a well-marked tendency in those courts not irrevocably committed to the extension of said privilege to criminal defendants, to deny it as to them. What we believe to be the weight of recent authority is to that effect, and recognizes the want of reason for adherence to the early rule. When the reason for the rule fails, the rule itself

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should fall, is the statute of our state as well as the course dictated by common sense.

It may be urged that these proceedings in arrest and bail may interfere with the right of this defendant to make his defense in the criminal prosecution,—a plausible and for the moment appealing circumstance that admittedly may be the result. But had the defendant remained a resident of this state, as he concededly was at the time of any commission of this offense for which he is held for trial, he would have been subject to arrest and imprisonment on mesne civil process. On the contrary, had he then been a resident of Minnesota, and been extradited here, he would have been subject to prosecution for any criminal offense, and to which further criminal prosecutions might have been added, the result of which might have been to equally hamper him in his first defense. Such subsequent prosecution would have violated no rule of comity between states, as the state of Minnesota has no interest in shielding either a refugee from this state or one domiciled within its borders from amenability for crimes here committed. To recognize any such rule as contended for would be contrary to the whole theory of the extradition laws.

It has been argued that to permit these proceedings may cause the executive of a foreign state to deny extradition in meritorious cases. The granting of extradition is intrusted to the chief executive of the state. He may, and oftentimes does, assume the right he does not, under the spirit of the extradition laws, possess, to pass upon the real merit of the prosecution. He may assume a given case to be an abuse of process, and deny extradition,—the equivalent of holding that the courts of the extraditing state will permit an abuse of their process. Nor is it the duty of an executive to refuse rendition under extradition under a plea of protection of the property rights of the fugitive, as must be the case should such grounds be considered in passing upon requisition. Had this defendant been extradited, the foreign executive should not be concerned with whether the fugitive, if rendered on extradition, would thereafter be served with civil process, with perhaps bail and arrest proceedings as an incident thereto. The courts here are, as the courts there would be, amply able to see that fraudulent use is not made of criminal process to obtain extradition merely for the purpose of mulcting by subsequent civil proceedings the party so prosecuted. This duty is intrusted to the courts, and the rule is well established that in such cases of fraud the defendant will be regarded and his rights measured as though he had not come with-

in the jurisdiction; the court not permitting its process to be used to perpetrate a fraud upon him in getting him here. This question has not been raised in this case except as it incidentally appears from the single fact that the corporation procuring his criminal prosecution is the plaintiff in the civil action. That such plaintiff made use of criminal process to obtain petitioner's presence here, that he might then be served with civil process, is wholly negated by the fact that at the time of the laying of the criminal complaint, and for two weeks thereafter, including the time of his arrest, he was a resident and householder of Richland county, where he and his wife were residing. Had the corporation plaintiff desired to serve a civil process, it could have done so without employing the aid of any criminal prosecution. No principle of extradition is violated by a denial of privilege, available in civil proceedings, to petitioner here as a defendant in a criminal case.

Any extended quotation from the authorities is needless. We must choose between two opposing lines of authority. Our holding is in line with the following: *Netograph Mfg. Co. v. Scrugham*, 27 L.R.A. (N.S.) 333, and note (197 N. Y. 377, 134 Am. St. Rep. 886, 90 N. E. 262); *Bank of Metropolis v. White*, 26 Misc. 504, 57 N. Y. Supp. 460; *Moore v. Green*, 73 N. C. 394, 21 Am. Rep. 470; *White v. Underwood*, 125 N. C. 25, 46 L.R.A. 706, 74 Am. St. Rep. 630, 34 S. E. 104; *Mullen v. Sanborn*, 79 Md. 364, 25 L.R.A. 721, 47 Am. St. Rep. 421, 29 Atl. 522; *Reid v. Ham*, 54 Minn. 305, 21 L.R.A. 232, 40 Am. St. Rep. 333, 56 N. W. 35; *Scott v. Curtis*, 27 Vt. 762; *Wood v. Boyle*, 177 Pa. 620, 55 Am. St. Rep. 747, 35 Atl. 853; and note in 38 Am. Rep. 720; *Re Walker*, 61 Neb. 803, 86 N. W. 513, 12 Am. Crim. Rep. 343; *Rutledge v. Krauss*, 73 N. J. L. 397, 63 Atl. 988; *Knox v. State*, 164 Ind. 226, 108 Am. St. Rep. 291, 73 N. E. 255, 3 Ann. Cas. 539; and the earlier New York cases of *Williams v. Bacon*, 10 Wend. 636; *Browning v. Abrams*, 51 How. Pr. 172; and *Lucas v. Albee*, 1 Denio, 666; 23 Century Dig. "Extradition," § 53; Decen. Dig. same title, §§ 41 and 42; 19 Cyc. 98. The trend of recent decisions is well illustrated in *Ex parte Flack*, decided a year ago by the supreme court of Kansas, and reported in 88 Kan. 616, 47 L.R.A. (N.S.) 807, 129 Pac. 541, where that court expressly overruled *State v. Hall*, 40 Kan. 338, 10 Am. St. Rep. 200, 19 Pac. 918, in principle analogous to that we are asked by petitioner to adopt, while *Ex parte Flack* is analogous in principle to our holding that a defendant extradited from another state comes without privilege from arrest in a civil suit.
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For contrary holdings, see *Murray v. Wilcox*, 122 Iowa, 188, 64 L.R.A. 534, 101 Am. St. Rep. 263, 97 N. W. 1087; *Moleitor v. Sinnen*, 76 Wis. 308, 7 L.R.A. 817, 20 Am. St. Rep. 71, 44 N. W. 1099, which case could have been disposed of as one of fraudulent requisition to obtain service in civil proceedings; the same with *Re Cannon*, 47 Mich. 481, 11 N. W. 280. See also *Martin v. Bacon*, 76 Ark. 158, 113 Am. St. Rep. 81, 88 S. W. 863, 6 Ann. Cas. 336; *State ex rel. Hattabaugh v. Boynton*, 140 Wis. 89, 121 N. W. 887, 17 Ann. Cas. 618; *Compton v. Wilder*, 40 Ohio St. 130. The citations on both sides of this question might be multiplied, but the notes to these reports cite numerous authorities.

We are satisfied that the common-law privilege that would protect this petitioner from arrest under civil process, had he been attending the courts of this state as a witness in a civil or criminal case, or as a suitor in a civil suit, should have no application where he is here as a defendant in a criminal prosecution.

The writ is therefore denied.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA
v.
WILLIAM DARNELL, Appt.

(— N. C. —, 81 S. E. 338.)

Municipal corporation — authority to prevent members of different races from living on same street.

Charter and statutory authority to pass ordinances for the general welfare of the city, and such regulations for the better government of the town as the commissioners may deem necessary, does not include power to forbid members of either the white or colored race to live in any block where a majority of the residents are of the other race.

(April 8, 1914.)

APPEAL by defendant from a judgment of the Superior Court for Forsyth County convicting him of violating the so-called segregation ordinance. Reversed.

The facts are stated in the opinion.

Messrs. Watson, Buxton, & Watson, for appellant:

The ordinance is unconstitutional. It

Note. — For validity of segregation statute or ordinance prohibiting persons of different race or color from living in same locality, see note to *State v. Gurry*, 47 L.R.A. (N.S.) 1087.

takes the right of the defendant to occupy his own home without due process of law.

2 Story, Const. 5th ed. § 1950; *State v. Julow*, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *Dupy v. Wickwire*, 1 D. Chip. (Vt.) 237, 6 Am. Dec. 728; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Block v. Schwartz*, 27 Utah, 387, 65 L.R.A. 308, 101 Am. St. Rep. 971, 76 Pac. 22, 1 Ann. Cas. 551; *People ex rel. Manhattan Sav. Inst. v. Otis*, 90 N. Y. 48; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *State v. Thomas*, 118 N. C. 1225, 24 S. E. 535; *State ex rel. Jones v. Froehlich*, 115 Wis. 32, 58 L.R.A. 757, 95 Am. St. Rep. 894, 91 N. W. 115; *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Shelby v. Cleveland Mill & Power Co.* 155 N. C. 196, 35 L.R.A. (N.S.) 488, 71 S. E. 218, Ann. Cas. 1912C, 179; *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Re Lee Sing*, 43 Fed. 360; *Re Hong Wah*, 82 Fed. 623; *Richmond & D. R. Co. N. C. Div. v. Brogden*, 74 N. C. 711; *State v. Hill*, 126 N. C. 1146, 50 L.R.A. 473, 36 S. E. 326; *Slaughter-House Cases*, 16 Wall. 36-87, 21 L. ed. 394-412; *Cooley*, Const. Lim. 6th ed. 561; *State v. Ray*, 131 N. C. 814, 60 L.R.A. 634, 92 Am. St. Rep. 795, 42 S. E. 960; *State v. Thomas*, 118 N. C. 1221, 24 S. E. 535.

Messrs. T. W. Bickett, Attorney General, and G. T. Stephenson, for the State:

The city of Winston had authority to pass the ordinance, as a municipality has such powers as are essential to its declared object and purpose.

State v. Webber, 107 N. C. 962, 22 Am. St. Rep. 920, 12 S. E. 598; 1 Dill. Mun. Corp. § 87; *State v. Austin*, 114 N. C. 855, 25 L.R.A. 283, 41 Am. St. Rep. 817, 19 S. E. 919; *Ashland v. Coleman*, 19 Va. L. Reg. 427.

Race relations have long been considered a proper subject of legislation under the police power.

Berea College v. Kentucky, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33, 123 Ky. 209, 124 Am. St. Rep. 344, 94 S. W. 623, 13 Ann. Cas. 337; *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; *West Chester & P. R. Co. v. Miles*, 55 Pa. 209, 93 Am. Dec. 744; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 592, 50 L. ed. 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; *State v. Gurry*, 121 Md. 534, 47 L.R.A. (N.S.) 1087, 88 Atl. 546; *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 203 U. S. 55, 51 L. ed. 88, 27 Sup. Ct. Rep. 1; *Utsey v. Hiott*, 30 S. C. 365, 14 51 L.R.A. (N.S.)

Am. St. Rep. 910, 9 S. E. 338; *State v. Whitlock*, 149 N. C. 542, 128 Am. St. Rep. 670, 63 S. E. 123, 16 Ann. Cas. 765; 1 Dill. Mun. Corp. 3d ed. § 141.

Clark, Ch. J., delivered the opinion of the court:

On July 5, 1912, the board of aldermen of Winston, North Carolina, adopted an ordinance which made it unlawful for any colored person to occupy as a residence any house upon any street or alley between two adjacent streets on which a greater number of houses were occupied as residences by white people than were occupied as residences by colored people. Another section of the ordinance made a similar restriction against white people occupying as residences houses on streets where there were more houses occupied by colored residents than by whites. In 1913 the defendant, William Darnell, a colored man, moved his family into a house on Highland avenue to occupy it as a residence. At that time in the other houses on that street and block there were more white families than colored. The defendant was tried in the municipal court for violating this ordinance, and, being found guilty, he was fined and appealed. In the superior court he was again found guilty and fined, and appealed to this court.

The only authority which the board of aldermen claim for the passage of this ordinance is § 44 of the city charter, which provides that the aldermen "may pass any ordinance which they may deem wise and proper for the good order, good government, or general welfare of the city, provided it does not contravene the laws and Constitution of the state." In 1 Dill. Mun. Corp. § 89, which is copied and approved in *State v. Webber*, 107 N. C. 962, 22 Am. St. Rep. 920, 12 S. E. 598, it is said: "It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: (1) Those granted in express words; (2) those necessarily or fairly implied; . . . (3) those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." In *State v. Thomas*, 118 N. C. 1225, 24 S. E. 535, the court reiterated this doctrine, and quoted with approval 1 Dill. Mun. Corp. § 325, as follows: "An ordinance cannot legally be made which contravenes a common right, unless the power to do so be plainly conferred by a valid and competent legislative grant." In *State v. Dannenberg*, 150 N. C. 800, 63 S. E. 946, it was held:

"Municipal corporations can only exercise such police powers as are granted by their charters, and all fair and reasonable doubts as to whether such powers have been so conferred are resolved by the courts against their being exercised."

The brief for the state frankly says: "It is not claimed that the city of Winston had any express grant of power to pass a segregation ordinance. To uphold the validity of such an ordinance, therefore, it must be shown that the passage of it was a reasonable exercise of the police power." Revisal, 2923, is broader even than this provision of the charter, for it gives town commissioners "power to make ordinances, rules and regulations for the better government of the town not inconsistent with this chapter and the law of the land, as they may deem necessary," and to enforce them by suitable penalties. It is held under this last section that such ordinances and by-laws must be in harmony with the general laws of the state. *Washington v. Hammond*, 76 N. C. 33; *State v. Langston*, 88 N. C. 692; *State v. Brittain*, 89 N. C. 574, 4 Am. Crim. Rep. 458.

We do not think that the authority conferred by § 44 of the charter to enact ordinances for the "general welfare of the city" can justly be construed as intended by the legislature to authorize an ordinance of this kind which establishes a public policy which has hitherto been unknown in the legislation of our state. To do so would give to the words "general welfare" an extended and wholly unrestricted scope which we do not think the legislature could have contemplated in using those words. If the board of aldermen is thereby authorized to make this restriction, a bare majority of the board could, if they may "deem it wise and proper," require Republicans to live on certain streets, and Democrats on others, or that Protestants shall reside only in certain parts of the town, and Catholics in another, or that Germans or people of German descent should reside only where they were in the majority, and that Irish and those of Irish descent should dwell only in certain localities designated for them by the arbitrary judgment and permission of a majority of the aldermen. They could apply the restriction as well to business occupations as to residences, and could prescribe the localities allotted to each class of people without reference to whether the majority already therein is of the proscribed race, nationality, or political or religious faith.

Besides, an ordinance of this kind forbids the owner of property to sell or to lease it to whomsoever he sees fit, as well as forbids those who may be desirous of

buying or renting property from doing so where they can make the best bargain. Yet this right of disposing of property, the *jus disponendi*, has always been held one of the inalienable rights incident to the ownership of property which no statute will be construed as having power to take away. In *Bruce v. Strickland*, 81 N. C. 267, it is said: "The *jus disponendi* is an important element of property, and a vested right protected by the clause in the Federal Constitution which declares the obligation of contracts inviolable." The same doctrine is fully held and discussed in *Hughes v. Hodges*, 102 N. C. 239, 9 S. E. 437, and in the numerous citations to those and two cases, which will be found in the Anno. ed. This ordinance forbids a white man or a colored man to live in his own house if it should descend to him by inheritance, and should happen to be located on a street where the majority of the residents happen to be of such different race. There is no reason why the power of the county commissioners to provide for the public welfare should not be as broad as those of the town commissioners, and if, under such general authority, similar regulations are prescribed for the country districts, one who should buy or inherit property in a section where the opposite race is in the majority could not reside on his own property, and he could not sell it or rent it out except to persons of such different race, since none other could reside there. Neither a white manager nor any white tenants could reside on a farm where a majority of the tenants or hands are colored.

In Ireland there were years ago limits prescribed beyond which the native Irish or Celtic population could not reside. This was called the "Irish Pale," and one of the results was continued disorder and unrest in that unhappy island, which had as one of its consequences that more than half its population came to this country. That policy has since been reversed. But in Russia, to this day, there are certain districts to which the Jews are restricted, with the result that vast numbers of them are emigrating to this country. We can hardly believe that the legislature, by the ordinary words in a charter authorizing the aldermen to "provide for the public welfare," intended to initiate so revolutionary a public policy. Had this been intended, there would certainly have been a thorough discussion and a full consideration by the general assembly of the question whether, under the Constitution of the United States and of this state, the legislature could establish a policy which would deny to the owners of lands, either in the country or town, the right to dispose of them by sale or

renting to whomsoever they saw fit as of ancient right they had been long accustomed to do, or to restrict any class of citizens from buying or renting where they wished.

Indeed, so far as the declaration of a public policy is concerned, when a few years ago labor agents began carrying out of the state the colored laborers on whom many farmers depended for the cultivation of their crops, which alone maintained the value of their lands, the legislature promptly passed chapter 75, Laws 1891, which made it indictable to exercise such vocation without having first paid a license fee of \$1,000. When that act was held invalid in *State v. Moore*, 113 N. C. 697, 22 L.R.A. 472, 18 S. E. 342, the legislature promptly passed another, chapter 9, § 84, Laws 1901, prescribing a smaller license fee, but making it indictable to act as agent to procure laborers for another state without obtaining such license. This was upheld in *State v. Hunt*, 129 N. C. 686, 85 Am. St. Rep. 758, 40 S. E. 216, as was also a like act to the same purport (*Laws 1903*, chap. 247, § 74) in *Carr v. Duplin County*, 136 N. C. 125, 48 S. E. 597.

Judging by the experience of the "Irish Pale" and of the similar restrictions upon the Jews in Russia, the result of this policy might well be a large exodus, and naturally of the most enterprising and thrifty element of the colored race, leaving the unthrifty and less desirable element in this state on the taxpayers. Such a result would be contrary to the above-cited statutes, by which the legislature indicated a public policy of retaining the colored laborers in this state. The initiation by this ordinance of a public policy so little in accord with the above legislation cannot reasonably be inferred from the general expression in the charter relied upon.

There is a wide distinction between suffrage, which is not an inherent right, but which is conferred by constitutional prescription, and which is usually extended from time to time, and the inalienable right to own, acquire, and dispose of property, which is not conferred by the Constitution, but exists of natural right. There is no question that legislation can control social rights by forbidding intermarriage of the races, and in requiring Jim Crow cars, and in similar matters. It was also held in *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, that, as the state had the right to regulate or forbid the sale of liquor, that one who had devoted his property to such purpose could not object that he is forbidden longer to so use it; but none of these interfere with the

fundamental right of everyone to acquire and dispose of property by sale. The right to devise is statutory, and therefore can be modified. *Re Garland*, 160 N. C. 555, 76 S. E. 486. Whether, if the general assembly had passed a statute conferring on town or county commissioners the authority to make such an ordinance as this, it would have been constitutional, is not now before us. We simply hold that an act of this broad scope so entirely without precedent in the public policy of the state, and so revolutionary in its nature, cannot be deemed to have been within the purview of the legislature from the use of the words conferring authority to make ordinances for the general welfare.

There was a similar restriction of the Jews to certain quarters of the towns in the middle ages, and the quarters assigned them were called "ghettoes." If the intention of the legislature had been to establish such policy as to the colored people, either in our towns or country districts, there would certainly have been some provision prescribing the methods to be used in selecting these districts. The selection would not have been left to the arbitrary and irreviewable power of the majority of the board elected without any reference to this matter. A man whose property might be made unsalable or reduced in value by forbidding him to sell or rent it to a white man because the majority of the houses in such district were occupied by negroes certainly should have some compensation from the public for his loss. The same would be true of property just across the street from one of these ghettoes which might be established to the depreciation of his property. Then, too, both in town and country the owners of property who might be deprived of the opportunity of renting it to laboring people of color, because the majority in that section or block were white people, who did not wish to rent or buy, might make an objection to the demarkation adopted. Then, too, the designation of these localities surely would not be left to a majority of the aldermen or the county commissioners, without some right to have the facts found by a jury, and a review of the proceedings by a court of justice.

The absence of such provisions is further evidence that the general assembly did not intend to confer so broad and arbitrary a power upon the aldermen of Winston.

We therefore hold that the ordinance was adopted without authority of law, and the indictment should have been quashed.

Action dismissed.

OKLAHOMA SUPREME COURT.

THOMAS C. GREER et al., Pliffs. in Err.,
v.

F. H. AUSTIN et al.

(40 Okla. 113, 136 Pac. 590.)

Injunction — to enjoin discharge of teacher.

1. At the instance of resident taxpayers of a school district, the powers of equity may not be invoked to enjoin the officials of the school district from discharging a teacher employed by contract to teach a school for a specified time.

Same — breach of contract.

2. The powers of equity may not be invoked by such teacher to enjoin the school board from discharging him before he had taught the school pursuant to the terms of said contract.

(November 4, 1913.)

ERROR to the District Court for Jackson County to review a judgment in de-

Headnotes by WILLIAMS, J.

Note. — Right of taxpayer to enjoin removal of teacher.

It has been held that liability to pay taxes is sufficient interest to enable a taxpayer to sue to enjoin illegal expenditure of public funds. 22 Cyc. 910. Only two cases, however, beside GREER v. AUSTIN, have been found discussing the question as to the right of a taxpayer to enjoin removal of a teacher. Both are in accordance with the ruling in GREER v. AUSTIN.

Thus, where a school board had decided to drop a teacher because of the unduly severe chastisement of a pupil, the right of taxpayers to enjoin the discharge of a teacher was denied in *School Dist. v. Carson*, 9 Colo. App. 6, 46 Pac. 846. The court said: "If the teacher was employed and under contract to teach a given length of time, and he was arbitrarily discharged without sufficient cause, he had an adequate and speedy remedy at law for the violation of the contract. By statute the board of school directors are empowered to employ, and, for cause, discharge, teachers. If they abuse the discretion vested in them, and discharge without cause, they are liable in damages. . . . As a taxpayer and patron of the school, all that the complainant could require was that the school should be open, under the charge of proper, competent, and qualified instructors, as provided by law, and that his children should be allowed to attend and afforded equal educational facilities with the balance. He had no authority in law or equity to compel the employment and retention of a particular teacher. If such rights were recognized and exercised in different directions by different taxpayers and patrons, the conduct of schools would be impossible. An-

pendants' favor in an action brought to enjoin them from discharging the plaintiff teacher from a public school. Affirmed.

The facts are stated in the opinion.

Messrs. Lawson & Dabney for plaintiffs in error.

Mr. W. T. McConnell for defendants in error.

Williams, J., delivered the opinion of the court:

The only question essential for determination under this record is as to whether the powers of equity may be invoked to enjoin the officers of a school district from discharging a person employed by said officials under a valid contract to teach a school for said district for a definite term. It has been settled in this jurisdiction that a taxpayer, without showing a special private interest, may maintain an action to prevent an illegal disposition of money of a municipality or school district, or the illegal creation of a debt which he, with other property owners and taxpayers in such municipality or district, may be compelled to

other teacher was immediately substituted by the board, and there was no charge that she was not properly qualified and eminently fitted for the position, and that the child of complainant was not receiving all the benefits and rights to which it was entitled."

An almost exact parallel case is *Schwier v. Zitike*, 136 Ind. 210, 36 N. E. 30, where the right of taxpayers to enjoin the discharge of a public school teacher was also denied. In this school trustees employed one J. as principal to teach in room No. 1 for the school year 1893, commencing on the 4th day of September of that year. On the 2d day of September, they employed one B. as principal, putting him in charge of room No. 1, and at the time of the commencement of this action he was in charge of that room, teaching therein, and excluding J. therefrom. The court said: "If Jackson, with whom the board made a contract, could not enjoin such board from dismissing him and employing another in his stead to teach the schools in the town of Batesville, it is difficult, if not impossible, to perceive how these appellants can perform that feat for him. To permit them to do so would be to permit that to be done by indirection which could not be done directly. It is now so well settled that a person cannot be enjoined from violating a contract for personal services when such contract contains no negative stipulations, that it seems not to be an open question. . . . On the other hand, we think it is equally well settled that the employer cannot be enjoined from a violation of such a contract by discharging the employee."

Generally, as to right of taxpayer, in absence of statute, to enjoin unlawful expenditures by municipality, see note to *Pierce v. Hagans*, 36 L.R.A.(N.S.) 1, J. D. C.

pay. It is a general rule that for wrongs against the public, whether actually committed or only apprehended, the remedy, whether civil or criminal, is by a prosecution instituted by the state in its political character, or by some officer authorized by law to act in its behalf, or by some of those local agencies created by the state for the management of such of the local affairs of the community as may be intrusted to them by law. The individual citizen does not in his own name interfere in behalf of the interest of society, but society acts through and by its properly constituted agencies. *Kellogg v. School Dist.* 13 Okla. 285, 74 Pac. 110, and authorities therein cited; *Marlow v. School Dist.* 29 Okla. 304, 116 Pac. 797, and authorities therein cited. In *Thompson v. Haskell*, 24 Okla. 70, 102 Pac. 700, it is said: "The case of *Kellogg v. School Dist.* supra, does not appear to go to the extent of permitting private individuals to restrain public officers to correct purely public wrongs, but to restrict the right of a private individual to that class of cases which involve the creation of debts illegally against, or the wrongful expenditure of moneys of, the taxpayers." The question involved in that case was as to the creation of or addition to or subtraction from political subdivisions of a county, and involved political acts. The question here, so far as the action is brought on the part of the taxpayers, is a public act involving the discharge of a teacher of a public school.

The teacher is also joined in this action. The question as to misjoinder of parties does not seem to be urged, but the joining of him in this action does not add merit to the case, for if his discharge is wrongful, he has his action at law to sue for the recovery of his salary or for damages on account of the breach of contract. *School Dist. v. Ward*, — Okla. —, 136 Pac. 588.

The action of the lower court is affirmed.

All the Justices concur.

TENNESSEE SUPREME COURT.

HARRY SIVLEY, by Next Friend,
v.
NIXON MINING DRILL COMPANY, Plff.
in Certiorari.

(— Tenn. —, 164 S. W. 772.)

Master and servant — simple tools — ladder.

1. Spikes in the bottom of a ladder to prevent its slipping do not change its character as a simple tool, risk from defects in which is assumed by the employee.
51 L.R.A.(N.S.)

Same — notice of defect — sufficiency.

2. A request by a servant about to use a ladder, that someone hold it, is not a notice of defect, where the employee was ignorant that one existed, so as to render the master liable for injury due to fall of the ladder because of a defect, when the foreman directs the employee to go ahead and use the ladder, saying that it had been in use for three years and had never fallen with anyone.

(November 15, 1913.)

CERTIORARI to the Court of Civil Appeals to review a judgment reversing a judgment of the Circuit Court for Hamilton County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Allison, Lynch, & Phillips, for plaintiff in certiorari:

Plaintiff was chargeable with knowledge of the condition of the ladder, and assumed the risks incident to using it.

Choctaw, O. & G. R. Co. v. Tennessee, 191 U. S. 326, 48 L. ed. 201, 24 Sup. Ct. Rep. 99, 15 Am. Neg. Rep. 240; *Ferguson v. Phoenix Cotton Mills*, 106 Tenn. 236, 61 S. W. 53; *Moore v. Chattanooga Electric R. Co.* 119 Tenn. 716, 16 L.R.A.(N.S.) 978, 109 S. W. 497; *Brewer v. Tennessee Coal, Iron & R. Co.* 97 Tenn. 619, 37 S. W. 549; *Trotter v. Chattanooga Furniture Co.* 101 Tenn. 260, 47 S. W. 425; *Cumberland Teleg. & Teleph. Co. v. Loomis*, 87 Tenn. 504, 11 S. W. 356; *Ohio River & C. R. Co. v. Edwards*, 111 Tenn. 52, 76 S. W. 897; *Gulf, C. & S. F. R. Co. v. Larkin*, 1 L.R.A.(N.S.) 944, note; 26 Cyc. 1217.

A blunted or rounded spike is as easy to see and understand as a dull axe, or dull hoe, or dull hand tool of any kind, and is very much more obvious, and the danger of using it more apparent, than various other defects in ladders, on account of which the courts have held injured employees could not recover.

Dessecker v. Phoenix Mills Co. 98 Minn.

Note. — Liability of master for injury from defect in simple tool.

This note supplements the earlier notes appended to *Vanderpool v. Partridge*, 13 L.R.A.(N.S.) 668; *Sheridan v. Gorham Mfg. Co.* 13 L.R.A.(N.S.) 687 (as to ladders); and *Parker v. W. C. Wood Lumber Co.* 40 L.R.A.(N.S.) 832 (including ladders), to which the reader is referred for a discussion of the principles involved.

The simple-tool rule has been held applicable to the following tools or appliances:

—an iron or steel clamp to be attached to the rail by means of a bolt driven through

439, 108 N. W. 516; *Blundell v. Wm. A. Miller Elevator Mfg. Co.* 189 Mo. 552, 88 S. W. 103; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56; *Gahili v. Hilton*, 106 N. Y. 518, 13 N. E. 339; *Wood v. Tileston & H. Co.* 182 Mass. 449, 65 N. E. 810, 13 Am. Neg. Rep. 321; *McDonald v. Lovell*, 196 Mass. 583, 82 N. E. 955; *Meador v. Lake Shore & M. S. R. Co.* 138 Ind. 290, 46 Am. St. Rep. 384, 37 N. E. 721; *Corcoran v. Milwaukee Gaslight Co.* 81 Wis. 194, 51 N. W. 328; *Duncan v. Gernert Bros. Lumber Co.* 27 Ky. L. Rep. 1039, 87 S. W. 762; *Sheridan v. Gorham Mfg. Co.* 28 R. I. 256, 13 L.R.A.(N.S.) 687, 66 Atl. 576.

Mr. H. J. Denton, for defendant in certiorari:

The ladder is not within the operation of the rule applicable to simple tools.

Ritt v. True Tag Paint Co. 108 Tenn. 647, 69 S. W. 324; *Southern Queen Mfg. Co. v. Morris*, 105 Tenn. 654, 58 S. W. 651; *Lookout Boiler & Mfg. Co. v. Jones*, May term 1908; *Guthrie v. Louisville & N. R. Co.* 11 Lea, 372, 47 Am. Rep. 286; *Morris*

its eyes beneath the rail, and used to hold a steam-shovel car in place. *Bougas v. Eschbach-Bruce Co.* — Wash. —, 137 Pac. 472;

—a pole with a T end, used for lifting quarters of beef from overhead hooks. *Davis v. Plant*, 138 N. Y. Supp. 145;

—an empty nail keg turned upside down, and used by an experienced carpenter to stand upon, by direction of his foreman. *H. G. Nunnelley Co. v. Prather*, 157 Ky. 157, 162 S. W. 812;

—a hammer which came off the handle while being wielded by a fellow employee on a tool held by plaintiff. *Buaso v. Wells Bros. Co.* 167 Ill. App. 574; *American Car & Foundry Co. v. Fess*, — Ind. App. —, 101 N. E. 318;

—a stick 6 feet long and 1 inch square, pointed at one end, furnished to clean out a refuse chute under a saw, its structure and grain being as easily comprehended by the servant as by the master. *Fordyce Lumber Co. v. Lynn*, 108 Ark. 377, 47 L.R.A.(N.S.) 270, 158 S. W. 501;

—a T-rail cutter being held by plaintiff and struck by a fellow servant in cutting off rivets. *Ohio Valley R. Co. v. Copley*, 159 Ky. 38, 166 S. W. 625;

—a chisel being held by a blacksmith while a helper struck it to cut off rivets, the repair of said tool being left to the blacksmiths themselves. *Modlagl v. Kay-sing Iron & Foundry Co.* 248 Mo. 587, 154 S. W. 752;

—a common pick. *Toth v. Osceola Consol. Min. Co.* — Mich. —, 146 N. W. 668;

—an ordinary blunt-ended steel drill from which a chip flew when plaintiff was tapping it into the socket. *Chicago, R. I. & P. R. Co. v. Lillard*, — Okla. —, 141 Pac. 8;

51 L.R.A.(N.S.)

Bros. v. Bowers, 105 Tenn. 59, 58 S. W. 328; *McDowell v. Williams & V. Lbr. Co.* May term 1911; Ct. of Civ. App.

The law does not place the burden of inspection on the servant, but he may rely, to a certain extent, at least, upon the presumption that the master has performed his duty toward the servant, and has not placed in his hands a dangerous and unsafe instrumentality.

26 Cyc. 1217, 1218; *Wood, Mast. & S. § 377*; *St. Louis, I. M. & S. R. Co. v. Birch*, 89 Ark. 424, 28 L.R.A.(N.S.) 1250, 117 S. W. 243; *Choctaw, O. & G. R. Co. v. Jones*, 77 Ark. 367, 4 L.R.A.(N.S.) 837; 92 S. W. 244, 7 Ann. Cas. 430.

Williams, J., delivered the opinion of the court:

This suit was brought by Harry Sivley to recover damages for personal injuries, and is based upon alleged negligence of the employer company in furnishing him for use, in reaching to oil the overhead shafts and pulleys in the company's plant, a ladder about 18 feet in length, the lower end

—an auger bit, the cutting points of which had become dull and blunt from use and frequent sharpening. *St. Louis & S. F. R. Co. v. Mayne*, 36 Okla. 48, 42 L.R.A.(N.S.) 645, 127 Pac. 474;

—a rope with a loop on one end, used in lifting plaintiff out of the well in which he was working. *Greinert v. Lamont Invest. Co.* — Wash. —, 135 Pac. 817;

—a common ladder. *Shute v. New York*, 149 App. Div. 758, 134 N. Y. Supp. 111; *Tramel v. Armour Packing Co.* 88 Kan. 730, 129 Pac. 1174. See also *SIVLEY v. NIXON MIN. DRILL CO.*;

—a ladder used in painting houses. *Philip Carey Roofing & Mfg. Co. v. Black*, — Tenn. —, post, 340, 164 S. W. 1183. But in the latter case it was held that, while the ladder was a simple tool, nevertheless, where the master had notice of the defect, and directed that the ladder be used, he could not escape liability on that ground when the defect was not known to the servant, and was of such nature that it would not ordinarily be discovered by such observation as would naturally accompany its use. However, a mere direction by the employer to the employee to go ahead and use a ladder, in response to a request for someone to hold it, is not sufficient to render the master liable for an injury resulting from a defect which was not known to the employee. *SIVLEY v. NIXON MIN. DRILL CO.*

In *Cooper v. Fleischman*, 85 Misc. 1, 147 N. Y. Supp. 65, it was held that while a ladder is an instrumentality of such an ordinary nature that an employee would ordinarily recognize a defect as well as the employer, yet, where he brought the defect to the attention of the employer, who assumed to repair it, and did so in such a manner that the defect was hidden, but not

of which ladder was equipped with metal spikes or brads (fixed in the upright posts to prevent the ladder from sliding) which had worn blunt and become defective.

The proof shows that plaintiff was, at the time of the accident, caused by the ladder slipping from its footing on an oily floor, between nineteen and twenty years of age, and that he had been engaged in the particular service from six to eight weeks, making use of this ladder to reach the shafting about twice a week. He testifies that he had not been notified as to and did not know the condition of the spikes; that he had had previous experience in factory work, and in the use of ladders, but not around shafts.

The trial judge, on motion of the company, directed a verdict in favor of the company. On appeal the court of civil appeals held this to be error, reversing the cause, and the defendant has brought the case here for review on writ of certiorari.

It has been ruled by courts, quite without exception, that an ordinary ladder falls within the class of simple tools in respect

of a defect in which the employer is held not liable, on the ground that a defect in such a simple tool must be obvious to its user, by whom any risk of danger therefrom must be held to be assumed. *Cahill v. Hilton*, 106 N. Y. 512, 13 N. E. 339; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56; *Blundell v. Wm. A. Miller Elevator Mfg. Co.* 189 Mo. 552, 88 S. W. 103; *Jenney Electric Light & P. Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30; *Meador v. Lake Shore & M. S. R. Co.* 138 Ind. 290, 46 Am. St. Rep. 384, 37 N. E. 721; *McDonald v. Lovell*, 196 Mass. 583, 82 N. E. 955; *Labatt, Mast. & S.* § 924 (a).

The plaintiff's insistence is, however, that the fact that the ladder in this case had been equipped with metal brads or spikes at the bottom takes it out of the operation of the rule applicable to simple tools.

In *Dessecker v. Phoenix Mills Co.* 98 Minn. 439, 108 N. W. 516, the facts were that a ladder had been equipped with iron brads at the bottom, one of which had in some way become detached; and when the ladder was placed by an employee on an oily

remedied, the employer would be liable for injury resulting from its use thereafter.

And ladders used solely as the equivalent of stairs do not come under the rule. *O'Brien v. Northwestern Consol. Mill. Co.* 119 Minn. 4, 137 N. W. 399; *Pendegrass v. St. Louis & S. F. R. Co.* — Mo. App. —, 162 S. W. 712; *Thompson-Starrett Co. v. Wilson*, 39 App. D. C. 211.

Likewise, in *Richter v. Tegtmeier*, 167 Ill. App. 478, the simple-tool rule was held not to apply when plaintiff slipped on blocks allowed to accumulate on the floor where he was carrying lumber near revolving saws.

And it was held in the following cases that the simple-tool rule was not applicable to:

—a huge pair of metal tongs attached by a chain to a crane, used to lift hot metal ingots, and requiring the services of a blacksmith to keep them sharp and in repair. *Colorado Fuel & Iron Co. v. Gardner*, 21 Colo. App. 273, 121 Pac. 680;

—a pin maul having an inherent defect, easily discoverable by the master, but not by plaintiff. *Crader v. St. Louis & S. F. R. Co.* — Mo. App. —, 164 S. W. 678;

—a hammer in the hands of a fellow servant. *Pushcart v. New York Shipbuilding Co.* 81 N. J. L. 261, 81 Atl. 113;

—a stool used by clerks to stand upon in reaching articles on shelves, the top of which became loosened from the legs,—a defect not easily observable. *Stimson v. Whitmore*, 34 R. I. 581, 85 Atl. 113;

—a jack used for raising cars. *Missouri, K. & T. R. Co. v. Odom*, — Tex. Civ. App. —, 152 S. W. 730;

—a defectively tempered pick being used so that it necessarily struck railroad rails occasionally. *Freeman v. Wilson*, — Tex. Civ. App. —, 149 S. W. 413; 51 L.R.A. (N.S.)

—a hand car used to transport a track crew from place to place. *Rosellini v. Saltsich Lumber Co.* 71 Wash. 208, 128 Pac. 213.

In *Chicago, R. I. & P. R. Co. v. Smith*, 107 Ark. 512, 156 S. W. 166, the court sustained a verdict for plaintiff, a car repairer's helper, who was injured by a sledge hammer in the hands of a car repairer, due to a defect in the striking face of the hammer, the court saying: "There is no hard and fast rule that may be laid down as governing the liability of an employer for a defect in common tools. In view of this condition, we do not undertake to say what state of facts the rule of liability should embrace and what state of facts it should not. We deem it sufficient to say that, while the question of liability of the defendant in the case at bar is an exceedingly close one, yet, under all the circumstances adduced in evidence, it was a question of fact for the jury, and not one of law for the court."

In *Herrick v. Chicago & E. I. R. Co.* 257 Ill. 264, 100 N. E. 897, the simple-tool rule was held not to apply, so as to require a nonsuit in an action by a blacksmith's helper who was injured by a chip from a set-hammer which had been repaired by the blacksmith, the helper not having sufficient knowledge to determine whether the hammer had been properly repaired.

And in *Ruck v. Chicago, M. & St. P. R. Co.* 153 Wis. 158, 140 N. W. 1074, it was held that while a punch having a handle like a hammer, and used to remove rivets by striking it with a heavy sledge, was simple in form, it was not simple with reference to its resisting qualities, or with reference to using it after the end became battered or burred,

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floor it slipped, causing plaintiff to fall. The court said: "A ladder of the character of this one is not a complicated instrumentality, nor were there any latent defects in the construction of the one in question. It is a simple appliance, to which the rule requiring the master to inspect for the purpose of discovering possible defects caused by its use does not ordinarily apply. . . . The least effort on his [employee's] part would have disclosed the defect, and we conclude that, on the evidence presented, the question whether defendant was chargeable with negligence was one of law for the trial court, and that it properly resolved it in favor of defendant."

Another phase (and the one here appearing) was presented in *Sheridan v. Gorham Mfg. Co.* 28 R. I. 256, 13 L.R.A.(N.S.) 687, 66 Atl. 576. A ladder was equipped with brads at its lower end, which brads had become dull and smooth, so that the ladder, when in use, was likely to slip on the floor. While plaintiff was standing on one of its rounds, the ladder slipped, and caused plaintiff to fall to the floor. It was held that the employee was chargeable, equally with the employer, with knowledge of the obvious imperfection of the ladder.

The court of civil appeals held that "the record tends to show that this was not an ordinary ladder. The spikes were located in the bottom of the upright pieces, and were not so obvious and patent as to be discernible by a casual observation,"— and therefore refused to class the ladder as a simple tool. This ruling was in opposition to the authorities in point, and erroneous.

It is difficult to see how the brads or spikes had the effect to remove what would otherwise be a simple tool into a class with more complicated instrumentalities, and equally as difficult to distinguish between the dulling or rounding of the points of the metal brads, and a wearing, due to use, of the lower ends of wooden upright pieces of a ladder not equipped with brads. *Jenney Electric Light & P. Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30. The placing of the brads tended to render safer the simple instrumentality, and to hold that that act changed the rule otherwise applicable would be to discourage employers in making such provisions.

The plaintiff relies on the case of *Ritt v. True Tag Paint Co.* 108 Tenn. 646, 652, 69 S. W. 324, 325, which dealt with a defective ladder; but the case is not in point. There it was ruled: "The plaintiff cannot be held to have been negligent, since the proof is that the ladder had been repaired, and was apparently safe." The repairs "apparently rendered the ladder safe, and this misled plaintiff," who, while on the ladder, was 51 L.R.A.(N.S.)

caused to fall by the breaking of a step or round where it had been repaired. The *Ritt* Case, when the real point in decision is regarded, is sound and in harmony with *Jones v. Pacific Mills*, 176 Mass. 354, 57 N. E. 663, 8 Am. Neg. Rep. 63, and neither is in conflict with the Massachusetts case of *McDonald v. Lovell*, 196 Mass. 583, 82 N. E. 955, or with what is here ruled.

It appeared in plaintiff's proof that, before he ascended the ladder, plaintiff requested his foreman to have someone hold the ladder while he went up, but was told by the foreman to go ahead and use the ladder; that it had been in use for three years and had never fallen with anyone. In several of the cases cited above the rule is further declared to be, in respect of simple tools, that, since it does not rest with the employee to say that his employer has superior knowledge, the fact that the former notified the employer of its defective condition, and made use of the ladder under order of the employer, does not make a case of liability. *Meador v. Lake Shore & M. S. R. Co.* 138 Ind. 290, 46 Am. St. Rep. 384, 37 N. E. 721, citing *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56, and *Jenney Electric Light & P. Co. v. Murphy*. And see *Brewer v. Tennessee Coal, Iron & R. Co.* 97 Tenn. 615, 37 S. W. 549; *Brouseau v. Kellogg Switchboard & Supply Co.* 27 L.R.A.(N.S.) 1052, and note (158 Mich. 312, 122 N. W. 620).

It is not necessary for us to determine that point, since it does not appear that plaintiff, Sivley, complained or gave notice of any defect. In fact, his testimony was to the effect that he was not aware of the existence of any defect; nor, on the proof, was there any order of the superior of plaintiff, given to plaintiff, which was predicated upon such a condition of the instrumentality, or upon any inspection, given in response to the plaintiff's request, or otherwise, at the time, upon which the plaintiff could have relied.

The Court of Civil Appeals erred in reversing the Circuit Court in respect of peremptory instructions. Reversed, with judgment here in accord.

TENNESSEE SUPREME COURT.

PHILIP CAREY ROOFING & MANUFACTURING COMPANY, Plff. in Certiorari,
v.
JOHN Q. BLACK.

(— Tenn. —, 164 S. W. 1183.)

Master and servant — simple tool — effect of superintendent's direction to use.

1. A master cannot avoid liability to an

employee through a defect in a ladder, on the theory that it was a simple tool, if his superintendent, upon being notified of the defect, insisted that the ladder was safe, and required it to be used, and the injured employee was in fact ignorant of the defect, which was not readily discoverable.

Same — negligence of servant — manner of descending ladder.

2. The court cannot declare an employee negligent as matter of law in descending a ladder face foremost, so as to relieve the master from liability for injury by a fall through the breaking of a round of the ladder.

Appeal — insufficient instructions — reversible error.

3. A judgment for plaintiff in a negligence case will be reversed if defendant's theory of the case was not fairly presented to the jury in the instructions, which were insufficient in stating the rules of law applicable to the case.

(March 14, 1914.)

CERTIORARI to the Court of Civil Appeals to review a judgment affirming a judgment of the Circuit Court for Davidson County in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Reversed.

The facts are stated in the opinion.

Messrs. Larkin E. Crouch and Thomas H. Malone, for plaintiff in certiorari:

Plaintiff was negligent in descending the ladder.

Knoxville Traction Co. v. Carroll, 113 Tenn. 514, 82 S. W. 313; Kansas City, M. & B. R. Co. v. Williford, 115 Tenn. 108, 88 S. W. 178.

The plaintiff's negligence in adopting the unsafe method of descent proximately caused or contributed to the accident, and bars him from any recovery.

Erskine v. Chino Valley Beet-Sugar Co. 71 Fed. 270; Kansas City, M. & B. R. Co. v. Williford, 115 Tenn. 108, 88 S. W. 178; Memphis Street R. Co. v. Haynes, 112 Tenn. 736, 81 S. W. 374; Nashville, C. & St. L. R. Co. v. Hayes, 117 Tenn. 696, 99 S. W. 362.

To recover damages in cases of this nature, the servant must not only show knowledge or negligent ignorance on the part of the master, but excusable ignorance on his own part.

Note. — As to liability of master for injury from defect in simple tool, see *Sivley v. Nixon Min. Drill Co.* ante, 337, and annotation referred to in the footnote thereto.

As to servant's right of action for injuries received in obeying direct command accompanied by an assurance of safety, see note to *Brown v. Lennane*, 30 L.R.A. (N.S.) 453.

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Ohio River & C. R. Co. v. Edwards, 111 Tenn. 31, 76 S. W. 897; *Nashville, C. & St. L. R. Co. v. Handman*, 13 Lea, 430.

Where a servant has two or more ways of doing a thing, and the one is dangerous and the other safe, and he chooses the unsafe and is injured, he is guilty of contributory negligence, provided he knew or ought to have known that the one method was safe and the other unsafe.

Bailey, Personal Injuries, 2d ed. § 469; *Erskine v. Chino Valley Beet-Sugar Co.* 71 Fed. 270; *Gribben v. Yellow Aster Min. & Mill. Co.* 142 Cal. 248, 75 Pac. 839, 16 Am. Neg. Rep. 1; *Nashville Spoke & Handle Co. v. Thomas*, 114 Tenn. 458, 86 S. W. 379.

A ladder is a "simple appliance" or "hand tool," as to which the servant's knowledge is equal or superior to the master's.

Cahill v. Hilton, 106 N. Y. 512, 13 N. E. 339; *Sheridan v. Gorham Mfg. Co.* 28 R. I. 256, 13 L.R.A. (N.S.) 687, 66 Atl. 576; *Borden v. Daisy Roller Mill Co.* 98 Wis. 407, 67 Am. St. Rep. 816, 74 N. W. 91; *Brewer v. Tennessee Coal, Iron & R. Co.* 97 Tenn. 615, 37 S. W. 549.

Messrs. Parks & Bell and R. B. O. Howell for defendant in certiorari.

Green, J., delivered the opinion of the court:

The defendant in error, Black, brought this suit to recover damages for injuries alleged to have been sustained by him while he was in the employ of the plaintiff in error. He was foreman of a painters' crew, and when descending a ladder from the roof of a house on which he was at work, one of the rounds broke and he had a fall, as the result of which he sues.

There was a judgment in his favor for \$700 in the court below, which was affirmed by the court of civil appeals. The case is before us on writ of certiorari granted to the action of the latter court.

A motion for peremptory instructions in its favor was made by the defendant below, which was overruled by the trial court. It is with reference to this action of the trial court that the principal controversy has been waged in this court and in the court of civil appeals.

The first ground upon which the motion is predicated is that a ladder, such as the one used by defendant in error, is a simple tool, and it is insisted that defendant in error assumed the risk of its use, and the master owed him no duty of inspection in regard to the same.

The ladder which broke seems to have been a portion of a sectional ladder. There was nothing complicated about it, and only this particular section was in use when de-

fendant in error had his fall. Such a ladder so used is a simple tool, and a servant ordinarily does assume any risk incident to its employment. We have expressly so held in the late case of *Sivley v. Nixon Min. Drill Co.* — Tenn. —, ante, 337, 104 S. W. 772.

It was said in this case that "an ordinary ladder falls within the class of simple tools, in respect of a defect in which the employer is held not liable on the ground that a defect in such a simple tool must be obvious to its user, by whom any risk of danger therefrom must be held to be assumed."

In the case under consideration, however, proof was introduced by plaintiff below tending to show that the superintendent of plaintiff in error had been notified of a defect in this ladder by another foreman who had formerly used it. This foreman testifies he discovered that the ladder was defective, and refused to employ it in his work; that he was questioned by the superintendent as to why he put it aside, and that he (the foreman) then called the attention of the superintendent to the defects. The foreman testifies, further, that the superintendent differed from him as to the condition of the ladder, and insisted that it was safe. All this happened a short while before plaintiff below sustained his fall.

This proof takes the case out of the authority of *Sivley v. Nixon Min. Drill Co.* supra, in so far as peremptory instructions are concerned.

The general principle is that a master is bound to inspect tools or appliances furnished by him to his workmen, and to keep them in sufficient repair. If, however, the tools or appliances are common or simple tools, there is an exception to this general rule. The presumption in such cases is that the servant is equally conversant with the nature of such simple or common tools, and is in as good a position as the master to discover any defects therein.

The master's opportunities for learning of a fault in a tool of this kind are no better than the opportunities of the servant. By reason of the character of such an implement, no superiority of knowledge on the part of the master exists, or can be presumed, as to defects therein. The foundation of the simple tool doctrine is the assumption that the knowledge of the master and servant must be equal.

Such a presumption cannot be indulged where the master has actual notice of a defect, where the proof shows his knowledge is superior. If the master is, as a matter of fact, cognizant that a tool with which he furnishes an employee is in such

a condition as to render its use by the employee dangerous to the latter, he will be liable for an injury sustained by the employee in the use of such an implement, where the defect is not known to the employee, and is not of such a nature as to be discovered by that observation which would naturally accompany its use. *Guthrie v. Louisville & N. R. Co.* 11 Lea, 372, 47 Am. Rep. 286; *Stork v. Charles Stolper Cooperage Co.* 127 Wis. 318, 106 N. W. 841, 7 Ann. Cas. 339; *Mercer v. Atlantic Coast Line R. Co.* 154 N. C. 399, 70 S. E. 742, Ann. Cas. 1912A, 1002, 2 N. C. C. A. 118.

In the latter case it is apparently held that the duty of a master to exercise ordinary care to furnish reasonably proper tools to his servants applies to simple, as well as to complicated, tools, and the rule is relaxed only as to the duty of inspection thereafter. See, however, cases in note following report of this decision in Ann. Cas. 1912A, 1002-1004.

Although the master is not required to inspect simple tools previously furnished to the employee, to discover defects of which the employee using such implements should be aware, and although generally no inspection of a simple tool may be necessary at the time it is delivered to an employee, yet if the master furnishes such a tool, with a dangerous defect of which he has actual knowledge, he is negligent. He should not be permitted to expose the servant to such a risk, particularly if the defect is of such a character that it might be overlooked by the servant. There is testimony in this record that the defective condition of the round of the ladder which broke was not readily discoverable.

For the reasons above stated the trial judge properly overruled the first ground of the motion to direct a verdict.

It is next urged that the injuries of the defendant in error were sustained as a result of his contributory negligence. It is said that he was descending this ladder at the time he fell, face foremost; that in this way, he put all his weight on the rounds of the ladder, and was not in a position to hold to the sides of the ladder with his hands when the round broke, as he would have been if he had come down backwards.

It is urged that when an employee has two methods in which to do his work, one of which is safe and the other dangerous, he cannot hold the master liable when he adopts the latter method and is injured. This is a correct principle; but, in the absence of proof, the court is not willing to say, as a matter of law, that the defendant in error was guilty of such contributory

negligence in descending the ladder in the manner he did as to bar his recovery.

It is insisted that the proper use of a ladder is of common knowledge, and that the court should view the act of defendant in error as it would the act of a person who jumps from a moving train, and hold him guilty of contributory negligence without proof. We think, however, there might be some reasonable difference of opinion as to the proper manner in which workmen may use a ladder. They frequently ascend and descend with material and tools in their hands, without holding, and are expected so to do. While we know it would have been safer for defendant in error to have descended this ladder backwards, with his hands on the rails, yet we would not be justified, upon our own knowledge, in imputing such negligence to him, on account of the manner of his descent, under the facts and circumstances of this case, as to defeat his action.

The question of contributory negligence, as well as the question of negligence, is ordinarily for the jury. Even though the facts be undisputed, if intelligent minds might draw different conclusions as to whether, under circumstances conceded, the conduct of a plaintiff was that of an ordinarily prudent man, the matter should be left to the jury. The court should draw no inference when in doubt, but only in those cases where the evidence is without material conflict, and such that all reasonable men must reach the same conclusion therefrom. It is only in cases where the evidence is susceptible of no other fair inference that the court is justified in instructing the jury, as a matter of law, that the plaintiff has been guilty of contributory negligence which would bar his recovery. *Knoxville Traction Co. v. Carroll*, 113 Tenn. 514, 82 S. W. 313; *Knoxville Traction Co. v. Brown*, 115 Tenn. 323, 89 S. W. 319; *Cummings v. Wichita R. & Light Co.* 68 Kan. 218, 74 Pac. 1104, 1 Ann. Cas. 708, 15 Am. Neg. Rep. 548; *Vindicator Consol. Gold Min. Co. v. Firstbrook*, 36 Colo. 498, 86 Pac. 313, 10 Ann. Cas. 1108; *Merchants' Ice & Cold Storage Co. v. Bargholt*, 129 Ky. 60, 110 S. W. 364, 16 Ann. Cas. 965; *Burch v. Southern P. Co.* 32 Nev. 75, 104 Pac. 225, Ann. Cas. 1912B, 1166.

We must decline, therefore, to say that the defendant in error as a matter of law was guilty of such contributory negligence as to defeat his suit. This question should have been left to the jury under a proper charge.

The defendant below offered several requests presenting its theory as to the use of simple tools, and as to the contributory

negligence of the plaintiff there. These requests were refused by the circuit judge. While, for reasons stated above, a verdict should not have been directed, the doctrine of simple tools should have been charged, with the qualifications herein indicated. His Honor did not charge the doctrine of simple tools at all, and his charge upon contributory negligence was quite meager, the theory of plaintiff in error was not fairly submitted, and the whole case went to the jury under a charge insufficiently stating the rules of law applicable thereto.

The case will accordingly be reversed, for errors in the charge, and remanded for another trial.

TENNESSEE SUPREME COURT.

FECHHEIMER-KEIFFER COMPANY,
Plff. in Certiorari,

v.

D. L. BURTON et al.

(— Tenn. —, 164 S. W. 1179.)

Bulk sales law — distribution of price among preferred creditors — effect.

One who purchases a stock of goods without complying with the bulk sales law, and whose payment is turned over to preferred creditors of the seller, is liable to the other creditors for their *pro rata* share of the contract price of the property, although he is entitled to credit for the *pro rata* share which was received by the preferred creditors.

(February 7, 1914.)

CERTIORARI to the Court of Civil Appeals to review a decree affirming a decree of the Equity Court for Putnam County in defendants' favor in a suit to hold certain of them liable as purchasers of a

Note. — Right of purchaser in violation of bulk sales law, where price has been applied to payment of creditors of seller.

As to the remedy of creditors where a sale is made in violation of the bulk sales law, see note to *McGreenery v. Murphy*, 30 L.R.A. (N.S.) 374.

While but little authority has been found upon the question as to the rights of a purchaser in violation of the bulk sales law, where the purchase price has been applied to the payment of creditors of the seller, the decision in *FECHHEIMER-KEIFFER Co. v. BURTON*, to the effect that the purchaser is subrogated to the rights of the creditors who have been paid with his money, seems to be sound, and is supported by the other

stock of goods from defendant Burton in violation of the bulk sales act. Reversed.

The facts are stated in the opinion.

Messrs. B. G. Adcock and W. Bryant for plaintiff in certiorari.

Mr. E. D. White for defendants in certiorari.

Williams, J., delivered the opinion of the court:

The bill was filed by complainants, wholesale merchants, to hold liable defendants Cooper & Brown as the purchasers of a stock of goods from defendant Burton, a retail merchant, in violation of the bulk sales act (Acts 1901, chap. 133).

The value of the stock sold in bulk, without compliance with the statute's provi-

sions, was \$924.85, and that sum was paid in notes by the vendees, Cooper & Brown. Both parties were without intent to defraud, and fraud in fact is thus negated.

Two of the three notes of Cooper & Brown were turned over to a brother of the vendor on the day of sale, and on realization he paid the proceeds to bona fide creditors of D. L. Burton. A third purchase-money note executed by the vendee firm was transferred to this brother in his own right, he being a creditor of the vendor.

The chancellor and the court of civil appeals held that, as the entire sum received for the stock of goods had been expended in the payment of this indebtedness of the vendor, D. L. Burton, complainants were

cases most nearly in point. Thus, in *Adams v. Young*, 200 Mass. 588, 86 N. E. 942, where the defendants had purchased a stock of goods in violation of the bulk sales law,—both the seller and the purchaser, however, acting in good faith and with no actual intent to defraud creditors,—and a large part of the consideration was paid over to the holder of two mortgages on the goods, who had taken possession of a part of the property under the terms of his mortgages, and who, upon the payment of his claims, discharged the first mortgage and assigned the second to the purchaser of the goods; and the balance of the purchase price was used in paying other small debts owing by the seller, in part for some of the mortgaged property, and in part for clerical and legal services,—it was held that the plaintiff (the trustee in bankruptcy of the seller) was entitled to no relief against the defendant (the purchaser), the court saying: "One whose purchase of property has for that reason [fraud] been avoided by the creditors of the seller, being himself free from any actual fraud, may stand in the place of creditors whose demands he has paid out of the property or in consideration of the transfer to himself. . . . So, if he has paid off debts which constituted liens or encumbrances upon the property conveyed to him, he may, for his protection and reimbursement, take by subrogation the rights of the secured creditors whom he has thus paid. . . . If, instead of a discharge, he has taken an assignment of such a mortgage or other encumbrance, it will not be treated as merged, but will be upheld in his hands as a charge upon the property. . . . The merely constructive fraud of a purchaser will not prevent him from being protected in this manner, if he has not himself actively participated in the fraud. . . . The application of these principles is fatal to the maintenance of this bill. The defendants have the right to rest upon the mortgage of which they took an assignment. If it were necessary to pass upon that question, it would not be easy to avoid saying that they could rest also upon the mortgage which was paid 51 L.R.A. (N.S.)

and discharged. It was their money that paid the mortgage debts. The fact that the money passed through the hands of the mortgagor, and the form of the transfer which the defendants took, cannot overcome the real effect of the transaction."

So, in *McIntosh v. Owosso Carriage & Sleigh Co.* — Tex. Civ. App. —, 146 S. W. 239, an appeal by the purchasers of a stock of goods in violation of the bulk sales law, from a judgment garnishing them in favor of a creditor of the seller, it appearing that there had been no intentional fraud in the sale, and that the purchasers had paid full value for the goods, partly in cash and by their notes, which they had subsequently paid to the seller, and largely by assuming two debts owing by the seller for the goods, which they had also paid prior to the institution of the garnishment suit,—the court said that, as against the seller's creditors, the purchasers "acquired no title to the goods, in excess of the debts owing on such goods and paid by them."

For a brief history of the earlier bulk sales legislation, and a full consideration of the earlier authorities as to the validity and construction, in general, of bulk sales statutes, including a few earlier cases on procedure, see note to *Everett Produce Co. v. Smith*, 2 L.R.A. (N.S.) 331; and for later cases as to the constitutionality of this legislation, see note to *Young v. Lemieux*, 20 L.R.A. (N.S.) 160.

For the later cases as to what kind or classes of property are within the operation of bulk sales statutes, see notes to *Cooney, E. & Co. v. Sweat*, 25 L.R.A. (N.S.) 758, and *Connecticut Steam Brown Stone Co. v. Lewis*, 45 L.R.A. (N.S.) 495; as to the applicability of bulk sales laws to exempt property, see note to *McCormick v. Kistler*, 45 L.R.A. (N.S.) 497; and as to what are "fixtures" within the meaning of bulk sales laws, see note to *Bowen v. Quigley*, 34 L.R.A. (N.S.) 218.

As to the effect of misrepresentations in statement the seller is required to make, as a condition of a valid sale in bulk, see note to *International Silver Co. v. Hull*, 45 L.R.A. (N.S.) 492. A. C. W.

without remedy, although they received no part of the consideration sum.

It seems clear, since the sale was only fraudulent in law (*Daly v. Sumpter Drug Co.* 127 Tenn. 412, 424, 155 S. W. 167), that the purchasers are entitled to stand in the place of the creditors whose demands against their vendor were thus paid by the purchase-money notes, or the proceeds thereof. Those whose purchase of property has been under such a statute denounced as constructively fraudulent, and avoided by creditors of the seller, may stand in the place of other creditors whose demands have been thus paid. This was held in *Adams v. Young*, 200 Mass. 588, 86 N. E. 942, a case involving a sale in violation of the Massachusetts bulk sale act. *Loos v. Wilkinson*, 113 N. Y. 485, 4 L.R.A. 353, 10 Am. St. Rep. 495, 21 N. E. 392; *Alley v. Connell*, 3 Head, 578.

But does it follow that the purchasers may pay, or cause to be paid, one or more of the unsecured creditors of their vendor in full, and leave other creditors of the same grade wholly unpaid, and successfully withstand a complaint by the latter?

The recoveries of all of the creditors of the seller cannot exceed, in the aggregate, the true value of the property fraudulently passed to the purchasers, and therefore converted.

May the entire purchase price be paid by the purchaser to one creditor, leaving the others remediless, where that price was the value of the stock of goods converted?

If this may be done, it would seem that a single creditor holding a demand against the seller equal in amount to the value of the stock of goods on hand could purchase that stock without complying with the terms of the act, or contravening its provisions. In the case of *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50, the purchaser was a creditor of the seller, but that fact was not remarked on for differentiation to save the sale there involved, which was held to be fraudulent.

In *Sampson v. Brandon Grocery Co.* 127 Ga. 454, 56 S. E. 48, 9 Ann. Cas. 331, it was said: "The question presented by this record is whether a sale of a stock of goods in bulk by a debtor to his creditor, in partial payment or entire extinguishment of his debt, is valid, unless the sale is made agreeably to the terms of the act approved August 17, 1903 (Acts 1903, p. 92). . . .

This salutary object would not be attained if sales by the debtor to the creditor in the extinguishment of his debt were excepted. . . . But it is contended that if the act of 1903 be applied to a sale of a stock of goods in bulk by a debtor to his creditor, so much of Civ. Code [1895] § 2697, as per-
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mits a debtor to prefer a creditor by a sale without reservation of any benefit will be impliedly repealed. It is a well-recognized canon of statutory construction that a subsequent statute will not repeal a former if the two can be reconciled. Construing the act of 1903 and § 2697 together, we may easily reach the conclusion that sales of stock in bulk by a debtor to a creditor, in extinguishment of his debt, in whole or in part, are still permissible, but that such sales are null and void unless there be compliance with the terms of the act of 1903."

The same rule as to a creditor purchaser was announced in *Gallus v. Elmer*, 193 Mass. 106, 78 N. E. 772, 8 Ann. Cas. 1067, and assumed in the decision of other cases cited in note in 9 Ann. Cas. 332.

Both phases of the above decision by the Georgia court are approved by us as sound, when application is made of its principles to our bulk sales act and our law touching the right of an insolvent debtor to prefer a creditor. If the preference may not be made directly by way of a bulk sale to the creditor, it would seem that the preference of one, with consequent exclusion of other creditors, cannot be reached by indirection in the manner presented on this record.

The true theory appears to us to be that declared by the supreme court of Washington in *Fitz Henry v. Munter*, 33 Wash. 629, 74 Pac. 1003, where, in speaking of a like act, it was said: "The object of this law was to hold the goods of debtors under such circumstances as a trust fund for the benefit of all the creditors, and to hold the purchaser in possession as a trustee for such creditors. This being so, the cause will have to be reversed, with instruction to distribute the funds *pro rata* to all of the creditors who are parties to the suit."

See also *Kohn v. Fishbach*, 36 Wash. 69, 104 Am. St. Rep. 641, 78 Pac. 199; *Appel Mercantile Co. v. Bark*, 92 Neb. 669, 675, 138 N. W. 1133; *Guaranty Title & T. Co. v. Pearlman* (D. C.) 144 Fed. 550. But see, seemingly *contra*, *National Grocer Co. v. Plotler*, 167 Mich. 626, 133 N. W. 493.

In *Gallus v. Elmer*, *supra*, the Massachusetts court said, in reference to such a statute, that it was its purpose to prevent alienation by a merchant of his stock of goods "away from his creditors in general." A prime purpose of the statute was to prevent preferences of creditors by and through bulk sales. Any other view and ruling would render the act the easy instrument of inequality and injustice, if not of frauds, differing only in kind from those it was meant to prevent.

The rule of distribution *pari passu* to creditors of the grantor has been applied, and justly, in cases involving subrogation,

where the conveyance was fraudulent under test of common-law principles, and where no lien had been fixed by one or more of them. *Robinson v. Stewart*, 10 N. Y. 189, 196; *Chatterton v. Mason*, 86 Md. 236, 37 Atl. 960.

Since subrogation is a remedy invented by courts of equity, they will move to administer it where the result will be an equitable one, but not to work injustice to another in the defeat of an equal equity. *American Bonding Co. v. National Mechanics' Bank*, 99 Am. St. Rep. 480 note; *Knaffle v. Knoxville Bkg. & T. Co.* 128 Tenn. —, 50 L.R.A.(N.S.) 167, 159 S. W. 838.

The right of the defendant purchasers, in this case in equity, therefore, was to be subrogated to the rights of the creditors, paid by the proceeds of sale, to a *pro rata* share of the value of the stock of goods.

Complainants' rights are, by parity of reasoning, not to a recovery in full, as contended by them, but to a recovery from appellee firm of the *pro rata* distributable to them.

Writ of certiorari granted complainants; reversed, with remand for further proceedings not inconsistent with what is herein ruled.

VERMONT SUPREME COURT.

BARTON SAVINGS BANK & TRUST COMPANY

v.

I. STEPHENSON et al.

(— Vt. —, 89 Atl. 639.)

Alteration of instruments — changing date of note.

1. Crossing out the date of a note and writing another above it cannot be regarded

Note. — Alteration of date of note.

The general rule stated in the note to *Lombardo v. Lombardini*, 32 L.R.A.(N.S.) 515, to which the present note is merely supplementary, to the effect that a change of date is a material alteration, finds support in the following recent decisions: *Pensacola State Bank v. Melton*, 210 Fed. 57; *Fry v. Jenkins*, 173 Ill. App. 486; *Bodine v. Berg*, 82 N. J. L. 662, 40 L.R.A.(N.S.) 65, 82 Atl. 901, Ann. Cas. 1913D, 721; *Cornog v. Wilson*, 231 Pa. 281, 80 Atl. 174; *Baldwin v. Haskell Nat. Bank*, 104 Tex. 122, 133 S. W. 864, 134 S. W. 1178, reversing — *Tex. Civ. App.* —, 124 S. W. 443; *Schubert v. Schubert*, 168 Ill. App. 419.

To so change the date of a note as to bring it within the statute of limitations is a material alteration. *Schubert v. Schubert*, supra.

In *Baldwin v. Haskell Nat. Bank*, 104 Tex. 122, 133 S. W. 864, 134 S. W. 1178, 51 L.R.A.(N.S.)

as mere memorandum of the time from which interest is to be figured, rather than an alteration of the instrument.

Same — alteration by comaker.

2. Alteration of the date of a note by one of several makers to whom it has been intrusted for delivery, before delivering it, and without the consent of the comakers, avoids the instrument.

Same — materiality.

3. Change of date of a note by one of several comakers to whom the instrument has been intrusted for delivery cannot be regarded as immaterial because it was intended to give the instrument the date to which interest had been paid on a prior note which it was intended to renew; at least, as to persons not parties to the old note.

Bills and notes — alteration — presumption as to time.

4. An indorsee of a note containing an alteration in its date cannot rely upon the presumption that the alteration was made before its execution, to establish the validity of the instrument, if the alteration was in fact made under circumstances which avoid it.

(February 14, 1914.)

EXCEPTIONS by plaintiff to rulings of the Orleans County Court made during the trial of an action on a promissory note which resulted in a judgment against defendant Stephenson alone. Affirmed.

The facts are stated in the opinion.

Messrs. Young & Young, for plaintiff:

The intent with which the "December 1st" was written and "June 1" lined out was material. It is not the fact that an instrument is altered, that makes it void. It is the intent that gives the act its character and avoids the instrument.

Bigelow v. Stilphen, 35 Vt. 521; *Smith v. Dunham*, 8 Pick. 246; *Adams v. Frye*, 3

reversing — *Tex. Civ. App.* —, 124 S. W. 443, a note bearing interest from maturity was executed to a bank, and a controversy arising as to whether it was intended to bear interest from date, the cashier wrote in a blank after the printed word "maturity," the word "date" in pencil. It was held that the alteration thus effected was material, and that its legal effect could not be defeated on the ground that it was a mere memorandum. The court said: "Was the alteration material? The court of civil appeals held not. This holding seems to have been based on the theory that there was no difference between the expressions 'maturity' and 'maturity date.'" If, determined in the light of all the facts, and having reference to the contentions of the several parties, it should be held that the inserted word 'date' was intended not to supersede the printed word 'maturity,' and to express a different intention from that evidenced by the language

Met. 103; Ford v. Ford, 17 Pick. 418; Ames v. Colburn, 11 Gray, 390, 71 Am. Dec. 723; Lee v. Butler, 167 Mass. 426, 57 Am. St. Rep. 466, 46 N. E. 52; Milbery v. Storer, 75 Me. 69, 46 Am. Rep. 361; Thornton v. Appleton, 29 Me. 298; Crosswell v. Labree, 81 Me. 44, 10 Am. St. Rep. 238, 16 Atl. 331; Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232; Murray v. Peterson, 6 Wash. 418, 33 Pac. 969; Wolferman v. Bell, 36 Am. St. Rep. 129, note; Conner v. Routh, 7 How. (Miss.) 176, 40 Am. Dec. 59; Vogle v. Ripper, 34 Ill. 100, 85 Am. Dec. 298; Kountz v. Kennedy, 63 Pa. 187, 3 Am. Rep. 541.

"December 1st" was written above "June 1" and lines drawn through "June 1" in furtherance of an honest purpose to show the exact intent of each maker when he signed the note, namely, to renew the exact amount due upon the first note when the note in suit was delivered to the payee, and the note remained the valid note of all defendants.

Derby v. Thrall, 44 Vt. 413, 8 Am. Rep. 389; Murray v. Graham, 29 Iowa, 520; Barlow v. Buckingham, 68 Iowa, 169, 26

N. W. 58; Duker v. Franz, 7 Bush, 273, 3 Am. Rep. 314; Jessup v. Dennison, 2 Disney (Ohio) 150; Hammerschlag v. Union Nat. Bank, 13 W. N. C. 205; Hervey v. Harvey, 15 Me. 357.

The law presumes the change, if change it is, to have been made before signature. The payee and plaintiff were in no fault in relying on this presumption and accepting the note.

Fletcher v. Blodgett, 16 Vt. 26, 42 Am. Dec. 487; Beaman v. Russell, 20 Vt. 205, 49 Am. Dec. 775; Wolferman v. Bell, 6 Wash. 84, 36 Am. St. Rep. 126, 32 Pac. 1017; Little v. Herndon, 10 Wall. 26, 19 L. ed. 878; Doe ex dem. Tatum v. Catomore, 16 Q. B. 745, 20 L. J. Q. B. N. S. 364; 1 Greenl. Ev. § 564.

An alteration in a promissory note, which makes it conform to the true intention of the parties, if honestly made, with no intent of procuring any advantage, will not vitiate the note.

McRaven v. Crisler. 53 Miss. 542.

The note in its present form was used to accomplish, and did accomplish, the exact

as it stood, but was to be read in harmony with such printed word and as meaning the same thing, the addition of the word 'date' would be but idle surplusage, and there would be some fair warrant for the opinion of the court of civil appeals. But it seems to us clear that this was not the intention of the cashier, nor do we believe that there is any testimony in the record which presents this view. Nor do we think in the light of the situation, presented by the contention of the respective parties can this intention be gathered from the instrument. It is a rule of almost universal application that 'where, as in the use of printed forms, a contract is partly printed and partly written, and there is a conflict between the printing and the writing, the writing will prevail.' 9 Cyc. 584. Again while, as used, there may be no irreconcilable repugnancy in the use of the words together, 'maturity date,' . . . and as applied to the controversy here involved, it is utterly unreasonable to conclude that no change was wrought or intended to be wrought in the instrument sued on by the insertion of the word 'date.' If the note had been originally drawn so as to bear interest from date, and if thereafter, without the consent of the bank, plaintiff in error had inscribed in a blank space left in the note the word 'maturity,' so as to make same read, if both words are to be considered as parts thereof, 'date maturity,' could such a change be upheld on the ground that it meant the same thing as originally written? We cannot think so. In any event, it cannot be denied that the insertion of the word 'date' left ambiguous and uncertain what was, when the note was signed, left beyond doubt clear 51 L.R.A. (N.S.)

and explicit. Nor do we think that the legal effect of the evident alteration can be defeated on the ground that it was a mere memorandum. As we view the matter, it is quite a different alteration from a mere marginal memorandum, which is sometimes treated as no part of the note proper, but simply as a memorandum for information or convenience."

In Pensacola State Bank v. Melton, 210 Fed. 57, the court declared that a statutory provision that any alteration which changes the time of payment of a negotiable instrument is a material alteration was but a declaration of the common law.

In Ensign v. Fogg, — Mich. —, 143 N. W. 82, where the date of a note was alleged to have been altered, it was held that, there being nothing suspicious upon the face of the instrument beyond the fact that an erasure was manifest, the presumption was that the alteration was made before the note was signed.

And in Corzog v. Wilson, 231 Pa. 281, 80 Atl. 174, a note was held properly rejected as evidence of a debt in the absence of proof that an alteration in date was made before delivery. The court said: "When it clearly appears on the face of a writing that it has been altered in a material part, it is incumbent on the party producing it to account for the alteration, and until this is done it is not admissible in evidence. This rule is more stringent when applied to negotiable paper than to other written instruments, and in relation to it there is no presumption of innocence, and the burden of explaining any apparent material alteration is cast on the holder thereof."

W. W. A.

purpose and intent of all the defendants in making it.

Boyd v. Brotherson, 10 Wend. 93.

An alteration, though in a material part, will not vacate the instrument, where the bill is altered to correct a mistake, or supply an omission, and in furtherance of the original intent of the parties.

Byles, Bills & Notes, 6th Am. ed. 486, *320; Ames v. Colburn, 11 Gray, 390, 71 Am. Dec. 723; Jacobs v. Hart, 2 Starkie, 45, 6 Maule & S. 142, 18 Revised Rep. 335; Byrom v. Thompson, 11 Ad. & El. 31, 3 Perry & D. 71, 9 L. J. Q. B. N. S. 26, 3 Jur. 1121; Brutt v. Picard, Ryan & M. 37, 27 Revised Rep. 727; Dodge v. Pringle, 29 L. J. Exch. N. S. 115; Derby v. Thrall, 44 Vt. 413, 8 Am. Rep. 389; Duker v. Franz, 7 Bush, 273, 3 Am. Rep. 314; Collins v. Makepeace, 13 Ind. 448; Murray v. Graham, 29 Iowa, 520; Kountz v. Kennedy, 63 Pa. 187, 3 Am. Rep. 541; Cole v. Hills, 44 N. H. 227; Hervey v. Harvey, 15 Me. 357.

An alteration, though in a material part, will not vacate the instrument, where such alteration is made before the bill is issued.

Byles, Bills & Notes, 6th Am. ed. p. 486, *320; Catton v. Simpson, 8 Ad. & El. 136; Ex parte Yates, 2 De G. & J. 191, 27 L. J. Bankr. N. S. 9, 4 Jur. N. S. 649, 6 Week. Rep. 178; Dodge v. Pringle, 29 L. J. Exch. N. S. 115; Aldous v. Cornwall, 9 Best & S. 607, L. R. 3 Q. B. 573, 37 L. J. Q. B. N. S. 201, 16 Week. Rep. 1045; Kennerly v. Nash, 1 Starkie, 452; Downes v. Richardson, 5 Barn. & Ald. 674, 1 Dowl. & R. 332, 24 Revised Rep. 522; Tarleton v. Shingler, 7 C. B. 812.

The rule that the alteration of a negotiable instrument by the party benefited thereby vitiates the note applies only to cases where alteration has been made by the payee or party seeking to enforce the instrument.

Fullerton v. Sturges, 4 Ohio St. 529; Draper v. Wood, 17 Am. Rep. 100, note; United States v. Linn, 1 How. 104, 11 L. ed. 64; Bridges v. Winters, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598; Bigelow v. Stilphen, 35 Vt. 521; Bellows v. Weeks, 41 Vt. 590; Walsh v. Hunt, 120 Cal. 46, 39 L.R.A. 697, 52 Pac. 115; Herrick v. Baldwin, 17 Minn. 209, Gil. 183, 10 Am. Rep. 161.

In writing "December 1st" above "June 1," Stephenson was agent of all the defendants in making the note conform to their intention, or what he did was the act of a stranger.

Fullerton v. Sturges, 4 Ohio St. 529; Draper v. Wood, 17 Am. Rep. 100, note; Murray v. Graham, 29 Iowa, 520; Bridges v. Winters, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598.
51 L.R.A.(N.S.)

Under the circumstances of this case, Stephenson had authority to make the change which he did make.

Lee v. Butler, 167 Mass. 428, 57 Am. St. Rep. 466, 46 N. E. 52; Murray v. Graham, 29 Iowa, 520; Eddy v. Bond, 19 Me. 461, 36 Am. Dec. 767.

If Stephenson was not defendants' agent in so doing, his act was that of a stranger, was not an alteration, but a mere spoilation, and the note remained a valid note of all defendants as of June 1, 1908.

Bigelow v. Stilphen, 35 Vt. 521; Equitable Mfg. Co. v. Allen, 76 Vt. 22, 104 Am. St. Rep. 915, 56 Atl. 87; Bridges v. Winters, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598; United States v. Linn, 1 How. 104, 11 L. ed. 64; Walsh v. Hunt, 120 Cal. 46, 39 L.R.A. 697, 52 Pac. 115; Lee v. Alexander, 9 B. Mon. 25, 48 Am. Dec. 412; Hunt v. Gray, 35 N. J. L. 237, 10 Am. Rep. 232; Langenberger v. Kroeger, 48 Cal. 147, 17 Am. Rep. 418; Pierson v. Grimes, 30 Ind. 129, 95 Am. Dec. 673; Parsons, Bills & Notes, 569-571; 3 Randolph, Paper, § 1765; Force v. Elizabeth, 28 N. J. Eq. 403; Drum v. Drum, 133 Mass. 566; Rees v. Overbaugh, 6 Cow. 746; Herrick v. Baldwin, 17 Minn. 209, Gil. 183, 10 Am. Rep. 161; Murray v. Graham, 29 Iowa, 520; Kountz v. Kennedy, 63 Pa. 187, 3 Am. Rep. 541; Williams v. Moseley, 2 Fla. 304; Fullerton v. Sturges, 4 Ohio St. 529; Draper v. Wood, 17 Am. Rep. 100, note.

If the change made by Stephenson was an alteration, it was immaterial, and does not release defendants.

Adams v. Frye, 3 Met. 103; Bridges v. Winters, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598; Eddy v. Bond, 19 Me. 461, 36 Am. Dec. 767; Michigan Ins. Co. v. Leavenworth, 30 Vt. 11; Drexler v. Smith, 30 Fed. 754; Herrick v. Baldwin, 17 Minn. 209, Gil. 183, 10 Am. Rep. 161; Bingham v. Reddy, 5 Ben. 266, Fed. Cas. No. 1,414; Reed v. Roark, 14 Tex. 329, 65 Am. Dec. 127; Burgess v. Blake, 86 Am. St. Rep. 84, note; Clark v. Kidder, 12 Vt. 689; Broughton v. Fuller, 9 Vt. 373; Derby v. Thrall, 44 Vt. 413, 8 Am. Rep. 389; Kountz v. Kennedy 63 Pa. 187, 3 Am. Rep. 541; Bashaw v. Wallace, 101 Va. 733, 45 S. E. 290; San Antonio Brewing Asso. v. J. M. Abbott Oil Co. — Tex. Civ. App. —, 129 S. W. 373; Lombardo v. Lombardini, 57 Wash. 352, 32 L.R.A.(N.S.) 515, 106 Pac. 907.

If Stephenson's act was fraudulent in writing "December 1st" and lining out "June 1," and he was not the agent of the defendants in so doing, his act was that of a stranger, and had no effect.

Fullerton v. Sturges, 4 Ohio St. 529; Draper v. Wood, 17 Am. Rep. 100, note;

Walsh v. Hunt, 120 Cal. 46, 39 L.R.A. 697, 52 Pac. 115.

Messrs. Harland B. Howe, J. W. Redmond, and H. W. Witters, for defendants:

The indicated change of date vitiated the note as to all defendants other than Stephenson.

2 Cyc. 144, 145; Hershman v. Stafford, 58 W. Va. 459, 52 S. E. 533; McGavock v. Morton, 57 Neb. 385, 77 N. W. 785; Sherwood v. Merritt, 83 Wis. 233, 53 N. W. 512; Pew v. Laughlin, 3 Fed. 39; The Hero, 6 Fed. 526; Waterman v. Vose, 43 Me. 504; Bethune v. Dozier, 10 Ga. 235.

The change of date in the circumstances was a material alteration, aborted the nascent contract, and no action can be maintained on either the original or the altered instrument against any of the defendants except Stephenson, who made the alteration.

Bigelow, Bills & Notes, 187; Mersman v. Werges, 112 U. S. 141, 28 L. ed. 642, 5 Sup. Ct. Rep. 65; Wood v. Steele, 6 Wall. 80, 18 L. ed. 725; Angle v. North-Western Mut. L. Ins. Co. 92 U. S. 330, 23 L. ed. 556; Greenfield Sav. Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67; Crawford v. West Side Bank, 100 N. Y. 50, 53 Am. Rep. 152, 2 N. E. 881; Dietz v. Harder, 72 Ind. 208; Flanigan v. Phelps, 42 Minn. 186, 43 N. W. 1113; Dan. Neg. Inst. 5th ed. §§ 1373, 1375, 1376; 2 Jones, Ev. § 573; 2 Elliott, Ev. § 1492; Montgomery v. Crossthwait, 90 Ala. 553, 12 L.R.A. 140, 24 Am. St. Rep. 832, 8 So. 498; Woodworth v. Bank of America, 19 Johns. 391, 10 Am. Dec. 239; Draper v. Wood, 112 Mass. 315, 17 Am. Rep. 92; Weir Plow Co. v. Walmsley, 110 Ind. 242, 11 N. E. 232; Benedict v. Cowden, 49 N. Y. 396, 10 Am. Rep. 382; Miller v. Finley, 26 Mich. 249, 12 Am. Rep. 306; Warrington v. Early, 2 El. & Bl. 763, 2 C. L. R. 398, 23 L. J. Q. B. N. S. 47, 18 Jur. 42, 2 Week. Rep. 78; Fordyce v. Kosminski, 49 Ark. 40, 4 Am. St. Rep. 18, 3 S. W. 892; McDaniel v. Whitsett, 96 Tenn. 10, 33 S. W. 567; National Ulster County Bank v. Madden, 114 N. Y. 280, 11 Am. St. Rep. 633, 21 N. E. 408; Burrows v. Klunk, 70 Md. 451, 3 L.R.A. 576, 14 Am. St. Rep. 371, 17 Atl. 378; Phoenix Ins. Co. v. McKernan, 100 Ky. 97, 37 S. W. 490; Hartley v. Corbooy, 150 Pa. 23, 24 Atl. 295; 2 Cyc. 180, 182.

Whether the alteration is material is a question of law for the court.

2 Elliott, Ev. § 1516; Steele v. Spencer, 1 Pet. 552, 7 L. ed. 259; Payne v. Long, 121 Ala. 385, 25 So. 780; Heard v. Tappan, 116 Ga. 930, 43 S. E. 375; Belfast Nat. Bank v. Harriman, 68 Me. 522; Keen v. Monroe, 75 Va. 424; Pritchard v. Smith, 51 L.R.A. (N.S.)

77 Ga. 463; Vance v. Lowther, L. R. 1 Exch. 176, 45 L. J. Exch. N. S. 200, 34 L. T. N. S. 286, 24 Week. Rep. 372; Overton v. Matthews, 35 Ark. 146, 37 Am. Rep. 9; Winkles v. Guenther, 98 Ga. 472, 25 S. E. 527; Bowers v. Jewell, 2 N. H. 543.

The date of a note is a material part of the contract.

Joyce, Com. Papers, § 152; Boulton v. Langmuir, 24 Ont. App. Rep. 618; Mersman v. Werges, 112 U. S. 141, 28 L. ed. 642, 5 Sup. Ct. Rep. 65; Britton v. Dierker, 46 Mo. 591, 2 Am. Rep. 553; Outhwaite v. Luntley, 4 Campb. 179, 16 Revised Rep. 771; Vance v. Lowther, L. R. 1 Exch. 176, 45 L. J. Exch. N. S. 200, 34 L. T. N. S. 286, 24 Week. Rep. 372; 2 Elliott, Ev. §§ 1492, 1494; 2 Jones, Ev. § 573; 2 Cyc. 201; Montgomery v. Crossthwait, 90 Ala. 553, 12 L.R.A. 140, 24 Am. St. Rep. 832, 8 So. 498; Miller v. Gilleland, 19 Pa. 119; Lisle v. Rogers, 18 B. Mon. 528; Taylor v. Taylor, 12 Lea, 714; Bathe v. Taylor, 15 East, 412; Draper v. Wood, 17 Am. Rep. 101, note; Woodworth v. Bank of America, 10 Am. Dec. 268, note; Ames v. Colburn, 71 Am. Dec. 724, note.

Munson, J., delivered the opinion of the court:

The suit is upon a note, the body of which is as follows: "On demand after date for value received, we each as principal, jointly and severally, promise to pay the Barton National Bank or order, at their banking rooms in Barton, Vermont, \$7,000, with interest payable semiannually on the 1st day of June and December each year." The note bears the payee's indorsement to the plaintiff. There are ten signers to the note, all of whom are defendants. The date of the note as originally drawn was June 1, 1908. The face of the note shows a change by drawing lines in ink across "June 1," and writing above this the words "December 1st." The part thus crossed remains perfectly legible.

From May, 1904, until the giving of the note in suit, the Barton National Bank held a note identical in terms with the note in suit, which was signed by defendant Stephenson and nine others, three of whom had deceased before the new note was given, and six of whom became signers on the new note and are defendants herein. The remaining signers on the new note were procured on the requirement of the bank to take the place of the former signers who had deceased. The note in suit was prepared by the cashier of the bank after the interest on the old note had been paid to June 1, 1908, and was mailed to Stephenson for the required signatures July 10, 1908. Several letters urging attention to

the matter were written to Stephenson in the next four months. December 3, 1908, he paid the interest on the old note to December 1st. The note in suit was delivered to the bank by mail in exchange for the old note March 10, 1909. March 15, 1909, the plaintiff bank purchased from the liquidator of the Barton National Bank all its assets, including the note in suit. The first note was not presented to the commissioners on the estate of either of the three signers who had deceased. The three signers of the new note who were not on the first note are Horace S. Richardson, Homer W. Tillotson, and J. S. Brahana. Richardson and Tillotson were sons of deceased signers of the first note, and Brahana was the brother of a deceased signer. Richardson testified that he understood, at the time he signed, that his father was on the previous note. Nothing further appears as to any knowledge of these signers regarding the first note. The signatures to the note in suit were procured at different times from July, 1908, to March, 1909. Subsequent to the signing of the note, and just before sending it to the bank, Stephenson, made the change above described, without the knowledge, authorization, or consent of any of the other defendants, unless the law implies such authority or consent from the conduct of the parties. Stephenson testified that he made the change to have the note correspond with the date to which interest had been paid on the old note.

The declaration contains the general counts and four special counts. The first special count declares on the instrument as a note dated June 1, 1908; the second declares on it as a note dated December 1, 1908; and the third declares on it as a note delivered to the Barton National Bank on the 10th day of March, 1909, without alleging a date. The plaintiff recovered a judgment against Stephenson, and the other defendants had judgment for their costs. In speaking of the defendants, the reference will be to the nine defendants who had judgment. The case antedates the operation of No. 99, Acts of 1912, known as the negotiable instruments act.

The plaintiff claims that the court should have held, or permitted the jury to find, that the words "December 1st" were a mere memorandum of the time from which interest was to be figured, and not an alteration of the date. It is true that entries may be made on the face of a note, which, if made to serve the purposes of a memorandum, and without an intention to alter the instrument, will not affect its validity. *Carr v. Welch*, 46 Ill. 88; *Maness v. Henry*, 96 Ala. 454, 11 So. 410. If Stephenson had

written these words in pencil or red ink above the date and without crossing it out, the entry could doubtless be treated as a mere memorandum; but the writing of one in connection with the crossing out of the other, both in the same durable substance, forbids this construction. An inspection of the note shows an alteration in fact, and Stephenson's testimony as to his purpose in making it cannot convert it into a mere memorandum.

The general proposition that any material alteration of a note will render it void cannot well be questioned. The rule governing the subject of the alteration of writings has been stated in these terms: "Any material alteration in a written contract, made without the consent of the party sought to be charged thereon, at any time after its execution by him, renders it void as to him, even in the hands of an innocent holder." The more recent statements of the rule confine it to changes made by a party to the writing or one claiming under him. Notes in 10 Am. Dec. 267, and 86 Am. St. Rep. 82. A material alteration is one which makes the instrument speak a language different in legal effect from that which it originally spoke; an alteration which produces some change in the rights, interests, or obligations of the parties to the instrument. 1 Greenl. Ev. § 565; Note in 86 Am. St. Rep. 86. An alteration in the date of a writing, if it results in altering the legal effect of the instrument, as by changing the day of maturity, is a material alteration. *Wald's Pollock*, Contr. 871; 2 Cyc. 201. The date of a note ordinarily evidences the inception of the undertaking, fixes the time of payment, and determines the period of limitation; and when this is the case, any change in the date will impart to the note a new legal effect and operation. 2 Dan. Neg. Inst. §§ 1376, 1377; *Newman v. King*, 54 Ohio St. 273, 35 L.R.A. 471, 56 Am. St. Rep. 705, 43 N. E. 683; *Lisle v. Rogers*, 18 B. Mon. 528; *Miller v. Gilleland*, 19 Pa. 119.

But the plaintiff urges upon several grounds, that while a change in the date of a note may ordinarily be material, it cannot be so regarded in the circumstances of this case. The specific claims presented will be best stated and considered in connection with some reference to the cases. In referring to the authorities upon this subject, it is important to notice the relation sustained to the writing by the one making the alteration. In many of the cases the alteration was made by the payee of the note after its delivery. In other cases, as in the case submitted here, the alteration was made by one of several

makers, after the note had been signed by others, and before it was delivered. In cases of the first class, the question manifestly relates to the effect of an alteration in a completed and existing contract. In cases of the second class, it may be said, as to those who had previously signed, that the alteration comes in to prevent the completion of a contract, rather than to avoid a contract which has come into existence. This view is presented by the defendants, and will be found in the reasoning of several decisions. *Fay v. Smith*, 1 Allen, 477, 79 Am. Dec. 752; *Draper v. Wood*, 112 Mass. 315, 17 Am. Rep. 92; *Blakey v. Johnson*, 13 Bush, 197, 26 Am. Rep. 254.

The argument of the plaintiff seems to raise the question whether Stephenson is to be regarded as a party to the writing within the meaning of the rule. Authorities are quoted which say that an alteration, to avoid an instrument, must be made by one who is entitled to some right or benefit under it, and that a joint promisor or maker is not such a party. Note in 17 Am. Rep. 100; *Fullerton v. Sturges*, 4 Ohio St. 529. But the rule is generally taken to apply to any party to the instrument; and it has been specifically held in numerous cases that an alteration by one obligor or principal, without the consent of his co-obligor or surety, discharges the latter. 2 Cyc. 150, 151, 154; *Montgomery v. Cross-thwait*, 90 Ala. 553, 12 L.R.A. 140, 24 Am. St. Rep. 832, 8 So. 498; *Britton v. Dierker*, 46 Mo. 591, 2 Am. Rep. 553; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Goodman v. Eastman*, 4 N. H. 455; *Wood v. Steele*, 6 Wall. 80, 18 L. ed. 725. The writer of the note in 17 Am. Rep. 98, remarks that the case last cited was apparently not very well considered; but the decision has since been frequently cited by the state courts, and been recognized as authoritative by the court which rendered it. *Mersman v. Werges*, 112 U. S. 139, 28 L. ed. 641, 5 Sup. Ct. Rep. 65. And in *Jones v. Bangs*, 40 Ohio St. 139, 48 Am. Rep. 664, it was remarked that all that was said by the writer of the opinion in *Fullerton v. Sturges* on the law relating to a material alteration was *obiter*. It is only in the case of a note that has been delivered that it can properly be said that an alteration, to be destructive, must be made by, or by the authority of, one who takes some benefit under it.

It is now almost universally held that the alteration of a written instrument by a stranger will not render it void; but courts have had some difficulty in determining who shall be considered a stranger. There is a class of cases where a note is procured by an agent, delivery to whom is delivery

to the payee, but whose subsequent authority is limited to the custody and transmission of the writing; and alterations made by these persons are treated as the acts of a stranger. In this class are *Bigelow v. Stilphen*, 35 Vt. 521; *Equitable Mfg. Co. v. Allen*, 76 Vt. 22, 104 Am. St. Rep. 915, 56 Atl. 87. The plaintiff claims that Stephenson had authority as agent of the other defendants to change the date, and claims further that, if he had no such authority, his act was the act of a stranger and of no effect.

There is nothing in the relation ordinarily existing between the principal makers of a note, or between principal and surety, that authorizes one to change the writing after it has been signed by the other. Note in 86 Am. St. Rep. 107. No authority to alter will be presumed from the mere fact that one leaves the note with the other to be delivered. *Blakey v. Johnson*, *supra*. And it is said in general terms in the note above cited that no agency to alter will be implied from any other agency, special in its nature. See *Walsh v. Hunt*, 120 Cal. 46, 39 L.R.A. 697, 52 Pac. 115. No special argument is made in support of the claim of agency; and the question is apparently advanced for decision to clear the ground for the further claim that, if Stephenson had no authority to make the change, his act was the act of a stranger and left the note unimpaired.

This further claim is based upon the fact that by the terms of the note each signer assumed the liability of a principal. It is said that each of the other principals left the note with Stephenson to be delivered to the bank, and that, as regards that purpose, his relations to the note and to the other principals were the same as they would have been in the case of an ordinary messenger. This cannot be so. Stephenson was a party to the note, and was holding it for delivery for himself as well as for the others. The other signers intrusted it to his possession in his capacity as comaker, and his acts in connection with that possession cannot be accounted acts of a stranger.

But the plaintiff claims that the change of date in this instance was an immaterial alteration, because its effect was simply to make the note conform to what all the makers intended it to be. The courts of several states recognize the doctrine that there may be special circumstances from which the law will imply an authority to alter. Note in 86 Am. St. Rep. 116. The cases are mostly those of alterations by the promisee; and the alterations are generally justified upon the ground that they were made to correct a mistake, and thus

make the writing conform to the intention of the parties. These alterations have included the correction of mistakes in the date, the completion of defective statements of the amount of the debt and the period of credit, and the correction of errors in the name of the payee. Among the cases of the latter class is *Derby v. Thrall*, 44 Vt. 413, 8 Am. Rep. 389. There the payee of a note, who was known to both debtor and surety, and to whom the surety understood the note was being given, was commonly called Frank, and the debtor had him designated as Franklin in the note as drawn, supposing that to be his first name. His name was in fact Francis E., and the debtor permitted him to alter the note in that respect on receiving it. The court treated this as an immaterial alteration. See also *Ames v. Colburn*, 11 Gray, 390, 71 Am. Dec. 723; *Duker v. Franz*, 7 Bush, 273, 3 Am. Rep. 314; *Boyd v. Brotherson*, 10 Wend. 93; *Conner v. Routh*, 7 How. (Miss.) 176, 40 Am. Dec. 59; *Cole v. Hills*, 44 N. H. 227.

The plaintiff argues that the change made here simply carried out the understanding of the makers, and that the case is within the holding in *Derby v. Thrall*. Six of the defendants were signers on the old note; and their purpose in signing the note in suit was not to create a new obligation, but to continue an old one. They knew that this was to be done through an exchange of one note for another, and must have expected that the business would be so transacted as to maintain a continuous liability. This implied that the new note was to be so framed as to commence where the former note ended, and not be such as to show a duplication of interest for a six months' period. The note as originally prepared was drawn to correspond with the situation as it then existed,—with the June interest day past and the interest paid. During the delays incident to procuring the signatures of the required number, another interest day passed, and the additional six month's interest was paid, and the date of the note was changed to correspond with the altered situation. The change was not the correction of a mistake; for there was no mistake in the date as first entered. The same considerations which determined the date in the first instance called for the subsequent change. This change in the date, in connection with the payment of six months' interest, exactly maintained the situation which these six defendants contemplated when they signed the note.

The cases above referred to doubtless afford some support to the plaintiff's contention regarding these matters, as applied to 51 L.R.A.(N.S.)

the six defendants; but the decisions of other courts of equal authority deny the right of one party to a writing to alter it, even though the alteration makes it conform to the understanding of all the parties. If we were to sustain the claim of an implied authority upon the case presented, it would greatly extend the application of the rule adopted in *Derby v. Thrall*. But we are not called upon to determine this question, for it is obvious that the above reasoning has no application to the three defendants who were not parties to the first note, and no point was made in the court below which suggested any ground of recovery not applicable to all the signers. No claim was made to the court in any form at any stage of the trial that left room for the theory that there might be a recovery against some of the nine defendants and not against all. The charge of the court, in treating the right to alter as depending upon consent, evidently referred to consent in fact, and not by implication of law.

The plaintiff also contends that the change in the date is immaterial, because it in no way altered the rights or liabilities of the parties. It is argued that the course of the transaction was such that the change did not effect the operation of the statute of limitations. The note was not completed as to the signatures and delivered to the bank until March 10th, more than three months subsequent to the date of the note as altered. It is said that the date of the delivery was the first day when suit could have been brought on the note, and that it was this that determined the expiration of the period of limitation, and not the change in the date. It is not necessary to take up the inquiry in this form. It is true that Stephenson would have had the right to deliver the note when he did, if nothing more than the delay had intervened. But this writing had ceased to be, or had failed to become, the note of the defendants, because of the alteration before the delivery was made.

It is said further that, while the change might, in one possible contingency, have deprived defendants of the defense of the statute, as it is, they have suffered, and can suffer, no possible harm from it. This argument fails to recognize the true import of the rule. Any alteration which may in any event alter the rights, duties, or obligations of the party sought to be charged is material in the legal sense. It is enough that in some circumstances which might have supervened the alteration might have been prejudicial. *Woodworth v. Bank of America*, 19 Johns. 418, 10 Am. Dec. 239; *Miller v. Gilleland*, 19 Pa. 119, 124;

Soaps v. Eichberg, 42 Ill. App. 375. Moreover, the authorities are practically unanimous in holding that the question whether the alteration was beneficial or prejudicial to the party not consenting is immaterial. *Mahaiwe Bank v. Douglass*, 31 Conn. 170; *Gardner v. Walsh*, 5 El. & Bl. 83, 24 L. J. Q. B. N. S. 285, 1 Jur. N. S. 828, 3 Week. Rep. 460.

It is claimed that the alteration, if material, will not prevent a recovery, because it was made with an honest purpose and intent. There are cases which hold that an alteration made by a payee through some misunderstanding and for an honest purpose will not bar his recovery, if the original language of the instrument remains perfectly legible. But the great weight of authority sustains the general proposition that a material alteration will avoid the instrument, although innocently made. *Master v. Miller*, 2 Smith, Lead. Cas. 9th Am. ed. 1153; *Green v. Sneed*, 101 Ala. 205, 46 Am. St. Rep. 119, 13 So. 277; *Aldrich v. Smith*, 37 Mich. 468, 26 Am. Rep. 536; *Eckert v. Pickel*, 59 Iowa, 545, 13 N. W. 708; *Davis v. Eppler*, 38 Kan. 629, 16 Pac. 793.

In this state it is presumed in the first instance that all alterations in an instrument were made before or at the time of its execution, and the plaintiff argues that it was not in fault in relying on this presumption and accepting the note. But this presumption was not conclusive, and could not be relied upon as a protection when the time of the alteration was questioned in evidence. It could better be said, as is claimed by the defendants, that the plaintiff was put upon inquiry by the appearance of the note. The bank must have known that the change in the date afforded an opportunity for raising some question regarding the note, and it cannot well urge its good faith to establish the validity of the instrument.

Plaintiff claimed a ratification of the change by some of the defendants, including Tillotson, at a certain interview at the bank. Tillotson was called as a witness for the defense, and testified as to the time when and the circumstances under which he signed the note. In cross-examination, and without objection, he produced a letter received from the bank, and testified that he went to the bank at the time named in the letter, but that he went at Stephenson's request, and not in response to the demand for payment. He was then asked whether he did not understand that he was called upon to pay the note, and whether the letter that he had received from the bank had something to do with his going there, which questions were severally ob-

jected to, and were excluded, with the suggestion that the inquiry had better be had in connection with the plaintiff's case in rebuttal. This disposition of the matter was within the court's discretion.

This specifically disposes of or sufficiently covers all the points relied upon. The plaintiff's motion for a verdict was properly overruled, and the case was correctly submitted upon evidence properly received. Judgment affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

CITY OF CHARLESTON et al.

v.

SAMUEL D. LITTLEPAGE, Judge, et al.

(— W. Va. —, 80 S. E. 131.)

Municipal corporation — employment of agent — form of contract.

1. The employment of an agent or attorney to perform a special service for a municipal corporation need not, in the absence of a statute requiring it, be evidenced by a formal ordinance, by-law, or resolution, nor is it essential that it be in writing.

Prohibition — application to lower court.

2. The rule under which a supervising court sometimes requires an applicant for a writ of prohibition first to make application to the lower court for discontinuance or vacation of the proceeding or action complained of, on the ground of lack of jurisdiction, is a discretionary one of courtesy and deference to the court below, and does not apply if it appears in any manner that such court has acted deliberately, or has considered the question of its jurisdiction and intends to proceed.

Courts — jurisdiction — pleading.

3. Where the jurisdiction of a court depends upon the existence of facts, it has no right or power to proceed or act upon a pleading which does not substantially set forth such facts, and, if it has acted upon such insufficient pleading, its claim of right to time for consideration of the sufficiency thereof does not justify or sustain its action in refusing to vacate the void order.

Injunction — against municipal action.

4. In the absence of a statutory right of supervision or control, a court cannot, at the instance of citizens and taxpayers, in any manner restrain or control the govern-

Headnotes by POFFENBARGER, P.

Note. — For other cases on the question of the necessity of making employment of attorney, agent, or employee by municipality a matter of record, see note to *Gilmer v. School Dist.* 50 L.R.A. (N.S.) 99, on the general question of parol evidence to vary or supplement minutes of public body.

ing body of a municipal corporation, in the exercise of powers and functions vested in it by law, whether the discretion and power so vested is legislative, executive or administrative.

(November 4, 1913.)

PETITION for a writ of prohibition to restrain respondents from enforcing an injunction which attempted to restrain petitioners from consideration of and action upon an ordinance granting a franchise to a water company, and contracting with it for a water supply. Writ awarded.

The facts are stated in the opinion.

Messrs. J. E. Chilton and John Baker White for petitioners.

Messrs. B. T. Clayton, Jones, Murphy, & Ballard, Morgan & Morgan, and C. J. Van Fleet for respondents.

Poffenbarger, P., delivered the opinion of the court:

The circuit court of Kanawha county having provisionally enjoined the city of Charleston, the members of its board of affairs, and council, from consideration of a certain ordinance and action thereon, granting a franchise to the West Virginia Water and Electric Company, securing to it privileges in the city streets and alleys for pipe lines for supplying the city and its inhabitants with water, obligating the city to take a certain number of hydrants at specified rentals, and prescribing rates and regulations for supply of water to the inhabitants of the city, and from passing said ordinance, it being then pending in the council, the city and others of the defendants applied to this court for a writ of prohibition to restrain the judge of said court and the plaintiffs in the said bill from enforcing the injunction and from further procedure upon the bill.

Before this action was taken, certain members of the council and the West Virginia Water & Electric Company appeared and filed demurrers to the bill. Chilton, MacCorkle, & Chilton tendered a demurrer on behalf of the city, the board of affairs, and council, which was objected to on the ground of alleged lack of authority in the attorneys to appear for the city, and the court took the objection under advisement. Thereupon and on the same day, four members of the council moved the court to dissolve the injunction, which motion the court overruled. The return sets up the alleged failure of the city, its board of affairs, and council, to appear and demur to the bill or move to dissolve the injunction, as matter for abatement of the rule, and an affidavit was filed showing a search of the records of the meetings of the board of

affairs had disclosed no order or entry appointing or employing J. E. Chilton, a member of said law firm, who actually appeared for the city, an attorney for the board of affairs, or any authority in him to appear on behalf of the city in said cause, or to appear for it in this proceeding to prohibit the prosecution of the injunction bill.

The effort to show such lack of authority apparently proceeds upon the assumption that the employment of the attorney must have been made a matter of record. He is not acting in the capacity of an officer, either elective or appointive. He is a mere employee or agent, and a municipal corporation, in the absence of a statutory restriction upon its powers, may make verbal contracts for such employment, just as private corporations and individuals may. "The contract need not be in writing, except where so required by statute or ordinance. So the employment, in the absence of statutory or charter provisions, need not necessarily be by a formal ordinance, by-law, or resolution. . . . An implied promise to pay therefor, may be raised against a municipality, the same as against an individual, by circumstances." 28 Cyc. 586. A statute requiring all officers not otherwise elected to be elected by the general council does not apply to mere clerks and employees, or laborers, whose appointment may be made in such manner as the council shall designate. *Lowry v. Lexington*, 113 Ky. 763, 68 S. W. 1109. That such contracts, to be valid, need not be made matter of record, is well established. *Ross v. Madison*, 1 Ind. 281, 48 Am. Dec. 361; *Langdale v. Bonton*, 12 Ind. 469; *Indianapolis v. Skeen*, 17 Ind. 628; *McCabe v. Fountain County*, 46 Ind. 383; *Logansport v. Dykeman*, 116 Ind. 15, 17 N. E. 587; *Wilt v. Redkey*, 29 Ind. App. 199, 64 N. E. 228. A verbal employment of an attorney was made in *Board of Excise v. Sackrider*, 35 N. Y. 154, and the court found no fault with the employment on account of its form, or rather for lack of writing or matter entered of record, but declared the action of the attorney in bringing the suit void, because the commissioners had not first determined to institute it, but had left it in his discretion to do so. As the board of affairs clearly had the power to make a verbal contract of employment with the attorney to represent the city, the failure of its record to disclose an order, resolution, or entry of such employment does not disprove its existence, and no other evidence is offered. When an attorney appears for a client, there is a presumption in favor of his employment which must be overcome with proof before the court can

deny him the privilege of representing his client. *State v. Ehrlick*, 65 W. Va. 700, 23 L.R.A. (N.S.) 691, 64 N. E. 935; *Mullan v. United States*, 118 U. S. 271, 30 L. ed. 170, 6 Sup. Ct. Rep. 1041; *Western P. R. Co. v. United States*, 107 U. S. 526, 108 U. S. 512, 27 L. ed. 621, 806, 2 Sup. Ct. Rep. 802, 862. The general rule is that the question of an attorney's authority to represent an alleged client can only be raised on a motion directly made for that purpose, and supported by affidavit, after notice of the motion. 4 Cyc. 931. In view of these principles and authorities, it is clear that the authority of the attorney to appear here for the city of Charleston has not been successfully denied or questioned.

If the circuit court had cognizance of the matter in which the attorney appeared, the judge thereof would likely have been entitled to time for consideration of the objection informally made; but, if the cause was not within its jurisdiction, he could not bring it within it by his claim of right to time for consideration of the objection. Courts always pass upon questions of their own jurisdiction at their peril, and an erroneous decision on that point avails nothing. However, as the court's alleged lack of jurisdiction was brought to its attention by the demurrer of four members of council and the corporation seeking the franchise, and the motion of the four members of the council to dissolve the injunction, it is immaterial whether the city properly filed its demurrer or not. It is not the purpose of the rule, under which we sometimes require want of jurisdiction in the lower court to be brought to its attention as a condition precedent to the application for the writ of prohibition, to require the question of jurisdiction to be there litigated and decided for review here, but only to give that court an opportunity to correct its act in excess of its jurisdiction, due to misapprehension or oversight or some other adventitious circumstance. The rule is a mere exercise of the discretion of this court, and is not in any sense rigid or arbitrary. Its application is clearly unnecessary in any instance in which the intention of the inferior court to act beyond its jurisdiction is made apparent in any way. The rule was first announced by this court in *Board of Education v. Holt*, 51 W. Va. 435, 41 S. E. 337, and it was there characterized as a rule of courtesy, or deference to the judge below. In *Board of Education v. Holt*, 54 W. Va. 167, 46 S. E. 134, it was not applied because deliberate action on the part of the judge was apparent. It was applied in *Jennings v. Judge*, 56 W. Va. 146, 49 S. E. 23, because it was apparent the decree com-

plained of had been inadvertently entered. At least there was nothing to show it had not been so entered. The necessity of application to the court below in any case was denied in *Swinburn v. Smith*, 15 W. Va. 483; *Hein v. Smith*, 13 W. Va. 358; *Culpeper v. Gorrell*, 20 Gratt. 484. Here it appears beyond question that the court's alleged want of jurisdiction had been brought to its attention. Demurrers to the bill, sufficient to raise the jurisdictional question, had been filed, and the court had overruled a motion to dissolve the injunction, made by the parties to the bill, having a right to appear and make the motion. Hence there is a clear lack of just grounds for application of the discretionary rule of courtesy.

Suing as residents, citizens, qualified voters, householders, and freeholders, the plaintiffs charged in their bill intent and purpose on the part of the council of the city to create an unconstitutional debt by the passage of the ordinance. This charge was founded upon provisions in the proposed ordinance or franchise binding the city to rent from the company 170 fire hydrants at an annual rental of \$38 each, payable at the rate of \$9.50 quarterly for each hydrant, making a total of \$1,615 per quarter; such rentals to be paid during the life of the contract or franchise, an absolute period of thirty years and an additional conditional one of twenty years. This contract, if consummated, would impose an annual charge for water hydrants of \$6,460, and there is no suggestion of insufficiency of the revenue or income of the city to pay it. It does not impose an indebtedness of 30 or 50 times the amount, which, added to the existing indebtedness, might make a sum in excess of that permitted to the city by the Constitution and statutes. *Allison v. Chester*, 69 W. Va. 533, 37 L.R.A. (N.S.) 1042, 72 S. E. 472, Ann. Cas. 1913B, 1174. As this provision does not create an indebtedness within the statutory or constitutional limitations, nothing in the charter of the city requires the matter to be submitted to a vote of the people, and the charge of invalidity or excess of authority, based upon failure so to submit the proposition, is wholly unsustained and without foundation. That the contract is intended to run beyond the terms of office of the present council and board of affairs does not make the passage thereof an *ultra vires* act, for nothing in the charter or general statutes prohibits the making of such a contract. The bill contains a number of allegations as to excessive or extravagant charges for service; but these are all matters clearly within the jurisdiction and power of the council. A provision for the purchase of

the plant at the expiration of thirty years is said to be illegal because it requires the city to pay for the plant on the basis of its productive value; but this allegation is contradicted by the provision itself, exhibited with the bill. It gives the city an option of purchase "at a fair valuation," to be determined by arbitration; but the arbitrators are authorized to take into consideration the productive value of the waterworks company's rights and privileges and property, but not the value of the unexpired term of the franchise. A charge of perpetuity in the franchise is founded upon a provision requiring the company, at the expiration of the franchise, to continue to furnish water to the city and its inhabitants at the rates and upon the conditions therein prescribed until other rates may be agreed upon. Clearly this provision contemplates nothing more than continued operation at the option and will of the city. It is a provision for the benefit of the city and its inhabitants. It enables them to obtain water from the company at the expiration of the franchise, or pending settlement of the terms of purchase, in case of necessity therefor, due to the inability of the city or its unpreparedness to obtain water from other sources. The right of the company to occupy the streets and furnish water is expressly limited to fifty years at the most, and the right to shorten this period by purchase is reserved to the city. Notwithstanding the charge of insolvency of the applicant for the franchise, the ability to perform the service required of it is clearly a question for the council. The city is not bound to pay anything unless the services are performed. Moreover, failure to comply with conditions and covenants in favor of the city and its inhabitants is made a ground of forfeiture by the terms of the franchise. Neither the charter nor any statute prescribes any standard or measure of financial ability of persons or corporations applying for franchises. A clause in the franchise providing a scheme or method of co-operation between the applicant and the city for the licensing of plumbers is said to amount to a delegation of the police powers of the city, but an examination of this provision shows a reservation of full control of these licenses by the city. There is no surrender of its power of revocation of licenses, and applicants have a right to appeal to the board of affairs in cases of denial of their applications by the company. A charge of exclusiveness in the franchise and intent to establish a monopoly is founded upon a provision binding the city not to maintain or operate any waterworks plant or system in the city, except the system now owned by

the waterworks company. This provision would fall under the rule of strict construction. *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435, 4 S. E. 650, and, under that rule, it would not be construed as denying to the city power to grant a rival franchise. Its plain purpose is to prevent the city from becoming itself a rival of the grantee of the franchise. The bill contains no charge of fraud or corruption on the part of the council, but it says large and powerful influences have been brought to bear through the public press and otherwise upon the members of the council, and that deceit, fraud, and misrepresentations have been resorted to in order to deceive the people. There is nothing in this charge inconsistent with honest action on the part of the council. Hence the allegation has no semblance of a charge of fraud or corruption on their part.

In the argument, sufficiency of the allegations of the bill to show acts *ultra vires*, or to make out a case of fraud, was not vigorously insisted upon. Their insufficiency was rather tacitly admitted, but the right of the court below to let the injunction stand pending consideration of the sufficiency of the bill was insisted upon and constituted the shibboleth of the argument. This position is altogether untenable. Though not often so expressed in terms by the courts, the rule is that, in passing upon the question of its own jurisdiction, a court always acts at its peril. Its decision upon that question affords it no protection from supervisory process from a higher court, and confers no right upon the parties in whose favor the decision was rendered. Had not the injunction been awarded and the exercise of jurisdiction on the bill made effective, the judge of the circuit court could no doubt have taken time for consideration of the question. He could deliberate as to whether he would act. But he had already acted upon the bill and granted the relief prayed for. If the bill conferred no jurisdiction, his claim of right to time for consideration of the demurrer came after action, and, insisting upon the right to consider, he refused first to undo what he had done without authority. Being wrongfully in the domain of another, he insisted upon staying there pending consideration of his right of occupancy. Though it may not have been expressly stated in the return to the rule or in argument in the case of *Board of Education v. Holt*, 51 W. Va. 435, 41 S. E. 337, such was the position of the judge of the circuit court in that case. He refused to entertain a motion to dismiss, and postponed the hearing to a future time. This was a tacit, if not express, assertion of right to time for

consideration. This court denied any such right by saying his action in refusing dismissal was equivalent to a determination in favor of jurisdiction, and subjected him to the writ of prohibition. Such appears to have been the interpretation of the rule in *Jennings v. Judge*, 56 W. Va. 146, 49 S. E. 23, in which the circuit court was accorded mere opportunity to vacate a void decree. It says to the effect that, if the judge refuses to do so upon request, he will be immediately subjected to the writ of prohibition. To warrant interposition by the writ of prohibition, it is only necessary to show that the inferior tribunal is actually proceeding or about to proceed in some matter in which it has no rightful jurisdiction. *Hassinger v. Holt*, 47 W. Va. 348, 34 S. E. 728; *High, Extr. Legal Rem.* § 780. Thus stated by courts everywhere, the terms of the rule preclude right to time for consideration after action, and authorize prevention of action without any allowance of time for consideration. In other words, a court proceeded against by prohibition decides in favor of its own jurisdiction at its peril, whether its decision be in the form of an act done or a claim of right to time for consideration, with intent to act pending that consideration. Its action is not sustained by reason of the necessity of legal questions in the process of the unauthorized act. In *McConiha v. Guthrie*, 21 W. Va. 134, the lower court, in affirming the right of a railroad company to take land within 20 feet of a dwelling, found it necessary to pass upon intricate questions of statutory interpretation and construction. Nevertheless this court awarded prohibition. In *Ensign Mfg. Co. v. Carroll*, 30 W. Va. 532, 4 S. E. 782, the action of the court below in perpetually enjoining a judgment involved many intricate questions; but the necessity of their decision afforded no protection from the writ of prohibition. The proposition thus affirmed is fundamental and its soundness so apparent and self-evident that it is seldom questioned.

That allegations of fact, when necessary to vest jurisdiction in a court, must be sufficient, is an obvious corollary of the proposition just asserted. To say the court may act upon insufficient allegations, because they may be made sufficient by amendment, is clearly inconsistent with the rule or principle. The facts stated do not confer jurisdiction, and ability to amend is mere matter of surmise and conjecture. Nothing in the view of the court establishes it. Hence it is not a fact within the knowledge of the court. If it is permitted to act under such circumstances, it clearly acts without jurisdiction. To permit action upon such a bill or pleading will enable

the court at any time to exercise jurisdiction in cases in which it has none. If it has power to retain for amendment, and act upon the pleading, pending the process of amendment, the time allowable for amendment would be within its discretion, and not reviewable. It might take a week, a month, or a year, during which there would be action without jurisdiction shown. The power to proceed at all depends upon certain facts, and they are not shown and may never be. If a court could act upon such a pleading, there would never be any lack of jurisdiction except in those cases in which it is denied by some statute or principle of law, and is in no sense dependent upon facts.

Assuming for the purposes of this case, without deciding it, that citizens and taxpayers may enjoin the council of a city from passing an ordinance, because the proposed act, when done, will be one *ultra vires*, and that this may be done without any conclusive showing that the pending ordinance will be passed, or an averment of facts showing intent on the part of the council to pass it, as contradistinguished from a mere claim that it will be, and that citizens and taxpayers, without showing any special interest or injury peculiar to them and distinct from that which the general public will suffer, will suffer by reason of the act, the question raised by the bill is whether or not citizens and taxpayers may enjoin a city council from proceeding to consider and act upon a proposed ordinance without a disclosure of lack of power or jurisdiction in the council to consider and act upon it. In other words, the question is whether citizens and taxpayers may, by an appeal to the court, control the discretion, judgment, and action of a city council within its own jurisdiction. That they cannot do so is plainly apparent. A municipal corporation is vested by law with certain powers which it may exercise as freely as a court may exercise its own jurisdiction, or an individual his own right respecting his property and privileges accorded by law. Within the limitations prescribed by law, a citizen may do what he pleases with his property and make such contracts as he sees fit. His discretion respecting these matters, whatever it may be called, is beyond the power of control by courts. So is that of a municipal council. Such matters as have been intrusted to it or are determinable by its discretion, no matter whether that discretion is legislative or administrative, belongs to it and to no other tribunal. If its discretion is reviewable or controllable by the citizens under a referendum statute, their right of veto or control is a limitation upon the city's powers;

but, if power has been vested in the city without any such limitation, the absence thereof affords no ground for intervention or control by the courts. If a municipal corporation is exceeding its powers, courts may, under some circumstances, intervene by injunction or otherwise, and prevent such action. What these circumstances are and what interest the citizen must have in order to confer such right upon him, it is not necessary here to inquire. It suffices to say that, in those instances, the jurisdiction of the court commences with the lack of jurisdiction in the city or its governing body, and the court cannot proceed until it has been shown. In the absence thereof, it has no power to interfere by certiorari, appeal, injunction, or any other remedy. *County Ct. v. Boreman*, 34 W. Va. 87, 11 S. E. 747; *County Ct. v. Boreman*, 34 W. Va. 362, 12 S. E. 490; *County Ct. v. Armstrong*, 34 W. Va. 326, 12 S. E. 488; *Miller v. County Ct.* 34 W. Va. 285, 12 S. E. 702; *State ex rel. Boggs v. County Ct.* 33 W. Va. 589, 11 S. E. 72; *Fleming v. Guthrie*, 32 W. Va. 1, 3 L.R.A. 53, 25 Am. St. Rep. 792, 9 S. E. 23. Nor has equity jurisdiction to enjoin every illegal act on the part of a governing body or public officer. *Mann v. County Ct.* 58 W. Va. 651, 52 S. E. 776; *Morgan v. County Ct.* 53 W. Va. 372, 44 S. E. 182. Ordinarily, in the absence of a statutory right of interference, a citizen must show, in addition to the illegality, an injury to himself from the illegal act, peculiar and distinct from that suffered by the public in general.

Upon these principles and conclusions, the writ of prohibition prayed for was awarded.

WISCONSIN SUPREME COURT.

L. H. GRUBBE
v.

W. F. LAHAY et al., Appts.

(156 Wis. 29, 145 N. W. 207.)

Payment — note of one partner — release of firm.

An express agent who, after delivering to one member of a firm C. O. D. packages

Note. — Note or other commercial paper of individual partner as payment of firm debt which he had not previously assumed.

This note is supplemental to an earlier note on the same question, to Burdett v. Hayman, 15 L.R.A.(N.S.) 1019.

It should be observed that cases involving settlement of firm debts by individual paper upon dissolution of the firm are ex- 51 L.R.A.(N.S.)

without payment of the charges, contrary to the directions of the other partner, takes the duebill or note of the partner to whom delivery was made in satisfaction of the debt of the firm, thereby discharges the obligation of the other partner.

(February 3, 1914.)

A PPEAL by defendants from a judgment of the Circuit Court for Outagamie County in plaintiff's favor in an action to recover a loss sustained by him in delivering to one member of a firm C. O. D. packages without payment of the charges, contrary to the directions of the other partner, which plaintiff was required to make good to the express company. Reversed.

The facts are stated in the opinion.

Mr. E. T. Fairchild, with Mr. Francis S. Bradford, for appellants:

Wells Fargo knew, when it accepted the goods for shipment, that there were others than Lahay interested in the contract, and of course their authorized agent knew the same fact. It had no right to breach this contract without the consent of every person interested; but, having done so, neither it nor the man who stands in its place can recover.

Usher v. Waddingham, 62 Conn. 412, 26 Atl. 538.

Whether or not Grubbe accepted Lahay's duebill or note in full satisfaction and payment of the debt is a question for the jury.

Eastman v. Porter, 14 Wis. 40; *McDonald v. Provident Sav. Life Assur. Soc.* 108 Wis. 213, 81 Am. St. Rep. 885, 84 N. W. 154.

There was a waiver on the part of Grubbe as against the firm, and the relinquishment of a known right.

Pabst Brewing Co. v. Milwaukee, 126 Wis. 120, 105 N. W. 563; *Dunn v. Superior*, 148 Wis. 645, 135 N. W. 145; *Swedish American Nat. Bank v. Koebernick*, 136 Wis. 473, 128 Am. St. Rep. 1090, 117 N. W. 1020; *Voss v. Northwestern Nat. L. Ins. Co.* 137 Wis. 502, 118 N. W. 212.

Mr. Julius P. Frank, for respondent:

The rule that every action must be prosecuted in the name of the real party in interest is imperative; but this rule is satisfied when it is shown that the party suing

cluded from this as well as the former note on this question.

In general as to payment by commercial paper, see note to *A. Leachen & Sons Rope Co. v. Mayflower Gold Min. & Reduction Co.* 35 L.R.A.(N.S.) 1.

Since the preparation of the former note on this question the general rule therein indicated that a promissory note made by one partner alone for a debt of the firm before dissolution does not, if he had not

is the one who has the right to control and receive the recovery.

Landauer v. Espenhain, 95 Wis. 169, 70 N. W. 287; *Chase v. Dodge*, 111 Wis. 70, 86 N. W. 548; *Palmer v. Banfield*, 86 Wis. 441, 56 N. W. 1090; *Gross v. Heckert*, 120 Wis. 314, 97 N. W. 952; 14 Enc. Pl. & Pr. 710.

As a general rule, *prima facie* the acts of every partner who does an act for carrying on in the usual way business of the kind carried on by the firm in which he is a member binds the firm, though in point of fact such acts were not authorized by the other partners.

Seaman v. Ascherman, 57 Wis. 547, 15 N. W. 788.

In commercial partnership the power of a partner to bind the firm may generally be determined by the court as a question of law.

22 Am. & Eng. Enc. Law, 147; *Judge v. Braswell*, 13 Bush, 67, 26 Am. Rep. 185, 11 Mor. Min. Rep. 508.

An individual promissory note of a partner, given for a partnership debt, does not operate as a payment of such debt, and does not release the other partners therefrom, unless the creditor agrees to accept such note as a payment of the debt, and to release the other partners.

Burdett v. Greer (*Burdett v. Hayman*) 63 W. Va. 515, 15 L.R.A.(N.S.) 1019, 129 Am. St. Rep. 1014, 60 S. E. 497, 15 Ann. Cas. 935; *Höflinger v. Wells*, 47 Wis. 628, 3 N. W. 589.

previously agreed to assume the debt, release the other partners from the debt, unless the creditor agrees to accept it as payment and release the other partners, was followed in *Craswell v. Pure Bred Cattle Commission Co.* 148 Iowa, 9, 126 N. W. 908. It was said that no discharge or satisfaction or release is to be implied from the mere acceptance of such a note.

It was held also in *Craswell v. Pure Bred Cattle Commission Co.* *supra*, that testimony of the maker of the note as to whether the other members of the firm understood that the giving of the note was a settlement of the indebtedness of the firm was properly excluded in an action against the firm for the amount of the debt.

And in *Lee v. Larkin*, 125 App. Div. 302, 109 N. Y. Supp. 480, it was held that a partner was liable on an original note given for an indebtedness of the firm, although other partners had executed renewal notes which had not yet been paid, and the original notes had been returned in exchange for the new note. The rule, it was said, was well settled, that the individual note of one of two partners will not operate as payment of the partnership debt unless expressly received as payment; that the individual note thus given is treated the same as if a debtor should give to his

Barnes, J., delivered the opinion of the court:

The defendants were copartners doing business at Appleton under the firm name of Lahay & Company. Their business consisted of taking orders for \$16 suits of clothes made by the International Tailoring Company of Chicago. The plaintiff was the agent of the Wells Fargo Express Company at Appleton. The defendant Pierce lived in Milwaukee, and took no active part in the management of the business. He first directed that the clothes be shipped on open account to the firm, but, learning that Lahay was not paying the bills as he should, undertook to protect himself by directing the shipments to be made by express, C. O. D., and they were so made. Grubbe, without Pierce's knowledge or consent, and against the rules of his employer, delivered goods to the amount of \$418 to Lahay without collecting the amount called for on delivery of the goods. He was required by the express company to make good this sum, and sues both partners to recover his loss. The court directed a verdict in plaintiff's favor. Grubbe was advised by Lahay that Pierce was a partner in the business and was responsible, but testified that he did not know whether he was so informed before or after the credit was furnished. He also testified that before the credit was extended he knew that Pierce was in the firm. On July 25, 1912, Grubbe took a duebill signed by W. F. Lahay for the amount of the account. Later

creditor the note of a third person; the rule in that regard being that where a creditor accepted the obligation of a third party for a debt contracted contemporaneously, there was a presumption that it was taken in payment, and the burden of proving the contrary rested upon him who asserted it; but that where the obligation was received for a precedent debt, the presumption was that it was not taken in payment, and the burden of proof shifted accordingly.

It was also held in *Lee v. Larkin*, *supra*, that the return of the original note in exchange for the new note was not sufficient to change the presumption that the new note was not taken in payment of the debt.

In *Union Stove Works v. Robinson*, 113 N. Y. Supp. 608, it was held that a finding that a note by a partner had been received in discharge of the debt of the firm was sustained by the evidence, and would not be disturbed, the partner who gave the individual note testifying that it was given and accepted as payment of the balance due from the firm, it appearing that the note had been indorsed and discounted by the creditor, and no evidence of a return or offer to return the note being given.

R. E. H.

he took a note signed by Lahay for the amount due, and attempted to negotiate it. He was asked if he took the note in settlement of the indebtedness, and replied: "No, sir; I took it as an accommodation note to pay the account." He also testified that he did not take Lahay for the amount of the bills, but took Lahay & Company. One Steidl, who had been employed in defendants' store, testified that Grubbe wanted to learn Lahay's address because he thought Lahay was honest, and he might get \$20 or \$25 on account from him from time to time. Lahay testified that plaintiff accepted a duebill signed by him individually for the amount of the claim, and agreed to take him (Lahay) for the amount of the debt. The note was destroyed, and it does not appear when it became due.

Under this testimony a jury might find that plaintiff accepted the duebill and note of Lahay for the amount of the debt with the understanding and agreement that Pierce should be released. Where a creditor accepts an evidence of indebtedness from one of two persons jointly liable, and informs the debtor who gives such evidence that he accepts him for the debt, the inference may reasonably be drawn that the creditor intends to release the other debtor. It was for the jury to draw such inference in this case, if the alleged agreement was valid.

The briefs on file give us no assistance on the most difficult question in the case. Numerous authorities hold that where a creditor accepts the note or obligation of a third person under an agreement to discharge one primarily liable, the agreement is valid. *Challoner v. Boyington*, 83 Wis. 399, 53 N. W. 694; *Willow River Lumber Co. v. Luger Furniture Co.* 102 Wis. 636, 78 N. W. 762; *Davenport v. Schram*, 9 Wis. 120; *Allis v. Meadow Spring Distilling Co.* 67 Wis. 16, 29 N. W. 543, 30 N. W. 300; *First Nat. Bank v. Case*, 63 Wis. 504, 22 N. W. 833. There are authorities which hold that the taking by a creditor of a note or obligation of one partner under an agreement to discharge a copartner jointly liable does not preclude the creditor from proceeding against all the partners to collect the debt. It is said that the party giving the obligation is simply agreeing to pay his own debt, and that the creditor receives no benefit from the promise made by him to release one of his debtors, and therefore it is *nudum pactum*. *Cole v. Sackett*, 1 Hill, 516; *Waydell v. Luer*, 5 Hill, 448; *Frentress v. Markle*, 2 G. Greene, 553; *Farly v. Burt*, 68 Iowa, 716, 28 N. W. 51 L.R.A. (N.S.)

35; *Walstrom v. Hopkins*, 103 Pa. 118; *Morrison v. Kendall*, 6 Ind. App. 212, 33 N. E. 370. The preponderance of authority is, however, to the contrary. The English cases hold that the taking of a note or obligation of one partner for a partnership debt, coupled with an agreement to accept the same as a payment and to discharge the other parties liable for the debt, does in fact discharge them. *Thompson v. Percival*, 5 Barn. & Ad. 925, 3 Nev. & M. 167, 3 L. J. K. B. N. S. 98, 19 Eng. Rul. Cas. 728; *Lyth v. Ault*, L. R. 7 Exch. 669, 21 L. J. Exch. N. S. 217. These cases hold that the transaction constitutes an accord and satisfaction.

Chief Justice Marshall, in speaking of the discharge of one of two joint debtors in the manner above specified, says: "The note of one of the parties, or of a third person, may, by agreement, be received in payment. The doctrine of *nudum pactum* does not apply to such a case; for a man may, if such be his will, discharge his debtor without any consideration. But, if it did apply, there may be inducements to take a note from one partner, liquidating and evidencing a claim on a firm, which might be a sufficient consideration for discharging the firm." *Sheehy v. Mandeville*, 6 Cranch, 253, 264, 3 L. ed. 215, 219.

The following cases hold directly or inferentially that where the note or obligation of one partner is tendered to and accepted by the creditor, and the latter agrees to look to such partner alone for his debt, the remaining partner or partners are discharged: *Collyer v. Moulton*, 9 R. I. 90, 98 Am. Dec. 370; *Motley v. Wickoff*, 113 Mich. 231, 71 N. W. 520; *Harris v. Lindsay*, 4 Wash. C. C. 271, Fed. Cas. No. 6,124; *Wadhams v. Page*, 6 Wash. 103, 32 Pac. 1068; *First Nat. Bank v. Cheney*, 114 Ala. 536, 21 So. 1002; *Hoopes v. McCan*, 19 La. Ann. 201; *Lewis v. Davidson*, 39 Tex. 660; *Burdett v. Greer* (*Burdett v. Hayman*) 63 W. Va. 515, 15 L.R.A. (N.S.) 1019, 129 Am. St. Rep. 1014, 60 S. E. 497, 15 Ann. Cas. 935. Other cases which lean in the same direction, but which were decided on somewhat different facts, are: *Venable v. Stevens*, 94 Ga. 281, 21 S. E. 516; *Hellman v. Schwartz*, 44 Ill. App. 84; *Rusk v. Gray*, 83 Ind. 589; *Stone v. Chamberlin*, 20 Ga. 259; *Frye & Bruhn v. Phillips*, 46 Wash. 190, 89 Pac. 559, 93 Pac. 668.

There seems to be but one case decided in this court which involves the question under consideration. *Höfvinger v. Wells*, 47 Wis. 628, 3 N. W. 589. In this case it is held that, where the individual note

of one partner is taken for a loan made to a firm, the presumption is that it was not taken in payment. In the opinion it is said: "And if the jury or the court should find as a fact that the money was borrowed by and loaned to the firm, and upon its credit, then the taking of the individual note of one member of the firm would not be a payment of such firm debt, unless it was affirmatively shown that such note was taken in payment of the same." The case of *Sheehy v. Mandeville*, supra, is cited to the proposition quoted, and the court evidently intended to follow Chief Justice Marshall's decision and hold that such an agreement as we are considering would not be *nudum pactum*.

Considering what our own court has said upon the subject and the authorities elsewhere, we think it should be held that, if plaintiff accepted a duebill or note from Lahay for the amount of the firm debt, agreeing expressly at the same time to accept Lahay solely for the debt, such acceptance and agreement made a valid contract, which operated to discharge Pierce.

If it should be conceded that there was no valid consideration to support such an agreement, we still think the question of whether or not such an arrangement had been made should have been submitted to the jury. Surely the plaintiff had the right to waive his claim against Pierce. There are some equitable considerations which might well induce him to do so. Pierce had tried to protect himself against the very thing that happened, by directing the goods to be shipped C. O. D., and it was only because plaintiff failed to do what Pierce had a perfect right to assume he would do that Pierce became liable. Some of our cases have defined a waiver to be an intentional relinquishment of a known right. *Monroe Waterworks Co. v. Monroe*, 110 Wis. 11, 22, 85 N. W. 685; *Swedish American Nat. Bank v. Kobernick*, 136 Wis. 473, 479, 128 Am. St. Rep. 1090, 117 N. W. 1020; *Dunn v. Superior*, 148 Wis. 636, 645, 135 N. W. 145. Other cases have gone still farther, but for present purposes the cases cited go far enough. If it should be found that plaintiff made the agreement claimed with full knowledge of the facts, it might also be found that he waived his claim against Pierce. *Consaulus v. McConihe*, 17 N. Y. S. R. 538, 2 N. Y. Supp. 89, and *id.* 119 N. Y. 652, 23 N. E. 1150.

Judgment reversed, and cause remanded for a new trial.

Siebecker, J., took no part.
51 L.R.A.(N.S.)

CALIFORNIA SUPREME COURT. (In Banc.)

EX PARTE WONG WING.

(— Cal. —, 138 Pac. 695.)

Constitutional law — limiting hours of labor — laundry.

Forbidding labor in a public laundry from 6 P. M. to 7 A. M. is not an unconsti-

Note.— *Constitutionality of legislative limitation of hours of labor.*

The earlier cases discussing this question may be found in notes to *People v. Orange County Road Constr. Co.* 65 L.R.A. 33; *People v. Williams*, 12 L.R.A.(N.S.) 1130; *Ex parte Martin*, 26 L.R.A.(N.S.) 242; *Withey v. Bloem*, 35 L.R.A.(N.S.) 628; *People v. Elerding*, 40 L.R.A.(N.S.) 893.

In line with *EX PARTE WONG WING*, upholding an ordinance limiting hours of labor in a public laundry to eleven hours a day, the constitutionality of the woman's ten-hour law of 1909, making ten hours in every twenty-four the labor limit for women in any mechanical establishment, factory, or laundry, is upheld in *People v. Bowes-Allegretti Co.* 244 Ill. 557, 91 N. E. 701, as applied to a paper box manufacture, on the strength of *W. C. Ritchie & Co. v. Wayman*, 244 Ill. 509, 27 L.R.A.(N.S.) 994, 91 N. E. 695, set out in earlier note in 35 L.R.A.(N.S.) 628.

So, an act limiting the employment of females in certain establishments, including hotels, is held in *Ex parte Miller*, 162 Cal. 687, 124 Pac. 427, not an improper police regulation as being unreasonable and unnecessary for the promotion and preservation of health; nor is it special legislation because there are other equally injurious occupations followed by women that are not regulated, such as employment in lodging and boarding houses; nor does the exemption of persons employed in harvesting, curing, canning, or drying perishable fruits or vegetables from the operation of the law make an improper discrimination; nor does the act, the general subject of which is the regulation of female employment, embrace two subjects because of the subdivision by the particular details stated in the title.

So, an Indiana statute which prohibits the employment of a person under sixteen years of age in a manufacturing establishment for more than sixty hours in any one week, or for more than ten hours in any one day, except for the purpose of making a shorter day of the last day of the week, is held in *Inland Steel Co. v. Yedinax*, 172 Ind. 423, 139 Am. St. Rep. 389, 87 N. E. 229, not invalid as class legislation, the classification being natural, just, and reasonable.

So, a statute restricting the right to employ laborers in manufacturing and repairing establishments to ten hours per day except in cases of emergency, or where pub-

tutional interference with liberty or property rights.

(January 16, 1914.)

APPPLICATION for a writ of habeas corpus to secure petitioner's release from custody to which he had been committed for violation of an ordinance limiting the hours of labor in public laundries. Writ discharged.

The facts are stated in the opinion.

Messrs. Leon Samuels, William M. Madden, and Knight & Haggerty for petitioner.

Mr. Maxwell McNutt for respondent.

Per Curiam:

Petitioner attacks as unconstitutional a certain ordinance of the city and county of San Francisco which limits the hours of labor in public laundries.

Wong Wing was charged with and con-

lic necessity requires, does not deprive the proprietors of their liberty or property without due process of law, deny them a remedy by due course of law, or the equal protection of the law, nor abridge their privileges or immunities; nor is such a statute void for unreasonableness. *State v. J. J. Newman Lumber Co.* 102 Miss. 802, 45 L.R.A.(N.S.) 851, 59 So. 923, affirmed on rehearing, on suggestion of error, in 103 Miss. 263, 45 L.R.A.(N.S.) 858, 60 So. 215; *Buckeye Cotton Oil Co. v. State*, 103 Miss. 767, 60 So. 775.

The law limiting the hours of labor of minors and women in factories other than canning establishments, to nine hours a day and fifty-four hours a week, was held constitutional in *People ex rel. Hoelderlin v. Kane*, 79 Misc. 140, 139 N. Y. Supp. 350, as applied to candy factories, the exception as to canning establishments not rendering the law invalid as class legislation. "The power of the legislature," said the court, "to create a class consisting of women only, and limit their hours of labor, is established in *Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957 [set out in 12 L.R.A.(N.S.) 1131]. That the limitation may be to fifty-four hours a week is decided by *State v. Somerville*, 67 Wash. 638, 122 Pac. 324 [set out in 40 L.R.A.(N.S.) 894] and *Withey v. Bloem*, 163 Mich. 419, 35 L.R.A.(N.S.) 628, 128 S. W. 913; and in these two cases the regulation was held valid as applied to the manufacture of paper boxes and seals for locking freight cars, occupations apparently as light and innocuous as candy making."

The employment of women for more than ten hours in any day or more than fifty-six hours a week in any manufacturing or mechanical establishment may be forbidden, as is done by Massachusetts Laws 1909, chap. 514, § 48, which makes the exception that a different apportionment of the hours may be made for the sole purpose of making a shorter day's work for one day of the week, without infringing the liberty of contract assured by the 14th Amendment to the Federal Constitution. *Riley v. Massachusetts*, 232 U. S. 671, 58 L. ed. —, 34 Sup. Ct. Rep. 469, same case below discussed in 40 L.R.A.(N.S.) 893.

So, forbidding the employment of women at a time other than is stated in the notice, which the employer must post in a conspicuous place, as is done by Massachusetts Laws 1909, chap. 514, § 48, regulating the 51 L.R.A.(N.S.)

hours of labor for women, is not such an arbitrary and unreasonable provision as to be wanting in the due process of law secured by the 14th Amendment to the Federal Constitution. *Ibid.*

An amendment seeking to enlarge the number of callings in which the hours of employment of women is limited by a former act is held in *People v. Chicago*, 256 Ill. 558, 43 L.R.A.(N.S.) 954, 100 N. E. 194, Ann. Cas. 1913E, 305, not to be in conflict with a constitutional requirement that no act shall embrace more than one subject, which shall be expressed in its title, because the title merely recites that it is an act to amend certain sections of the former act and the title, while the amendment of the title appears as a section of the statute.

But a statute as follows: "That no factory manufacturing establishment, office building, warehouse, workshop, or any business establishment keeping open or running day and night, shall permit, except in case of emergency, or compel, the stationary firemen therein employed to work consecutively in any one day more than eight hours; that a full day's labor shall be composed of eight hours and no more; provided that the provisions of this act shall not apply to stationary firemen or assistants employed in the petroleum industry or in any cotton gin or any sugar plantation or in the sawmill industry," is held in *State v. Barba*, 132 La. 768, 45 L.R.A.(N.S.) 546, 81 So. 784, to be repugnant to the 14th Amendment of the Constitution of the United States in that said act denies the liberty of contract in relation to labor, and the equal protection of the laws guaranteed by said Amendment, as construed by the Supreme Court of the United States. The expressed exemption in the act of steam plants, such as oil refineries and sawmills, works an unjust discrimination against other plants operated by steam; and the division of such plants into two classes, the one running day and night, and the other running day or night, is clearly arbitrary, and furnishes no reasonable basis for discriminating against the former in the matter of the hours of labor.

As to constitutionality of statutes limiting hours of labor on public work, see notes in 8 L.R.A.(N.S.) 131; 24 L.R.A.(N.S.) 201; and 34 L.R.A.(N.S.) 767.

As to constitutionality of child labor laws, see notes in 17 L.R.A.(N.S.) 602, and 24 L.R.A.(N.S.) 1121.

J. D. C.

victed of misdemeanor consisting of a violation of the provisions of § 1 of ordinance No. 144 (new series) of the board of supervisors of said city and county, and of § 4 of said ordinance as amended by § 1 of ordinance No. 2298 (new series) of said board, in that he ironed clothes in a public laundry between the hours of 6 o'clock P. M. of a certain day and 7 o'clock A. M. of the following day. The 1st section of the ordinance No. 144 prescribes that on and after the passage of that by-law it shall be unlawful for any person, firm, or corporation to establish, maintain, or carry on the business of a public laundry or a public washhouse where clothes or other articles are cleaned for hire within the limits of San Francisco, without having first complied with the conditions thereafter specified. Section 4 as amended is as follows: "No person or persons owning or employed in the public laundries or public washhouses provided for in § 1 of this ordinance shall wash, mangle, starch, iron, or do any other work on clothes between the hours of 6 o'clock P. M. and 7 o'clock A. M. nor upon any portion of that day known as Sunday."

The sole question presented by this writ relates to the reasonableness and constitutionality of the hours of labor prescribed by § 4 as amended. We are not concerned with that part of the section prohibiting work on Sunday, nor with another provision of the ordinance requiring that public laundries which open upon a public thoroughfare shall be so constructed as to permit an unobstructed view of their interiors during working hours. Our only task is that of determining whether or not the limitation of the hours of labor in public laundries within the city and county of San Francisco to the period between 7 o'clock in the morning and 6 o'clock at night is an unreasonable exercise of the police power. This court and the Supreme Court of the United States have declared constitutional an ordinance very similar to the one before us, where the restriction upon the hours of labor required the cessation of work in public laundries between the hours of 10 o'clock P. M. and 6 o'clock A. M. *Ex parte Moynier*, 65 Cal. 34, 2 Pac. 728; *Barbier v. Connolly*, 113 U. S. 29, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 707, 28 L. ed. 1146, 5 Sup. Ct. Rep. 730. The principles announced in those cases have been so frequently upheld, and the authorities themselves have been so often cited, that extended discussion of the opinions is quite unnecessary. In the opinions in those cases of the courts discussed the police power of the municipal government to require cessation of work in public laundries for eight hours out of every twenty-four while the ordinance here attacked by petitioner seeks to prohibit labor in such places for thirteen hours every day. It is settled law that such ordinances operate alike upon all persons and property similarly situated, and that the motives impelling the legislators who adopt such regulations are immaterial, unless it appear that the laws operate inequitably. We are therefore to determine whether the limitation of the time of labor in public laundries to eleven hours each day is a restriction so unreasonable that it invades the constitutional rights of persons engaged in the laundry business. We cannot say that it does. Very many, perhaps a majority of, occupations, employments, and forms of business in San Francisco are conducted during less than eleven working hours a day. The authority of the municipal legislature to prescribe hours of cessation from labor in laundries must be conceded, under the authorities cited above, and we think the fair measure of the extent of that power is the usual period of business activity in similar sorts of employment. We cannot say, therefore, that the restriction of the hours of activity provided in the ordinance here attacked is an unconstitutional exercise of the legislative will of the board of supervisors of the city and county of San Francisco.

Let the writ be discharged, and the prisoner remanded.

Beatty, Ch. J., does not participate in the foregoing:

KENTUCKY COURT OF APPEALS.

LOUISE GERNERT, Appt.,

v.

CITY OF LOUISVILLE.

(155 Ky. 589, 159 S. W. 1163.)

Eminent domain — establishment of grade of city street on country road — liability.

That a highway running through suburban property has been improved by the county authorities does not prevent the construction of a street upon another grade,

Note. — Grading street formerly used as a country highway as initial establishment of grade within rule as to municipal liability for changing grade.

As shown in the note to *Dickenson v. Okolona*, 36 L.R.A.(N.S.) 1194 and previous notes referred to therein, one line of authorities holds that a municipality is not liable for consequential damages result-

when the property is taken into the city limits, from being an original construction within the rule that the municipality is not liable for injury to abutting property by the original establishment of the grade of a street.

(October 30, 1913.)

A PPEAL by plaintiff from a judgment of the Common Pleas Branch, Fourth Division, of the Circuit Court for Jefferson County, in defendant's favor in an action brought to recover for damages to plaintiff's property by a change in the grade of a street. Affirmed.

The facts are stated in the opinion.

Messrs. Augustus E. Willson and Richard Priest Dietzman, for appellant:

As Jefferson county had once fixed the grade of the Bardstown road, the city of Louisville, after annexing that road, is liable for damages to abutting property owners if it changes that established grade, for:

Had the county instead of the city changed the grade, it would have been liable for such damages.

Layman v. Beeler, 113 Ky. 221, 67 S. W. 995; Moore v. Lawrence County, 143 Ky. 450, 136 S. W. 1031.

The city is merely the governmental suc-

cessor of the county as to annexed territory.

Louisville v. Hall, 28 Ky. L. Rep. 1064, 91 S. W. 1133.

The change of grade of the Bardstown road was a change of grade, and not the fixing of the original grade, under § 242 of the Kentucky Constitution.

Louisville v. Hegan, 20 Ky. L. Rep. 1532, 49 S. W. 532; Barfield v. Gleason, 111 Ky. 491, 63 S. W. 964; Owensboro v. Hope, 128 Ky. 524, 15 L.R.A. (N.S.) 996, 108 S. W. 873; Henderson v. McClain, 102 Ky. 402, 39 L.R.A. 349, 43 S. W. 700; McHenry v. Selva, 99 Ky. 232, 35 S. W. 645.

Mr. Pendleton Beckley, with Mr. Leon P. Lewis, for appellee:

When a county road is taken into the city limits by annexation, and the grade of that road is fixed for the first time by the city in converting it into a city street, such establishment of the grade and making of the street is original construction within the rule exempting municipalities from liability for consequential injury growing out of the original construction of streets.

Henderson v. McClain, 102 Ky. 402, 39 L.R.A. 349, 43 S. W. 700; Owensboro v. Hope, 128 Ky. 524, 15 L.R.A. (N.S.) 996, 108 S. W. 873; Louisville v. Hegan, 20 Ky. L. Rep. 1532, 49 S. W. 532; Barfield v. Gleason,

ing from a change of grade unless it is a change for a grade previously established. Whether a grade established on a country highway is an established grade within this rule, so as to render a municipality which has afterwards included the highway within its limits liable for a change therefrom, is the question discussed in the present note. There is very little authority on the question.

In Harman v. Bluefield, 70 W. Va. 129, 73 S. E. 296, where the corporate limits of a municipality were extended so as to include a county road, and the road was used thereafter by the public on the natural grade as a public street for about two years, it was held that the city would be considered as having adopted the street as a public street, and that it was liable for a change of grade thereafter. It was stated that it is not necessary that the city should have first, by ordinance, established a grade line and afterwards changed it to constitute liability, but that the use of the street as above stated was tantamount to an adoption of the grade thereof.

The court in Cincinnati v. Williams, 8 Ohio Dec. Reprint, 118, 9 Ohio L. J. 243, after stating that there can be no recovery by an abutting owner except for a change from a former grade, holds that where a turnpike company had established a public road, and afterwards such road was included within the limits of a municipality, abutting owners who had improved their property with reference to the established

grade were entitled to damages against the municipality for a change.

In Youngstown v. Moore, 30 Ohio St. 133, the rule of municipal liability is stated as follows: "Where the corporation fails or neglects to fix any grade, and none is established for a street save that of a county road, and the lot owner improves his lot with reference to the then state of the road and street as used and kept in repair by the village or city in front of his lots, and is guilty of no negligence, but uses ordinary discretion, care, and judgment in making his improvements, having reference to the probable future improvements and street grades of the village or city, and with reference also to the right of the municipal authorities to make reasonable and proper grade for the street, and he is afterwards injured by a grade caused to be made by the village or city authorities, he will be entitled to receive a just compensation for the injury so sustained even though the grade that causes the injury is a reasonable and proper one. The converse of this principle is true. If, when he made his improvements, he was careless, and for want of proper care, discretion, and a judicious exercise of judgment in placing his improvements, he is injured by a grade made in the proper exercise of corporate power, he cannot recover for such injury."

A borough was held liable in Norris-town's Appeal, 3 Walk. (Pa.) 146, for changing the grade of an old township road which had been used for many years by the

son, 111 Ky. 491, 63 S. W. 964; Owensboro v. Singleton, 33 Ky. L. Rep. 775, 111 S. W. 284; Philpot v. Tompkinsville, 148 Ky. 511, 146 S. W. 1093; Hosmer v. Gloversville, 27 Misc. 669, 59 N. Y. Supp. 559.

The actual making of a road by the county or by private individuals does not constitute original construction so as to save the property owners from assessment when the street is made subsequently under the orders of the municipality.

McHenry v. Selva, 99 Ky. 232, 35 S. W. 645; Heim v. Figg, 28 Ky. L. Rep. 396, 89 S. W. 301; Lindsey v. Brawner, 29 Ky. L. Rep. 1236, 97 S. W. 1; Wymond v. Barber Asphalt Pav. Co. 25 Ky. L. Rep. 1135, 77 S. W. 203; Mackin v. Wilson, 20 Ky. L. Rep. 218, 45 S. W. 663; Sparks v. Barber Asphalt Pav. Co. 129 Ky. 769, 22 L.R.A.(N.S.) 877, 130 Am. St. Rep. 492, 112 S. W. 830; Layman v. Beeler, 113 Ky. 221, 67 S. W. 995.

Hobson, Ch. J., delivered the opinion of the court:

Louise Gernert has owned since March, 1899, a contract of land on the Bardstown road; prior to June, 1908, the property was located outside of the corporate limits of the city of Louisville, but the city boundary has been extended, and the property has

since then been in the city limits. More than twenty years before that time, the Bardstown road was a public highway of Jefferson county and under the supervision and control of the fiscal court, and had been graded and macadamized as a county highway by the agents of the fiscal court; the road having been constructed according to the grade fixed by the fiscal court. After the city limits were extended so as to include the property, the city of Louisville converted the Bardstown road at that point from a macadamized highway into an asphalt street, and in the construction of the street raised the grade of the road in front of her property from 3 to 6 feet. She brought this suit against the city, alleging the above facts, and also alleging that by reason of the change of the grade of the street her property had been greatly damaged in that the salable value of the property has thereby been decreased. The city demurred to the petition; the circuit court sustained the demurrer, and, she declining to plead further, dismissed the action. She appeals.

The ground on which the circuit court sustained the demurrer to the petition was that, when the city established for the first time the grade of the street, it was not liable for damages done the property by rea-

public at a grade which was adapted to all purposes for an ordinary highway, the court stating that this was a change of grade for which the borough was answerable in damages. It is not clear, however, that any claim was made that this was an initial change of grade which would not render the borough liable.

In Hutchinson v. Parkersburg, 25 W. Va. 226, a municipality was held liable for a change of grade in a turnpike, which had been included within the limits of a municipality, to an owner who had improved his property abutting upon the turnpike before it was included within the municipality. The decision here, however, does not rest upon the fact that the road was an established turnpike, but upon the fact that the plaintiff had improved his premises; and it is stated that the liability of the municipality would have been the same if the improvements had been made on no public road. The court, after referring to the case of Johnson v. Parkersburg, 16 W. Va. 426, 37 Am. Rep. 779, in which it was stated that if the improvement of the plaintiff had been made before the street was made or the grade fixed at all, what his right would be in that case was not decided, as the question did not arise in that case, continues: "And we deem it improper in this case to decide what the plaintiff's rights would be if his improvements had been made after the street was made, but before the grade of it was fixed at all; for such question does not arise in this case, 51 L.R.A.(N.S.)

either as alleged in the amended declaration or as proven."

In Hosmer v. Gloversville, 27 Misc. 669, 59 N. Y. Supp. 559, a town road on which the plaintiff's premises abutted was included in a municipal corporation. Under the law of this state, the owner of premises abutting upon a town highway was entitled to no compensation for a change of grade. A provision in the municipal charter was to the effect that when the grade of any street had been established and a record made thereof, and such street or part thereof graded accordingly, such grade should not be changed except upon certain conditions unless compensation be made to the owners of the property injured by the regrading. The new grade was established by the municipality as soon after its inclusion in the corporation as the needs of the locality demanded, and it was held that under the charter provision above mentioned there was no liability for such change.

The rule announced in GERNERT v. LOUISVILLE is approved in Erlanger v. Cody, — Ky. —, 166 S. W. 202, where a macadamized public highway of many years' existence was included within the limits of a town upon its incorporation. In this case, however, the municipality had established the grade for making sidewalks, and the establishment of this grade was held to be such an establishment of the grade of the highway as to render the municipality liable for a subsequent change therefrom.

W. A. E.

son of the establishment of the grade of the street. In *Owensboro v. Hope*, 128 Ky. 524, 15 L.R.A.(N.S.) 996, 108 S. W. 873, it was held that a lot owner is not entitled to recover from a city for consequential damages to a lot adjacent to a street because of the establishment of the original grade of the street, when not done negligently. That case was followed in *Owensboro v. Singleton*, 33 Ky. L. Rep. 775, 111 S. W. 284, and *Philpot v. Tompkinsville*, 148 Ky. 511, 146 S. W. 1093. But it is insisted that these cases do not control here, because they rest upon the ground that, where a street is dedicated or acquired by condemnation, it is implied that it may be graded so far as necessary to fit it for the intended purposes, and that it must be presumed that the injury to the property from the grading was considered at the time the right of way was acquired either by the dedicator or by the injury in fixing the damages. It is insisted that, the grade of the highway having been fixed once by the fiscal court, it could not thereafter be changed by the county authorities without compensating the owner for such incidental damages as she sustained (*Layman v. Beeler*, 113 Ky. 221, 67 S. W. 995; *Moore v. Lawrence County*, 143 Ky. 450, 136 S. W. 1031), and that the city, having succeeded to the rights of the county, is equally without power to change the grade of the street without compensating the owner for the damages sustained. But the mistake in this argument is in assuming that the city simply succeeds to the rights of the county. The city derives its power from the commonwealth, and it is not limited to the rights possessed by the county. While it is true that the precise reason assigned for the decision in *Owensboro v. Hope*, does not apply here, similar principles do apply.

The legislature of the state has power to define what shall be urban property and what shall be county property. It has the power to define the limits of the cities and towns of the commonwealth. All persons hold their property subject to this power of the legislature to include it within the boundary of a city when the public necessity so requires. City property is subject to burdens and enjoys benefits not possessed by country property. The including in a city of property which has theretofore been without the city is the act of the state.

When property is thus included in a city, it stands just as any other property within the city. The public highway becomes *ipso facto* a street of the city. *Louisville v. Hall*, 28 Ky. L. Rep. 1064, 91 S. W. 1133. The construction of a street upon such a highway is not a reconstruction of it, but an original construction, and the property

owner is liable for the cost. *McHenry v. Selvage*, 99 Ky. 232, 35 S. W. 645; *Sparks v. Barber Asphalt Pav. Co.* 129 Ky. 769, 22 L.R.A.(N.S.) 877, 130 Am. St. Rep. 492, 112 S. W. 830. The construction of the street is one of the incidents to the including of the property within the city limits, and is one of the burdens which the state places upon the city in establishing its boundaries so as to include the property. The city does not succeed merely to the rights of the county in the highway, but it holds the highway under the authority of the state just as it holds any other street, and with all the powers over it and rights in it which it may exercise as to its other streets. *Danville v. Fiscal Ct.* 106 Ky. 608, 51 S. W. 157.

All purchasers of suburban property in the vicinity of a growing city purchase with the knowledge that, as the city grows, the property may be taken into the city. The increased price which the property will then bring is often the inducement for the purchase. Country property is sold by the acre, city property by the front foot. They also know there are burdens which city property must bear, but which are not borne by country property. One of these burdens is the cost of converting the country highway into a city street. They cannot complain that this cost is assessed against their property, although it would have been exempt from such a charge had it not been taken into the city. The fixing of the grade is a necessary incident to the proper construction of the street, and they can no more complain of the grade being fixed than of the street being constructed. Both are necessarily incidental to the conversion of the property from country property into city property. As all property is held subject to the police powers of the state to include it in a city when the public good so requires, no owner has ground of complaint that his property is properly taken into the city, and he must take the benefits with the burdens. The burden of the grading of the street rests on the same ground as the burden of constructing the street, and he can no more recover damages of the city for one than the other.

One who buys property in the vicinity of a city, adjacent to a highway, must know that if the land is taken in the city the highway will become *ipso facto* a city street; and he must know that when it becomes a part of the street system of the city it must be given a grade to conform with the other streets and the necessities of city travel. He buys his property with notice that these things may be done. When the land covered by the highway was dedicated as a county highway, it was so dedicated with the knowl-

edge that, if the highway was taken into the city, it would become a city street and be subject to all the incidents of any other street. No new servitude has therefore been imposed. All that has happened was within the reasonable contemplation of the parties when their rights were acquired. The city is therefore not liable to appellant for establishing the grade of the street. There is no charge that the work was done negligently. In *Henderson v. McClain*, 102 Ky. 408, 39 L.R.A. 349, 43 S. W. 700, the court expressly reserved the question whether damages could be recovered upon the original establishment of the grade of a street; that question not being presented by the record. In *Louisville v. Hegan*, 20 Ky. L. Rep. 1532, 49 S. W. 532, the facts were similar to *Henderson v. McClain*, and the ruling in that case was followed. In *McHenry v. Selvage*, 99 Ky. 232, 35 S. W. 645, the question was not presented by the record or before the court.

Judgment affirmed.

MICHIGAN SUPREME COURT.

HATTIE N. B. DUSBIBER, Appt.,
v.

FLORENCE A. MELVILLE et al.

(— Mich. —, 146 N. W. 208.)

Will — conditional bequest — living apart from husband.

A condition in a bequest to a woman who, at the time of making the will, was living apart from her husband, that she should have the money in case she was compelled to live apart from him, and support herself, to be paid as soon as the executor shall be convinced that it is impossible for her to live with her husband, is reasonable, and not void on the ground of public policy as an inducement to destroy the marriage relation.

(March 26, 1914.)

APPEAL by complainant from a decree of the Circuit Court for Saginaw County in favor of defendants in a suit for the construction of the will of Thomas E. Briggs, Deceased. Affirmed.

The facts are stated in the opinion.

Mr. W. F. Denfeld, for appellant:

The paragraph of the will to be construed constitutes a condition precedent, is

Note. — The point involved in the above case is discussed in a note to *Re Gunning*, 49 L.R.A.(N.S.) 637. Since the preparation of that note no other decisions have been reported.
51 L.R.A.(N.S.)

illegal and void, and the performance of the condition was the sole motive for testator's making the bequest, which, being illegal, entirely defeats the bequest made to her "strictly on this condition."

Burdie v. Burdie, 96 Va. 81, 70 Am. St. Rep. 827, 30 S. E. 462; *Bigelow, Wills*, Student Series, p. 244; *Scott v. West*, 63 Wis. 566, 24 N. W. 161, 25 N. W. 18; 29 Am. & Eng. Enc. Law, p. 546.

The condition in the will the law will always and without regard to circumstances defeat, as contrary to public policy, immoral, and therefore illegal.

Wren v. Bradley, 2 De G. & S. 49, 17 L. J. Ch. N. S. 172, 12 Jur. 168; *Tennant v. Braie, Tothill*, 77; *Brown v. Peck*, 1 Eden, 140; *O'Brien v. Barkley*, 28 N. Y. Supp. 1050; *Conrad v. Long*, 33 Mich. 79; *Born v. Horstmann*, 80 Cal. 452, 5 L.R.A. 577, 22 Pac. 169, 338; *Thayer v. Spear*, 58 Vt. 327, 2 Atl. 161.

The condition being immoral, against public policy, and a restraint upon marriage, and for that reason impossible of performance, the gift will fail.

Rood, Wills, 212; *Woerner, Am. Law of Administration*, § 440, p. 953; *Coppage v. Alexander*, 2 B. Mon. 313, 38 Am. Dec. 160; *Nunnery v. Carter*, 58 N. C. (5 Jones Eq.) 370, 78 Am. Dec. 231, and note; *Leffer v. Rowland*, 62 N. C. (Phill. Eq.) 143; *Priestley v. Holgate*, 3 Kay & J. 286, 26 L. J. Ch. N. S. 448, 3 Jur. N. S. 486, 5 Week. Rep. 445; *Johnson v. Warren*, 74 Mich. 497, 42 N. W. 74; *Pearl v. Lockwood*, 123 Mich. 142, 81 N. W. 1087; *Bullard v. Shirley*, 153 Mass. 559, 12 L.R.A. 110, 27 N. E. 766; *Lynch v. Melton*, 150 N. C. 595, 27 L.R.A.(N.S.) 687, 64 S. E. 497.

Messrs. L. E. Bradt in *propria persona*, and J. A. Harris, for Florence A. Melville:

If the condition in the clause of the will giving the legacy to Mrs. Melville is void on the ground of public policy the legatee takes an estate clear of conditions.

Conrad v. Long, 33 Mich. 78; *Randall v. Randall*, 37 Mich. 563.

A contract by a third person to support a married woman is valid when it is not given, nor has any tendency, to cause a separation between her and her husband.

Greenhood, Pub. Pol. p. 483; *Farnum v. Bartlett*, 52 Me. 570; *Ransdell v. Boston*, 172 Ill. 439, 43 L.R.A. 526, 50 N. E. 111.

The condition was not void.

Born v. Horstmann, 80 Cal. 452, 5 L.R.A. 577, 22 Pac. 169, 338; *Thayer v. Spear*, 58 Vt. 327, 2 Atl. 161; 2 Pom. Eq. Jur. § 933; *Scott v. Tyler*, 2 Bro. Ch. 432, *Dick*, 712, 2 White & T. Lead. Cas. in Eq. 144.

Bird, J., delivered the opinion of the court:

After the death of Thomas E. Briggs, of Saginaw, his last will and testament was found to be in the following form:

"I, Thomas F. Briggs, of the city of Saginaw, Michigan, being of sound and disposing mind and memory, do make, publish, and declare this as and for my last will and testament, hereby revoking all former wills by me at any time heretofore made.

"My will is that all my just debts and funeral expenses shall be paid out of my estate as soon after my decease as shall by my executor hereinafter named be found convenient.

"I understand that Florence A. Melville, of Saginaw, Michigan, has been compelled by the extreme cruelty of her husband, to leave her home and that she cannot live with him because of his cruelty toward her. Now, my will is, that in case she shall be compelled to live apart from her said husband, Frederick Melville, and shall have to support herself, that I give, devise, and bequeath to her, the said Florence A. Melville, the sum of \$2,000, to be paid to her by my executor, out of my estate, as soon as executor shall be convinced that it is impossible for the said Florence A. Melville to live with her husband, Frederick Melville; said payment of said \$2,000 shall be in lawful money of the United States of America.

"I give, devise, and bequeath to my sister Hattie Nora Bell Dusbiber, of Hamilton, Ohio, all of the rest and residue of my estate, real, personal, and mixed, of which I shall die seised and possessed, or to which I shall be entitled at my decease, to have and to hold the same forever.

"And lastly, I do nominate and appoint Lincoln E. Bradt to be the executor of this, my last will and testament."

The parties in interest cannot agree as to the construction which should be given to the clause in the will defining the conditional legacy to Florence A. Melville. To secure a judicial construction of that clause, this bill was filed. The testator was a bachelor, and he left an estate of the value of \$6,000. It appears that he and Mrs. Melville were very friendly, and were in each other's company a great deal during the last two or three years of his life. The interest which they manifested in each other, without doubt, led to the trouble between Mrs. Melville and her husband, and later to divorce proceedings, which were pending at the time of testator's death. The will was executed only a few days prior to his death.

It is contended by complainant, the sister of testator, that the condition annexed to 51 L.R.A. (N.S.)

the gift is void on the ground of public policy, because it offers an inducement to Mrs. Melville to live separate and apart from her husband. The position of the defendant is that the condition is a reasonable one, and therefore valid, but that, in the event the condition is found to be void, Mrs. Melville would then take the legacy free and clear of the condition. The chancellor who heard the case came to the conclusion that the condition was a reasonable one, and upheld the validity of the provision.

The legacy with which we have to deal does not vest under the terms of the will until the executor determines that the legatee cannot live with her husband; it is therefore a condition precedent. It appears to be pretty well settled by the authorities that, where a condition precedent is annexed to a gift of personal property which prohibits marriage absolutely or unreasonably, the condition is void, and the legacy becomes absolute in like manner as if no condition were attached. 1 Story, Eq. Jur. § 280; 2 Pom. Eq. Jur. § 933.

It will be noted that this rule is unlike the one which applies to devises of real estate which impose conditions precedent. *Conant v. Stone*, 176 Mich. 654, 143 N. W. 39.

It also appears to be settled by the more recent authorities that, where a condition precedent is annexed to a bequest of personal property, and imposes only a partial and reasonable restraint upon the marriage of the legatee, and there is a bequest over, the condition is valid. 2 Pom. Eq. Jur. § 933; 1 Story Eq. Jur. § 280; *Phillips v. Ferguson*, 85 Va. 509, 1 L.R.A. 837, 17 Am. St. Rep. 78, 8 S. E. 241; *Ransdell v. Boston*, 172 Ill. 439, 43 L.R.A. 526, 50 N. E. 111; *Born v. Horstmann*, 80 Cal. 452, 5 L.R.A. 577, 22 Pac. 169, 338.

The question is therefore presented as to whether the condition imposed on the legacy to Mrs. Melville is a reasonable one. The testator, knowing that the inevitable was near, made this provision for Mrs. Melville only eight days before he passed away. At the time he made the will he was cognizant of the fact she was living separate from her husband, and that she had begun divorce proceedings against him. It is not unreasonable to suppose that he felt that he owed her some duty to provide for her if she could not live with her husband after he was gone. If she could and did live with him again, she would be provided for, and would be in no need of his bounty. If she could not, she would then need the legacy which he gave to her. Considered from this viewpoint, I am impressed that the condition is not an unreasonable one,

especially in view of fact that she is not to be the judge as to whether she can live with her husband, but that determination lies with the executor. She might decide that she could not; but that would not entitle her to the legacy. The executor might conclude otherwise, and, if he did, she could not get it, even though she actually lived away from her husband. Had she been made the judge instead of the executor, it would present a somewhat different case. This view of the condition is supported by the cases of *Ransdell v. Boston*, and *Born v. Horsmann*, *supra*.

I am of the opinion that the chancellor reached the right conclusion, and the decree will be affirmed. Defendants will receive their costs in this court.

MONTANA SUPREME COURT.

T. J. HARRINGTON, Admr., etc., of James Kelly, Deceased, Resp't.,
v.

BUTTE MINER COMPANY et al., Appts.
and
CHARLES C. COHAN.

(48 Mont. 550, 139 Pac. 451.)

Appeal — granting motion for new trial — grounds.

1. The granting of a motion for new trial will not be upheld upon a ground other than that specified by the court, if counsel points out no other prejudicial error in the

Note. — Effect of provision that jury shall determine the law and the facts in libel cases.

This note supplements the one appended to *Oakes v. State*, 33 L.R.A.(N.S.) 207, where the earlier cases are collected. See also *Diener v. Star-Chronicle Pub. Co.* 33 L.R.A.(N.S.) 216.

The constitutional provision that the jury in libel cases shall determine the law and the facts does not eliminate the requirements that the issues be made up and the same procedure followed as in the other cases, and that the rules of evidence be likewise followed. *Meeker v. Post Printing & Pub. Co. — Colo.* —, 135 Pac. 457.

The constitutional provision of Missouri is that the jury are to determine the law of libel "under the directions of the court," and in *Patterson v. Evans*, — Mo. —, 162 S. W. 179, it was held that the provision does not preclude the court from advising the jury as to what, under the law, is libelous, but it is better to include in an instruction of this kind the qualification as to the jury's right to determine for themselves the law, though it does not follow that such qualification must in all cases appear in each instruction in which the court tells

record but leaves the court to find one if it exists.

Libel — duty of jury to follow instructions.

2. Where, under the Constitution, the jury, under the direction of the court, are to determine the law and the facts in actions for libel, a new trial cannot be granted because of the refusal of the jury to follow an instruction that the matter complained of is libelous *per se*.

(February 27, 1914.)

APPEAL by defendants Butte Miner Company et al. from an order of the District Court for Silver Bow County granting a new trial in an action brought to recover damages for an alleged libel. Reversed.

The facts are stated in the opinion.

Messrs. George F. Shelton, Fred J. Furman, A. J. Verheyen, and M. P. Gilchrist, for appellants:

The death of Mr. Kelly, before judgment in his favor, abates the action unless saved by statutory provision.

Comegys v. Vasse, 1 Pet. 193, 7 L. ed. 108; *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551; *Tufts v. Matthews*, 10 Fed. 609; *Morenus v. Crawford*, 51 Hun, 89, 5 N. Y. Supp. 453; *Robinson v. Govers*, 65 Hun, 562, 20 N. Y. Supp. 571; *People ex rel. Stanton v. Tioga*, 19 Wend. 73; *Selden v. Illinois Trust & Sav. Bank*, 239 Ill. 67, 103 Am. St. Rep. 180, 87 N. E. 860; 1 Cyc. 49; 37 Cyc. 626; *Gibson v. Gibson*, 43 Wis. 23, 28 Am. Rep. 527;

the jury what the general law of libel is, and what their duty is under it. Where the instructions taken as a whole could not have mislead the jury as to their power, they are sufficient in that respect.

Under this constitutional provision it is the province of jury, under the instructions of the court, to construe the publication charged to be libelous. *Cook v. Globe Printing Co.* 227 Mo. 471, 127 S. W. 332.

The court can direct a nonsuit but cannot force a verdict for plaintiff. *Kerone v. Block*, 144 Mo. App. 575, 129 S. W. 43; *Patterson v. Evans*, *supra*.

In *State v. Tolley*, 23 N. D. 284, 136 N. W. 784, it was held that a constitutional provision that in all civil and criminal libel trials "the jury shall have the same power of giving a general verdict as in other cases; and in all indictments or informations for libels the jury shall have the right to determine the law and the facts under the direction of the court as in other cases," does not make the jurors the judges of the law, but merely gives them the right to render a general verdict upon the whole case, and prevents the court from requiring them to return a special verdict upon the facts.

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Ingersoll v. Gourley, 72 Wash. 462, 130 Pac. 743.

The question of libel or no libel is a matter to be determined by the jury.

Duncan v. Williams, 107 Mo. App. 539, 81 S. W. 1175; Sands v. G. W. Marquardt & Sons, 113 Mo. App. 490, 87 S. W. 1011; Heller v. Pulitzer Pub. Co. 153 Mo. 205, 54 S. W. 457; State v. Armstrong, 106 Mo. 395, 13 L.R.A. 419, 27 Am. St. Rep. 361, 16 S. W. 604; Arnold v. Jewett, 125 Mo. 241, 28 S. W. 614; State v. Powell, 66 Mo. App. 599; Benton v. State, 59 N. J. L. 551, 36 Atl. 1041; Haynes v. Spokane Chronicle Pub. Co. 11 Wash. 503, 39 Pac. 969; Hazy v. Woitke, 23 Colo. 556, 48 Pac. 1048; Ukman v. Daily Record Co. 189 Mo. 378, 88 S. W. 60; 13 Am. Eng. Enc. Law, 381; Murray v. Heinze, 17 Mont. 365, 42 Pac. 1057, 43 Pac. 714; King v. Lincoln, 26 Mont. 161, 66 Pac. 836; Allen v. Bear Creek Coal Co. 43 Mont. 289, 115 Pac. 673.

Messrs. D. M. Kelly and Canning & Geagan for respondent.

Holloway, J., delivered the opinion of the court:

Action for damages for libel. Upon the trial of this cause, at the instance of the plaintiff, the court gave instruction No. 2, as follows: "You are instructed that the article complained of in this action is libelous in itself, and, under the law and the evidence, you should find for the plaintiff and against the defendants, Butte Miner Company and J. Lawrence Dobell, and award him such damages as, in your judgment, are just and fair under the circumstances." Notwithstanding this direction, the jury returned a general verdict in favor of the company and Mr. Dobell. Plaintiff moved for a new trial upon three grounds: Insufficiency of the evidence, that the verdict is against law, and error in law occurring at the trial. The motion was sustained, and a new trial granted in an order as follows: "This day the motion of the plaintiff for a new trial herein is by the court granted, solely and entirely upon the single ground presented to this court that the jury disregarded and refused to obey the instruction of the court to find a verdict for the plaintiff." The appeal is from that order.

Counsel for respondent in their brief suggest that the order should be upheld, if it can be done upon any ground of the motion. That rule, however, applies only to a case where the order is a general one, not disclosing the particular ground upon which the court acted, or to a case where counsel have invoked the provisions of the act for the compensation of errors (§ 7118, Rev. Codes). In this instance counsel did not except to the order of the trial court, 51 L.R.A.(N.S.)

which, in effect, overruled their motion upon every other ground save the one designated in the order. But, assuming counsel's position to be correct, they do not indicate to us any error in the record claimed by them to be prejudicial to the plaintiff, other than the one upon which the trial court acted, and they cannot expect the members of this court to go through a record of more than 500 pages in a microscopic search for some error which they do not suggest exists there.

The one question before us is: Were the jurors bound by the trial court's instruction No. 2? In Murray v. Heinze, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714, this court held that in all cases, except libel, the jury are bound by the instructions of the court, and a verdict in disregard of them will be set aside as against law. That decision has been affirmed, repeatedly, and if in any given instance the exception noted above has been omitted in the statement of the rule, it was mere oversight. There has never been any intention on the part of the court to modify the rule as there expressed; so that, in the investigation of the question before us, we are not embarrassed by any conflicting statements heretofore made by this court; indeed, the question has never been presented directly before this. In Paxton v. Woodward, 31 Mont. 195, 107 Am. St. Rep. 416, 78 Pac. 215, 3 Ann. Cas. 546, it was suggested, but decision was reserved, as the question was not so directly involved that its determination was necessary to the proper disposition of the appeals in that case.

Section 10 of article 3 of the Constitution of Montana contains this provision: In all suits and prosecutions for libel, the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts." In its general scope, it is not new to the law. Prior to 1792, the law of libel in England was in an unsatisfactory, if not uncertain, state, and, for the purpose of setting at rest all questions as to the province of the jury in the trial of a libel case, the Parliament passed what is known as the Fox libel act, entitled "An act to remove doubts respecting the functions of juries in cases of libel" (32 Geo. III. chap. 60). The act was by its terms made applicable only to criminal libels. It provides that the trial court shall give the jury instructions as in other criminal cases, but that the jurors may determine for themselves the question of libel or no libel. The act will be found in its entirety in Odgers on Libel & Slander, 2d ed. p. 710.

In Capital & C. Ban v. Henty, L. R. 7 App. Cas. 741, the judicial committee of

the privy council, considering the effect of the Fox act upon the practice in England, said: "Since Fox's act at least, however the law may have been before, the prosecutor or plaintiff must also satisfy a jury that the words are such, and so published, as to convey the libelous imputation. If the defendant can get either the court or the jury to be in his favor, he succeeds. The prosecutor, or plaintiff, cannot succeed unless he gets both the court and the jury to decide for him."

In *Ogders on Libel & Slander*, 2d ed. p. 604, the proceeding in the trial of a criminal libel after the enactment of the Fox act is terse, stated as follows: "The judge, of course, may still direct the jury on any point of law, stating his own opinion thereon, if he thinks fit; but the question of libel or no libel must ultimately be decided by the jury."

Commenting upon the practice in England before the passage of the Fox act, under which the courts reserved to themselves the right to determine the question of libel or no libel, Judge Cooley in his *Principles of Constitutional Law*, 292, says: "This doctrine was overruled by statute in England, and the jury are now permitted to judge of the whole case, and to decide, not merely upon the responsibility of the publication, but upon the animus with which it was made, and whether within the rules of law the publication is libelous. The instructions of the judge upon the law become under this rule advisory merely, and the jury may disregard them if their judgment is not convinced."

That these authorities correctly interpret the statutory law of libel in England would seem to be beyond controversy.

Early in the history of this country, like provisions, applicable only to criminal prosecutions for libel, were enacted. Most of them have found expression in state Constitutions. For instance, in Alabama the Constitution (art. 1, § 13) provides "that in all indictments for libel, the jury shall have the right to determine the law and the facts, under the direction of the court," and a like provision is found in Arkansas, California, Connecticut, Delaware, Kentucky, Maine, Michigan, Mississippi, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Tennessee, Texas, and Wisconsin, and in the statute law of Iowa and Kansas. In every instance, however, it is limited to criminal libels.

Upon the question before us, it is idle to cite cases from states which have no provision of Constitution or law respecting the functions of a jury in the trial of a libel case. In the absence of any such provision, the general rule that the court's in-

structions are binding upon the jury would prevail (*Gregory v. Atkins*, 42 Vt. 237); and this would be the rule also in the trial of civil cases for libel in the states enumerated above, where the provision is limited to criminal libels. But a decision from any one of those states in a criminal prosecution is a precedent and valuable, to the extent that the reasoning of the court appeals to us, and indicates the general view as to the purpose of a provision of this character.

The Constitution of California provides: "In all criminal prosecutions for libels, . . . the jury shall have the right to determine the law and the fact." In *People v. Seeley*, 139 Cal. 118, 72 Pac. 834, the court said: "This provision in the Constitution is contained in nearly all the state Constitutions. The occasion for such provision was that in the early rulings of the courts the jury were required to confine their attention to the facts, and the court determined conclusively the libelous or innocent character of the publication. This doctrine was long ago overruled in England, and the jury are now permitted to judge of the whole case, and to decide not only as to the fact or publication, but upon the animus with which it was made, and whether, within the rules of law, the publication is libelous. The judge has the right to instruct the jury, but his instructions are advisory only. The jury could disregard the instructions and bring in a verdict even contrary to the evidence. They are the sole judges of the law as well as of the fact."

In *State v. Heacock*, 106 Iowa, 191, 76 N. W. 654, after referring to the section of the Iowa Code conferring upon juries in criminal libel cases the power to determine the law as well as the facts, it is said: "But the legal right of a jury, in a criminal prosecution under the sections quoted, to determine the law which should govern the verdict, even though a decision in conflict with the charge of the court be reached, cannot be doubted. The sections gave to the jury in such cases not merely the power, but the right, to make such a decision; and the jury was not required to follow the charge of the court, which must be regarded as advisory, and not conclusive as to the duty of the jury."

In Pennsylvania the constitutional provision applicable to criminal libels reads: "In all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases." In *Pittock v. O'Neill*, 63 Pa. 253, 3 Am. Rep. 544, the court, after quoting the provision above, said: "There can be no doubt that both in criminal and

civil cases the court may express to the jury their opinion as to whether the publication is libelous. The difference is that in criminal cases they are not bound to do so, and, if they do, their opinion is not binding on the jury, who may give a general verdict in opposition to it, and, if that verdict is for the defendant, a new trial cannot be granted against his consent. As our declaration of rights succinctly expresses it, the jury have the right to determine the law and the facts in indictments for libel as in other cases."

In Kansas it is provided by statute that, in all indictments or prosecutions for libel, the jury shall have the right to determine the law and the facts; and in *State v. Verry*, 36 Kan. 416, 13 Pac. 338, it is said: "Of course the court is not to abdicate its power and duty of instructing the jury upon the law of the case. The charge should be as full and complete as in cases where the jury are to implicitly take and follow the law laid down by the court. By reason of the learning and experience of the judge who presides, as well as the authority with which he is invested, the jury will doubtless heed and highly regard his opinion, as they should do, and will incline to adopt it rather than a contrary view presented by counsel; but the instructions which he gives are only advisory, and the jury are not in duty bound to accept and follow his views."

The foregoing are in harmony with the English cases, and indicate very clearly the purpose of the rule and the power intended to be conferred by it upon juries in criminal prosecutions for libel. In the Constitution of each of the following states, Colorado, Missouri, South Dakota, and Wyoming, is a provision similar to that quoted above from our own Constitution, which applies to all libel cases, civil as well as criminal. In *Ross v. Ward*, 14 S. D. 240, 86 Am. St. Rep. 746, 85 N. W. 182, the trial court had directed a verdict for plaintiff, leaving to the jury only the question of the amount of damages. After referring to the authority conferred upon the jury in the trial of a libel case, either civil or criminal, the court said: "The fact that the jury shall have the right to determine the fact and the law under the direction of the court seems to have been overlooked by the learned circuit court. The court, it is true, may direct the jury by stating to them what constitutes a privileged communication as laid down in the law, but whether or not the communication is privileged is a matter to be determined by the jury. This provision of the South Dakota Constitution is self-executing. To the lawyer familiar with the early decisions of 51 L.R.A., (N.S.)

the English courts upon the subject of libel and slander, the importance of this provision will be apparent. In our view of the case, therefore, the court had no right to take from the jury the question of whether or not the communication in this case was privileged."

Under a constitutional provision identical with our own, the Missouri courts have held consistently that the question of libel or no libel is for the jury; that it is the province of the trial court to advise the jury; but that the jury are not bound by the instructions, so far as the question of libel or no libel is concerned; and that a general verdict for a defendant concludes the case. *Duncan v. Williams*, 107 Mo. App. 539, 81 S. W. 1175; *Sands v. G. W. Marquardt & Sons*, 113 Mo. App. 490, 87 S. W. 1011; *Arnold v. Jewett*, 125 Mo. 241, 28 S. W. 614; *Heller v. Pulitzer Pub. Co.* 153 Mo. 205, 54 S. W. 457; *Ukman v. Daily Record Co.* 189 Mo. 378, 88 S. W. 60.

The question has not been before the Supreme court of Colorado directly, so far as our investigation discloses. In *Hazy v. Woitke*, 23 Colo. 556, 48 Pac. 1048, an order of the trial court granting a nonsuit was reversed, and some observations, by way of *dictum*, upon the power of the court in libel cases are made, but nothing is said which is out of harmony with the declarations of any of the courts referred to above.

The question does not appear to have been considered by the Wyoming court; and we have not found any authority contrary to the views expressed above from any state having a constitutional or statutory provision conferring upon juries in libel cases the power to determine the law as well as the facts. The authorities cited are entitled to respectful consideration from us. But, even if there were not any authorities upon the subject, we would be compelled to the same conclusion as they express; for any other decision of the question would render the language of our Constitution meaningless. It was unnecessary for the framers of our Constitution to make any declaration upon the subject at all, if it was intended that the court's instructions as to the libelous character of a publication should be binding upon the jury; for that would be the rule in the absence of any declaration. The history of these peculiar provisions, which make the trial of a libel case *sui generis*, discloses beyond all controversy that the purpose of their enactment has always been to confer upon juries a power not otherwise available to them, and that, to the extent of determining whether a particular publication is or is not libelous, the court's instructions shall be advisory only and may be discre-

garded by the jury. Except as to the question of libel or no libel, the authority of the trial court has not been curtailed, and in every other respect the trial of a libel case proceeds as any other.

It follows that the jury in this instance were not bound by instruction No. 2; that a decision contrary to that instruction is not a decision contrary to law, but, under the Constitution, is very clearly a verdict according to law as determined by the jury. The refusal of the jury to follow the advice of the court in this instance was not a ground for granting a new trial. In the absence of any prejudicial errors occurring at the trial, the general verdict in favor of defendants should have concluded this case.

The order granting a new trial is reversed.

Brantly, Ch. J., and Sanner, J., concur.

NEW MEXICO SUPREME COURT.

RE APPLICATION OF JOE CICA et al.

(— N. M. —, 137 Pac. 598.)

Habeas corpus — office.

1. The writ of habeas corpus is not a

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c. Prisoner discharged, legal sentence having been served, 382.

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e. Judgment modified, with directions to lower court to resentence, 386.

f. Case remanded for proper judgment, 386.

g. Judgment reversed and new trial granted, 388.

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writ of error, nor does it, except when perverted, discharge the functions of a writ of error.

Same — release for reversible error.

2. Errors or irregularities in the course of the proceedings at or anterior to the trial, which, if presented to an appellate court by way of appeal or writ of error, must necessarily result in the reversal of the judgment, are not sufficient, for that reason, as grounds for the release of a prisoner upon application for a writ of habeas corpus.

Judgment — collateral attack — jurisdiction.

3. As to jurisdictional questions, a judgment under which the prisoner is held is aided by the same presumptions as in other cases of collateral assault. If the record is silent as to jurisdictional facts, jurisdiction is presumed.

Criminal law — excessive sentence — effect.

4. A sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and the offense, and only void as to the excess, when such excess is separable and may be dealt with without disturbing the valid portion of the sentence.

(December 23, 1913.)

APPPLICATION for a writ of habeas corpus to secure the release of petitioners from custody to which they had

VI. English, Canadian, and Philippine decisions, 389.

I. Introduction.

This note is supplemental to a note on the same question to Re Taylor, 45 L.R.A. 136. It excludes the question whether a sentence is excessive, and is concerned only with the question of the effect of such a sentence. The question of practice in such cases is governed largely by statute, but the cases as reported frequently omit reference to the particular statutes, partly due, no doubt, to earlier decisions which have determined the matter, and which are collected in the earlier note. This note is, in general, confined to cases in which the effect of an excessive sentence has arisen as a point for consideration, and does not attempt to include all cases in which sentences have been adjudged excessive, and, without special consideration of the matter of procedure, some remedy has been applied.

II. General rule.

Supplementing 45 L.R.A. 137.

As will appear by reference to the earlier note, the weight of authority is in accord with Re Cica, to the effect that the fact that a sentence imposed by a court of competent jurisdiction is excessive, assuming that the punishment is of the kind appropriate to the offense, does not render the

been committed for violation of municipal ordinance. Denied.

Statement by Hanna, J.:

This was a petition for a writ of habeas corpus. The petitioners allege that, on the 18th day of November, 1913, a complaint was filed before J. M. Gauna, a justice of the peace in precinct No. 20 of Colfax county, attempting to charge an offense against the petitioners under a city ordinance of the city of Raton; said ordinance being designated as ordinance No. 133 in said complaint, but charged to have been ordinance No. 135 in the return and answer of the sheriff to the writ of habeas corpus. On the day the complaint was filed, the petitioners were sentenced to

sixty days in the common jail of Colfax county, and to pay a fine of \$25, and to pay costs amounting to \$7.50 each, and a commitment was issued accordingly. The petitioners were, in accordance with the mandate of the so-called commitment, taken into custody by Abe Hixenbaugh, sheriff of Colfax county, and by him imprisoned in the county jail on the 18th day of November, 1913, and there they remain.

The sheriff, by way of response to the writ, filed his return thereto. Thereupon the petitioners moved to quash the return and discharge the prisoners upon the petition and return of the officer. The return, which was designated "Return and Answer," admitted all the material allega-

entire sentence void, but that it is void only as to the excess, if the valid and invalid parts are separable. The effect of a majority of the decisions in this note supports the above rule, but attention is called to the following cases, as especially recognizing the general rule; *Martin v. District Ct.* 37 Colo. 110, 119 Am. St. Rep. 262, 86 Pac. 82; *Re Sullivan*, 3 Cal. App. 193, 84 Pac. 781; *Re Chase*, 18 Idaho, 561, 110 Pac. 1036; *Shields v. People*, 132 Ill. App. 109; *Perry v. Pernet*, 165 Ind. 67, 74 N. E. 609, 6 Ann. Cas. 533; *State v. Stone*, 40 Mont. 88, 105 Pac. 89; *Re Fantom*, 55 Neb. 703, 70 Am. St. Rep. 418, 76 N. W. 447; *Reese v. Olsen*, — Utah, —, 139 Pac. 941; *State v. Feilen*, 70 Wash. 65, 41 L.R.A.(N.S.) 418, 126 Pac. 75; *Ex parte Blystone*, 75 Wash. 286, 134 Pac. 827; *Re Welty*, 123 Fed. 122; *Harlan v. McGourin*, 218 U. S. 442, 54 L. ed. 1101, 31 Sup. Ct. Rep. 44, 21 Ann. Cas. 849, affirming 180 Fed. 119; *Cruz v. Director of Prisons*, 17 Philippine 269.

That a sentence is excessive is not ground for a new trial. *Burgamy v. State*, 114 Ga. 852, 40 S. E. 991; *Sturkey v. State*, 116 Ga. 526, 42 S. E. 747; *Bellinger v. State*, 116 Ga. 545, 42 S. E. 747; *Chapman v. State*, 118 Ga. 58, 44 S. E. 814; *Whittington v. State*, 121 Ga. 193, 48 S. E. 948; *Bradley v. State*, 121 Ga. 201, 48 S. E. 981; *Hill v. State*, 122 Ga. 166, 50 S. E. 507; *Mixon v. State*, 123 Ga. 581, 107 Am. St. Rep. 149, 51 S. E. 580; *Truitt v. State*, 124 Ga. 657, 52 S. E. 890; *Mayson v. State*, 124 Ga. 789, 53 S. E. 321; *Guthrie v. State*, 125 Ga. 291, 54 S. E. 180; *Fears v. State*, 125 Ga. 740, 54 S. E. 661; *Fears v. State*, 125 Ga. 739, 54 S. E. 667; *McCollum v. State*, 119 Ga. 308, 100 Am. St. Rep. 171, 46 S. E. 413; *Tipton v. State*, 119 Ga. 304, 46 S. E. 436, 15 Am. Crim. Rep. 209 (even though the verdict of guilty was accompanied with a recommendation to mercy); *Beaudrot v. State*, 126 Ga. 579, 55 S. E. 592 (same); *State v. Black*, 150 N. C. 868, 64 S. E. 778.

In *Jackson v. United States*, 42 C. C. A. 452, 102 Fed. 473, it was said that all the authorities agree that the defendant is not

entitled to a new trial because of an excessive sentence.

III. Effect of application for habeas corpus.

a. In general.

As to designation of wrong place of imprisonment as ground for discharge upon habeas corpus, see note to *Re Tani*, 13 L.R.A.(N.S.) 518.

As to whether habeas corpus is a proper remedy in a case of excessive sentence, the rule was laid down in *Bandy v. Hehn*, 10 Wyo. 167, 67 Pac. 979, 15 Am. Crim. Rep. 395, that "jurisdictional facts alone are to be considered. If the court had jurisdiction of the person and of the subject-matter, and to render the particular judgment in question, the inquiry is at an end, and, however erroneous the judgment may be, the applicant will be remanded into custody. If, upon the other hand, the court had jurisdiction of the person and of the subject-matter, but was without jurisdiction to render the particular judgment, then such judgment is void,—is, in effect, no judgment at all,—and the applicant must be discharged." It was accordingly held in this case that the prisoner would be discharged where he had pleaded guilty to petit larceny, but was erroneously sentenced to imprisonment for grand larceny.

And in *Ex parte Burden*, 92 Miss. 14, 131 Am. St. Rep. 511, 45 So. 1, the rule was laid down that whenever a sentence is merely excessive or erroneous or irregular, the writ of habeas corpus would not lie, but that the defendant must appeal; but that whenever the sentence for the particular offense is void for want of power to pronounce that particular sentence, the defendant may secure release by habeas corpus. In other words, the court was of the opinion that the true test as to whether habeas corpus was a proper remedy was whether the sentence imposed was of the kind or character authorized by law for the offense, in which case habeas corpus would not lie, even though the sentence

tions of the petition, except the averments with respect to the ordinance upon which the prosecution was based in the justice court.

Messrs. Elmer E. Studley and A. C. Voorhees, petitioners:

Justice courts, under the laws of this state, are courts of limited jurisdiction, and their records must show affirmatively their power to act.

24 Cyc. 497; *Crain v. United States*, 162 U. S. 625, 40 L. ed. 1097, 16 Sup. Ct. Rep. 952; *State v. Wood*, — Mo. App. —, 71 S. W. 724; *Ex parte Walton*, 2 Okla. Crim. Rep. 437, 101 Pac. 1034; *State v. Gray*, 37 N. J. L. 368, 1 Am. Crim. Rep. 556.

This judgment would be void if rendered

by a court of general jurisdiction. For stronger reason, it is void when rendered by a justice of the peace.

15 Am. & Eng. Enc. Law, 2d ed. 172; *People ex rel. Stokes v. Riseley*, 38 Hun, 280, 4 N. Y. Crim. Rep. 109; *People v. Carter*, 48 Hun, 165; *Ex parte Fury*, 19 N. J. L. 14; *Foy v. Talburt*, 5 Cranch, C. C. 124, Fed. Cas. No. 5,020.

Unless the court rendering the judgment had jurisdiction to render the particular judgment, it is a nullity.

Black, Judgm. § 258; 21 Cyc. 296; *Ex parte Gudenoge*, 2 Okla. Crim. Rep. 110, 100 Pac. 39; *Ex parte Webb*, 24 Nev. 238, 51 Pac. 1027; *Re Graham*, 138 U. S. 461, 34 L. ed. 1051, 11 Sup. Ct. Rep. 363; *Re Stewart*, 16 Neb. 193, 20 N. W. 255;

was excessive, whereas relief might be granted by habeas corpus if the court exceeded its jurisdiction by imposing a sentence not appropriate to the nature of the offense.

It was accordingly held in *Ex parte Burden*, supra, that habeas corpus was a proper remedy where, on a verdict for a misdemeanor, a sentence was pronounced as for a felony, by imprisonment in the penitentiary for a term of years. It was held, however, that the defendant was not entitled to an absolute discharge, but should be remanded to the lower court for proper sentence.

In distinguishing between a void judgment, from which a defendant would be released on habeas corpus, and a merely excessive judgment, from which he would not be released, the court in *Re Fanton*, 55 Neb. 703, 70 Am. St. Rep. 418, 76 N. W. 447, said: "If, upon a conviction for burglary, the court should sentence the accused to be hanged, the judgment would be void for want of jurisdiction of the court to impose a sentence of that kind in that case. But it would be otherwise if the court should adjudge an imprisonment in the penitentiary for a longer period than fixed by statute for the crime of burglary. In the latter case, the sentence would be erroneous merely, but not void. In the one case, the court had no jurisdiction to impose that particular kind of a sentence upon conviction of burglary, while in the other the statutory kind of punishment was meted out, although the time of imprisonment exceeded the statutory bounds. A sentence of a different character than that authorized by law to be imposed for the crime of which the accused has been found guilty is void, while a sentence which imposes the statutory kind of punishment is not absolutely void, although excessive. In the former case, the entire punishment is invalid, while as to the latter the excessive portion is alone erroneous, and not void in such a sense as to be available on habeas corpus, at least until after the valid portion of the judgment has been executed."

Accordingly, it was held in *Re Fanton*, 51 L.R.A. (N.S.)

supra, that one would not be discharged on habeas corpus from a sentence of imprisonment in the penitentiary for eight years, for a crime the maximum penalty for which was confinement for seven years, at least where the maximum penalty allowed had not been served.

b. Sentence void, prisoner discharged or remanded for proper sentence.

Supplementing 45 L.R.A. 139.

Where the sentence imposed is void, because of a kind which the court was not authorized to impose, the prisoner is entitled, as indicated under III. a, supra, on application for habeas corpus, to discharge or remand for proper sentence; and the cases of *Bandy v. Hehn* and *Ex parte Burden*, under that subdivision, illustrate the rule.

Under the following circumstances, it was held that a sentence of imprisonment was void, and that the prisoner should be discharged on habeas corpus:

—where, after conviction for a misdemeanor, the defendant was sentenced to the penitentiary for fourteen years as for a felony. *State v. District Ct. 35 Mont.* 321, 89 Pac. 63;

—where a fine of \$100 was imposed, and in default of payment the defendant was sentenced to and was confined in the penitentiary, when the violation of the ordinance in question could not be prosecuted as for a criminal offense, but by civil action only, and the court had jurisdiction only to impose a fine of \$50. *People ex rel. Kane v. Sloane*, 98 App. Div. 450, 90 N. Y. Supp. 762;

—where, without authority, the court ordered imprisonment of the defendant until he had secured payment of the judgment. *Re Comstock*, 10 Okla. 299, 61 Pac. 921;

—where a sentence was imposed that the defendant be imprisoned and pay a fine of \$200, and the only legal punishment was a fine of \$100, the court saying, also, that so much of the sentence as imposed a fine

Brown, Jurisdiction of Courts, §§ 101, 110; Church, Habeas Corpus, § 368; Ex parte Page, 49 Mo. 291; Ex parte Craig, 130 Mo. 590, 32 S. W. 1122; Ex parte Cox, 3 Idaho, 530, 95 Am. St. Rep. 29, 32 Pac. 197; Com. ex rel. Davis v. Lecky, 26 Am. Dec. 40, note; People ex rel. Stokes v. Riseley, 38 Hun, 280; 7 Am. & Eng. Enc. Law, 2d ed. 37; Geyger v. Stoy, 1 Dall. 135, 1 L. ed. 70.

The commitment is insufficient because it does not show a conviction of any offense known to the law; nor is it sufficient to warrant the officer in accepting the prisoners or in holding them thereunder.

Ex parte Walton, 2 Okla. Crim. Rep. 437, 101 Pac. 1034.

in excess of \$100 was void. Re Burns, 113 Fed. 987.

In Re Sullivan, 3 Cal. App. 193, 84 Pac. 781, a discharge on habeas corpus was granted, where an original sentence of fine, and of imprisonment in the state prison on default of payment, was valid to the extent of the fine; but the trial court, after issuance of the commitment, and after its authority was exhausted, on motion of the district attorney, vacated the judgment and imposed a sentence of imprisonment in jail on default in payment of the fine.

Where a sentence of imprisonment for contempt was unauthorized, except for the purpose of enforcing the payment of a fine, it was held in State ex rel. Holland v. Miesen, 98 Minn. 19, 106 N. W. 1134, 108 N. W. 513, that the prisoner would be discharged from imprisonment on habeas corpus, but, his conviction being valid, he would be remanded to the proper court for resentencing.

And where the only punishment authorized was a fine or imprisonment, but the defendant was sentenced to work on the chain gang, it was held in Littlejohn v. Stells, 123 Ga. 427, 51 S. E. 390, that, on application for writ of habeas corpus, an absolute discharge should not be granted, but the defendant should be remanded for proper sentence.

c. Discharge refused.

1. In general.

Supplementing 45 L.R.A. 145.

For instances where an absolute discharge on habeas corpus was denied although the sentence imposed was void, but relief was granted by remanding the prisoner for proper sentence, see Ex parte Burden, under III. a.; State ex rel. Holland v. Miesen and Littlejohn v. Stells, under III. b, supra.

Also, in People v. Quartararo, 76 Misc. 55, 133 N. Y. Supp. 985, where one who pleaded guilty to a crime, the maximum penalty for which was six months imprisonment, was sentenced to prison for eleven months, of which he served three, it was 51 L.R.A. (N.S.)

Mr. Orle L. Phillips, for the State:

Where one has been tried and convicted in the superior court, he will not be released by habeas corpus because he was not arraigned and did not plead in such court, since, as such errors do not go to the jurisdiction of the court, it is not subject to collateral attack.

Winslow v. Green, 155 Ind. 368, 58 N. E. 259.

The only question which is one of jurisdiction is, Did the complaint charge an offense known to the law? If so, no matter how defective, it is not ground for relief by habeas corpus.

Ex parte Williams, 121 Cal. 328, 53 Pac. 706; Re Marshall, 6 Idaho, 516, 56 Pac. 470; Ex parte Stacey, 45 Or. 85, 75

held that he would not be discharged on habeas corpus, but would be remanded to the lower court for sentence as though no judgment had been entered on his plea, the proper remedy from the judgment of the lower court being by appeal.

And in People ex rel. Schali v. Deyo, 103 App. Div. 126, 93 N. Y. Supp. 80, where a sentence was illegal in that the minimum was excessive, it was held on an appeal from an order dismissing a writ of habeas corpus, that the writ should be reinstated and the prisoner produced before the trial court for resentencing. It appears in this case that the prisoner had not served the legal minimum. But on appeal, in 181 N. Y. 425, 74 N. E. 430, the minimum term imposed was held not necessarily excessive, though the court indicated that the prisoner would be entitled to discharge after service of the legal term, if by reason of the earning of commutation the minimum should prove excessive in extending beyond the maximum as reduced by commutation.

Where a justice of the peace had jurisdiction to sentence to imprisonment in the county jail, but erroneously added to such a sentence the clause "at hard labor," it was held in Re Burkell, 2 Alaska, 108, that a discharge upon habeas corpus would not be granted, as it did not appear that the sentence as to hard labor was being enforced.

In Re Vitali, 153 Mich. 514, 126 Am. St. Rep. 535, 116 N. W. 1066, it was held that one who was serving a life sentence for murder in the second degree would not be discharged on habeas corpus on the ground that the sentence was void because not complying with the indeterminate sentence law, which repealed the statute allowing a sentence for life as a punishment for murder in the second degree; since habeas corpus should not be permitted to perform the functions of a writ of error.

Under statute forbidding a court on application for habeas corpus to inquire into the legality of any judgment or process whereby the party is in custody, or to discharge him when the term of commitment has not expired upon any process issued on

Pac. 1060; Gibson v. Gilman, 71 Kan. 320, 80 Pac. 587; Re Peraltarcavis, 8 N. M. 27, 41 Pac. 538; Tanner v. Wiggins, 54 Fla. 203, 45 So. 459, 14 Ann. Cas. 718.

If a court has jurisdiction to sentence one to imprisonment or to pay a fine, and inflicts both punishments, the prisoner will nevertheless not be discharged so long as he has neither paid the fine nor served the term.

28 Cyc. 306.

But even where the sentence is not severable, the sentence is not void absolutely, so the prisoner will be entitled to discharge upon habeas corpus, but valid so far as it is in keeping with the statute, and void only as to the excess.

DeBara v. United States, 40 C. C. A.

a final judgment of a court of competent jurisdiction, it was held in *Re McNaught*, 1 Okla. Crim. Rep. 528, 99 Pac. 241, that one serving a life sentence for manslaughter would not be discharged on habeas corpus on the ground that the sentence was excessive, such penalty being permissible under the law. The court indicated that where, as in this instance, the penalty imposed was not of an entirely different character from that authorized, the remedy for an alleged excessive sentence was by an appeal, and not by habeas corpus proceedings.

Where one sentence to pay a fine and costs was denied the right to secure payment thereof and ordered committed until the same was paid, it was said in *Ex parte Stanfeal*, 29 Ohio C. C. 664, affirmed in 78 Ohio St. 24, 84 N. E. 419, 14 Ann. Cas. 138, that although the penalty was thus made more oppressive than was warranted by statute, yet it was only an irregularity, which might be corrected by proceedings in error, and not by habeas corpus. To the same effect is *Re McAdams*, 21 Ohio C. C. 450, 11 Ohio C. D. 780.

In *People ex rel. Price v. Hayes*, 151 App. Div. 561, 136 N. Y. Supp. 854, where it was contended that the sentence exceeded the maximum penalty allowed by law, the court, although upholding the validity of the sentence, said that even if it had been erroneous or the court had not the power to pronounce it, the prisoner would not be entitled to relief by habeas corpus.

That the original sentence, before modification on motion of the government counsel, exceeded the authority of the court in requiring service at hard labor, is not ground for release on habeas corpus. *Harlan v. McGourin*, 218 U. S. 442, 54 L. ed. 1101, 31 Sup. Ct. Rep. 44, 21 Ann. Cas. 849, affirming 180 Fed. 119.

The fact that the minimum term was excessive was held in *Ex parte Melosevich*, — Nev. —, 133 Pac. 57, not to be sufficient ground for discharge on habeas corpus. In this instance a sentence of from two or three years was imposed, instead of the legal term of from one to fourteen years, 51 L.R.A. (N.S.)

194, 99 Fed. 943; *Ex parte Mooney*, 26 W. Va. 36, 53 Am. Rep. 59; *Re Swan*, 150 U. S. 637, 37 L. ed. 1207, 14 Sup. Ct. Rep. 225; *United States v. Pidgeon*, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746; *Ex parte Crenshaw*, 80 Mo. 447; *Re Sloan*, 5 N. M. 590, 25 Pac. 937.

Hanna, J., delivered the opinion of the court:

The petitioners contend that the judgment rendered by the justice of the peace, upon which the commitment is based, was void for the following reasons: First, because there was no arraignment of the defendants; second, because the judgment sentencing each of the defendants to sixty days in the county jail and to pay a fine

and the decision on the habeas corpus application was rendered nearly ten months after sentence. A statute provided that the board of pardons might at any time after expiration of the minimum term release the prisoner on parol. But in this instance the court was of the opinion apparently that the provisions of the statute in regard to the indeterminate sentence should be read into the judgment, giving the prisoner the right, at the expiration of the minimum fixed by statute, to apply for parol; and also that his rights were sufficiently protected, because, independent of statute, he could apply for and obtain relief from the board of pardons.

Under statutes providing that upon the hearing of a writ of habeas corpus, the court must remand the prisoner if it appears that he is in custody by virtue of the final judgment of a competent tribunal, and prohibiting inquiry into the legality of a judgment, but authorizing the appellate court to correct a judgment on appeal, it was held in *People ex rel. Bretton v. Schleth*, 68 Misc. 307, 123 N. Y. Supp. 686, that a prisoner whose term of sentence was excessive would not be released on habeas corpus, but that the proper remedy was by appeal. Whether the prisoner had served the legal term at the time of his application for release does not appear.

See also *Moyer v. Anderson* and *Ex parte Spencer*, under III. d, *infra*.

2. Until legal sentence is served.

Supplementing 45 L.R.A. 148.

The general rule is well settled in accord with RE CICA, that a prisoner is not entitled to discharge on habeas corpus because of an excessive sentence, where he has not suffered that part of the penalty which the court could legally impose, and the valid and invalid parts are separable. That case, it should be observed, dealt only with such a separable sentence as imposed both fine and imprisonment, neither of which the applicant for writ of habeas corpus had satisfied, and only one of which was authorized as a penalty. But the recent cases general-

of \$25 and costs was excessive, and beyond the power of the court to impose.

In considering the first ground of objection to the judgment, it is necessary to admit the well-settled principle that the writ of habeas corpus is not a writ of error, nor does it, except when perverted, discharge the functions of a writ of error. 2 Freeman, Judgm. § 620; Hurd, Habeas Corpus, 2d ed. 328.

Pursuant to this principle it has been quite universally held that errors or irregularities in the course of the proceedings at or anterior to the trial, which, if presented to an appellate court by way of appeal or writ of error, must necessarily result in the reversal of the judgment, are not sufficient, for that reason, as grounds

for the release of a prisoner upon application for a writ of habeas corpus. Freeman, Judgm. 4th ed. § 620; Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717.

The particular phase of the question here raised—i. e., that there was no arraignment of the defendants—does not seem to have been passed upon by any court of last resort, save that of the supreme court of Indiana, which court held, in the case of Winslow v. Green, 155 Ind. 368, 58 N. E. 259, that, where one has been tried and convicted in the superior court, he will not be released by habeas corpus because he was not arraigned and did not plead in such court, since, as such errors do not go to the jurisdiction of the court, its judgment is not subject to collateral

ly appear to hold that a sentence which imposes a longer term of imprisonment than that authorized is separable in the sense that before the prisoner has served such term as the court was authorized to impose, he will not be released on habeas corpus. Re Chase, 18 Idaho, 561, 110 Pac. 1036; Martin v. District Ct. 37 Colo. 110, 119 Am. St. Rep. 262, 86 Pac. 82; Martin v. District Ct. 37 Colo. 119, 86 Pac. 85; Re Richards, 150 Mich. 421, 114 N. W. 348; Ex parte Foster, — Or. —, 138 Pac. 849; Re Blystone, 75 Wash. 286, 134 Pac. 827; Harris v. Lang, 27 App. D. C. 84, 7 L.R.A. (N.S.) 124, 7 Ann. Cas. 141; Connella v. Haskell, 87 C. C. A. 111, 158 Fed. 285; De Bara v. United States, 40 C. C. A. 194, 99 Fed. 942 (on subsequent application to the United States Supreme Court for writ of habeas corpus, 179 U. S. 316, 45 L. ed. 207, 21 Sup. Ct. Rep. 110, the sentence was regarded as not being excessive).

In Re Blystone, 75 Wash. 286, 134 Pac. 827, where the maximum legal penalty was twenty years imprisonment, and the minimum from six months to five years, but the court imposed a sentence of from fifteen to twenty years, it was held that at least before the expiration of the five-year term, the prisoner would not be released on habeas corpus.

And in Re Richards, 150 Mich. 421, 114 N. W. 348, where a sentence was imposed of not less than six nor more than seven years, and a statute provided that the minimum term of imprisonment should not exceed one half of the maximum, discharge on habeas corpus was refused to one who had not yet served the legal minimum, the sentence being regarded as valid at least for three and a half years minimum.

Where a sentence was imposed of fine and imprisonment, and the only legal penalty was fine or imprisonment, it was held in Ex parte Davis, 112 Fed. 139, that the prisoner would not be discharged on habeas corpus before he had either paid the fine or suffered the imprisonment. The excessiveness of the sentence was conceded, and it was said that the prisoner might be remanded to the lower court for proper sen- 51 L.R.A. (N.S.)

tence, or he might be allowed to elect whether he would pay the fine or suffer the imprisonment; but since in this case part of the imprisonment has been served, the latter course was adopted.

And in Reese v. Olsen, — Utah, —, 139 Pac. 941, where the court had power to impose a fine and imprisonment, but illegally imposed also a sentence of imprisonment until the fine was paid, it was held that until the prisoner had served the legal term of imprisonment imposed as a penalty for the offense, he would not be released on habeas corpus.

To a similar effect is Ex parte Ellerd, — Tex. Crim. Rep. —, 158 S. W. 1145, where, for a contempt for which the court was authorized to impose a fine not exceeding \$100, a fine of \$250 was imposed, and the party committed until payment of the fine and costs, it being held that the judgment, although excessive as to the amount of the fine, was not void, and a discharge would not be granted on habeas corpus until the petitioner had showed payment of \$100 and costs.

Where a legal sentence of eighteen months could have been imposed, and the prisoner had not yet served that length of time under a sentence of three years, the court in DeBara v. United States, 40 C. C. A. 194, 99 Fed. 942, in refusing to discharge the prisoner under a writ of habeas corpus, said that "it is true that the cases wherein the writ has been denied because a part only of the sentence was within the power of the court to impose have generally been those in which the judgment was of a clearly separable nature, as for costs and imprisonment, where there was power only to impose the one or the other. We see no reason why the rule should be limited to such cases, and think the true principle to be that, before a prisoner can be discharged upon habeas corpus, it must appear that he is serving by virtue of a judgment which the court had no power to impose. As long as he is serving an imprisonment within the limits of a term which the court might lawfully impose, acting within its power and jurisdiction, he cannot be discharged

attack. In that case, as in the case now under consideration, it was not denied that the court had jurisdiction both of the subject-matter and the person of the defendant.

Our territorial supreme court, in the case of *Re Peraltareavis*, 8 N. M. 27, 41 Pac. 538, following *Ex parte Siebold*, supra, said: "That the only ground on which that court [United States Supreme Court], or any court, without special statute authority, will give relief on habeas corpus, is where there is want of jurisdiction over the person or the cause, or some other matter rendering the proceedings void, as distinguished from what is merely erroneous and reversible."

Our habeas corpus statute was adopted

on habeas corpus, no matter how irregular or erroneous the judgment may be."

But in *O'Brien v. McClaughry*, 209 Fed. 816, it was held that under the Federal parole law, providing that a prisoner might be released on parole after he had served one third of the total of the term or terms for which he was sentenced, one who was confined in the United States Penitentiary under sentences of five and three years respectively, for burglary of and larceny from a postoffice, the latter sentence being illegal, was entitled to a discharge from the illegal sentence on habeas corpus, although he had not completed the burglary sentence. The prisoner was, however, remanded as to the latter sentence. The court approved *DeBara v. United States*, supra, but distinguished it from this case because the former was decided before the passage of the Federal parole law. It was said that ordinarily the law will on habeas corpus grant no release to a prisoner under the circumstances of this case, until he has served the larger sentence imposed on the two counts, if that is within the power of the court to impose; that the ground of the decisions so holding was doubtless in part that, where a prisoner is held under a sentence lawfully imposed, the question as to whether he was lawfully or unlawfully held upon another sentence was a mere moot question. But as applied to the facts of this case, it was said: "We cannot conceive that the second sentence against the petitioner, utterly void as it was and is, should be used to defer his right to apply for a parole, . . . and, while fully convinced that the rule would be otherwise in the absence of the parole law, this case is reversed and remanded, with directions to the district court to discharge the petitioner from the custody of the defendant [the warden of the penitentiary] as to the charge of larceny, but to remand him upon the charge of breaking into a postoffice."

Where a justice of the peace exceeded his jurisdiction in imposing a sentence of nine months imprisonment, it was held in *Re Kenney*, 147 Mich. 678, 111 N. W. 189, that, 51 L.R.A. (N.S.)

prior to the rendition of the opinion on the *Peraltareavis* Case, and was doubtless carefully considered by the court at that time. We do not concede that the failure of the record, in this case, to show affirmatively an arraignment of the defendants, is a jurisdictional defect that would render void the judgment in the case and subject it to collateral attack. It has been held that, as to jurisdictional questions, a judgment under which the prisoner is held is aided by the same presumptions as in other cases of collateral assault. If the record is silent as to jurisdictional facts, jurisdiction is presumed. *Freeman*, Judgm. § 619; *Ex parte Ah Men*, 77 Cal. 198, 11 Am. St. Rep. 263, 19 Pac. 380.

In concluding our discussion upon this

on petition for writ of habeas corpus, a discharge would not be granted, since the petitioner had not served the punishment, three months, which the justice was authorized to impose, a statute providing that whenever, in a criminal case before a justice of the peace, the defendant is adjudged guilty and punishment imposed in excess of that allowed by law, the judgment shall be valid and effectual to the extent of the lawful penalty, and be reversed only as to the excess.

In *Re Groves*, 83 Kan. 238, 109 Pac. 1087, where a sentence of imprisonment was imposed until certain payments were made and the costs paid, it was held on application for writ of habeas corpus that the petitioner would not be discharged even if the court had no authority to imprison for failure to pay the costs, since he had failed also to make the payments.

Where, in addition to imprisonment as punishment for the offense, the defendant was sentenced to confinement for payment of costs at the rate of 40 cents per day, instead of at the authorized rate of 75 cents per day, but had not, at the time of application for release on habeas corpus, served such term as, estimated at the latter rate, would satisfy the costs, it was held in *Ex parte Smith*, 1 Ala. App. 535, 56 So. 247, that the petitioner was not entitled to discharge.

Where, in default of giving a bond to keep the peace and paying of costs, the defendant was committed to jail, and the order as to the commitment for costs was illegal, it was held in *State ex rel. Babin v. Foster*, 109 La. 587, 33 So. 611, that the defendant should not be released unconditionally on habeas corpus, but should be released only on furnishing the bond, and that on writ of certiorari to a judge who had granted an unconditional release, the judgment would be ordered modified accordingly.

d. Discharged, proper sentence having been served.

Supplementing 45 L.R.A. 144.

Under the following circumstances,

subject, we desire to observe that it is not contended by the petitioners that no arraignment was had; but their contention is entirely based upon the failure of the record to disclose the fact of arraignment.

The further contention of petitioners respecting defects in the complaint and impropriety of holding that the prosecution was had under ordinance No. 135 of the city of Raton, when the complaint was originally made under ordinance No. 133, are likewise collateral attacks upon the judgment of the justice court, which cannot now be entertained in this proceeding for the reason given.

This leaves for our consideration the question that the judgment sentencing each

prisoners having served legal sentences, where the sentences imposed were excessive, were discharged on habeas corpus:

—where imprisonment for costs at the rate of 40 cents per day was imposed, instead of at the authorized rate of 75 cents per day, and the defendant had served such term, estimated at the latter rate, as would satisfy the costs. *Ex parte Haley*, 1 Ala. App. 528, 56 So. 245;

—where the defendant was erroneously sentenced to hard labor for costs, and had served the sentence properly imposed as punishment for the crime. *Ex parte Hill*, 122 Ala. 114, 26 So. 230;

—where imprisonment for nonpayment of a fine was unauthorized and the term of imprisonment imposed as punishment for the offense had been served. *Cruz v. Director of Prisons*, 17 Philippine, 269;

—where, after conviction and sentence for ten years for assault with intent to commit murder, the defendant was convicted and sentenced for five years for burglary, and the court erroneously made the latter sentence cumulative, the prisoner having served the ten year term. *Ex parte Morton*, 132 Cal. 346, 64 Pac. 469;

—where, for an offense for which the maximum sentence was thirty days imprisonment, a sentence of six months was imposed, the defendant having served thirty days. *Ex parte McClure*, 6 Okla. Crim. Rep. 241, 118 Pac. 591;

—where, for a crime for which the legal punishment was imprisonment in the county jail not more than one year, or a fine not exceeding \$500, the defendant was sentenced to the state prison for a term of from two and a half to eight years, of which he had served more than four years. *Re Bolden*, 159 Mich. 629, 124 N. W. 548;

—where a single sentence for a term in excess of the period specified by statute for a single offense, upon conviction of separate crimes charged in several counts of the indictment, was void as to the excess, although the sentence was for a less term than the court might have imposed as cumulative sentences. *United States v. 51 L.R.A. (N.S.)*

of the defendants to sixty days in the county jail and to pay a fine of \$25 and costs was excessive and beyond the power of the court to impose. The ordinance upon which the judgment was based provides: "Sec. 3. Any person violating any provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in a sum of not exceeding \$25, or by imprisonment in the county jail for a period not exceeding sixty days."

It is urged by the petitioners that our statute is substantially the same as the statutes of Idaho and Missouri, and that our statute was adopted from the Missouri statute after it had been construed by the supreme court of that state in the

Poeke, 12 L.R.A. (N.S.) 314, 82 C. C. A. 340, 153 Fed. 166, affirming 144 Fed. 1016.

The rule that one who has served the legal penalty may be released on habeas corpus from service of an excess sentence was approved in *Re Holley*, 154 N. C. 163, 69 S. E. 872, although it was held in that case by a majority of the court, that the sentence in question was not excessive. This rule was approved although a statute provided that the writ of habeas corpus should be denied where it appeared that the petitioner was detained by virtue of the judgment of a "competent tribunal."

In *Munson v. McClaughry*, 42 L.R.A. (N.S.) 302, 117 C. C. A. 180, 198 Fed. 72, one who had served a sentence for burglary of a postoffice building with intent to commit larceny was discharged on habeas corpus from a sentence for larceny, which, as a part of the same criminal act, it was held the court had no power to impose. To the same effect is *Halligan v. Wayne*, 102 C. C. A. 410, 179 Fed. 112, where under similar circumstances the prisoner was discharged.

But in *Moyer v. Anderson*, 122 C. C. A. 175, 203 Fed. 881, it was said that in the two cases last cited no question was presented as to the propriety of the writ of habeas corpus as a remedy, but that in each case its appropriateness was assumed, and it was conceded also that the burglary and larceny were parts of one and the same transaction. It was accordingly held in the *Moyer Case* that the prisoner, who had been convicted on separate counts of burglary from a postoffice building, with attempt to commit larceny, and larceny committed on the same date, would not be released on habeas corpus, although he had served the sentence for burglary. It was said that the petitioner upon his trial could have interposed the defense that the larceny was merged in the burglary charge, or vice versa, and, having failed to do so, and the record not sufficiently showing that the two crimes were committed at the same time and place, he could not reserve this defense for presentation on habeas corpus; that the trial court had jurisdiction to determine

case of *Ex parte Page*, 49 Mo. 291. We are not convinced of the correctness of this contention, though there is great similarity between the statutes. The facts involved in the Missouri case, however, are not the same as those with which we are now concerned.

This case being similar to that of *Ex parte Mooney*, 26 W. Va. 36, 53 Am. Rep. 59, from the opinion therein we desire to quote at length with approval: "It is insisted, however, that, as the court had no legal right under the statute to sentence the petitioner both to confinement in the penitentiary and to pay a fine, it exceeded its jurisdiction, and thereby the whole proceeding became illegal and void. In support of this view the cases of *Ex parte*

Page, supra; *Rex v. Ellis*, 5 Barn. & C. 395, and *Rex v. Bourne*, 7 Ad. & El. 58, are relied on by counsel for petitioner. The two latter cases were decided upon writs of error by the court of King's bench, and by reason of the peculiar constitution of that court, the determination of such cases by it have no analogy to the proceeding by habeas corpus in our courts. I do not, therefore, regard those cases as authority in this case. The other case, from Missouri, was in some respects different from the one before us. In that case the extreme limit which the court could inflict as a punishment for grand larceny was fixed by statute at seven years' confinement in the penitentiary; but the court sentenced the petitioner to such confinement

whether the petitioner was guilty of both defenses, and its decision could be questioned only by means of a writ of error, and not by a writ of habeas corpus.

And in *Re Spencer*, 228 U. S. 652, 57 L. ed. 1010, 33 Sup. Ct. Rep. 709, it was held that one under sentence by the state court to a fine and imprisonment for not less than eighteen months, nor more than two years, who had paid the fine and served less than six months of the sentence, would not be discharged on habeas corpus, on the ground that the law authorizing the imposition of such a sentence was *ex post facto*, the law in force at the time of the commission of the crime admitting only of punishment by imprisonment for a term of not less than six months, nor more than two years, where an unsuccessful application for a writ of habeas corpus had been made to the United States district court, and the question of the constitutionality of the statute was not raised in the trial court, nor on appeal to the superior court of the state, nor on an unsuccessful petition to the state supreme court, which had power to review and modify the judgment, to allow an appeal from the superior court. The decision apparently is not placed upon the ground that the sentence was valid at least as to the six months, and that the petitioner would not be released prior to the expiration of that time, but upon the ground that habeas corpus was not the proper remedy; but that the efficient and orderly course to obtain relief was through the state tribunals, which had power to grant relief, and whose decision on the constitutional question could have been reviewed by the United States Supreme Court.

But in *Stevens v. McLaughry*, — C. C. A. —, 207 Fed. 18, where a sentence of five years imprisonment was imposed for stealing from a United States mail car a letter pouch containing registered mail, and also an additional sentence of five years imprisonment for larceny of mail matter was illegally imposed, the crimes not being distinct offenses capable of separate sentences, it was held that, after having served the first term of imprisonment, the defendant
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was entitled to release on habeas corpus; and the rule was laid down that he was not barred from such relief by the fact that he might have obtained it by writ of error, but failed to do so until it was too late.

IV. Effect on appeal or on writ of error.

a. In general.

Supplementing 45 L.R.A. 150.

In *State v. Huggins*, 84 N. J. L. 254, 87 Atl. 630, it was said that formerly in England and in New Jersey an excessive sentence rendered the judgment illegal, and called for a reversal for want of power in the higher court either to correct the sentence or remand the case to the lower court for that purpose; but that, to remedy this defect, it was provided by statute that whenever a final judgment in a criminal case was reversed on account of error in the sentence, the court making the reversal might remand the case for proper judgment, or might render such judgment therein as should have been rendered in the lower court. It was accordingly held in this case, where a maximum sentence of thirty years was imposed instead of the legal maximum of fifteen years, that the prosecutor might elect as to the form of relief to correct the sentence.

In *State v. Arbruzino*, 67 W. Va. 534, 68 S. E. 269, the rule was laid down in the headnote by the court that "if the error complained of be that the final judgment is in excess of the verdict, it is matter of record and may be reviewed on writ of error, without any formal exception being taken to the action of the trial court."

b. Sentence reversed, prisoner discharged.

Supplementing 45 L.R.A. 161.

Where, for a crime the maximum penalty for which was a fine of \$50, a fine of \$100 was imposed, and the defendant sentenced in default of payment to imprisonment, it was held in *Derby v. State*, 24 Ohio C. C. 304, that the judgment would be reversed, and as the time had passed for the pro-

for that crime for ten years. The court on habeas corpus held that the trial court by that sentence had exceeded its jurisdiction, and therefore under the provisions of the statute of that state the petitioner was discharged. The statute referred to declared that when a prisoner is brought up on habeas corpus, if it appear that he is in custody by virtue of process from any court or judicial officer, he can be discharged only in one of the following cases: 'First, where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum, or person. . . . Sixth, where the process is not authorized by any judgment, order, or decree, nor by any provision of law.' *Wagner's Stat.* 690, § 35. The judge who delivered the opin-

ion of the court, after quoting said statute, says: 'It seems to me that the court in passing the sentence exceeded its jurisdiction in the matter, and that it did not act by authority of any provision of law. This application, therefore, I think comes within the meaning of the statute.' 49 Mo. 292. It seems clear from the opinion that the court decided that case under the influence of the statute; and consequently it can be no precedent, and can have no application in a state like ours, where no such statute exists. But if that case could be regarded as decided upon principle, it must be disapproved, since it is not only contrary to the general rules hereinbefore stated, but it is in positive conflict with numerous other and seemingly better con-

nouncing of sentence by the lower court, and its jurisdiction to pronounce sentence was lost, the defendant must be discharged.

Derby v. State, supra, was, however, overruled in *Yocheim v. State*, 31 Ohio C. C. 430, where the rule was laid down that, upon reversal by the court of common pleas for error in the sentence alone, and remand for resentence, the lower court had authority to resentence, even though the time had elapsed after the trial within which judgment must be rendered.

c. Prisoner discharged, legal sentence having been served.

Supplementing 45 L.R.A. 152.

In *Galeo v. State*, 107 Me. 474, 78 Atl. 867, where a plea of guilty was entered, and the prisoner had suffered all the punishment that could legally have been imposed upon him for the offense committed, he was discharged on appeal.

In *Com. v. Fetterman*, 26 Pa. Super. Ct. 569, where an excessive sentence was imposed, it was said that the error might be corrected on appeal by reversing the judgment and remitting the record for proper sentence, or the appellate court might modify the judgment by passing proper sentence. The latter form of remedy was in this instance adopted, it being held that, where a prisoner had been sentenced to the penitentiary for a year and a half at solitary confinement at labor, and the only punishment which could legally be imposed was confinement in the county jail, the prisoner, who had served eleven months in the penitentiary, should be discharged, as the term served was adequate punishment for the offense.

Under statute providing that on appeal the appellate court might, in cases where an erroneous judgment had been entered upon a lawful verdict, correct the judgment, it was held in *People v. Scheuren*, 148 App. Div. 324, 132 N. Y. Supp. 1025, that one who had been convicted of a misdemeanor and sentenced as for a felony to not less than three nor more than five and one-half years imprisonment, and had 51 L.R.A. (N.S.)

served over a year in the state prison under the erroneous judgment, would be discharged on appeal. It was said that the proper procedure under the statute would be to direct that the defendant be brought before the court for judgment on his conviction; but as the defendant had served already over a year, an additional sentence would not be imposed, but the judgment would be reversed and the prisoner discharged.

d. Sentence corrected or modified.

Supplementing 45 L.R.A. 153, 157.

In some instances, instead of remanding the case to the lower court for resentence, where the sentence was excessive, the appellate court has corrected the sentence, usually stating that as modified the judgment is affirmed. Statutes giving the courts authority to modify a judgment or sentence on appeal in some of the cases, but in others no reference is made to particular statutory power.

In *Jackson v. United States*, 42 C. C. A. 452, 102 Fed. 473, it was said that the courts are not entirely uniform as to the particular manner in which the correction of a sentence shall be made,—whether by the court imposing the sentence or by the appellate court; that the difference seemed to depend upon the particular way in which the question was raised, whether by habeas corpus or by writ of error; but that the rule that the sentence might be corrected in the appellate court should be applied especially in a case like the one in question, where the prisoner was confined in a prison remote from the place of sentence, and to take him back for modification of the sentence would incur great expense without any benefit to him.

In *State v. Wisnewski*, 13 N. D. 649, 102 N. W. 883, 3 Ann. Cas. 907, it was said that the power to modify a judgment, as authorized by statute, would not be exercised in a case involving the discretion of the trial court as to the sentence, where its judgment as to the punishment had not been indicated; but in this instance, where

sidered decisions of courts of other states. *Re Petty*, 22 Kan. 477; *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787; *People ex rel. Woolf v. Jacobs*, 66 N. Y. 9; *Peopl. ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *People ex rel. Trainor v. Baker*, 89 N. Y. 460."

As pointed out in this opinion (*Ex parte Mooney*) the sentence under consideration by the Missouri Case was not severable, while in the *Mooney Case*, nine and imprisonment having been imposed, and one or the other being in excess of the statutory provision, it was held that the sentence was void as to the excess only, the sentence being severable. In the Idaho case, *Ex parte Cox*, 3 Idaho, 530, 95 Am. St. Rep. 29, 32 Pac. 197, a judgment im-

posed a sentence of five years for violation of an Idaho statute, when the statute in question authorized a maximum penalty of two years. This case is similar to the Missouri case of *Ex parte Page*, which was cited by the Idaho supreme court with approval.

In a later case, *Ex parte Crenshaw*, 80 Mo. 447, where the court exceeded the limit of punishment in imposing a fine of \$500, the supreme court held: "Notwithstanding these errors in the proceeding of the court, we cannot discharge the prisoner, since the order for his commitment, until he shall have obeyed the order to restore the goods, was a legitimate exercise of the power of the court. Neither this nor any other court can, on a petition for habeas corpus, dis-

an additional penalty of 200 days imprisonment was imposed for non-payment of a fine, instead of the legal penalty of six months, it was clear that the court would have imposed an additional sentence of six months, if the provision of the statute had not been overlooked. Accordingly, the additional sentence was reduced to six months.

In *Jones v. State*, — Okla. Crim. Rep. —, 137 Pac. 121, the court said regarding its power to reduce an alleged excessive sentence: "While this court has the power to modify a judgment and reduce a sentence inflicted by the jury or trial court, this power cannot be arbitrarily used, but can only be exercised where it appears from the record that an injustice has been done in assessing the punishment."

In *Haynes v. United States*, 42 C. C. A. 34, 101 Fed. 817, where the court erroneously added to a sentence of imprisonment the words "at hard labor," and designated the penitentiary instead of a county jail as the place of imprisonment, it was held on appeal that the appellate court might either correct the sentence or remit the record to the trial court for modification by eliminating the excessive part, and that in this instance the latter method would be adopted, because the appellate court did not have sufficient information to enable it to designate a suitable jail or other place of imprisonment in lieu of the penitentiary.

In *State v. Van Waters*, 36 Wash. 358, 78 Pac. 897, it was said that the sentence in question of twenty-one years seemed unnecessarily severe, and would have been reduced to five years if within the recognized powers of the court. But the court said that its investigation led it to doubt its authority to reduce or modify a sentence within the discretion of the trial court to impose, and the apparent excessiveness was mentioned in order that the prisoner might be aided thereby in application to the pardoning power for clemency after he had served a reasonable time.

Under the following circumstances it has been held that the appellate court would modify an excessive sentence or judgment: 51 L.R.A. (N.S.)

—where the words "at hard labor" were erroneously included in a sentence of imprisonment, and the prisoner was confined in a prison remote from the place of sentence. *Jackson v. United States*, 42 C. C. A. 452, 102 Fed. 473;

—where imprisonment in the penitentiary at hard labor in default of payment of a fine was erroneously imposed instead of confinement in the county jail. *Thompson v. State*, 52 Fla. 113, 41 So. 899;

—where, in a conviction for second degree murder, the sentence was fixed by the verdict, but the court erroneously sentenced the defendant to an additional term at hard labor for costs. *Weaver v. State*, 1 Ala. App. 48, 55 So. 956, rehearing on other points denied in 2 Ala. App. 98, 56 So. 749;

—where the defendant was sentenced to a certain term at hard labor to pay costs at the rate of 40 cents per day, and, the statute fixing this rate having been declared unconstitutional, the judgment was corrected so as to require service for an additional term estimated under statute at the rate of 75 cents per day. *Martin v. State*, 1 Ala. App. 215, 56 So. 3; *Crandall v. State*, 2 Ala. App. 112, 56 So. 873;

—where a sentence of 294 days imprisonment in default of payment of fine and costs was reduced to six months, the legal maximum. *State v. Stevens*, 19 N. D. 249, 123 N. W. 888;

—where a sentence imposing imprisonment for a certain term, for assault, also imposed a fine, and erroneously directed additional imprisonment in default of payment of the fine, the judgment being modified by striking out that part directing imprisonment upon failure to pay the fine. *People v. Kerr*, 15 Cal. App. 273, 114 Pac. 534;

—where, after a verdict fixing the punishment as imprisonment, the court erroneously also imposed a fine. *Shields v. People*, 132 Ill. App. 109;

—where, in addition to payment of a fine, the court erroneously added a sentence of imprisonment. *Johnson v. State*, — Miss. —, 26 So. 967;

charge the prisoner for a mere irregularity in the proceedings. It must be for an illegality which renders the commitment void. *Hurd, Habeas Corpus*, 327. Here the court had jurisdiction, and the imprisonment of the petitioner until he should comply with the order of the court was warranted by law. After he shall have restored the goods, the prisoner will be entitled to his discharge, the other requirements of the judgment being nullities. *Feeley's Case*, 12 Cush. 598; *People v. Markham*, 7 Cal. 208."

The great weight of authority is that, where a court has jurisdiction of the per-

son and the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion in excess open to question and attack. *Re Taylor*, 7 S. D. 382, 45 L.R.A. 136, 64 N. W. 253, 58 Am. St. Rep. 843. See also authorities collected in note.

Counsel for petitioners contends that this rule is not applicable to the present case, because the judgment is not separable. In this he is mistaken, as the judgment here is separable. The principle is better stated, in its entirety, in the following language: A sentence is legal so far as it

—where the court erroneously added to a sentence of life imprisonment for second degree murder, a provision that the defendant be disfranchised and rendered incapable of holding any office of trust for a period of ten years, the erroneous portion being ordered stricken out of the sentence. *Dorsey v. State*, — Ind. —, 100 N. E. 369;

—where, on a verdict for assault with intent to commit robbery, fixing the punishment at two years imprisonment, a judgment was entered for assault with intent to murder. *Hernandez v. State*, 60 Tex. Crim. Rep. 382, 131 S. W. 1091;

—where a verdict and judgment showed conviction for burglary, but the sentence was for assault with intent to commit murder, an order being made that the sentence be modified so as to show a sentence for burglary. *Gradington v. State*, — Tex. Crim. Rep. —, 155 S. W. 210;

—where a sentence for one day imprisonment and the payment of a fine of \$100 for an offense for which the legal penalty was a fine of from \$10 to \$50 was modified by striking out the imprisonment and reducing the fine to \$50. *Diamond v. State*, 123 Tenn. 348, 131 N. W. 686;

—where the court included in a judgment a sentence of infamy for a crime which did not carry with it such punishment. *Griffin v. State*, 109 Tenn. 17, 70 S. W. 61;

—where, unless assessed by jury, a fine exceeding \$50 was not authorized, and the court erroneously imposed a fine of \$100, the fine being reduced to \$50 and the judgment as modified affirmed, although the penalty for the offense in question was a fine of not less than fifty nor more than two hundred dollars. *Shoun v. State*, 111 Tenn. 166, 78 S. W. 91;

—where, for an offense for which the penalty was from \$10 to \$100, but under statute a fine exceeding \$50 could not be assessed except by jury, the court erroneously assessed a fine of \$100, it being held that the judgment was valid to the extent of \$50 only. *Madden v. State*, — Tenn. —, 67 S. W. 74;

—where a sentence was imposed of a fine of \$10 and confinement for six months, and the punishment authorized was a fine of not less than \$10 nor more than \$200, the 51 L.R.A. (N.S.)

judgment being modified by striking out the imprisonment. *Pressly v. State*, 114 Tenn. 534, 69 L.R.A. 291, 108 Am. St. Rep. 921, 86 S. W. 378;

—where sentences were imposed for burglary and for larceny, although the two alleged crimes were not distinct offenses for which separate punishments could be imposed, it being held that the defendant should be released from the judgment for larceny. *Cronan v. State*, 113 Tenn. 539, 82 S. W. 477;

—where the sentence of two of the defendants was reduced from the extreme penalty of ten years imprisonment to seven years, it appearing that a third defendant was sentenced only for the latter term, and there was nothing in the evidence to indicate that he was less guilty. *Keeler v. State*, 73 Neb. 441, 103 N. W. 64;

—where a sentence of five years imprisonment for felonious shooting was regarded as excessive, there being mitigating circumstances, and was reduced on appeal to two years. *Krause v. State*, 88 Neb. 473, 129 N. W. 1020, Ann. Cas. 1912B, 736;

—where a sentence to the penitentiary for an indefinite term for burglary committed with intent to steal property worth \$3.50 was reduced to nine months in jail, the time already served in the penitentiary being applied on the jail sentence. *State v. Rogers*, — Iowa, —, 137 N. W. 819;

—where the amount of a fine for contempt of a surety on a bond, for falsely representing his financial ability, was reduced to the amount recovered in an action upon the bond. *Buffalo Loan, Trust & S. D. Co. v. Medina Gas & E. L. Co.* 68 App. Div. 414, 74 N. Y. Supp. 486;

—where sentence was imposed under a statute admitting of a different and larger penalty than the statute applicable to the offense. *Wechsler v. United States*, 86 C. C. 37, 158 Fed. 579; *Fletcher v. United States*, 42 App. D. C. 8 (judgment being reversed and cause remanded for proper sentence as to all the defendants, although only those who had received a sentence in excess of that permitted by the statute applicable to the case raised the question of the illegality of the sentence).

The same remedy, correction of excessive sentence in the appellate court, has been

is within the provisions of law and the jurisdiction of the court over the person and the offense, and only void as to the excess, when such excess is separable and may be dealt with without disturbing the valid portion of the sentence. *United States v. Pridgeon*, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746; *State ex rel. Dudoussat v. Klock*, 48 La. Ann. 67, 55 Am. St. Rep. 259, 18 So. 957; *Ex parte Mooney*, 28 W. Va. 36, 53 Am. Rep. 59.

It is our conclusion that the sentence in this case is separable, and that, had petitioners paid the fine or suffered the imprisonment, they would be entitled to the

writ; but, having done neither, they are not entitled to release. In *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872, it was held that "the error of the court in imposing the two punishments mentioned in the statute, when it had only the alternative of one of them, did not make the judgment wholly void." In that case the petitioner, before applying for a writ of habeas corpus, had paid the fine imposed. He was discharged.

For the reasons given, the writ is denied.

Roberts, Ch. J., and Parker, J., concur.

applied under the following circumstances, in cases in which express reference is made to the statutory power of the court to modify or correct a sentence on appeal:

—where a sentence of twenty-five years imprisonment for a crime the maximum legal punishment for which was five years was reduced to the latter term. *Williams v. State*, — Okla. Crim. Rep. —, 136 Pac. 599;

—where a sentence of ten years imposed by the jury under erroneous instructions that the punishment for the crime was from ten to twenty years, the legal penalty being from five to ten years, was reduced to five years. *Arnold v. State*, — Okla. Crim. Rep. —, 132 Pac. 1123;

—where a sentence was imposed of a fine of \$50, and in case of nonpayment of imprisonment for 100 days, the legal penalty for failure to pay a fine being imprisonment not to exceed one day for every dollar of the fine; and, although defendant had paid the fine, the sentence was corrected as to the term of imprisonment. *People v. Jeratino*, 62 Misc. 587, 116 N. Y. Supp. 1121;

—where the judgment erroneously recited that the defendant had been convicted of the crime charged in the first instead of the second degree. *Sayers v. State*, — Okla. Crim. Rep. —, 135 Pac. 944;

—where the verdict and judgment showed that the punishment was fixed at two years confinement in the penitentiary, but the sentence erroneously recited that the punishment had been assessed by the verdict at confinement for five years. *Laudermilk v. State*, 47 Tex. Crim. Rep. 427, 83 S. W. 1107;

—where the verdict assessed the punishment at a fine of \$25 and twenty days imprisonment, but through inadvertence of the clerk the judgment assessed a fine of \$100 and costs. *Byrd v. State*, 51 Tex. Crim. Rep. 539, 103 S. W. 863;

—where the defendant entered a plea of guilty to grand larceny as a first offense, and, it having been shown to the trial court by defendant's answers that he had been previously convicted of crime and sentenced to state prison, judgment was erroneously entered as for a fourth offense. *People v. Bretton*, 144 App. Div. 282, 129 51 L.R.A. (N.S.)

N. Y. Supp. 247, motion for reargument denied in 156 App. Div. 904, 141 N. Y. Supp. 4, motion in arrest of judgment denied in 157 App. Div. 341, 142 N. Y. Supp. 256;

—where a sentence of ten years imprisonment for a crime for which the jury had assessed the punishment at five years was reduced to the latter term. *Martinez v. State*, — Tex. Crim. Rep. —, 153 S. W. 886;

—where the court reduced a sentence of capital punishment for murder, which it regarded as excessive, to life imprisonment. *Fritz v. State*, 8 Okla. Crim. Rep. 342, 128 Pac. 170;

—where a sentence of imprisonment in the penitentiary for a year for aggravated assault was regarded as excessive, and was reduced to confinement in the county jail for a period of thirty days. *Kilgore v. State*, — Okla. Crim. Rep. —, 137 Pac. 364;

—where a judgment of \$50 for assault, regarded as excessive, was reduced to \$10. *Hooper v. State*, 7 Okla. Crim. Rep. 43, 121 Pac. 1087;

—where a sentence of the maximum penalty of six months in jail and a fine of \$500 imposed upon a negro boy for a first offense in selling whisky, the sale being induced by a detective, was reduced to imprisonment of sixty days and a fine of \$100, although the jury had recommended the maximum punishment. *Hall v. State*, 7 Okla. Crim. Rep. 126, 122 Pac. 729;

—where the sentence of a boy of sixteen to confinement in jail for six months for stealing chickens was reduced to two months. *People v. Loomis*, 65 Misc. 156, 121 N. Y. Supp. 91;

—where a sentence of seven years imprisonment for larceny of a stray steer worth \$20 was reduced to two years. *Palmer v. State*, 70 Neb. 136, 97 N. W. 235;

—where a sentence of five years imprisonment for larceny of property worth \$40 was reduced to two and one half years. *Junod v. State*, 73 Neb. 208, 119 Am. St. Rep. 800, 102 N. W. 462.

In *State v. Maher*, 25 Nev. 465, 62 Pac. 236, it was said, regarding a contention that a judgment should be reversed because the court included as a part of the sentence

"at hard labor," that if the claim were correct, the court could under statute modify the judgment by striking therefrom the unauthorized part.

In *Williams v. State*, 66 Ark. 264, 50 S. W. 517, where the jury erroneously assessed the punishment by a "quotient verdict" at five years, and the minimum for the crime in question was three years, the court modified the judgment by reducing the punishment to the latter term.

Also, in *Walker v. State*, 91 Ark. 497, 121 S. W. 925, where, after a finding of guilty of murder in the second degree, the jury erroneously assessed the punishment by lot at seventeen years imprisonment, the judgment was modified by reducing the sentence to five years, which was the minimum punishment for the crime.

In *State v. Harness*, 11 Idaho, 122, 80 Pac. 1129, it was said that where the evidence supports the verdict the judgment will not be reversed on the ground that the sentence is excessive, but the remedy is by way of modification of the judgment.

e. Judgment modified, with directions to lower court to resentence.

Supplementing 45 L.R.A. 154.

In several instances the court has modified excessive judgments and affirmed the judgment as modified, with directions to the lower court to impose proper sentence. *State v. Stone*, 40 Mont. 88, 105 Pac. 89 (where a judgment erroneously included payment of costs as a part of the penalty); *Screen v. State*, 107 Ga. 715, 33 S. E. 393 (where a sentence of imprisonment or work on a chain gang was either excessive or irregular).

In *Re Gompers*, 40 App. D. C. 293, on appeal from the supreme court of the District of Columbia, it was held that the appellate court had statutory power to modify excessive judgments, and sentences imposed upon certain labor leaders of one year, nine months, and six months, respectively, for contempt of court for violating an injunction restraining a boycott, were regarded as so grossly excessive under the circumstances that the case was remanded with instructions to the lower court to impose sentences in the one case of imprisonment for thirty days, and in the others of fines of \$500.

And in *State v. Neil*, 13 Idaho, 539, 90 Pac. 860, rehearing denied in 13 Idaho, 554, 91 Pac. 318, the court regarded a sentence of ten years for assault with intent to commit rape as excessive under the circumstances, and remanded the case with directions to impose a sentence of two years.

f. Case remanded for proper judgment.

Supplementing 45 L.R.A. 156.

As will be seen from the cases under this section, the circumstances under which the courts have in some instances remanded cases to the lower court for proper sentence are similar in many instances to those above cited, where other courts have corrected or modified the sentence. Statutory 51 L.R.A. (N.S.)

provisions may account in part for this difference in practice, although, as indicated above, reference to particular statutes is not always made in the cases, and in some instances it appears that the appellate court might either have modified the sentence and affirmed the judgment as modified, or remanded the case to the lower court for proper sentence.

Under the following circumstance it was held that the case would be remanded to the lower court for proper sentence, where the sentence imposed was excessive:

—where the court erroneously sentenced the defendant to hard labor in lieu of payment of costs. *Lewis v. State*, 3 Ala. App. 20, 57 So. 1012;

—where, in a sentence of imprisonment and payment of costs, the court erroneously ordered the defendant committed until payment of costs. *Smith v. State*, 24 Ohio C. C. 140;

—where, in a verdict for manslaughter, the jury, although authorized to fix the duration of the term, attempted also to fix the place of punishment, the verdict and sentence in accordance therewith being for one year in the penitentiary, but the court was authorized where the term was for one year or less, to sentence only to imprisonment in the county jail, or to hard labor for the county. *Ex parte Robinson*, — Ala. —, 63 So. 177;

—where the court, although authorized to impose a sentence only as indicated in the above case, erroneously sentenced to imprisonment in the penitentiary for six months. *Minto v. State*, — Ala. App. —, 64 So. 369;

—where a sentence of one year at hard labor in the penitentiary was imposed, and such imprisonment was legal only when the term exceeded one year. *Mitchell v. United State*, 116 C. C. A. 436, 196 Fed. 877, petition for writ of certiorari denied in 226 U. S. 611, 57 L. ed. 381, 33 Sup. Ct. Rep. 218 (However, in this instance, the legal limit of imprisonment for the crime in question was eighteen months);

—where the defendant was sentenced to pay a fine, and on default in payment to confinement in the state prison, and the statute authorized confinement only in the county jail on default in the payment of a fine. *Taylor v. State*, — Fla. —, 64 So. 454;

—where imprisonment only in the county jail was authorized, when the court imposed a sentence in the penitentiary. *Com. v. Barge*, 11 Pa. Super. Ct. 164; *Com. v. Lewis*, 29 Pa. Super. Ct. 282;

—where imprisonment in the workhouse at labor was imposed as part of a sentence, instead of confinement in jail. *Arnsman v. State*, 30 Ohio C. C. 445;

—where the only penalty authorized was imprisonment in the county jail or fine, and the sentence imposed was imprisonment in the county jail at hard labor. *State v. Houghton*, 46 Or. 12, 75 Pac. 822;

—where one under twenty-one years of age was sentenced to the penitentiary for

life instead of to the state reformatory for an indeterminate period. *People v. Rardin*, 225 Ill. 9, 99 N. E. 59, Ann. Cas. 1913D, 282;

—where, instead of a sentence to the reformatory for an indeterminate period, the defendant was sentenced to the penitentiary for six years, the case, however, being remanded for a new trial because of other prejudicial errors. *Neathery v. People*, 227 Ill. 110, 81 N. E. 16;

—where the defendant was sentenced to the penitentiary for ten years instead of for an indeterminate period of not less than one year. *People v. Coleman*, 251 Ill. 497, 96 N. E. 239;

—where, after a verdict fixing the punishment at imprisonment for three years, the court erroneously sentenced the defendant for an indeterminate period under the parole law. *People v. Warfield*, 172 Ill. App. 1, reversed on other grounds in 261 Ill. 293, 103 N. E. 979;

—where the court, although authorized only to sentence as for a first offense, pronounced sentence as for a second offense. *Coeller v. State*, 119 Md. 61, 85 Atl. 954; *Kenny v. State*, — Md. —, 87 Atl. 1109, the judgment, however, being reversed also for other errors; *Oaks v. State*, 100 Miss. 737, 57 So. 1;

—where a sentence of imprisonment exceeding the maximum was imposed, and the court said that for such an error in the judgment it was authorized under statute to remand the case for proper judgment; but since in this instance there was reversible error in addition to the erroneous sentence, the judgment was reversed and a new trial granted. *Cochran v. State*, 119 Md. 539, 87 Atl. 400;

—where the defendant was erroneously sentenced under a statute enacted after the commission of the crime, which deprived him of his right under the law previously existing to a deduction of his sentence for good behavior, and a statute required the remanding of cases to the lower court with instructions, where the judgment was reversed, affirmed, or modified. *State v. Tyree*, 70 Kan. 203, 78 Pac. 525, 3 Ann. Cas. 1020;

—where, for a misdemeanor for which imprisonment for from ten to sixty days only was authorized, a sentence was imposed of imprisonment for two years. *State v. Williams*, 114 La. 940, 38 So. 686;

—where a sentence was imposed as for another offense than that of which the defendant had been convicted. *State v. Hesterly*, 178 Mo. 43, 76 S. W. 985;

—where, on a verdict for second degree murder fixing the term of imprisonment at twenty years, judgment was entered as for first degree murder. *Lewis v. State*, — Ala. App. —, 64 So. 537;

—where a sentence was imposed for an offense greater than that charged in the information and found by the verdict. *State v. Mead*, 27 S. D. 381, 131 N. W. 305;

—where, although the only authorized penalty was imprisonment in state prison 51 L.R.A.(N.S.)

not exceeding five years, or in jail not exceeding two years, a sentence was imposed of imprisonment in the state prison for not more than seven nor less than six years. *Smith v. Com.* 178 Mass. 340, 59 N. E. 1019;

—where a fine of \$300 was imposed, although the penalty authorized was a fine not exceeding \$200. *Carey v. State*, 70 Ohio St. 121, 70 N. E. 955;

—where imprisonment and fine were imposed, and only imprisonment or fine was authorized. *State v. Swikert*, 65 Or. 286, 132 Pac. 709;

—where an excessive minimum term was imposed, the legal punishment being a maximum of twenty years and a minimum of not less than six months or more than five years, the sentence imposed being from ten to twenty years. *State v. Andrews*, 71 Wash. 181, 127 Pac. 1102,

—where a sentence of four years was regarded as excessive as to all over eighteen months, and the case was remanded with instructions to modify the judgment by remitting the excess. *Hanley v. United States*, 59 C. C. A. 153, 123 Fed. 849. But on rehearing in 61 C. C. A. 668, 126 Fed. 944, and 62 C. C. A. 561, 127 Fed. 929, it was held that the sentence was not excessive;

—where, on a conviction for embezzlement, in addition to a fine and imprisonment, the court erroneously sentenced the defendant to pay to the county all money embezzled less the amount he had already paid. *Com. v. Shoener*, 25 Pa. Super. Ct. 526, reversed on other grounds in 212 Pa. 527, 61 Atl. 1093;

—where the court without authority imposed a sentence of perpetual banishment from the state after five years imprisonment, with a penalty of two additional years imprisonment in case of return to the state. *State v. Baker*, 58 S. C. 111, 36 S. E. 501, 12 Am. Crim. Rep. 107.

In *People v. Farrell*, 146 Mich. 264, 109 N. W. 440, it was held by a divided court that a conviction of first degree murder of one who had on a former trial on the same information been convicted of manslaughter should be treated as a valid conviction for manslaughter, and that where, in accordance with the verdict of first degree murder, the court had sentenced the defendant to imprisonment for life, and the maximum sentence for manslaughter was only fifteen years, the trial court had power, although the illegal sentence had been partly executed, to impose a proper sentence; and that for resentencing the case would be remanded to the trial court. Some of the judges took the position that the appellate court should affirm the judgment as to fifteen years imprisonment, the maximum allowed for manslaughter, and reverse the judgment as to the excess, a statute providing that whenever punishment was imposed by imprisonment in excess of that allowed by law, the judgment should not be wholly reversed upon review, but should be valid to the extent of the lawful penalty, and only be re-

versed as to the excess. But a majority of the court held that this statute was inapplicable, apparently on the ground that the conviction, as well as the sentence, in this instance, was erroneous, although, as indicated, the conviction was upheld as valid for the crime of manslaughter.

g. Judgment reversed and new trial granted.

Supplementing 45 L.R.A. 157.

Where an erroneous instruction that if the defendant was convicted, since he was under eighteen years of age, he would be transferred from the penitentiary to the reform school, might have led the jury, in assessing his punishment for manslaughter at three and a fourth years in the penitentiary, to fix the penalty higher than they would otherwise have done, the court in *Pittman v. State*, 84 Ark. 292, 105 S. W. 874, reversed the judgment and remanded the case for a new trial, saying that it might follow this course, or it had authority to reduce the punishment to the minimum for manslaughter.

That a sentence is excessive is not ground ordinarily for a new trial. See subdivision II. *supra*.

h. Judgment reversed, but case not remanded.

Where one under twenty-one years of age was sentenced to the penitentiary for life, when he should have been sentenced to the reformatory for an indeterminate period, the court in *People v. Smith*, 253 Ill. 283, 97 N. E. 649, said that under the decisions in that state, if the prisoner was then under twenty-one, there was no question but that the judgment should be reversed and the cause remanded to the trial court for re-sentence to the reformatory; but since in this instance the prisoner, while confined in the penitentiary, had become more than twenty-one years of age, it was held that, while the judgment would be reversed, the cause would not be remanded.

To a similar effect is *People v. DeGraff*, 56 Misc. 429, 107 N. Y. Supp. 1038, where, on appeal from a judgment of a court of special sessions, imposing a fine of \$100, although it had jurisdiction only to impose a fine not exceeding \$50, it was held that the county court had no power to remit the case for proper sentence, but that the sentence was void and the judgment should be reversed.

i. Miscellaneous.

In *State v. Davenport*, 149 Iowa, 294, 128 N. W. 351, where it was contended that a sentence of life imprisonment for burglary was excessive, the court, while admitting that the sentence, being for a definite period, was contrary to the indeterminate sentence law, held that the ease was not one for interference by the appellate court, saying that the action of the court in fixing the definite period would not interfere with §1 L.R.A.(N.S.)

the adjustment of punishment as provided for by the indeterminate sentence law.

Under statutes directing the imposition of sentences notwithstanding exceptions, abolishing criminal terms, and authorizing the court to stay the sentence, it was held in *Com. v. O'Brien*, 175 Mass. 37, 55 N. E. 466, where the defendant was erroneously sentenced to imprisonment for a term of not less than three nor more than five years, that, after the overruling of exceptions in the appellate court, when the defendant was again brought before the trial court more than a year after the imposition of sentence, it could impose a proper sentence of three years imprisonment, the defendant in the meantime having been admitted to bail and the sentence being wholly unexecuted. To a similar effect, see *Com. v. Lobel*, 187 Mass. 288, 72 N. E. 977, although in this case the nature of the error in the sentence does not appear.

V. On certiorari.

Supplementing 45 L.R.A. 158, 159.

In *Ex parte Phillips*, 80 Ark. 200, 96 S. W. 742, it was held that certiorari would not lie to review an alleged excessive sentence, within the legal penalty for the offense, where no sufficient reason appeared for not prosecuting an appeal.

Where a fine was imposed and the defendant sentenced to work on the streets for thirty days in default of payment, it was contended in *Brown v. Atlanta*, 123 Ga. 497, 51 S. E. 507, in a petition for certiorari, that the alternative sentence to labor was illegal; but it was held that since it appeared the fine had been paid, the petition should be dismissed.

In *Johnson v. Atlanta*, 6 Ga. App. 779, 65 S. E. 810, it was held that the superior court had statutory power to modify a judgment on certiorari, and an alleged unauthorized sentence of labor in default of payment of a fine was changed to imprisonment.

In *Cole v. State*, 2 Ga. App. 738, 59 S. E. 24, the court said that it had no jurisdiction to review a sentence imposed in a criminal case, on the ground that it was excessive, if within the limits set by statute; but in this instance a sentence to the chain gang for four months or a fine of \$40, when it appeared to the appellate court that a fine of \$1 would have been ample, if not excessive, was regarded as so disproportionate to the offense that, on appeal from the superior court, which had refused a petition for certiorari from the trial court, while the judgment was affirmed, direction was given that the superior court might in its discretion, as authorized by law, review and correct the sentence.

Where the maximum penalty was \$100 or imprisonment for not more than three months, but sentence was imposed of a fine of \$1,000 or in default in payment two years labor on the public roads, it was held in *State ex rel. Hart v. Hicks*, 113 La. 846, 37 So. 776, on application for a writ of cer-

tiorari, that the verdict of guilty should remain, but that the sentence was void, and that the judgment of the trial court should cause the defendant to appear before him for resentence.

And in *State ex rel. Rivoire v. St. Paul*, 104 La. 203, 28 So. 973, where a fine of \$250 was imposed for contempt, and the legal penalty was a fine of \$50, it was held that the judgment on certiorari should be set aside, leaving to the lower court the duty of imposing a new sentence. To the same effect is *State v. Williams*, 131 La. 392, 59 So. 822, where, instead of imprisonment not exceeding twenty-four hours, for contempt of court, a sentence of three days was imposed.

See also *State ex rel. Babin v. Foster*, under III. c, 2, *supra*.

VI. English, Canadian, and Philippine decisions.

Supplementing 45 L.R.A. 159.

By the English criminal appeal act 1907 (7 Edw. VII. chap. 23), "on an appeal against sentence, the court, if they think a different sentence should have been passed are to quash the sentence and pass such other sentence warranted in law as they think ought to have been passed, and in other cases are to dismiss the appeal; the substituted sentence may be more or less severe than the sentence passed; a different sentence may be passed, whether the appellant has or has not pleaded guilty." 9 *Laws of England* (Halsbury) 435. In the following, among other cases, the court under this statute reduced excessive sentences: *Rex v. Davies*, 28 Times L. R. 431; *Rex v. Raybould*, 25 Times L. R. 581, 73 J. P. 334, [1909] W. N. 118; *Rex v. Syres*, 25 Times L. R. 71; *Rex v. Nuttall*, 25 Times L. R. 76, 73 J. P. 30, 53 Sol. Jo. 64; *Rex v. George*, 25 Times L. R. 66; *Rex v. Prince*, 25 Times L. R. 197; *Rex v. Bruce*, 27 Times L. R. 51, 75 J. P. 111; *Rex v. Brooks*, 29 Times L. R. 152; *Rex v. Treholm*, 29 Times L. R. 530, 77 J. P. 344; *Rex v. Briggs* [1909] 1 K. B. 381, 78 L. J. K. B. N. S. 116, 100 L. T. N. S. 240, 73 J. P. 31, 25 Times L. R. 105, 53 Sol. Jo. 164; *Rex v. Bradford*, 28 Times L. R. 26.

In *Rex v. Davidson*, 25 Times L. R. 352, [1909] W. N. 52, 100 L. T. N. S. 623, where a sentence of imprisonment at hard labor was illegally imposed on a plea of guilty to a misdemeanor, the court was of the opinion that it could not impose a proper sentence, as the statute authorized it to pass only such other sentence warranted in law by the verdict as it saw fit, and in this instance there had been no verdict. Therefore the sentence was quashed, but no other sentence was imposed.

But this decision was overruled in *Rex v. Ettridge* [1909] 2 K. B. 24, 25 Times L. R. 391, 73 J. P. 253, 78 L. J. K. B. N. S. 479, 100 L. T. N. S. 624, 53 Sol. Jo. 401, 51 L.R.A.(N.S.)

where, although there had been a plea of guilty, an excessive sentence was reduced.

The English practice on an appeal against sentence, as to reducing an alleged excessive sentence, is well illustrated by the case of *Rex v. Nuttall*, 25 Times L. R. 76, 73 J. P. 30, 53 Sol. Jo. 64, it being said that where there had been a trial, the trial judge had a far better opportunity of justly determining the proper sentence than the court of criminal appeals, and in such a case the latter court would be slow to interfere with a sentence, although it might feel that it would have imposed a different sentence; but that this reason did not extend to cases where the defendant had pleaded guilty, and the circumstances were before the court of appeals to much the same extent as before the trial court. So that where the defendant had pleaded guilty to a minor offense, which it appeared had been committed probably when drunk, a sentence of eighteen months imprisonment at hard labor was reduced to six months, although it appeared the defendant had previously been convicted of other crimes.

The Canadian cases appear to be of little value as precedents outside of the territorial operation of the statutes, under which for the most part they were decided.

In *Reg. v. Spooner*, 4 Can. Crim. Cas. 209, the court on certiorari, under statutory authority, reduced a sentence which was in excess of that authorized by law.

In *Rex v. McKenzie*, 12 Can. Crim. Cas. 435, it was held that the supreme court of Nova Scotia had power on certiorari to amend a conviction which imposed a longer term of imprisonment than the statute permitted in case of failure to pay a penalty.

In *Rex v. Shing*, 20 Manitoba L. Rep. 214, it was held that a sentence of a fine of \$200 for the keeping of a common gaming house was excessive, in that the court had no power to impose a fine exceeding \$100, but that the case was not one in which the appellate court could modify the sentence; and the conviction was quashed on certiorari.

In *Rex v. Sperdakes*, 40 N. B. 428, it was held that a sentence was excessive which imposed a sentence of two years imprisonment and a fine of \$1,000, for fraudulently abstracting electricity of the value of \$13, one half of the fine to be paid to the company from whom the electricity had been stolen, and that on appeal the court had power to modify the sentence; that a proper penalty was a fine of \$500 and six months imprisonment, with the further imprisonment of six additional months in case of nonpayment of the fine. Accordingly, the sentence of the lower court was set aside and the case remitted to that court, with directions to pronounce the sentence indicated in place of the one imposed.

In *Rex v. Baird*, 13 Can. Crim. Cas. 240, it was held that on appeal from a justice court, to the district court, the case being heard *de novo*, an excessive judgment should be amended; and that in this in-

stance, where a justice had imposed the maximum penalty of a fine of \$200 and in default of payment six months imprisonment, the sentence should be reduced, on the ground that under the circumstances it was excessive, to \$50 fine, and in default of payment one month imprisonment.

And in *Rex v. Williams*, 21 Ont. L. Rep. 467, where a sentence of three years imprisonment was imposed, and the maximum authorized by law was three months, it was held on appeal that under statutory authority to pass such sentence as ought to have been passed, or make such other order as justice required, the court had power to discharge the prisoner, the confinement he had already suffered being regarded as sufficient for the crime.

In *Rex v. Kavanagh*, 5 Can. Crim. Cas. 507, it was held that an alleged excessive term of imprisonment imposed by the county court judge's criminal court was not ground for releasing by habeas corpus in the supreme court of Nova Scotia.

In *Reg. v. Dupont*, 4 Can. Crim. Cas. 566, a sentence of seven years imprisonment, when the maximum authorized was three years, was reduced by the court of appeals under statutory power to the latter term.

In *Rex v. Simmons*, 17 Ont. L. Rep. 239, where a sentence of four months imprisonment, the statutory penalty for a second offense, was imposed, upon an insufficient admission of the defendant of a first offense, it was held that a discharge should be granted on application for writ of habeas corpus. The court indicated that it would have amended the conviction by substituting the maximum penalty authorized for a first offense, but doubted its power to do so.

And in *Rex v. Hayward*, 6 Can. Crim. Cas. 399, where, on a plea of guilty to theft of 80 cents, an imprisonment of two years was imposed, and the confinement actually suffered was in a different place than that specified in the commitment, the prisoner was discharged on habeas corpus after he had served two months, although the maximum penalty for the offense was six months.

Also, in *Reg. v. Randolph*, 4 Can. Crim. Cas. 165, a prisoner was discharged on habeas corpus, although he had served less than a month of a sentence of two years, and the maximum penalty authorized was six months, but the sentence imposed was also erroneous in fixing the place of confinement in the central prison of the province, instead of in the common jail.

Among possibly other cases in which the supreme court of the Philippine Islands has exercised its power to modify or reduce sentences on appeal are the following: *United States v. Lariosa*, 15 Philippine, 208 (where an excessive sentence was imposed under a statute not applicable to the offense); *United States v. Baguio*, 14 Philippine, 240; *United States v. Goboy*, 17 Philippine, 615 (penalty of imprisonment reduced on account of the defendant's ex-51 L.R.A.(N.S.)

trême age); *United States v. Penalver*, 17 Philippine, 616 (penalty of imprisonment reduced on account of defendant's youth).
R. E. H.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

CHARLES A. STEVENS, Alias Charles
Savage, Appt.,

v.
ROBERT W. McCLAUGHRY, Warden of
the United States Penitentiary.

(— C. C. A. —, 207 Fed. 18.)

Criminal law — sentence — concurrent offenses.

1. The sentence of a defendant, convicted under separate counts of an indictment under § 5469, Revised Statutes (U. S. Comp. Stat. 1901, p. 3692), of larceny of a mail pouch containing registered letters and of letters, and also of larceny of registered letters and embezzlement of their contents, committed at the same time and place and as parts of a continuous criminal act to separate punishments, is beyond the jurisdiction of the court, and void as to the excess above the maximum punishment that may be imposed for a single offense; and, after the defendant has satisfied such a sentence, he is entitled to his release by habeas corpus.

Separate offenses which are committed at the same time and are parts of a continuous criminal act, inspired by the same criminal intent which is an essential element of each offense, are susceptible of but one punishment.

Habeas corpus — judgment not void.

2. The proper Federal court may release by writ of habeas corpus one who is being restrained of his liberty for many years by virtue of the judgment of a Federal court beyond its jurisdiction and therefore void, but it may not release one so held by virtue of a judgment which is erroneous but within the jurisdiction of the court which rendered it, and hence not void. The writ of habeas corpus is not available to perform the function of a writ of error where the judgment assailed is not void.

Headnotes by SANBORN, Circuit Judge.

Note. — The right to convict for several offenses growing out of the same facts is treated in the note to *Hughes v. Com.* 31 L.R.A.(N.S.) 693, and see also *Munson v. McClaghry*, 42 L.R.A.(N.S.) 302. For stealing property from different owners at the same time as distinct offenses, see note to *State v. Sampson*, 42 L.R.A.(N.S.) 967.

As to effect of excessive sentence, including the remedy by habeas corpus, see notes to *Re Taylor*, 45 L.R.A. 136, and *Re Cica*, ante, 373.

Criminal law — excessive sentence — effect.

3. The excess of a judgment beyond the jurisdiction of the court which renders it is as void as a judgment without any jurisdiction, and a prisoner held under such excess only is entitled to his release by writ of habeas corpus.

Habeas corpus — delay in seeking writ of error.

4. One who is being restrained of his liberty for many years by virtue of the judgment of a Federal court which is beyond its jurisdiction and void is not barred from a release therefrom, by writ of habeas corpus, by the fact that he might have secured such relief by a writ of error, but failed to apply for it until it was too late.

(July 10, 1913.)

APPEAL by petitioner from an order of the District Court of the United States for the District of Kansas denying his petition for a writ of habeas corpus to secure his release from the United States Penitentiary. Reversed.

The facts are stated in the opinion.

Argued before Sanborn and Carland, Circuit Judges, and Willard, District Judge.

Mr. Turner W. Bell for appellant.

Messrs. H. J. Bone and A. M. Harvey, with Mr. Charles S. Briggs, for appellee.

Sanborn, Circuit Judge, delivered the opinion of the court:

This is an appeal from an order which denied the petition of Charles A. Stevens, alias Charles Savage, for a writ of habeas corpus and a release from the United States penitentiary at Leavenworth, Kansas. He was indicted, convicted, and sentenced, under the first two counts of an indictment, to imprisonment for five years under § 5469 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3692), for feloniously taking, stealing, and carrying away on June 6, 1908, "from and out of a certain United States mail car lying and being upon a side track at the Union Depot Transfer Station for United States mails at Kansas City, Jackson county, Missouri, and then and there being the duly authorized depository for registered mail matter, a certain letter pouch containing registered mail, . . . from Los Angeles, California, to New York, New York, which said pouch contained large quantities of registered mail matter, from United States postoffice at Los Angeles, California, and intended for delivery at United States postoffice at New York city, New York," and 108 letters and packages which had been lately deposited in the United States mails for mailing and delivery. At the same trial he was convicted and sentenced to an im-

prisonment for five years more, under § 5469, of the Revised Statutes, under four counts of the same indictment, for feloniously taking, stealing, and carrying away on June 6, 1908, "from and out of a certain United States mail car lying and being upon a side track at the Union Depot Transfer Station for United States mails at Kansas City, Missouri, and then and there being a duly authorized depository for registered letters, certain mail matter," to wit, four registered letters numbered 96,419, 96,420, 96,421, and 96,422, and feloniously embezzling and converting to his own use the contents thereof. Each of these four letters was thus described in the indictment: "A certain letter which had theretofore been deposited in the United States postoffice in Los Angeles, California, for mailing and delivery, to wit, registered letter No. 96,419 (or one of the other numbers), of the United States postoffice at Los Angeles, California, mailed and deposited in said postoffice by the Farmers' & Merchants' National Bank of Los Angeles, California, and intended to be conveyed by mail and addressed to and intended for the Importers' & Traders' National Bank of New York City, New York, which said letter then and there contained" \$12,500 lawful money of the United States.

The petitioner served his term of five years under the first two counts of the indictment, and then presented his petition for his release on the ground that all the offenses of which he was convicted constituted a single continuing criminal act, inspired by the same felonious intent, which was equally essential to each of the offenses charged in the indictment, and that the excess of his sentence beyond imprisonment for five years, which was the maximum punishment prescribed by § 5469 for a single offense, was beyond the jurisdiction of the court which sentenced him, and void, under the decision of this court in *Munson v. McClaghry*, 42 L.R.A.(N.S.) 302, 117 C. C. A. 180, 198 Fed. 72, 75, 76, the decision of the Circuit Court of Appeals of the Ninth Circuit in *Halligan v. Wayne*, 102 C. C. A. 410, 179 Fed. 112, and the opinions in *Re Snow*, 120 U. S. 274, 285, 30 L. ed. 658, 662, 7 Sup. Ct. Rep. 556; *Re Nielsen*, 131 U. S. 176, 182, 190, 33 L. ed. 118, 120, 122, 9 Sup. Ct. Rep. 672; *Kite v. Com.* 11 Met. 581, 583; *Triplett v. Com.* 84 Ky. 193, 1 S. W. 84; *Yarborough v. State*, 86 Ga. 396, 12 S. E. 650; *Com. v. Birdsall*, 69 Pa. 482, 485, 8 Am. Rep. 283.

The principle upon which the decisions in these cases rests is that two or more separate offenses which are committed at the same time and are parts of a single continuing criminal act, inspired by the

same criminal intent which is essential to each offense, are susceptible to but one punishment. The most familiar illustration of the rule is that burglary with intent to commit larceny and larceny committed at the same time and as one continued act do not subject the perpetrator to two punishments,—one for the burglary and another for the larceny,—because the same criminal intent is indispensable to each, and they are each parts of a continuing criminal act. In order to take this case out from under this principle, counsel for the government argue that § 5469 denounces several separate offenses, two of which are: (1) Stealing the mail, or any letter or packet from any authorized depository for mail matter; and (2) taking the mail, or any letter or packet, which contains an article of value, from any authorized depository for mail matter, opening and embezzling the contents thereof; that the intent to embezzle is not essential to the former, but is indispensable to the latter, offense; that the two offenses are therefore separate. Let all this be conceded. Nevertheless, in the case at bar, the pleader alleged the stealing of the letters in the third, fourth, fifth, and sixth counts of the indictment in the same words in which he alleged the stealing of the letter pouch and the letters in the first and second counts. He averred that the defendant "did unlawfully and feloniously take, steal, and carry away from and out of a certain United States mail car" the letters whose contents he also alleged that the defendant embezzled. Conceding, but not admitting, that the United States might have charged and upon conviction have punished the separate offense of taking the four registered letters and embezzling their contents, its averment in the four counts which treat of these letters, of the intent to steal them and of their stealing made that intent an issue under each count and an essential element of each offense charged, and thus brought this case directly under the rule and the authorities cited. In burglary with intent to commit larceny and larceny committed at the same time, the intent to break and enter is not essential to the offense of larceny, but the intent to steal is indispensable to each offense. So, in the case at hand, the intent to embezzle is not essential to the offense of stealing a mail pouch and the letters, but under this indictment the intent to steal and the stealing is made by the pleadings as indispensable an element of the four offenses charged in the third, fourth, fifth, and sixth counts of the indictment as it is of the offenses charged in the first two counts.

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Counsel call attention to the conceded rule that charges of separate offenses of the same class may be joined in separate counts in the same indictment. But this rule and the practice under it does not detract from the soundness or effect of the principle that two or more separate offenses which are committed at the same time and are parts of a continuing criminal act inspired by the same indispensable felonious intent are susceptible of but one punishment. The two offenses in *Munson v. McClaghry*, 42 L.R.A. (N.S.) 302, 117 C. C. A. 180, 198 Fed. 72, were charged in separate counts of the same indictment, and the situation was the same in *Halligan v. Wayne*, 102 C. C. A. 410, 179 Fed. 112.

Finally it is said that the record fails to prove that the stealing and carrying away charged in the third, fourth, fifth, and sixth counts of the four registered letters, and the conversion of their contents, was a part of the same continuing act as the stealing and carrying away of the mail pouch and the 108 letters charged in the first and second counts. Let us see. The record is that the defendant was tried and convicted under each of these counts; hence that the charges they contain are true. The first count charges that on June 6, 1908, the defendant, at Kansas City, Missouri, took, stole, and carried away—"from and out of a certain United States mail car lying and being upon a side track at the union depot transfer station for the United States mails at Kansas City, Jackson county, Missouri, and then and there being the duly authorized depository for registered mail matter, certain United States mail, to wit, a certain letter pouch containing registered mail, the lock on said pouch being number 2,424, rotary number 311, from Los Angeles, California, to New York, New York, which said pouch then and there contained large quantities of registered mail matter from United States postoffice at Los Angeles, California, and intended for delivery at United States postoffice at New York city, New York."

Each of the third, fourth, fifth, and sixth counts charged that the defendant on June 6, 1908, at the same time that he took the mail pouch, at Kansas City, Missouri, at the same place that he took the mail pouch, feloniously took, stole, and carried away a registered letter "from and out of a certain United States mail car lying and being upon a side track at the Union Depot Transfer Station for United States mails at Kansas City, Missouri," a mail car at the same place and described in the same words as the car from which he took the registered mail pouch, "a certain letter which had lately theretofore

been deposited in the United States post-office at Los Angeles, California, mailed and deposited in said postoffice by the Farmers' & Merchants' National Bank of Los Angeles, California, and intended to be conveyed by mail and addressed to and intended for the Importers' & Traders' National Bank of New York City, New York," such a letter as, in the ordinary and almost invariable course of business, would be in the letter pouch, and nowhere else, containing registered mail from Los Angeles, California, to New York, described in the first count of the indictment.

The averments in each of the counts of this indictment that the six stealings occurred at the same time, at the same place, from a mail car described in each of them in the same words, and that the registered letters described in the third, fourth, fifth, and sixth counts were such as in the usual course of business would have been in the mail pouch containing registered letters from Los Angeles to New York described in the first count, converge upon the mind with such compelling force as to leave no doubt that all these stealings were committed at the same time, were parts of a single continuous criminal transaction, and that they were inspired by the same indispensable felonious intent. This conclusion is in accord with the decision in the circuit court of appeals of the ninth circuit in Halligan v. Wayne, *supra*, and with the decision of this court in Munson v. McClaghry, *supra*, where the fact that a count for burglary with intent to commit larceny charged the commission of the offense at the same time and place as a count for larceny was held sufficient, without more, to satisfy the court that the offenses charged were parts of the same continuous act. The case at bar, therefore, falls within the rule upon which the decisions in these cases are founded. It rests upon the principle that no man shall be twice punished for the same offense, so that when under the first two counts of the indictment the district court had sentenced the petitioner to the maximum punishment fixed by the law, it had exhausted its power, and its second sentence to imprisonment for five years more on the third, fourth, fifth, and sixth counts was in excess of its jurisdiction and void. The excess of a sentence or judgment beyond the jurisdiction of the court which renders it is as void as a judgment without any jurisdiction, and a prisoner held under such excess may be released by writ of habeas corpus. *Ex parte Lange*, 18 Wall. 163, 176, 178, 21 L. ed. 872, 878, 879; *Re Snow*, 120 U. S. 274, 285, 30 L. ed. 658, 662, 7 Sup. Ct. Rep. 556; *Re Nielsen*, 131

U. S. 176, 182, 190, 33 L. ed. 118, 120, 122, 9 Sup. Ct. Rep. 672; *Mackey v. Miller*, 62 C. C. A. 139, 141, 126 Fed. 161, 163; *Ex parte Peeke* (D. C.) 144 Fed. 1016; *Bigelow v. Forrest*, 9 Wall. 339, 19 L. ed. 696; *Foltz v. St. Louis & S. F. R. Co.* 8 C. C. A. 635, 639, 19 U. S. App. 576, 60 Fed. 316, 320.

Since this case was argued and submitted, however, the Supreme Court has handed down, on May 26, 1913, its opinion in *Re Petitions of Spencer, Scholl, and Moyer*, 228 U. S. 652, 57 L. ed. 1010, 33 Sup. Ct. Rep. 709, who had applied for writs of habeas corpus to release them from imprisonment under sentences of a state court requiring them to pay fines and costs and undergo an imprisonment for an indeterminate period, the minimum of which should be eighteen months and the maximum two years, upon the ground that when they committed their crimes the maximum imprisonment which could be imposed upon them was two years and the minimum six months, and that the amendment which permitted the sentences imposed was an *ex post facto* and unconstitutional law. They had first appealed from their sentences to the superior court of Pennsylvania, where the judgments had been affirmed. They had then petitioned the supreme court of the state for a special allocatur to allow an appeal to that court from the judgment of the superior court. The supreme court had given the amendment such a construction as rendered it constitutional and valid, and had denied their petition. The petitioners had not raised the constitutionality of the amendment to the law which they sought to challenge in either of the courts of the state, nor had they sought a writ of error to the supreme court of the state from the Supreme Court of the United States. They had, however, applied to the United States district court after their defeats in the state courts for writs of habeas corpus, those applications had been denied, and they were met in the Supreme Court of the United States by the objections that they were too late, and that their claims had been adjudicated in the United States district court. They had paid their fines and costs, and their contention was that their sentences of imprisonment were void, although it was plain that under any interpretation of the original statutes and the amendment to them their sentences were legal and valid for at least six months of the terms of their imprisonment, and they had not served that much of those terms. The Supreme Court refused to issue the writ of habeas corpus, on the ground, among others, that their sentences to imprisonment

were not void, but were merely erroneous, and that the national courts in the exercise of their discretion may and should, save in exceptional cases of which that was not one, refuse to interfere by habeas corpus with the course or final administration by the state courts of the criminal justice of their state, and should require the petitioners to present their claims by writs of error, citing *Urquhart v. Brown*, 205 U. S. 179, 51 L. ed. 760, 27 Sup. Ct. Rep. 459, which rests on the latter ground, and *Re Lincoln*, 202 U. S. 178, 50 L. ed. 984, 26 Sup. Ct. Rep. 602, which is founded on the rule that the Supreme Court may deny the writ in petty criminal cases where no writ of error has been sought and no application for a writ of habeas corpus has been made to any lower court, although the prisoner is restrained under the judgment of a Federal court and there is full jurisdiction to issue the writ. The circumstances in *Lincoln's Case* were these: The petitioner had been sentenced by the United States district court to jail for sixty days and to pay a fine of \$100, for selling liquor to Indians. His jail sentence had expired. Under the law he could either pay the fine, of which he was complaining, or be discharged within ninety days from February 19, 1906, by taking the poor debtor's oath. The Supreme Court declared that the case was practically a moot one, for the decision was filed on May 14, 1906, only five days before he could be discharged under the poor debtor's oath; that in *Ex parte Mirzan*, 119 U. S. 584, 30 L. ed. 513, 7 Sup. Ct. Rep. 341, it had declined to issue a writ of habeas corpus after a conviction, "holding that it might be issued by the proper circuit court, and that application should be made to that court, except in cases where there were some special circumstances making immediate action by this court necessary or expedient," and it declined to issue the writ, with the concluding remark that "to permit every petty criminal case to be brought directly to this court upon habeas corpus, on the ground of an alleged misconception or disregard of our decisions, would be a grievous misuse of our time, which should be devoted to a consideration of the more important legal and constitutional questions which are constantly arising and calling for our determination." This brief review of *Lincoln's Case* seems to demonstrate that it is no authority for any claim that a district court ought not to issue its writs to relieve a prisoner, like the petitioner here, who is otherwise remediless, from an illegal and unconstitutional imprisonment for five years under a void sentence of a Federal court, because this decision rules the prac-

tice of the Supreme Court only, and not that of the district court, because it is limited by its facts to a moot and a petty criminal case, and a case which involves one's deprivation of his liberty for five years is not petty, and because in the case in hand the petitioner applied for his writ to a lower court, to which he was directed to apply by the Supreme Court in the *Lincoln* and *Mirzan* Cases. Moreover, the Supreme Court calls special attention in that decision to the fact that, even that court had issued the writ and discharged a prisoner although the claim to his discharge could have been and was not litigated by writ of error in *Re Heff*, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506, and that it would do so in a matter involving a question of great significance involving the rights of many. 202 U. S. 178, 183, 50 L. ed. 984, 986, 26 Sup. Ct. Rep. 602. What question is of greater significance, or involves the rights of more persons, than the right to the constitutional immunity from a second punishment for the same offense? *Re Nielsen*, 131 U. S. 176, 183, 184, 33 L. ed. 118, 120, 9 Sup. Ct. Rep. 672.

We return to the cases of *Spencer* and others. The opinion in that case sets forth the facts that by writ of error to the superior court of Pennsylvania and by petition to the supreme court of that state the petitioners had challenged the sentence of which they complain, and had not in either case raised, as they might have done, the issue that it was based on an *ex post facto* law; that they had applied to the United States district court for a writ of habeas corpus on that ground, and their application had been denied; that their sentence was in any event valid for six months of their terms, and those six months had not expired, and after reciting all these facts it reviewed the opinion in *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872, where a prisoner was relieved of a void sentence by writ of habeas corpus from the supreme court, and distinguished the cases of *Spencer* and others from that case on the ground that their sentences were erroneous but not void, while the sentence in the *Lange Case* was void, invoked the rule that a writ of habeas corpus may not be used to perform the function of a writ of error, called attention to the fact that the amendment to the statute which was claimed to be *ex post facto* had been so construed by the supreme court of Pennsylvania as to have no *ex post facto* effect, and then because the application was too late, coming after a decision of a like application by the United States district court and after reviews by the state courts, be-

cause the statute challenged had been construed by the state supreme court to be harmless, and because the sentence assailed was erroneous but not void, it refused to issue the writ. In the course of the opinion the Supreme Court called attention sharply to the fact that the sentences of the petitioners were subject to review and modification by the supreme court of Pennsylvania, and that no application therefor on the ground that the amendment to the law was *ex post facto* had been made to that court. This portion of the opinion suggests two questions: Did the Supreme Court hold or intend to hold by its decision in these cases, or in the Lincoln Case, that a United States district court may not and ought not, in any case, to issue a writ of habeas corpus and release a person otherwise remediless, who is being restrained of his liberty by virtue of a judgment of a Federal court beyond its jurisdiction, where he might have obtained his release by a writ of error, but failed to do so until it was too late, and, if not, does the case in hand fall within the class of cases in which such a writ may and should issue? The circuit court of appeals of the fifth circuit seems to have been of the opinion that the first of these questions should be answered in the affirmative. *Moyer v. Anderson*, 122 C. C. A. 175, 203 Fed. 881. After a careful consideration of the purpose and effect of the right to the writ of habeas corpus, and of the rules and practice which govern it, it has been found difficult for us to reach that conclusion. In deference to the profound learning, commanding ability, and long experience of the eminent jurists who occupy the bench in that circuit, and to the high authority of that court, it has seemed proper to state the reasons which have forced us to a different conclusion.

The judgment in the case at bar was rendered by a national court, and the cogent reasons against interference by the Federal courts with the administration of justice in the state courts are inapplicable here. *Ex parte Royall*, 117 U. S. 254, 29 L. ed. 872, 6 Sup. Ct. Rep. 742; *Re Dowd* (C. C.) 133 Fed. 747, 754; *Re Lincoln*, 202 U. S. 178, 182, 50 L. ed. 984, 986, 26 Sup. Ct. Rep. 602. While it is a conceded rule that a writ of habeas corpus may not be used as a mere writ of error, it has been an established principle of our national jurisprudence for many years that one restrained of his liberty by virtue of a judgment or order of a court which that court had no jurisdiction to make might be released by the writ of habeas corpus, whether such a release could have been secured by writ of error or not. *Ex parte Lange*, 18 51 L.R.A. (N.S.)

Wall. 163, 169, 173, 21 L. ed. 872, 876, 877; *Re Heff*, 197 U. S. 488, 508, 509, 49 L. ed. 848, 850, 857, 25 Sup. Ct. Rep. 506; *Ex parte Bridges*, 2 Woods, 428, Fed. Cas. No. 1,862; *Ex parte Wilson*, 114 U. S. 417, 422, 429, 29 L. ed. 89, 91, 93, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283; *Re Snow*, 120 U. S. 274, 285, 30 L. ed. 658, 662, 7 Sup. Ct. Rep. 556; *Ex parte Bain*, 121 U. S. 1, 13, 14, 30 L. ed. 849, 853, 7 Sup. Ct. Rep. 781, 6 Am. Crim. Rep. 122; *Re Nielsen*, 131 U. S. 176, 182, 190, 33 L. ed. 118, 120, 122, 9 Sup. Ct. Rep. 672. The cases of *Spencer* and others questioned a judgment of a state court imposing a sentence of imprisonment for an indeterminate period the minimum of which should be eighteen months and the maximum two years, on the ground that there was no law, except an *ex post facto* law, which authorized an imprisonment for more than six months. The petitioners had not served six months. The judgments under which they were restrained were not void because the court had jurisdiction to sentence them for six months. Moreover, their validity depended upon the construction of statutes of the state which its courts on writs of error had construed against them, so that the judgment challenged was an erroneous and not a void judgment, and the writ of habeas corpus was not available under the rule of *Re Nielsen*, 131 U. S. 176, 183, 184, 33 L. ed. 118, 120, 121, 9 Sup. Ct. Rep. 672.

On the other hand, the case at bar is one in which the trial court had jurisdiction to sentence the petitioner, for all the offenses with which he was charged to an imprisonment for five years, and no longer. It imposed that sentence, thereby exhausting its power to sentence him to imprisonment, and then without jurisdiction sentenced him to an imprisonment for another five years. The second sentence alone is challenged; no part of it is valid; he did not seek to reverse it by writ of error, and his time to apply for such a writ has expired. Is he barred from all relief? In *Ex parte Lange*, 18 Wall. 163, 169, 173, 21 L. ed. 872, 876, 877, the petitioner had been tried, convicted, and sentenced for an offense for which he was liable to the alternative punishment of fine or imprisonment. The court imposed both. He paid the fine, and made application to the same court by writ of habeas corpus for release on the ground that he was then entitled to a discharge. The circuit court set aside its judgment, and sentenced him to imprisonment only. He then applied to the Supreme Court by writ of habeas corpus for his release. Mr. Justice Miller delivered the opinion of the court, and, among other things, he said: "If there is anything settled in the juris-

prudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense. . . . But it has been said that, conceding all this, the judgment under which the prisoner is now held is erroneous, but not void; and as this court cannot review that judgment for error, it can discharge the prisoner only when it is void. But we do not concede the major premise in this argument. A judgment may be erroneous, and not void, and it may be erroneous because it is void. The distinctions between void and merely voidable judgments are very nice, and they may fall under the one class or the other as they are regarded for different purposes. We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone; that the principle we have discussed then interposed its shield, and forbid that he should be punished again for that offense. The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case, and for that very offense, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offense was at an end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist."

And the court discharged the prisoner.

In *Ex parte Bridges*, 2 Woods, 428, Fed. Cas. No. 1,862, the petitioner had been tried, convicted, and sentenced for perjury by a state court without jurisdiction of the subject-matter. He prayed a writ of habeas corpus and a discharge. Mr. Justice Bradley said: "It is contended, however, that where a defendant has been regu-

larly indicted, tried, and convicted in a state court, his only remedy is to carry the judgment to the court of last resort, and thence by writ of error to the Supreme Court of the United States, and that it is too late for a habeas corpus to issue from a Federal court in such a case. This might be so if the proceeding in the state court were merely erroneous; but, where it is void for want of jurisdiction, habeas corpus will lie, and may be issued by any court or judge invested with supervisory jurisdiction in such case."

In *Ex parte Wilson*, 114 U. S. 417, 422, 429, 29 L. ed. 89, 9¹, 93, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283, a prisoner convicted and sentenced to imprisonment at hard labor on a trial upon an information sought release by writ of habeas corpus because he had never been indicted or presented by the grand jury, and the Supreme Court granted his release although the question raised by the petition had not been urged at the trial.

In *Ex parte Bain*, 121 U. S. 1, 13, 14, 30 L. ed. 849, 853, 7 Sup. Ct. Rep. 781, 6 Am. Crim. Rep. 122, the prisoner had been tried, convicted, and sentenced to imprisonment on an indictment which the court had amended before the trial. He prayed a writ of habeas corpus and a discharge. The Supreme Court held that the trial court lost its power to try him by the amendment, and discharged him.

In *Re Snow*, 120 U. S. 274, 285, 30 L. ed. 658, 662, 7 Sup. Ct. Rep. 556, § 3 of the acts of Congress of March 22, 1882, chap. 47, 22 Stat. at L. 31, U. S. Comp. Stat. 1901, p. 3634, provided that if any male person in a territory of the United States should cohabit with more than one woman, he should, on conviction thereof, be punished by a fine of not more than \$300, or by imprisonment for not more than six months, or by both said punishments. On December, 5, 1885, three indictments were found against Snow, the first for continuously living and cohabiting with seven women named as his wives, between December 31, 1882, and December 31, 1883, the second for continuously claiming, living, and cohabiting with the same women as his wives between January 1, 1884, and December 1, 1884, and the third for continuously living and cohabiting with the same women between the 1st day of January, 1885, and 1st day of December, 1885. There was a separate trial and conviction on each indictment. After the verdicts had been rendered, the court sentenced Snow on the same day to pay a fine of \$300 and to imprisonment for six months on each indictment. After serving six months and paying a fine of \$300, Snow prayed the trial court for a writ of habeas

corpus and a release from further imprisonment, on the ground that the offenses charged in all the indictments constituted a single continuous offense, that the court had been without jurisdiction to impose more than one punishment therefor, and that the sentences on the second and third indictments were void. The district court denied the application, and the petitioner appealed to the Supreme Court. That court sustained the claim of the petitioner, held that the acts charged in the three indictments constituted one continuous criminal act, and said: "Not only had the court which tried them no jurisdiction to inflict a punishment in respect of more than one of the convictions, but, as the want of jurisdiction appears on the face of the judgment, the objection may be taken on habeas corpus, when the sentence on more than one of the convictions is sought to be enforced;" reversed the court below and ordered the issue of the writ.

In *Re Nielsen*, 131 U. S. 176, 182, 190, 33 L. ed. 118, 120, 122, 9 Sup. Ct. Rep. 672, 674, another case with parallel facts, is reported. To the objection that the validity of the second sentence could not be assailed by writ of habeas corpus, Mr. Justice Bradley replied: "It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus. . . . It was laid down by this court in *Re Coy*, 127 U. S. 731, 758, 32 L. ed. 274, 280, 8 Sup. Ct. Rep. 1263, 1272, that the power of Congress to pass a statute under which a prisoner is held in custody may be inquired into under a writ of habeas corpus as affecting the jurisdiction of the court which ordered his imprisonment; and the court, speaking by Mr. Justice Miller, adds: And if their want of power appears on the face of the record of his condemnation, whether in the indictment or elsewhere, the court which has authority to issue the writ is bound to release him.' . . . It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment against the defendant. This was the case in *Ex parte Lange*, where the court had authority to hear and determine the

case, but we held that it had no authority to give the judgment it did. It was the same in the case of *Snow*: The court had authority over the case, but we held that it had no authority to give judgment against the prisoner. He was protected by a constitutional provision, securing to him a fundamental right. It was not a case of mere error in law, but a case of denying to a person a constitutional right. And where such a case appears on the record, the party is entitled to be discharged from imprisonment."

And here is the true distinction between the cases in which the writ of habeas corpus may and those in which it may not issue. If the judgment or sentence challenged is without the jurisdiction of the court and void, the writ may issue. If it is erroneous, but within the jurisdiction of the court which rendered it, the writ may not issue. The parallel between the cases of *Snow* and *Nielsen* and the case at bar is complete, and unless the decision in the case of *Spencer* and others has overruled the cases which have just been reviewed, and departed from the fundamental principles they sustain and the practice under them which has prevailed for years in *Re Mayfield*, 141 U. S. 107, 116, 35 L. ed. 635, 638, 11 Sup. Ct. Rep. 939; *Re Ladd* (C. C.) 74 Fed. 31, 42; *Re Waite* (D. C.) 81 Fed. 359, 362, 372; *Mackey v. Miller*, 62 C. C. A. 139, 126 Fed. 161, 163; *Ex parte Peeke* (D. C.) 144 Fed. 1016,—there would seem to be no doubt of the power or duty of the court to issue the writ in the case in hand. We are not persuaded that it has overruled them, departed from the rules they maintain, or decided that everyone restrained of his liberty by a void judgment which he might have challenged by a writ of error, is barred of relief by means of the writ of habeas corpus. It has not expressly declared that those decisions are wrong, or that the principles on which they rest are erroneous, and they are too firmly established to be overthrown by silence. On the other hand, it has carefully distinguished the leading case, the *Lange Case*, from those in which its opinion was delivered, and to hold that one who is being deprived of his liberty for a long term of years by virtue of a sentence beyond the jurisdiction of the court which rendered it has deprived himself of his right to relief by writ of habeas corpus, because through ignorance, poverty, or neglect he failed to challenge that judgment by writ of error until it was too late, is to rob the writ of the very purpose of its existence,—the purpose to afford speedy and inexpensive relief from unlawful imprisonment to those otherwise remediless. To us it is incredible that the

Supreme Court ever intended to decide, to take the striking illustrations of Mr. Justice Miller in *Ex parte Lange*, 18 Wall. at page 176, 21 L. ed. 878, that one who should be sentenced by a justice of the peace having jurisdiction to fine for a misdemeanor, or by a court of general jurisdiction on an indictment for a libel, to imprisonment and death, who through ignorance or neglect should fail to appeal or procure a writ of error within the prescribed time, would be barred of relief by the writ of habeas corpus. It is a writ of right. The acts of Congress declare that the court to which the application for it is made "shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto," and "shall proceed in a summary way to determine the facts of the case, . . . and thereupon to dispose of the party as law and justice require." Revised Statutes, §§ 755, 761, U. S. Comp. Stat. 1901, pp. 593, 594. The petitioner is being restrained of his liberty for five years by a judgment of a Federal court which was beyond its jurisdiction and void.

And our conclusion is that one who is being restrained of his liberty for many years by virtue of the judgment of a Federal court which is beyond its jurisdiction and void may, and should, be relieved from that restraint by the proper Federal court by means of the writ of habeas corpus, and that he is not barred from such relief by the fact that he might have obtained it by a writ of error, but failed to do so until it was too late. The case at bar falls under the rule we have announced and within the class of cases governed by it, and the court below should have issued the writ and discharged the prisoner. The order denying the petition for the writ of habeas corpus and for the release of the petitioner from the penitentiary is accordingly reversed, and the case is remanded to the District Court, with directions to discharge the prisoner.

WASHINGTON SUPREME COURT.
(Department No. 1.)

F. C. HEWSON, Appt.,
v.

PETERMAN MANUFACTURING COMPANY, Resp't.

(— Wash. —, 136 Pac. 1158.)

Statute of frauds — sale of stock not yet issued.

1. A contract for the sale of corporate stock thereafter to be issued is one for the 51 L.R.A.(N.S.)

sale of goods, wares, and merchandise, within the meaning of the statute of frauds.

Same — part payment.

2. The resignation of his former position by one who had entered into an oral contract with a corporation whereby it was to sell him some of its stock, and to employ him as its bookkeeper, does not constitute giving "something in earnest to bind the bargain, or in part payment," so as to take the contract out of the statute of frauds.

Damages — breach of contract to employ.

3. No recovery can be had for breach of contract to employ one as secretary and treasurer of a corporation, since, being a position of responsibility and trust, the incumbent was removable at will.

Appeal — review — nominal damages.

4. A judgment will not be reversed for the purpose of permitting the appellant to recover nominal damages.

(December 12, 1913.)

APPEAL by plaintiff from a judgment of the Superior Court for Pierce County in defendant's favor in an action brought to recover damages for breach of an oral contract to sell corporate stock and give employment to plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. Garvey, Kelly, & MacMahon, for appellant:

The mere fact that, after having employed him, the defendant could have discharged him at will, does not justify defendant in breaking a contract to employ.

26 Cyc. 977, 978; *Davis v. Barr*, 12 N. Y. S. R. 111; *Watson v. Russell*, 149 N. Y. 388, 44 N. E. 161.

If plaintiff's resignation was known, acquiesced in, and accepted by the defendant as a part performance of his contract, it was one of the considerations upon which the contract was made, and was a part payment.

White v. Drew, 56 How. Fr. 53; *Post v. Wilson*, 5 Ohio Dec. Reprint, 368; *Raymond v. Colton*, 43 C. C. A. 501, 104 Fed. 219.

Mr. John E. Gallagher, for respondent:

A contract for the sale of corporate stock is one for the sale of goods, wares, and merchandise within the statute of frauds.

Note. — Contract for the sale of corporate stock as one for the sale of "goods," etc., within statute of frauds.

The earlier cases on this question are discussed in the note to *Sprague v. Hosie*, 19 L.R.A.(N.S.) 874.

The rule stated in the earlier note as followed in the courts of this country, that a sale of corporate stock is a sale of "goods," etc., within the statute of frauds, has been

Sprague v. Hosie, 155 Mich. 30, 19 L.R.A. (N.S.) 874, 130 Am. St. Rep. 558, 118 N. W. 497; *Franklin v. Motoa Gold Min. Co.* 16 L.R.A. (N.S.) 381, 86 C. C. A. 145, 158 Fed. 941, 14 Ann. Cas. 302.

If the alleged agreement to sell is invalid, the balance of the contract is also invalid.

20 Cyc. 285.

The respondent, even though the appellant had rendered any services, could have discharged him at any moment without being liable for any salary except that already earned.

Llewellyn v. Aberdeen Brewing Co. 65 Wash. 319, 118 Pac. 30, Ann. Cas. 1913B, 667.

followed in the late cases passing upon that question. *Stift v. Stiewel*, 91 Ark. 445, 125 S. W. 1008, 18 Ann. Cas. 597; *Russell v. Betts*, 107 Ark. 629, 156 S. W. 457; *Korner v. Madden*, 152 Wis. 646, 140 N. W. 325; *Snow Storm Min. Co. v. Johnson*, 108 C. C. A. 615, 186 Fed. 745. But see *Clement v. Rowe*, *infra*.

Consequently, in an oral sale of stock the vendor cannot recover the price, in the absence of anything taking the transaction out of the statute. *Stift v. Stiewel*, *supra*; *Korner v. Madden*, 152 Wis. 646, 140 N. W. 325.

Nor can one who has orally made a conditional sale of his stock enforce the same upon the happening of the contingency upon which the sale was to be completed. *Russell v. Betts*, 107 Ark. 629, 156 S. W. 457. The agreement in this case was that if the owner of the stock would sell the same to another party, the defendant would pay him a certain amount if the dividends on the stock and the owner's equitable interest in the assets of the corporation when the same became insolvent, if it did become insolvent, did not amount to the stated sum. This was treated as a conditional sale and the validity determined as above.

Nor can the corporation refuse to issue a new certificate of stock to replace a lost certificate on the ground of an oral contract of sale of the stock by the stockholder. *Snow Storm Min. Co. v. Johnson*, 108 C. C. A. 615, 186 Fed. 745.

The question what constitutes a sale is not properly within the scope of the present note, and the following cases which pass upon this question are inserted for illustrative purposes merely.

A qualified sale of stock upon condition that should the purchaser become dissatisfied therewith or want his money the seller would refund, upon a notice of a certain length of time, is not a contract for the sale of property from the purchaser to the seller within the statute of frauds. *Schaefer v. Strieder*, 203 Mass. 467, 89 N. E. 618.

In *Hankwitz v. Barrett*, 143 Wis. 639, 128 N. W. 430, it is held that where stock is sold, paid for, and delivered in pursuance

Gose, J., delivered the opinion of the court:

Plaintiff claims damages for breach of an oral contract to sell corporate stock and give employment. His complaint alleges that he and the defendant entered into an oral contract, whereby the defendant agreed to increase its capital stock and sell him 50 shares of such increase at par, that is, at \$100 a share, and to employ plaintiff as its "bookkeeper under the title of secretary and treasurer," at a salary of \$150 per month, in consideration of his resigning the position which he then held with another company and paying to defendant \$5,000 for the stock. It is further alleged that, in fulfilment of the contract, the plaintiff, upon the day of the bargain, re-

ceived of a contract wherein the vendor, as a condition of the sale, agrees to repurchase it, at the option of the buyer, the whole constitutes but an entire original contract that is sufficiently performed to take it out of the statute.

An oral agreement by the agent of a corporation to induce a prospective purchaser to take stock therein that he would pay her upon demand the amount of money paid for the stock was held in *Trenholm v. Kloepfer*, 88 Neb. 236, 129 N. W. 436, not to be an agreement to purchase stock, but an entire contract, the purchaser's part in which was fully executed.

So, an oral contract by a stockholder who has a large personal interest in a corporation, by which he agrees, upon a sale of the corporate stock through him as agent, to personally take the stock if the purchaser should become dissatisfied therewith, is not void as being a sale of goods, wares, or merchandise from the purchaser to such stockholder. *Schaefer v. Strieder*, *supra*.

But an oral agreement by a third person, although made at the time of the sale, to take the stock at the purchaser's option, is a sale within the condemnation of the statute. *Korner v. Madden*, *supra*.

A subscription to take a number of shares in a corporation about to be formed is not a sale of stock within the condemnation of the statute. *Clapp v. Gilt Edge Consol. Mines Co.* — S. D. —, 144 N. W. 721.

Nor is the original issue of stock to one by the corporation a sale within the meaning of this section of the statute. *Peninsula Leasing Co. v. Cody*, 161 Mich. 604, 126 N. W. 1053.

An oral agreement by one to induce another to exchange land for stock in a corporation, that he would purchase the stock at a stated time in case it failed to come up to his representations, is held in *Clement v. Rowe*, — S. D. —, 146 N. W. 700, not to be within the provisions of a statute making void an oral agreement for the sale of goods, chattels, or things in action in value not less than \$50, but why it is not within the statute is not stated.

W. A. E.

signed his position, and thereafter tendered to the defendant his services and the sum of \$5,000, both of which the defendant rejected; that the defendant increased its capital stock; that its capital stock is of the market value of \$150 per share; and that his resignation was "known, acquiesced in, and accepted" by the defendant as a part performance of the contract. The prayer is for \$2,500 damages for failure to deliver the stock, and \$600 for breach of the contract of employment. A demurrer to the complaint was interposed on three grounds: (1) That several causes of action are improperly united; (2) that the complaint does not state facts sufficient to constitute a cause of action; and (3) that the contract, under the statute of frauds, is required to be in writing. The demurrer was sustained and judgment of dismissal entered. The plaintiff has appealed.

The respondent's contention is twofold: (a) That shares of corporate stock are "goods, wares, and merchandise" within the meaning of the statute of frauds; and (b) that the act of the appellant in resigning his position was not the giving of an earnest or a part payment under the statute. Our statute (Rem. & Bal. Code, § 5290) provides: "No contract for the sale of any goods, wares, or merchandise, for the price of \$50 or more, shall be good and valid, unless the purchaser shall accept and receive part of the goods so sold, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." Section 3893, Rem. & Bal. Code, provides that the stock of a corporation shall be deemed personal property.

It is established by the great weight of authority that corporate stock is goods, wares, and merchandise within the meaning of the statute of frauds. 20 Cyc. 244; Cook, Corp. § 339; Helliwell, Stock & Stockholders, p. 15; 4 Words & Phrases, p. 3131; Sprague v. Hosie, 155 Mich. 30, 19 L.R.A.(N.S.) 874, 130 Am. St. Rep. 558, 118 N. W. 497; Franklin v. Matoa Gold Min. Co. 16 L.R.A.(N.S.) 381, 86 C. C. A. 145, 158 Fed. 941, 14 Ann. Cas. 302. This construction of the statute is not seriously disputed by the appellant. He contends, however, that a contract for the sale of stock to be issued does not fall within the ban of the statute; but he offers no sound reason for the distinction. It is well settled, we think, that a contract for the sale of stocks at a future date is within the statute. Franklin v. Matoa Gold Min. Co. supra, and authorities there cited. In 51 L.R.A.(N.S.)

Meehan v. Sharp, 151 Mass. 564, 24 N. E. 907, cited by appellant, the court suggested that it was "at least doubtful" whether a contract for the sale of corporate stock that had not been regularly issued was within the statute, but the case was affirmed upon the ground that there had been a delivery of the stock.

The second proposition is: Did the resignation of the appellant constitute giving "something in earnest to bind the bargain or in part payment?" The statute obviously contemplates that something of value shall pass to the promisee; that is, that something of value "must be really given and received toward payment." Benjamin, Sales, 7th ed. p. 180. "There must be an actual payment" of money or something of value "in the eye of the law." Clark, Contr. § 57. "To constitute a payment as earnest, or a part payment within the meaning of the statute of frauds, there must be an actual transfer or delivery of the thing or the money agreed to be given as earnest or part payment." Walrath v. Ingles, 64 Barb. 265. "Acts merely preliminary or ancillary to the agreement, such as delivering an abstract of title, giving directions for a conveyance, the preparation of the agreement, making valuations, and other like acts, are not sufficient." Reynolds v. Scriber, 41 Or. 407, 69 Pac. 48. The allegation that the appellant's resignation was "known, acquiesced in, and accepted by the defendant" as a part performance of the contract is merely the conclusion of the pleader. There is but one fact pleaded touching part payment and that is that the appellant resigned an employment which he held with a third party. In White v. Drew, 56 How. Pr. 53, cited by appellant, one of the elements of the consideration agreed upon passed from the vendee to the vendor. In the instant case the appellant merely resigned after the agreement had been made. Nothing actually passed to the respondent. Although not cited in the briefs, we have not overlooked the case of Harris v. Johnson, 75 Wash. 291, 134 Pac. 1048. The question there was: What constitutes a sufficient consideration for a promise to pay money? The question here is the correct interpretation of the words of a particular statute. The rule applicable to the one question is not necessarily controlling in the other. We conclude that there was nothing given in earnest to bind the bargain, or in part payment within the meaning of the statute. It follows that the contract for the sale of the corporate stock was void under the statute of frauds.

The appellant argues, however, that the contract is not an entirety, and that he

is entitled to recover at least nominal damages for a breach of the contract to give him employment. Had he been given employment, he would have occupied a position "of responsibility and trust," and would have been removable at the will of the respondent. *Llewellyn v. Aberdeen Brewing Co.* 65 Wash. 319, 118 Pac. 30, Ann. Cas. 1913B, 667. It cannot be doubted that the position of bookkeeper "under the title of secretary and treasurer" would be a position of responsibility and trust. If he had the title of secretary and treasurer, we think the legal presumption would be that he would exercise the functions of secretary and treasurer.

This court has held that, where the action is one for damages only, there being involved no property or personal rights having value in themselves, a failure to prove substantial damages is a failure to prove the substance of the issue, and warrants a judgment of dismissal. *Woodhouse v. Powles*, 43 Wash. 617, 8 L.R.A. (N.S.) 783, 117 Am. St. Rep. 1079, 86 Pac. 1063, 11 Ann. Cas. 54; *Casassa v. Seattle*, 75 Wash. 367, 134 Pac. 1080. This view is sound for another reason; that is, the law "does not concern itself with trifles." *Matzger v. Page*, 62 Wash. 170, 113 Pac. 254.

The case will not be retained for the purpose of determining the question of nominal damages.

The demurrer was properly sustained, and the judgment is affirmed.

Crow, Ch. J., and Ellis, Main, and Chadwick, JJ., concur.

ALABAMA SUPREME COURT.

KEARN FITZPATRICK, Appt.,
v.

AGE-HERALD PUBLISHING COMPANY.

(— Ala. —, 63 So. 980.)

Pleading — libel — effect of innuendo.

1. An innuendo cannot add to, enlarge, or change in any degree words alleged to be libelous.

Libel — house or occupants.

2. A written statement that a particular house has a bad reputation with the police is a libel on its occupants.

Same — bad reputation with police.

3. To write that one has a bad reputation with the police is libelous *per se*.

Note. — For defamation of occupants of house by imputing to it a disorderly character, see note to *Hyatt v. Lindner*, 48 L.R.A. (N.S.) 256, and notes on analogous subjects therein referred to.
61 L.R.A. (N.S.)

Same — definiteness of statement.

4. That the house is not designated in a statement that a shooting occurred on a named street between two other streets, in a house which bore a bad reputation with the police, does not prevent it from being a libel on the occupants if those familiar with the facts know which house was referred to.

Pleading — libel — failure to demand retraction.

5. Under a statute denying punitive damages against a newspaper for publication of a libel unless a demand for retraction has been made, the failure to make such demand is matter of defense.

Same — excessive demands — demurrer.

6. Demurrer is not the proper remedy for an excessive demand for damages in a libel suit.

(November 27, 1913.)

APPEAL by plaintiff from a judgment of the City Court of Birmingham in defendant's favor in an action brought to recover damages for the publication of an alleged libel. Reversed.

The facts are stated in the opinion.

Messrs. Harsh, Beddow, & Fitts, for appellant:

It does not appear but that plaintiff could have shown by extrinsic evidence that the publication referred to his home, although it did not name him.

He certainly had the legal right to adduce such proof.

25 Cyc. 493, note 79; *Enquirer Co. v. Johnston*, 18 C. C. A. 628, 34 U. S. App. 607, 72 Fed. 443.

It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant.

Odgers, Libel & Slander, pp. 129, 567; *Petsch v. Dispatch Printing Co.* 40 Minn. 291, 41 N. W. 1034; *Maynard v. Fireman's Fund Ins. Co.* 34 Cal. 48, 91 Am. Dec. 672, 47 Cal. 207.

Plaintiff was sufficiently identified, and could recover.

Steele v. Southwick, 9 Johns. 214; *Mann v. Dempster*, 104 C. C. A. 110, 181 Fed. 76.

The enjoyment of private reputation and social respectability, unassailed, is as much a constitutional right as the possession of life, liberty, or property.

McGee v. Baumgartner, 121 Mich. 287, 80 N. W. 21; *Park v. Detroit Free Press Co.* 72 Mich. 560, 1 L.R.A. 599, 16 Am. St. Rep. 544, 40 N. W. 731; *Iron Age Pub. Co. v. Crudup*, 85 Ala. 519, 5 So. 332; *Ferdon v. Dickens*, 161 Ala. 181, 49 So. 888; *Wandt v. Hearst's Chicago American*, 129 Wis. 419, 6 L.R.A. (N.S.) 919, 116 Am.

St. Rep. 959, 109 N. W. 70, 9 Ann. Cas. 864.

Any publication which tends to degrade a person, or to bring him into ill repute, or to destroy the respect of his neighbors, or to bring him into ridicule, is actionable *per se*.

Montgomery v. Knox, 23 Fla. 595, 3 So. 212; Morey v. Morning Journal Asso. 123 N. Y. 207, 9 L.R.A. 621, 20 Am. St. Rep. 730, 25 N. E. 161; Pfitzinger v. Dubs, 12 C. C. A. 400, 24 U. S. App. 376, 64 Fed. 696; Cervený v. Chicago Daily News Co. 139 Ill. 345, 13 L.R.A. 864, 28 N. E. 692; Fitzgerald v. Robinson, 112 Mass. 371; Morasse v. Brochu, 151 Mass. 568, 8 L.R.A. 524, 21 Am. St. Rep. 474, 25 N. E. 74; McClean v. New York Press Co. 46 N. Y. S. R. 706, 19 N. Y. Supp. 262; Merchants' Ins. Co. v. Buckner, 39 C. C. A. 19, 98 Fed. 222; Iron Age Pub. Co. v. Crundup, 85 Ala. 519, 5 So. 332; Fardon v. Dickens, 161 Ala. 181, 49 So. 888.

The statement in the publication to the effect that the house "had a bad reputation with the police" was the equivalent of saying that the house was one which, to say the least of it, had been the subject of police surveillance; and the common understanding of the words could convey to the ordinary mind even stronger and more offensive suggestions.

Morey v. Morning Journal Asso. 123 N. Y. 207, 9 L.R.A. 621, 20 Am. St. Rep. 730, 25 N. E. 161; Post Pub. Co. v. Hallam, 8 C. C. A. 207, 16 U. S. App. 613, 59 Fed. 530; Culmer v. Canby, 41 C. C. A. 302, 101 Fed. 195; State v. Armstrong, 106 Mo. 395, 13 L.R.A. 419, 27 Am. St. Rep. 361, 16 S. W. 604; McClean v. New York Press Co. 46 N. Y. S. R. 706, 19 N. Y. Supp. 262.

Unless an inspection of the publication convinces the court that no reasonable construction of the language employed could carry a defamatory meaning, then its meaning and interpretation must be left to the jury.

Culmer v. Canby, 41 C. C. A. 302, 101 Fed. 195; Twombly v. Monroe, 136 Mass. 464; Downing v. Wilson, 36 Ala. 718; Hanchett v. Chiatovich, 41 C. C. A. 648, 101 Fed. 742; Sanderson v. Caldwell, 45 N. Y. 398, 6 Am. Rep. 105; Pfitzinger v. Dubs, 12 C. C. A. 400, 24 U. S. App. 376, 64 Fed. 696.

Mr. Nathan L. Miller for appellee.

Dowdell, Ch. J., delivered the opinion of the court:

Action of libel brought by appellant, Kearn Fitzpatrick, against the Age-Herald Publishing Company. From a judgment 51 L.R.A. (N.S.)

for defendant the present appeal is prosecuted.

There is but one count in the complaint; the court sustained a demurrer thereto, and, the plaintiff declining to amend, judgment was thereupon rendered for the defendant, permitting it to go hence without day. The publication complained of is set forth *in hæc verba* in the complaint. It appears that a man by the name of Michael Brennan, otherwise called Micky Brennan, was shot in the city of Birmingham, Alabama, on July 2, 1911, and on the next morning the defendant company published in its paper, the Age-Herald, an account of the shooting, detailing some sensational facts with reference to the affair. The "offensive statement," constituting the alleged libel of plaintiff, is: "The shooting occurred on Avenue E. between Eleventh and Twelfth streets, in a house which bears a bad reputation with the police." The complaint avers that the house mentioned in the publication was at the time, and had been for a long time prior thereto, and has been ever since said time, occupied by plaintiff, with his family, as a residence, and that, as a proximate consequence of said libel, the plaintiff was greatly humiliated, his reputation greatly impaired, etc. Numerous grounds of demurrer were assigned to the complaint. The vital question in the case is whether or not the published words were libelous, and, if so, did they constitute a libel of the plaintiff, or of the house in which the plaintiff avers he was residing; that is, were they a libel of the person or of the thing—the house?

Counsel for appellee devotes practically his entire brief to the support of the proposition that the libel, if any, was of the thing,—the house,—and not of the plaintiff. The plaintiff charges that the alleged libelous words were falsely and maliciously published "of and concerning him." There is no mention of the plaintiff's name in the publication. By way of innuendo, the plaintiff avers that the said house mentioned in said publication was, at the time, and had been for a long time prior thereto, and has been ever since said time, occupied by the plaintiff, with his family, as a residence. The plaintiff insists that this averment sufficiently explains the precedent matter,—the publication,—and shows that the said publication related to, and was a libel upon, him. Unless the published words are fairly susceptible of the meaning attributed to them by the pleader in the innuendo, the actionable quality of the words is not disclosed, for the innuendo is but the deduction or conclusion of the pleader. The only office of the innuendo is to explain some matter already

expressed, or to serve to point out where there is precedent matter. It may apply what is already expressed, but cannot add to, enlarge, or change the sense of the previous words. If the meaning given to the words by the innuendo is broader than the words would naturally bear, the pleading is bad; for, in law, the innuendo is but the deduction of the pleader from the words used in the publication, and this court has repeatedly held that it is for the court to say whether the meaning charged by the innuendo is supported by the language used in the publication. *Henderson v. Hale*, 19 Ala. 159; *Wofford v. Meeks*, 129 Ala. 349, 55 L.R.A. 214, 87 Am. St. Rep. 66, 30 So. 625; *Gaither v. Advertiser Co.* 102 Ala. 458, 14 So. 788. As above stated, the appellee insists that the alleged libel was of the "house," and not of the plaintiff. It is also pointed out that the particular house referred to in the complaint is uncertain. The only house mentioned is the house which the plaintiff alleges was his residence, and the word "said" before the word "house" makes it certain that the plaintiff intended to and did aver that the alleged libelous publication referred to the particular house occupied by the plaintiff with his family.

It is strenuously argued that the plaintiff's complaint shows that he was not libeled, and that the libel, if any, was of the thing—the house; that it is the house which has a bad reputation with the police, and not the occupants thereof. In support of this contention the following Alabama cases are cited: *Cahn v. State*, 110 Ala. 56, 20 So. 380; *Toney v. State*, 60 Ala. 97; *Wooster v. State*, 55 Ala. 221; *Price v. State*, 96 Ala. 5, 11 So. 128. The cases are not in point. The principle announced in two of these decisions is that, in a prosecution for keeping a certain character of house prohibited by law, the state cannot offer evidence of the character of the house. The house acquires whatever reputation it has from the occupants thereof; it can make or earn none for itself; it can and does reflect only the reputation of its occupants, or those who frequent it. We know of no way by which a house can, of its own act, acquire a reputation. This being true, when we speak of a certain house as being disorderly, we must necessarily be understood as referring to the conduct of those who live in, or who frequent, the same by and with the permission of the occupants. When, therefore, it is said of a house, "It has a bad reputation with the police," we refer to the head of that house, and, in fact, we reflect upon each member of the same. The language of the publication is, "The shooting

occurred on Avenue E, between Eleventh and Twelfth streets, in a house which bears a bad reputation with the police." This charges that, at the present time, the house bears a bad reputation with the police; and, under the plaintiff's averment, it was at that moment of time, an "had been for a long while prior thereto, the place where he and his family resided. This reflected upon the plaintiff, for he and his family must be held to be the ones who gave to the house, and continued to give to it, that reputation, for the house is void of life and could not make for itself a bad reputation.

The case of *McClean v. New York Press Co.* 46 N. Y. S. R. 706, 19 N. Y. Supp. 262, is very similar in many respects to the case under consideration. The publication there charged that No. 234 West Twenty-Ninth street, in New York city, was disorderly. In that case the same question was raised as is raised in this case; that is, that the libel was of the thing,—the house,—and not of a person. Addressing itself to this point the court said: "It is manifest that this point is not well taken. The phrase used, it is true, is 'disorderly house;' but a house cannot be disorderly; . . . it refers entirely to the character of the occupants; and it is their character which fixes the character of the thing. When, therefore, a house is spoken of as disorderly, or as a bawdyhouse, or as disreputable, it is that the occupants are disorderly, are lewd persons, or are disreputable. It is idle in a charge of this kind to talk about it being a libel of the house where a house is called 'disorderly.'"

We are of the opinion that the publication in question was "of and concerning" the plaintiff, who resided in the house in question.

In the case of *Iron Age Pub. Co. v. Crudup*, 85 Ala. 520, 5 So. 332, this court said: "The definitions of libel, as found in the cases, vary somewhat in phraseology, and are more or less comprehensive, as may be called for by the particular charge involved in the case. Generally any false and malicious publication, when expressed in printing or writing, or by signs or pictures, is a libel, which charges an offense punishable by indictment, or which tends to bring an individual into public hatred, contempt, or ridicule, or charges an act odious and disgraceful in society. This general definition may be said to include whatever tends to injure the character of an individual, or blacken his reputation, or imputes fraud, dishonesty, or other moral turpitude, or reflects shame, or tends to put him without the pale of social intercourse."

The published words did not, it is true, charge the plaintiff, or any member of his family, with an indictable offense; but, giving to the publication the meaning that the words employed generally and fairly import, it tended to subject the plaintiff, the head of the house, to public hatred, contempt, or ridicule, and tended to reflect shame upon him, and to put him without the pale of social intercourse. This being true, the words were libelous *per se*. Trimble v. Anderson, 79 Ala. 514; Iron Age Pub. Co. v. Crudup, *supra*.

And, as we have above pointed out, the words, when published, were a libel upon the plaintiff. No one could doubt that the neighbors and friends of plaintiff, on reading this account of the shooting of Brennan, would conclude that the libel was directed to the plaintiff. It is not necessary that all the citizens of Birmingham should understand the libel, or know that the shooting occurred at plaintiff's house; it is sufficient that those who knew could understand that he was the person meant. Odgers, Libel & Slander, p. 567; Petsch v. Dispatch Printing Co. 40 Minn. 291, 41 N. W. 1034.

It is also objected that the complaint is faulty, in that punitive, as well as special, damages are claimed, and it is not averred that a demand for retraction was made before the institution of the suit, and that there was failure on the part of the defendant company to retract. The case of Comer v. Age-Herald Pub. Co. 151 Ala. 613, 13 L.R.A.(N.S.) 525, 44 So. 673, is cited in support of this contention. There is no merit in this contention. The law in force at the time the Comer suit was brought (Acts 1899, p. 32) is not the law now in force on this subject. The change is wrought by § 3750 of the Code of 1907. Assuming, without deciding, that the matter published was proper for public information, the failure to demand retraction is now, under the law, defensive matter. The act of February 20, 1899, inhibited the institution of suits for libel brought against a publisher of a newspaper, unless a demand for retraction was made before the institution of the suit. This court, in Comer's Case, *supra*, held that this inhibition did not prohibit the bringing of suits for the recovery of actual damages. There is no inhibition against bringing a suit to recover damages, under the law now in force, without first having made a demand for retraction, but simply a denial to the plaintiff of the right to recover punitive damages unless such demand was previously made. Code 1907, §§ 3750, 3751.

Assuming further, without deciding, that the plaintiff has failed to state a cause 51 L.R.A.(N.S.)

entitling him to punitive damages, but to actual damages, the proper way to get rid of the improper demand is not by demurrer, but by motion to strike, objections to the evidence, or special instructions to the jury. Western U. Teleg. Co. v. Garthright, 151 Ala. 413, 44 So. 212; Hayes v. Miller, 150 Ala. 621, 11 L.R.A.(N.S.) 748, 124 Am. St. Rep. 93, 43 So. 818; Woodstock Iron Works v. Stockdale, 143 Ala. 550, 39 So. 335, 5 Ann. Cas. 578.

After a careful consideration of this case we are of the opinion, and so hold, that the defendant's demurrer should have been overruled, and that in failing to so rule there intervened error for which the judgment of the court below must be reversed.

McClellan, Sayre, and Somerville, JJ., concur.

ARKANSAS SUPREME COURT.

MACKAY TELEGRAPH-CABLE COMPANY, Appt.,

v.
WILLIAM F. VAUGHAN.

(— Ark. —, 163 S. W. 158.)

Damages — mental anguish — lost telegram — sick child.

A telegraph company which causes a delay of a couple of days in the starting of a sick child for another climate through loss of a message is not answerable in damages for the mental anguish suffered by the father pending the delay, because of the child's condition; at least, if there was nothing to prevent the starting of the child without fixing definitely its accommodations at destination, which the message was intended to effect.

(January 19, 1914.)

APPEAL by defendant from a judgment of the Circuit Court for Phillips County in plaintiff's favor in an action brought to recover damages for mental anguish alleged to have been suffered because of defendant's negligent delay in transmitting a telegram. Reversed.

The facts are stated in the opinion.

Note. — The so-called mental-anguish doctrine is treated in a series of exhaustive notes in 49 L.R.A.(N.S.); the character of mental anguish necessary to sustain an action for mental anguish being discussed in a note to Western U. Teleg. Co. v. McKenzie, 49 L.R.A.(N.S.) 296; and the necessity of distinguishing between mental anguish caused by the sickness and death, and that caused by defendant's negligence, in the note to Western U. Teleg. Co. v. Chouteau, 49 L.R.A.(N.S.) 249.

Messrs. Fink & Dinning for appellant.
Messrs. Moore, Vineyard, & Satterfield for appellee.

McCulloch, Ch. J., delivered the opinion of the court:

Appellee instituted this action against appellant telegraph company to recover damages on account of mental anguish alleged to have been suffered by reason of delay in transmitting a telegraph message from Helena, Arkansas, the place of appellee's residence, to his mother at Cumberland, Virginia.

Appellee had been living in Helena a little over a month, and his infant child was in bad health, and under the care of a physician, who recommended that the babe be sent away for a change of climate. His mother lived at Cumberland, Virginia, and kept house there, and took a few boarders. He had a sister, also, who lived at the same place. He decided to send his wife and baby to Cumberland, and, in anticipation thereof, sent the following message directed to his mother: "Baby some better though not improving. Doctor thinks best she and Florence go to you for a while. Now have to feed her on bottle and both worn out losing sleep. Wire collect if convenient to have them and we leave soon as can get ready. Can arrange suitable diet for trip. Lovingly." This message was delivered to appellant's operator at Helena on the evening of March 6th about 7:45 o'clock. The operator was not in the office at the time, but told the appellee over the telephone to leave the message there, and that he would come down to the office and send it. It was not sent at all, but was lost, and during the next day the operator, upon inquiry of appellee, informed him, from hour to hour, that no reply had been received. Finally, on March 8th the operator informed appellee that he had lost the message, and that it had never been sent, and suggested to him that he send a day message by another telegraph company, and that he (the operator) would pay the difference between the price of a day and night message. Appellee then sent the message to his mother, and received a prompt reply, and his wife and baby started on the trip the next day. The operator, according to his agreement, paid to appellee the difference between the cost of the day and night message. According to the undisputed evidence, there was a delay of nearly two full days, caused by the negligent omission of appellant's operator. The jury awarded damages to appellee in the sum of \$300, and judgment therefor was entered by the court, and an appeal has been duly prosecuted.

51 L.R.A. (N.S.)

We are of the opinion that the evidence does not establish any right to recover damages, in that the testimony as to mental anguish does not bring it within the rules of law which permit recovery of damages. Appellee was not prevented by the delay from starting his wife and baby on their journey; in fact, they did start the next day after receiving reply from his mother, and made the journey successfully. Appellee testified that, when he sent the message, he had fully determined that his wife and baby should go to Cumberland, but the only uncertainty was as to whether he would ask his mother or his sister to receive them, and take care of them. The following is his statement on the subject:

Q. Well, you had every assurance to believe that your mother would welcome your wife and child at her home?

A. Yes; I did.

Q. It was merely a matter of courtesy that you sent the telegram to her?

A. Well, she had some people boarding with her,—some school teachers or some other people, and I never knew whether she had room.

Q. Did you not know that she would make room for you, and your wife, and your child?

A. I thought so.

Q. Were you sure of that?

A. Yes, sir.

Q. You knew that, if you had gone on without any telegram, that you would have been welcome?

A. Yes, sir.

Q. Now, during these two days, if it had proved that it was not convenient for you to have gone there, you could have gone elsewhere?

A. I would, no doubt, have gone to my sister's there in town.

Q. At any event, you were going to one of the two places?

A. Either there or to her mother's.

Q. And you were getting ready, although you never got a reply from your mother, to take it some place?

A. Yes sir; I was naturally uneasy about the child. The baby was better, but not improving.

Q. And your anxiety at that time grew out of the physical condition of your child?

A. Yes, sir; principally. I do not know how much of my anxiety was caused by the physical condition of my child, and how much by a desire to receive a reply from my telegram.

Now, it is clear from this testimony that the mental anxiety suffered by appellee was over the condition of his sick infant. The

anxiety concerning the time when his wife and child would leave home, and which one of his relatives in Cumberland would meet them, were mere incidents. It was a species of anxiety that is too remote to attribute to the delay in sending the message, for appellee could have started his wife and child on the journey at any time with the certain knowledge that either his mother or sister would receive and take care of them. His anxiety over the condition of his child was manifestly such that the slightest inconvenience would disturb him; but that does not constitute an element of damages for which the statute allows a recovery.

In the case of *Western U. Teleg. Co. v. Archie*, 92 Ark. 59, 121 S. W. 1045, we said: "In order to recover damages under the mental anguish doctrine, it is necessary that the mental anguish suffered be real and with cause, and not merely the result of a too sensitive mind or a morbid imagination."

In that case the plaintiff sued to recover damages on account of failure to transmit the reply to a message to her husband notifying him of the birth of their child, and requesting him to come to her immediately, to which he replied, acknowledging the receipt of her message, and saying that he would start immediately. She testified that she was very ill at the time, and suffered mental anxiety on account of her failing to hear from her husband, and was apprehensive, on account of the delay, that he had failed to receive her message. We held, as above stated, that such anxiety did not constitute mental anguish within the meaning of the statute.

The case of *Western U. Teleg. Co. v. Reed*, 37 Tex. Civ. App. 445, 84 S. W. 296, is directly in point, and the doctrine of the case was approved by this court in *Western U. Teleg. Co. v. Shenep*, 83 Ark. 476, 12 L.R.A.(N.S.) 886, 119 Am. St. Rep. 145, 104 S. W. 154.

In the Texas case cited, the plaintiff's sister died in another town, and she corresponded by telegraph to know whether the funeral would be postponed in time for her to attend it. There was negligent delay in transmitting the message; but the funeral was, in fact, postponed, and the plaintiff had the opportunity to, and did, attend the funeral. She claimed that she suffered great anxiety on account of the uncertainty as to whether she could attend the funeral, and sought to recover damages on that score. The Texas court held against the right of recovery, and said: "It appears from the petition in this case that the plaintiff was not deprived of the privilege of being present at the funeral of her sister, 51 L.R.A.(N.S.)

but that the anguish she suffered was from the uncertainty of whether the funeral would be postponed to enable her to be present. She was not deprived of this privilege, and in fact attended the funeral. To allow damages in such a case would be an extension of the rule beyond any decision heretofore made by the supreme court."

So, in the present case, the plaintiff was not deprived of the privilege of sending his wife and daughter away, as recommended by a physician, but merely suffered annoyance on account of the delay and his extreme anxiety concerning the health of his infant. This was, as before stated, too remote to justify a recovery of damages. *Howard v. Western U. Teleg. Co.* 106 Ark. 559, 153 S. W. 803.

Learned counsel for appellee seek to sustain the right of recovery on the decision of this court in the case of *Western U. Teleg. Co. v. Hollingsworth*, 83 Ark. 39, 11 L.R.A.(N.S.) 497, 119 Am. St. Rep. 105, 102 S. W. 681, 13 Ann. Cas. 397. But we do not think the doctrine of that case has any application to the present one. In that case plaintiff suffered real anguish on account of the critical illness of his brother in another town, and the delayed message would have relieved that distress, and he was allowed to recover an account of his suffering during the period of the delay. Here the plaintiff's anxiety was concerning the illness of his child, and, as before stated, the communication with his mother had nothing to do with lessening that anxiety.

We are of the opinion that the evidence does not make out a case, and that it should not have been submitted to the jury. The judgment is therefore reversed, and the cause dismissed.

ARKANSAS SUPREME COURT.

LITTLE ROCK FURNITURE MANUFACTURING COMPANY et al., Appts.,

v.

W. M. KAVANAUGH et al.

(— Ark. —, 164 S. W. 289.)

Principal and agent — Liability of committee for supplies.

An executive committee appointed by the

Note. — Personal liability of committee appointed at public meeting for services or supplies.

As indicated by its title, this note does not purport to cover cases involving committees of organized bodies or associations, representing distinct entities, such as unincorporated churches, clubs, etc.

citizens of a municipality to have control of the arrangements for the entertainment of an organization which has been invited to meet in the municipality is not personally liable for supplies ordered by it if it sees that the funds contributed for the enterprise are honestly accounted for and equitably disbursed.

(February 23, 1914.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Pulaski County in defendants' favor in an action brought to recover the balance due for supplies ordered by them for the entertainment of an organization holding a reunion in Little Rock. Affirmed.

The authorities upon the above question are not in harmony, in some instances the committee being held personally liable, in others not liable. This conflict, where the party furnishing the supplies or rendering the services knew of the relation of the committee to the project, apparently arises largely from a difference of opinion as to the presumption in the giving of credit, whether presumably credit was given to the committee personally, or whether the services or supplies were furnished in reliance upon the fund which the committee held, or the generosity and good faith of those it represented. Of course, the terms of a special contract may be such in any event, even though indicating that the supplies or services were furnished to a committee, as to create a clear personal liability of its members.

Upon grounds somewhat similar to those on which the decision rests in *LITTLE ROCK FURNITURE MFG. CO. v. KAVANAUGH*, it was held in *Trastour v. Fallon*, 12 La. Ann. 25, that members of a "permanent committee" appointed at a public meeting to take charge of the project of building an isthmus railroad to connect the Atlantic and Pacific Oceans, subscriptions being taken to defray expenses, were not personally liable to one engaged by them to make a preliminary survey. The burden of proof in this instance, it was said, as to the terms of the contract, was upon the plaintiff, and to hold the defendants liable he must show that he contracted with them personally, or that they misled him by assuming to act for others without sufficient authority; and the evidence was regarded as showing that the plaintiff, knowing of the representative capacity in which the committee acted, looked to the funds held by it, and not to the committee individually, for compensation. The controlling question, it was said, was, whom did the employee trust? And that if no artifice or deception was used in making the contract, and he knew the capacity in which the employers acted, and looked to a special fund to reward him, he could not hold the agents personally liable, if they had not misappropriated the fund.

But in *Eichbaum v. Irons*, 6 Watts & S. 51 L.R.A. (N.S.)

Statement by Smith J.:

Appellants were plaintiffs below, and alleged in their complaint substantially the following facts: The plaintiffs are corporations, organized under the laws of the state of Arkansas, and are engaged in the manufacture and sale of furniture. At a mass meeting of the citizens of Little Rock, held in the summer of 1910, to arrange plans for entertaining the Confederate Reunion in May, 1911, the defendants were selected as an executive committee, with W. M. Kavanaugh as chairman, to control the arrangements to be made for said reunion. That said mass meeting was a mere voluntary association, not incorporated, and had no legal existence, and could make

67, 40 Am. Dec. 540, members of a committee appointed at a political meeting to arrange for a free public dinner were held liable therefor to one who furnished it at their request. The court distinguished between liability of an entertainment committee appointed by an unorganized temporary body such as that in question, and a committee appointed by a permanent organization such as a club, holding that the presumption of credit in the former case was that the party furnishing the services or supplies relied on the responsibility of the individual members of the committee. The plaintiff testified that he looked for payment to the committee, but the case was apparently decided on the theory of presumption of credit given the committee, rather than on definite proof to that effect. It was said: "Now, it will not be pretended that nobody was responsible to the plaintiff for the order; and, if the defendants were not, who else was? Were they to be viewed as the agents of a club, we would have something palpable to deal with. The question would be whether they had become personally liable by having exceeded their authority, or whether they had not contracted on the credit of their constituents. But a club is a definite association, organized for indefinite existence; not an ephemeral meeting, for a particular occasion, to be lost in the crowd at its dissolution. It would be unreasonable to presume that the plaintiff agreed to trust to a responsibility so desperate, or furnish a dinner on the credit of a meeting which had vanished into nothing. It was already defunct; and we are not to imagine that the plaintiff consented to look to a body which had lost its individuality by the dispersion of its members in the general mass."

It was also held in *Eichbaum v. Irons*, supra, that members of the committee who had opposed the plan, but eventually yielded to the majority and were present when the order was given, were liable, as well as those who originally favored it, although afterwards, when the dinner was in preparation, the opposing members requested the plaintiff to give the matter up. It was said that if they would have escaped respon-

no contracts. That such defendants, as such executive committee, assumed and exercised full control of the affairs of said Confederate Reunion, made all contracts, controlled the collection of the subscriptions and the expenditures of funds, and the making of payments of the obligations incurred in connection with the said reunion. That said defendants, as such executive committee, acted through subcommittees appointed to attend to different departments of the work of caring for the reunion, one of which committees was the eating and lodging committee. That, in caring for the visitors' cots and mattresses were necessary, and were used for the reunion. That on February 23, 1911, the plaintiffs entered into the following contract with the defendants, for the furnishing of cots and mattresses, to wit:

Eating and Lodging Committee, Confederate Reunion,

Little Rock, Ark.

Gentlemen:—We hereby jointly agree to furnish, as per samples shown, woven wire top cots, mattresses, and pillows for use during the Confederate Reunion in Little Rock, at a rental of one dollar and sixty cents (\$1.60) for each complete outfit.

sibility, they should have protested and given up membership at once.

It appears in *Eichbaum v. Irons*, supra, that only certain members of the committee were sued; but the court dismissed this point by saying that no objection had been made by pleading in abatement nonjoinder of the other members.

Or the principles announced in *Eichbaum v. Irons*, supra, a committee appointed at a general meeting of creditors to carry on the mining business of the debtor was held liable in *Manley v. Hickman*, 1 Chester Co. Rep. 557, for commissions to a traveling salesman whom it employed. This conclusion was reached in spite of the fact that the salesman, who himself was a creditor, was present at the meeting of the creditors, and had knowledge at the time of his employment that the defendants were a committee appointed at such meeting. It was said: "The meeting, so far as appears, acted and adjourned without day, and lost its individuality. We have no information as to who were present and would be bound by the appointment. No tangible third party is presented as responsible for the debt. The contract of the plaintiff was with the defendants, and, when it was made, no principal was named, so that the plaintiff might inquire into his or their liability."

In regard to the knowledge of the salesmen of the relation of the committee to the undertaking, it was said in *Manley v. Hickman*, supra, that the committee undertook to operate the mines, and the salesmen had a right to presume that, having charge of

Mattresses to be made of felted lintars covered with ticking and tufted sufficiently to hold them in shape, and to weigh 10 pounds. Size 2' 6" x 6' 0". Pillows made of felted lintars, covered with ticking, and to weigh 3 pounds. Complete outfits in lots of 5,000, 10,000, 15,000, or any number designated by committee, will be furnished at above price on the following conditions: Contract for first 10,000 to be placed not later than January 15, 1911. Contract for first additional 5,000 or less to be placed not later than February 15, 1911, and order for all over 15,000 to be placed not later than March 15, 1911. Rents for the above outfits are to be paid as follows: One third cash at the time contract is signed and orders placed; one third when outfits are delivered to places designated; and the balance the day following the close of the reunion, an ample guaranty to be given by the committee that all payments will be made according to above conditions. It is also understood that the committee will reimburse us for all lost or damaged cots, mattresses, or pillows as follows: One dollar (\$1) for each cot; one dollar and thirty cents (\$1.30) for each mattress, and 30 cents for each pillow. We further agree to submit any damages that may occur to

them, they would make provision for the payment of debts; and it would be unreasonable to presume that he entered into the service agreeing to look for his compensation to a party called a "meeting of creditors."

In *Powers v. House*, 35 Neb. 129, 52 N. W. 849, where, at a public meeting of citizens, a committee was appointed to provide for a survey of a proposed railroad, and to disburse the funds raised at the meeting by subscription for carrying on the project, and the committee employed an engineer at a stated salary to assist in locating the railroad, a member of the committee was held liable for the engineer's salary and expenses, although it appears that the latter, at the time his services were engaged, was informed of the nature of the employment and the relation of the committee thereto. The principal question discussed, however, was whether the engineer had so failed to carry out his part of the contract as to defeat recovery, the court dismissing the point as to whether the defendant was liable on account of being a mere agent, by saying that there was no proof that he acted as agent for anyone in the transaction. No point was made of the fact that process was served upon only one member of the committee.

But in *Sloan v. Whitlock*, 13 Rich. L. 174, where, at a meeting of persons interested in a graveyard, the defendant and another were named as a committee to have charge of the building of a wall around the yard, it was held that in the absence

a board of arbitrators, composed of one person selected by ourselves, one by you, and the third by the two. We also agree to furnish a bond of \$10,000 to guarantee that we will carry out this contract.

Jones House Furnishing Company,
By Claudius Jones, Pres.
Little Rock Furniture Manufacturing
Company,
By Thomas B. Jacobs, Secy.

Indorsed: "Accepted. Executive Committee Confederate Reunion, by W. M. Kavanaugh, Chairman. Attest: Geo. R. Brown, Secy."

That plaintiffs complied with said contract, upon their part, and furnished the supplies contemplated by the contract to the amount of \$17,060.37, and have been paid upon said indebtedness the sum of \$13,802.90, leaving due and unpaid to plaintiffs the sum of \$3,257.47. That in furnishing said cots and outfits the plaintiffs relied upon the personal liability of the defendants and extended credit to them.

Appellees filed a general demurrer to the complaint, and also a motion to make other parties defendants, and to transfer to chancery.

of a special contract making the defendant personally liable to one whom he employed to do the work, the latter could not recover on an implied contract from the defendant alone for services rendered.

Where, at a general meeting of master and journeymen boat builders, held for the purpose of making arrangements to celebrate the completion of the Erie canal, a committee of arrangements was appointed, which, through an agent, employed men to build boats for use in the procession, the committee was held liable in *McCartee v. Chambers*, 6 Wend. 649, 22 Am. Dec. 550, for the services of the employees, as against a plea in abatement that the others present at the meeting should have been joined as defendants. It was said that there was nothing to warrant the conclusion that the workmen employed looked to the association, that is, to all the master and journeymen boat builders for their pay, but that the committee employed the workmen, and if anyone was legally responsible, they were; that the association, as it was called, was nothing more than a public meeting of a certain class of mechanics for a special purpose, who designated a committee to carry into effect its resolutions; and that the committee, and not the individuals composing the meeting, were the responsible persons in such cases.

Where, as an inducement to the location of a proposed mill in the town, a committee was appointed at a meeting of citizens to carry out the project of strengthening a

The answer contained a general denial of all the material allegations of the complaint, and alleged: That the executive committee was but a subcommittee of a general committee, composed of persons who actively participated in all plans and arrangements pertaining to said reunion, and that there were, altogether, 40 subcommittees; each having certain authority and responsibility delegated by the general committee. That plaintiffs, as merchants in the city of Little Rock were interested in said reunion, and were active in the promotion thereof, and were part of a small number largely profited thereby. That plaintiffs understood that they must depend upon public subscriptions to raise funds necessary to pay off any demands accruing by reason of any materials furnished or services rendered to said general committee, or to the city of Little Rock, for said reunion, and that said supplies were furnished with the understanding that they would be paid for, if a sufficient fund, was raised by public subscription, and each of said plaintiffs did receive their proper *pro rata* of all sums so raised. That each of the plaintiffs subscribed to the fund, out of which claims of the nature of plaintiffs were to be paid (that is to say,

bridge, so as to sustain cars passing from the railroad to the mill, subscriptions being raised for this purpose, and the committee made a written agreement, reciting that, in consideration of the plaintiffs repairing the bridge, they would pay him certain sums, and affixed their signatures and seals, the members of the committee were held personally liable in *Ulam v. Boyd*, 87 Pa. 477, although the word "committee" was added to the signatures as well as after the names of the parties in the first clause of the contract, designating by whom it was made. The court said that the fact that the defendants described themselves as a committee did not change the express language of the agreement, which in every part was personal to themselves, and not applicable to any principal, and which they confirmed by their own seals; and that the only effect of the word "committee" was like that of "executor" in a personal obligation,—to identify the transaction, and not to qualify the act.

And in *Rowland v. Phalen*, 1 Bosw. 43, it was held that parties who "acting as a committee of management of the Italian Opera," made a contract for services of certain artists, in which they undertook to "bind themselves" to carry out the agreement, were personally liable thereon. The words above quoted were said to be at most *descriptio personarum*, not importing authority to contract for any other person, and not implying that any other person would be bound by their act. R. E. H.

the Little Rock Furniture Manufacturing Company subscribed the sum of \$200, and the said Jones House Furnishing Company subscribed the sum of \$100); but they have failed to pay their subscriptions.

It was further alleged: That on May 5, 1911, the Confederate Veterans' Reunion Association was incorporated under the laws of the state of Arkansas relating to corporations for benevolent purposes, fair associations, et cetera, the general purpose of which was to arrange and prepare to take care of and entertain the Confederate veterans who might visit the reunion in Little Rock, in May, 1911, and to apply to that purpose all funds and things of value collected by that association, and to do and perform all other acts necessary to carry out the reunion plans. And it was provided that no member of said association should ever be liable for any indebtedness of said association, nor upon any obligation or contract of said association. That this association handled and disbursed all funds raised on account of said reunion, and plaintiffs received from it their proper *pro rata* share of all its funds.

There appears to be no serious conflict in the evidence. Appellants testified they knew nothing of the incorporation of the Confederate Veterans' Reunion Association, and furnished the supplies sued for under their contract hereinabove set out; and it appears this contract was made before the incorporation of this association, and its existence is therefore of no importance. Appellants say they furnished the supplies on the faith of the credit of the executive committee; but there is no evidence that this committee was so advised, until after the reunion had been held, and the supplies furnished.

It will be observed that the proposition submitted by appellants was a joint one, and the account was kept upon the books of the Little Rock Furniture Manufacturing Company; and it will also be observed that the proposition was addressed to the eating and lodging committee, and it was accepted by that committee, although it was indorsed as accepted by the chairman and secretary of the executive committee.

Wide publicity was given to the reunion, and a very large number of people were concerned in its promotion. A committee solicited funds from the business concerns, and also from the citizens of Little Rock, and a number of other towns of the state raised public subscriptions, and these operations extended over the period of time covered by appellants' contract. Appellants knew the money to defray the expenses of the reunion was being thus

raised by popular subscriptions, and each of them had subscribed for that purpose, and one of them made a second subscription to this fund, and the manager of the appellant Jones House Furnishing Company was the chairman of the subcommittee, having the duty of securing the necessary halls. Appellants' proposition called for "an ample guaranty to be given by the committee that all payment will be made according to the above conditions;" but this demand was not insisted upon, although the manager of one of the corporations testified he asked the executive committee for a guaranty, but this request was never complied with. The Confederate Veterans' Reunion Association disbursed all its funds, and there was found to be quite a deficit, but it was supposed that \$12,000 would extinguish this deficit, and the quorum court of Pulaski county made an appropriation of that amount for that purpose; but it was found that this appropriation paid only .225 per cent of the balance due the various claimants, and the appropriation was prorated on that basis. Appellants sued for the balance due them, and upon a trial before a jury a verdict was returned in favor of defendants. A number of questions were raised at the trial and are discussed in the briefs, which we find it unnecessary to discuss in this opinion, because of our view of the law applicable to the facts of this case.

Messrs. Jones & Danaher and E. L. McHaney, for appellants:

Each member of an association is liable for the debts thereof incurred during his period of membership, and which have been necessarily contracted for the purpose of carrying out the objects for which the association was formed.

4 Cyc. 311; Lewis v. Tilton, 64 Iowa, 220, 52 Am. Rep. 436, 19 N. W. 911; Ash v. Guie, 97 Pa. 493, 39 Am. Rep. 818; Fredendall v. Taylor, 23 Wis. 538, 99 Am. Dec. 203, 26 Wis. 286; Keller v. Tracy, 11 Iowa, 530; Drake v. Oskaloosa Normal School, 11 Iowa, 54; M'Cartee v. Chambers, 6 Wend. 649, 22 Am. Dec. 550.

Messrs. Morris M. Cohn and Louis M. Cohn for appellees.

Smith, J., delivered the opinion of the court:

Appellants say the evidence is practically undisputed, and that a verdict should have been directed in their favor. That this is true, because appellees were members of a voluntary association and acted within the scope of their authority in making the contract sued on, and that they are therefore within the rule of law that

"each member of an association is liable for the debts thereof, incurred during his period of membership, and which have been necessarily contracted for the purpose of carrying out the objects for which the association was formed." The law is so stated to be in 4 Cyc. 311. Appellants cite and quote freely from the cases of *Lewis v. Tilton*, 64 Iowa, 220, 52 Am. Rep. 436, 19 N. W. 911, and *Fredendall v. Taylor*, 23 Wis. 538, 99 Am. Dec. 203.

In *Lewis v. Tilton*, supra, a lease had been taken by the executive committee of a temperance club, and in a suit for the rent it was there said: "It is insisted that the lease shows that credit was extended to the club, and that the contract was made with it; that the principal was named; and therefore the defendants cannot be made individually liable. This line of argument possibly would be conclusive if there was a principal. But there is none. The club is a myth. It has no legal existence, and never had. It cannot sue or be sued. The defendants contracted in the name of a supposed principal; that is, they claim there was a principal for whom they were acting, but it now appears that there was no principal known to the law. But, under the allegations of the amended petition, it should be assumed, we think, that there was, as a matter of fact, a body of men associated together for a benevolent purpose, who had assumed the name above stated, for the avowed purpose, by their united efforts, of suppressing intemperance. There is, however, some doubt in our minds whether it can be said that the plaintiff extended credit to an organization that had no legal existence. As the law does not recognize such an organization, we are at a loss to know how or why it can be said as a matter of law that the plaintiff contracted with, and extended credit to, a mere myth. In legal parlance, the organization cannot be named. It has no habitation or place of abode. . . . But it is said these defendants did not contract. They certainly represented that they had a principal, for whom they had authority to contract. They, for or on behalf of an alleged principal, contracted that such principal would do and perform certain things. As we have said, there is no principal, and it seems to us that the defendants should be held liable, and that it is immaterial whether they be so held because they held themselves out as agents for a principal that had no existence, or on the ground that they must, under the contract, be regarded as principals, for the simple reason that there is no other principal in existence." But the force of this opinion as an authority in the 51 L.R.A. (N.S.)

instant case is lost when the following language from that case is quoted: "It is also insisted that a fund was provided for the payments of debts, and hence it must be presumed that the plaintiff contracted in reliance upon such fund, and therefore the defendants cannot be made individually liable. What the fact may be we are not advised, but certainly this does not appear on the face of the petition, and we have looked into the lease, and there is no provision in it from which such an inference can be drawn."

In the case of *Fredendall v. Taylor*, supra, it was decided that "a committee appointed by an unincorporated association to make arrangements for a public exhibition are individually liable for work necessary for the occasion, which a subcommittee of their number procured to be done, although in making the contract the subcommittee assumed to act as officers of the association." But that case was appealed from a judgment returned in favor of defendants by direction of the trial court, and in discussing the facts of that case the court said: "It is not to be presumed in this case that the plaintiff contracted upon the credit of the association. And there is proof tending to show that, although he fully understood that the committee was acting for the association, yet he relied on the personal liability of the committee." The cause was remanded for a new trial, and at this trial the court charged the jury as follows: "If the plaintiff entered into this contract and performed this work, believing that Spencer was acting in that behalf for a committee of the State Fireman's Association, consisting of all the defendants, and if the plaintiff relied for payment upon the personal responsibility of the defendants, whom he believed constituted such committee, then if either Leitch, Kreiss, or Taylor, with full knowledge that Spencer had assumed to act for such committee, that the plaintiff contracted upon the faith of the personal responsibility of the alleged members thereof, and that the work had not been paid for, assured the plaintiff that he should be paid for his work, made no objection to the manner in which the contract had been made, and participated in using the reservoir, such acts, with knowledge of the facts aforesaid, are a ratification of the contract, and render the defendants thus ratifying it liable thereupon; and this although no such committee or subcommittee were in fact appointed, and although the contract was made without the advice, consent, or approval of the defendants so ratifying it, and, further, although the reservoir was

unnecessary for the purpose of the tournament." This instruction was approved as a correct declaration of the law, and the court, in approving it, said: "As the defendants had no principal, no legal association or body which they could represent, act for, or bind, they must be held, in all the transactions, to have represented, acted for, and bound only themselves, in the same manner and to the same extent as if there had been no assumed authority to act for the State Fireman's Association." *Fredendall v. Taylor*, 26 Wis. 286.

In the case of *Heath v. Goslin*, 80 Mo. 310, 50 Am. Rep. 505, it was said: "It is well settled that although a party may be a mere agent, and known to be such, yet if he contracts in his own name, or in his name as agent when his principal is incapable of contracting, or is irresponsible, the law presumes he intended to bind himself. Story, Agency, §§ 281, 282." And in that case a number of authorities, both English and American, were reviewed, and the regents of the school in which the plaintiff had taught were held liable for the teacher's salary, but the court there said: "Had the people subscribed a certain sum to promote the project, to be paid annually, or otherwise, and the defendants had engaged the plaintiff with the understanding that they were the mere agents of this public body to disburse the fund subscribed, she could not have held them personally bound. Story, Agency, 287."

Other cases which discuss and illustrate the principles here involved are *Davidson v. Holden*, 55 Conn. 103, 3 Am. St. Rep. 40, 10 Atl. 515; *Bennett v. Lathrop*, 71 Conn. 613, 71 Am. St. Rep. 222, 42 Atl. 634; *Lawler v. Murphy*, 58 Conn. 294, 8 L.R.A. 113, 20 Atl. 457; and other cases cited in notes 61, 62, and 63, 4 Cyc. 311.

In the recent case of *Belding v. Vaughan*, 108 Ark. 69, 157 S. W. 400, the plaintiffs and defendant were jointly interested in forming a corporation, and defendant signed an agreement for the lease of a machine from the plaintiffs, when the corporation was formed, and agreed to pay a definite sum of money therefor, at a fixed time, but the corporation was never organized. Suit was brought upon the theory that defendant had contracted in the name of a nonexistent principal, and the court there said: "Appellants invoke the familiar rules that one becomes personally liable who acts as agent for an undisclosed principal, or who assumes to act for a principal who does not exist; but neither of those rules are applicable to the facts of the case, for appellee did not act for an undisclosed principal, nor did he assume to act for a principal who did not

exist. His undertaking was to act for the principal (the proposed corporation) when it came into existence, and not before. Therefore he is not liable personally. *Hersey v. Tully*, 8 Colo. App. 110, 44 Pac. 854. If the corporation had in fact been organized pursuant to the terms of the subscription contract, then the obligation of appellee would have been complete, for he undertook to pay as the agent of the corporation when organized, and if, upon the occurrence of that event, authority from the corporation had been withheld, then his personal obligation and liability would have attached, for his undertaking was, as before stated, to pay as agent of the corporation as soon as it was organized. That would have constituted a case of one who had impliedly contracted that he had authority, in the contingency named, to act for the corporation, and the obligation would have rested on him to make good the contract if the actual authority had been withheld. It is also argued that appellee is liable as a promoter of the proposed corporation, who induced a third party to extend credit, and is personally liable. The rule upon which liability in that case rests is however, limited to dealings with strangers who act in expectation of payment from the prospective corporation. 2 Cook, Corp. § 705. The rule does not apply in this case, for the reason that appellants became equally interested with appellee in the promotion of the affairs of the proposed corporation, and there is no reason why either one should be liable to the other except under the strict letter of the contract. If appellee had induced appellants to accept an unconditional obligation of the proposed corporations, then there would be reason for holding him personally liable as a promoter of the corporation; but that is not the case here, for, as before stated, the parties were jointly interested in the enterprise, and by the terms of the contract itself the obligation to pay was based on the condition that the corporation should thereafter be organized. The rule with reference to liability on that score is stated by the author of a recent text-book as follows: 'Promoters are merely persons who, for purposes of their own, bring about the formation of the corporation. In assuming to make contracts in its name or behalf before it comes into existence, they do not stand in the relation of agency, and they represent only themselves, inasmuch as a nonexistent body cannot have agents.' *Alger, Promoters and Promotion of Corp.* p. 199. Stress is laid upon the language of the contract stating the promise to pay on a definite date, 'or upon the organi-

zation of the corporation,' as characterizing the obligation as an absolute one to pay on the date named, whether the organization was completed or not. Authorities are cited in suits based upon promissory notes, where similar obligations are construed to amount to an absolute one to pay on the date named, or earlier upon the happening of a certain contingency. Ordinarily that is the proper interpretation of a written obligation for the payment of money; but when this contract is read as a whole, and in the light of the attending circumstances, it is manifest, as we have already shown, that it was not intended as an absolute and unconditional obligation to pay, but was merely an obligation to pay upon the organization of the corporation, which the parties to this contract were jointly interested in organizing."

Where one assumes to act as agent for another, he impliedly represents that his principal has existence, and that he has authority to act for him, and, if either of these things be false, the agent becomes personally liable. But "when the agent makes full disclosure of the facts constituting his authority, as where he shows to the other party the power of attorney, or letter of instructions under which he acts, the question of his authority becomes a mere question of construction or of law, and no warranty of the sufficiency of the authority can be implied." *Tiffany, Agency*, § 92; *McReavy v. Eshelman*, 4 Wash. 757, 31 Pac. 35; *Jefts v. York*, 10 Cush. 392.

Appellants contracted for the sale of their supplies with full knowledge of all the facts in regard to the connection of appellees with the reunion. These gentlemen were selected to serve upon the executive committee because of their executive capacity and public spirit, and all persons who dealt with them knew the only source of their revenue; appellants had this knowledge, for they were contributors to this public subscription; and all other creditors must also have had this knowledge, for none of them have brought suit for the balances due them.

Facts such as we have stated were evidently in mind of the author when, § 287 of *Story on Agency* was written. That section reads as follows: "But although it is thus true that persons contracting as agents are ordinarily held personally responsible, where there is no other responsible principal to whom resort can be had, yet the doctrine is not without some qualifications and exceptions, as, indeed, the words 'ordinarily held' would lead one naturally to infer. For, independent of the cases already suggested, where the contract is or may be treated as a nullity, on ac- 51 L.R.A. (N.S.)

count of its inherent infirmity or defective mode of execution, other cases may exist, in which it is well known to both of the contracting parties that there exists no authority in the agent to bind other persons for whom he is acting, or that there is no other responsible principal; and yet the other contracting party may be content to deal with the agent, not upon his personal credit or personal responsibility, but in the perfect faith and confidence that such contracting party will be repaid and indemnified by the persons who feel the same interest in the subject-matter of the contract, even though there may be no legal obligation in the case. Thus, for example, if private persons should subscribe, a sum towards some charitable object, and should request an agent to employ tradesmen and others to supply materials to carry it into effect, and it should be distinctly made known by the agent that the tradesmen and others were not to look to him, or to the subscribers personally, for payment, but that they must solely depend upon the success of the charitable subscription and the state of the funds, and the supplies should be furnished with this clear understanding, there could be no doubt that neither the subscribers (at least, beyond their subscriptions) nor the agent would be personally responsible. Such occurrences often take place in cases of voluntary charitable societies, and especially in cases of such charities, conducted by females, some of whom are married and some unmarried, where the tradesmen who furnish supplies are understood to trust entirely to the state of the funds, and to rely for reimbursement solely upon the funds, which may, from time to time, be obtained from charitable and beneficent persons. For it has been well remarked that few persons would be willing to become members of committees of Bible societies, and other voluntary religious and eleemosynary institutions, if they were held to be personally bound . . . for . . . articles furnished in furtherance of such meritorious objects. . . . Similar transactions may take place in relation to agents, acting for the public at large, or for particular public bodies, in cases avowedly beyond the scope of their authority, and yet for the benefit of the public at large, or for particular public bodies, where the other contracting party may rely solely upon the public liberality and sense of justice to award him a suitable compensation, without in any manner giving credit to the agents or looking to them for compensation."

And the same learned author, after discussing fully the liabilities of agents to

third persons, said: "The truth, however, is that the same general principle prevails in all these cases, notwithstanding their apparent diversity of form and decision. They are all answered by the same general inquiry. To whom is the credit knowingly given, according to the understanding of both parties? This inquiry is sometimes a matter of fact, as where the contract is verbal and unwritten, and sometimes a matter of law, as where it depends upon the true construction of the terms of a particular written instrument. The law in all these cases pronounces the same decision that he to whom the credit is knowingly and exclusively given is the proper person who incurs liability, whether he be the principal or the agent." Story, Agency, § 288.

Under this test we think appellees are not liable. There is nothing in the proof, as we understand it, which would have given appellants any reasonable right to expect appellees to assume any personal liability to them, or to anyone else. Ignoring the fact that the Confederate Veteran Reunion Association was incorporated and took charge of all the funds, the appellees were acting in a capacity known to all persons who dealt with them, and were chargeable with no higher duty to any creditor than to see that the funds were honestly accounted for and equitably disbursed. This they have done, and the judgment of the court below in their favor will be affirmed.

COLORADO SUPREME COURT.

EDWARD E. WEAVER, Plff. in Err.,
v.

NEW JERSEY FIDELITY & PLATE
GLASS INSURANCE COMPANY.

(— Colo. —, 136 Pac. 1180.)

Insurance — subrogation — settlement with person causing loss.

An insurer who undertakes to indemnify the assured, with full knowledge of an antecedent settlement between him and the party causing the injury, does so at its peril, is a mere volunteer, and cannot recover of the assured under the subrogation clause of the contract.

(December 1, 1913.)

Note. — As to right of insurer which has paid the loss as against insured who has recovered against or settled with third persons responsible for the loss, see note to Shawnee F. Ins. Co. v. Cosgrove, 41 L.R.A. (N.S.) 719.
61 L.R.A. (N.S.)

ERROR to the District Court for the City and County of Denver for review a judgment in plaintiff's favor in an action to recover under a subrogation clause in a contract of insurance money which plaintiff had paid to defendant on account of a loss alleged to have been covered by the policy. Reversed.

The facts are stated in the opinion.

Messrs. Garwood & Garwood and Jacob V. Schaetzel for plaintiff in error.

Mr. William J. Miles for defendant in error.

Bailey, J., delivered the opinion of the court:

Plaintiff below, an insurance company, brought suit against the defendant in the district court, alleging, in substance, that on or about June 4, 1909, it delivered to the defendant, for certain considerations therein mentioned, an insurance policy covering loss from breakage of certain glass in a building owned by him, situate at number 1421 Arapahoe street, Denver; that aside from \$9 paid as premium thereon, there was a further consideration contained therein of subrogation on demand of all rights and equities of the assured against any party or parties causing or liable for any damage or loss covered by the policy; that thereafter, while the policy was in full force and effect, a third party made an excavation on a lot immediately adjoining defendant's lot and building, causing his building to collapse, thereby breaking and destroying, among other things, the glass insured by the policy; that defendant made claim against the wrongdoer, in pursuance of which it paid him \$1,000, which he accepted in full satisfaction of all damage to his property, and made and delivered to the wrongdoer a complete release in writing; that plaintiff made good the loss and damage by replacing the glass destroyed, according to the term of its contract, at a cost to itself of \$143.15; that it made demand of defendant for that much of the money so received from the wrongdoer, which he refused to pay, wherefore it prays judgment for that amount, with interest. A demurrer was interposed and overruled. Defendant answering admitted the contract and settlement as alleged, but set up as new matter that the actual damage to his property was in excess of \$5,000, and that the \$1,000 was accepted from the wrongdoer to avoid litigation, and did not include the glass covered by the policy; that plaintiff, fully advised of the settlement and release between himself and the wrongdoer, voluntarily replaced the glass destroyed; that plaintiff did not make demand for a subrogation until about eighteen months after

the damage occurred, having knowledge of the antecedent settlement, whereupon a subrogation receipt was assigned and delivered to it. On motion, judgment was entered on the pleadings, against defendant in the sum of \$153.25. The only evidence submitted was proof of corporate capacity, to which no objection was made. A motion for new trial was overruled. Defendant brings the cause here on error.

Did the court below commit error in granting the motion for judgment on the pleadings? The answer avers that the plaintiff company, in replacing the glass, did so with full knowledge of the antecedent settlement between defendant and his tortfeasor. This averment was not denied. The law applicable to these facts is clear. The company's capacity under its contract was simply to indemnify for loss covered by it. As a general rule, recovery by the insured from the third party releases the insurer from liability. 19 Cyc. 883-894. In *Dilling v. Draemel*, 16 Daly, 104, 9 N. Y. Supp. 497, involving a similar state of facts, this was said:

"It is well settled that, if a loss under a policy of insurance is occasioned by the wrongful act of a third party, the insurer occupies the position of a mere surety, and the wrongdoer that of a principal debtor; and all the incidents of suretyship attach to the position of the underwriter in such a case, including the right of subrogation. . . . The same principle is applicable to a contract of insurance if the surety destroys the remedy of subrogation, and relieves the assurer to the full extent to which the wrongdoer could have been made liable for the loss."

And *Packham v. German F. Ins. Co.* 91 Md. 515, 50 L.R.A. 828, 80 Am. St. Rep. 461, 46 Atl. 1066, approving *Dilling v. Draemel*, supra, held that there could be no recovery on an insurance policy where the assured had been indemnified by the person causing the injury, since by settling with the tortfeasor the insurer's right of subrogation was destroyed.

"The liability of the wrongdoer is, in legal effect, first and principal, and that of the insurer secondary, not in order of time, but in order of ultimate liability." May, Ins. § 454.

Under the authorities, and in the light of reason, an insurer who undertakes to indemnify the assured, with full knowledge of an antecedent settlement between him and the party causing the injury, does so at its peril, is a mere volunteer, and cannot recover of the insured under the subrogation clause of the contract, because the right to subrogation, under such circumstances, has been destroyed.

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The complaint stated a cause of action, but a good defense was tendered when the answer alleged knowledge before indemnifying defendant, on the part of plaintiff, of the former's settlement with the wrongdoer, and since there was no issue on this alleged fact, the court erred in rendering judgment for plaintiff on the pleadings. It must be reversed and the cause remanded, with leave to plaintiff to reply to the answer, if he shall be so advised.

Judgment reversed and cause remanded.

Musser, Ch. J., and White, J., concur.

CONNECTICUT SUPREME COURT OF ERRORS.

ALEXANDER CRISTILLY, Admr., Appt.,
v.

CHARLES H. WARNER.

(87 Conn. 461, 88 Atl. 711.)

Conflict of laws — enforcement of foreign statute — penalty for death.

1. The courts of one state in which the penalization of negligence resulting in death is against public policy will not enforce a statute of another state giving a cause of action in tort for negligently killing a person the damages in which are to be assessed according to the degree of culpability, which statute is construed in the state of its origin as penal in its nature.

Same — limitation period — wrongful death.

2. The limitation period provided by a statute giving a right of action for negligent death governs actions brought in other states.

(Beach, J., dissents.)

(October 30, 1913.)

Note. — For jurisdiction of action for death under statute of another state as affected by penal remedial character of the statute, or differences between the *lex loci delicti* and *lex fori* as to the character of damages, see notes to *Boston & M. R. Co. v. Hurd*, 56 L.R.A. 193, 205, 206, 209, 210, and *Rochester v. Wells, F. & Co. Exp.* 40 L.R.A. (N.S.) 1095, and see also later case, *Strait v. Yazoo & M. Valley R. Co.* 49 L.R.A. (N.S.) 1068. The criterion of penal statutes within the rule that such statutes will not be enforced outside of the jurisdiction in which they are enacted is also discussed in *Great Western Machinery Co. v. Smith*, 41 L.R.A. (N.S.) 379, and note thereto; the specific subject there involved being the extraterritorial enforcement of the statutory liabilities of directors of corporations.

The law governing limitation where an action is brought in one state upon a cause of action by a statute of another is treated in the note to *Louisville & N. R. Co. v. Burkhart*, 46 L.R.A. (N.S.) 687.

APPEAL by plaintiff from a judgment of the Superior Court for New Haven County sustaining a demurrer to the complaint in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Messrs. Francis P. Gullfole and Clayton L. Klein, for appellant:

The Massachusetts statute is remedial rather than penal.

Boston & M. R. Co. v. Hurd, 56 L.R.A. 193, 47 C. C. A. 615, 108 Fed. 116; *Com. v. Boston & A. R. Co.* 121 Mass. 36; *Com. v. Boston & L. R. Corp.* 134 Mass. 211; *Rochester v. Wells, F. & Co. Exp.* 87 Kan. 164, 40 L.R.A. (N.S.) 1095, 123 Pac. 729; *Brooks v. Fitchburg & L. Street R. Co.* 200 Mass. 18, 86 N. E. 289; *Grella v. Lewis Wharf Co.* 211 Mass. 59, 97 N. E. 745, Ann. Cas. 1913A, 1136; 13 Cyc. 312; *Beach v. Bay State S. B. Co.* 30 Barb. 433; *Lamphear v. Buckingham*, 33 Conn. 237; *Whitlow v. Nashville, C. & St. L. R. Co.* 114 Tenn. 344, 68 L.R.A. 503, 84 S. W. 618; *Pittsburgh, C. C. & St. L. R. Co. v. Taber*, 168 Ind. 419, 77 N. E. 740, 11 Ann. Cas. 808.

Messrs. John F. McDonough and William E. Thoms, for appellee:

A foreign administrator cannot bring this suit in this state.

Hartford & N. H. R. Co. v. Andrews, 36 Conn. 213; *Connor v. New York, N. H. & H. R. Co.* 28 R. I. 560, 18 L.R.A. (N.S.) 1256, 68 Atl. 481, 13 Ann. Cas. 1033; *Upton v. Hubbard*, 28 Conn. 274, 73 Am. Dec. 670.

The rights accruing to the plaintiff are such rights as arise under the laws of Massachusetts, and such is the claim under the amended complaint.

Connor v. New York, N. H. & H. R. Co. supra; *Boston & M. R. Co. v. Hurd*, 56 L.R.A. 210, 47 C. C. A. 615, 108 Fed. 116; *Slater v. Mexican Nat. R. Co.* 194 U. S. 126, 48 L. ed. 902, 24 Sup. Ct. Rep. 581; *Raisor v. Chicago & A. R. Co.* 215 Ill. 47, 106 Am. St. Rep. 153, 74 N. E. 69, 2 Ann. Cas. 802.

A law assessing damages to the plaintiff, not according to his injuries, but according to the guilt of the defendant, must necessarily be a penal one.

Littlejohn v. Fitchburg R. Co. 148 Mass. 482, 2 L.R.A. 502, 20 N. E. 103; *Doyle v. Fitchburg R. Co.* 162 Mass. 66, 25 L.R.A. 157, 44 Am. St. Rep. 335, 37 N. E. 770; *Adams v. Fitchburg R. Co.* 67 Vt. 76, 48 Am. St. Rep. 800, 30 Atl. 687; *O'Reilly v. New York & N. E. R. Co.* 16 R. I. 388, 5 L.R.A. 364, 6 L.R.A. 719, 17 Atl. 171, 906, 19 Atl. 244; *Shearm. & Redf. Neg.* 5th ed. § 132.

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Wheeler, J., delivered the opinion of the court:

The complaint states that the defendant was operating his automobile in a negligent manner upon a street in a thickly settled part of Springfield, Massachusetts, at an unreasonable speed, and contrary to the ordinances of said city and the laws of the commonwealth; that without warning, although notified of the danger to the plaintiff's intestate,—a five-year old child,—and without reducing the speed of his automobile, or attempting to avoid a collision with the child, because of his reckless and negligent operation, he ran his automobile upon the child, who in the exercise of due care was then crossing the street, and caused her the injuries from which she shortly died. The complaint further states that at the time of the collision the law of Massachusetts was, and still is: "If a person or corporation by his or its negligence, or by the negligence of his or its agents or servants while engaged in his or its business, causes the death of a person who is in the exercise of due care and not in his or its employment or service, he or it shall be liable in damages in the sum of not less than \$500 nor more than \$10,000, to be assessed with reference to the degree of his or its culpability or of that of his or its agents or servants, to be recovered in an action of tort, commenced within two years after the injury which caused the death, by the executor or administrator of the deceased, one half thereof to the use of the widow, and one half to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow; or, if there is no widow, the whole to the use of the next of kin." Section 2, chapter 171, Revised Laws of Massachusetts, as amended by chapter 375, Acts and Resolves Mass., 1907. The action is thus based upon this statute. The demurrer to the complaint rests upon three grounds: (1) That the statute is a penal one; (2) that it is contrary to the public policy of Connecticut; and (3) that the action was not brought by an administrator duly qualified in Connecticut within one year from the date of accident. The trial court sustained the demurrer upon ground 1.

It is a general principle of our law that the plaintiff has the right to enforce in our courts any legal right of action which he may have, whether it arise under our own law or of that of another jurisdiction. *Vanbuskirk v. Hartford F. Ins. Co.* 14 Conn. 583.

There are certain recognized exceptions to this general rule. We do not enforce foreign statutes which are penal, or rights arising thereunder.

Nor do we enforce the law of another jurisdiction, nor rights arising thereunder, which we conceive "to be injurious to our public rights," or to the "interests of our citizens," nor those which "offend our morals or contravene our [public] policy or violate our positive laws." *Vanbuskirk v. Hartford F. Ins. Co.* 14 Conn. 583, 592.

In construing a foreign statute we accept the construction of the statute adopted by the highest tribunal of the jurisdiction of the state. *Crum v. Bliss*, 47 Conn. 592, 599.

No action lay under the common law of Massachusetts to recover damages for death through negligence. *Carey v. Berkshire R. Co.* 1 Cush. 475, 48 Am. Dec. 616. By statute (Stat. 1840, chap. 80) a remedy was provided against a carrier of passengers, for the death of a passenger through its negligence, by indictment and fine within certain limits, 'to be greater or smaller according to the degree of culpability attached to the defendant, and not to the loss suffered. The fine was distributed to the widow and heirs. This statute has always been held in Massachusetts a penal one.

It was pointed out in *Carey v. Berkshire R. Co.* that this statute and the English statute, Lord Campbell's act, were framed on different principles, the latter upon the principle of damages proportioned to the injury, the former upon the principle of punishment. "The penalty, when thus recovered, is conferred on the widow and heirs, not as damages for their loss, but as a gratuity from the commonwealth." *Com. v. Boston & L. R. Corp.* 134 Mass. 211, 213.

Later on an action of tort for a death was given against a railroad (Stat. 1881, chap. 199) as an additional remedy to that by indictment, and the act provided that the damages should be "assessed with reference to the degree of culpability of said corporation or of its servants or agents." The court held this remedy was penal. *Littlejohn v. Fitchburg R. Co.* 148 Mass. 478, 482, 2 L.R.A. 502, 20 N. E. 103. "Originally," the court said, "the remedy was by indictment. Afterwards it was extended to an action of tort. . . . But only one of the remedies can be pursued by the executor or administrator. . . . It is in substance a penalty given to the widow and children and next of kin, instead of to the commonwealth, and as such the intestate could not release the defendant from liability for it." *Doyle v. Fitchburg R. Co.* 162 Mass. 66, 71, 25 L.R.A. 157, 44 Am. St. Rep. 335, 37 N. E. 770, 771.

The remedy of tort was extended to railways. And thereafter the court said: "The conclusion which has been reached as to

the character of these two acts (Stat. 1881, chap. 199, and Stat. 1886, chap. 140) could not have been avoided. It had to be held that these acts gave a civil remedy for the recovery of a penalty imposed by way of punishment. . . . It was provided that the amount to be recovered in the action of tort was 'to be assessed with reference to the degree of culpability of said corporation or of its servants or agents.' That fixed the character of the action of tort under these two acts. . . . By that provision the effect of these two acts was to give a civil remedy for the recovery of a penalty imposed by way of punishment." *Hudson v. Lynn & B. R. Co.* 185 Mass. 510, 517, 71 N. E. 66, 67, 16 Am. Neg. Rep. 366.

This form of remedy was extended to other defendants, until the general statute, providing an action against any person or corporation, appeared in its present form, in chapter 375, Acts and Resolves 1907. Under the remedy by indictment for a negligent death, or that in tort, the fine was imposed and the damages assessed on the same basis, according to the degree of culpability, and not according to the loss. Of this statute (chapter 375, Acts and Resolves 1907) the supreme court of Massachusetts thus expressed itself: "The statute may be designated as remedial for the reason that a remedy is provided where before its enactment none existed. But the damages assessed are distinctly grounded upon the defendant's culpable misconduct, and are diminished or enhanced according to the degree of his delinquency." *Brown v. Thayer*, 212 Mass. 392, 399, 99 N. E. 237. This is the latest utterance of that court upon this subject, and we think, in the light of the uniform construction given this language when found in the various statutes affording the remedy by indictment and in tort, that it should be regarded as final.

The expressions found in *Brooks v. Fitchburg & L. Street R. Co.* 200 Mass. 8, 86 N. E. 289, and *Grella v. Lewis Wharf Co.* 211 Mass. 54, 97 N. E. 745, Ann. Cas. 1913A, 1136, that the statute is a remedial one, were not inaccurate, as applied to the situation discussed, although without explanation apt to prove somewhat misleading. The statute is in a sense a remedial one; for it has, step by step, in its progress of amendment, furnished a remedy where none existed before. Other tribunals have reached a similar view of similar statutes and of the law of Massachusetts. *Adams v. Fitchburg R. Co.* 67 Vt. 76, 48 Am. St. Rep. 800, 30 Atl. 687; *O'Reilly v. New York & N. E. R. Co.* 16 R. I. 388, 5 L.R.A. 364, 6 L.R.A. 719, 17 Atl. 171, 906, 19 Atl. 244.

We have never allowed a recovery in a case of a negligent death upon any theory save that of just compensation. We have never penalized for such a wrong. To permit this to be done would be against our public policy, and comity does not require that we enforce the statute of a foreign jurisdiction which is so manifestly contrary to the public policy of our law. *Vanbuskirk v. Hartford F. Ins. Co.* supra. This rule is of universal recognition. *Higgins v. Central New England & W. R. Co.* 155 Mass. 176, 31 Am. St. Rep. 544, 29 N. E. 534; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905.

The action was begun by the administrator appointed in Massachusetts shortly after the accident. Subsequently, without objection, the administrator appointed in Connecticut became a party, within two years, but over one year, subsequent to the accident.

One cause of demurrer is that the action was not brought within one year, the period of limitation within which, under chapter 193, Pub. Acts 1903, actions for just damages for injuries resulting in death must be brought. The present action is not of the character of the actions provided for by our statute of limitations, and it has no relation to an action to recover a penalty. Moreover, the Massachusetts statute limits the recovery of the penalty to two years, and actions thereunder are governed by its limitation.

There is no error.

In this opinion the other judges concur, except *Beach, J.*, who dissents.

Beach, J., dissenting:

I dissent from the conclusion that the Massachusetts statute is a penal statute in the international sense, and from the conclusion that its enforcement would contravene the public policy of the state of Connecticut.

Upon the question of what laws are penal in an international sense so that they will not be enforced by a foreign court, the decisions are in hopeless conflict; but, looking to the reason of the rule, I think that the English, Privy Council and the Supreme Court of the United States are right in holding that it should extend no further than to the criminal law; that is, to public wrongs as distinguished from private rights. *Huntington v. Attrill*, 8 Times L. R. 341, [1893] A. C. 150; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224. The rule appears to me to be properly stated as follows: "The test is not by what name the statute is called by the legislature or the courts of the state in

which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person." *Huntington v. Attrill*, 146 U. S. 683, 36 L. ed. 1133, 13 Sup. Ct. Rep. 233. "In its ordinary acceptation, the word 'penal' might embrace penalties for infractions of general law, which did not constitute offenses against the state; it might, for many legal purposes, be applied with perfect propriety to penalties created by contract; and it, therefore, when taken by itself, failed to mark that distinction between civil rights and criminal wrongs, which was the very essence of the international rule." *Huntington v. Attrill*, 146 U. S. 681, 36 L. ed. 1132, 13 Sup. Ct. Rep. 233, citing Lord Watson's opinion in the English case.

There are good reasons why the courts of one state cannot redress the public wrongs of another; and one of them is found in the obvious futility of one sovereign attempting to punish an offense which another sovereign has the right to pardon at will, either before or after sentence. But there seems to be no logical reason for refusing to enforce a foreign-created private right of action, which is transitory in its nature, simply because the defendant's conduct is, by the foreign law, independently punishable as a public wrong, or because the civil remedy in damages afforded by the foreign statute is more or less punitive in intention or effect, on account of the aggravated character of the wrong.

As this court said, in *Plumb v. Griffin*, 74 Conn. 133, 50 Atl. 2: "Penal statutes, strictly and properly, are those imposing punishment for an offense against the state; and the expression, 'penal statutes,' does not ordinarily include statutes which give a private action against a wrongdoer."

We have many such statutes. For example, General Statutes, § 1101, gives treble damages for theft; § 1102, double damages for forgery; § 1103, treble damages for removal of bridge; § 1104, treble damages for injury to milestone; § 1105, treble damages for vexatious suit; § 1097, treble damages for wrongfully cutting down large, and \$1 each for small, trees, but only actual damages if the trespass was through mistake; and chapter 216 of the Public Acts of 1905, as amended by chapter 268 of the Public Acts of 1909, authorizes the court to double or treble the actual damages, according to the circumstances of the case, in suits for injuries caused by neglect to conform to the law of the road. In all these cases the excess over actual damages is as-

assessed because of the defendant's criminal, malicious, or reckless conduct; and, in the case of the last two statutes referred to, the amount of the damages is assessed with reference to the degree of the defendant's culpability.

Yet none of these statutes are held to be penal. In *Plumb v. Griffin*, supra, § 1097 (then § 1345 of Revisal 1888) was held not to be a "penal statute" within the meaning of our statutes of limitations; and in the course of that opinion it was said: ". . . In the same chapter of the statutes in which is this section—§ 1345—there is another, which provides that 'every person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble its value.' This has never been regarded as a penal statute. . . . Another section—§ 1350—provides that every person who shall make and utter any forged or counterfeit document shall pay to the party injured double damages. This statute has been held by this court, in *Ross v. Bruce*, 1 Day, 100, not to be a penal statute, so that an action upon it would be barred by the lapse of one year." And in *Lamphear v. Buckingham*, 33 Conn. 237, 246, we held that our statute of 1866 (Gen. Stat. 1866, title 7, chap. 7), providing for a minimum recovery of \$1,000 in case the life of any passenger, in the exercise of due care, should be lost by the negligence of a railroad company, was not a penal statute, saying: "Moreover, we think the defendants' mistake in assuming the statute to be a penal one. It does not provide a penalty for the breach of a positive law or for a public wrong. It recognizes the fact that it is or may be a serious injury to the family and heirs of a person to have him or her removed by sudden and premature death, and the peculiar damage of such removal from a negligent management of railroads, and provides for compensation to the family or heirs in case of such death, and lacks some of the essential characteristics of a penal statute."

Our own definition of a "penal statute," in the strict and proper sense of that phrase, is therefore in accord with *Huntington v. Attrill*, supra, and I do not understand that the opinion of the court expresses any different view. It reaches the conclusion that the Massachusetts courts have characterized the statute as a penal statute, and then appears to hold that we are bound by that characterization. I agree that we must ordinarily accept the construction which the courts of another state have put upon its statutes. But the question here is not simply what the language of the statute means, but whether

it is so far penal that our courts cannot properly enforce it; and it seems clear that upon a question of the extent of our own jurisdiction, we ought not to surrender our own conceptions of what is a penal statute, and be controlled by the opinion of a foreign court. "The court appealed to must determine for itself, in the first place, the substance of the right sought to be enforced, and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another state. Were any other principle to guide its decision, a court might find itself in the position of giving effect in one case and denying effect in another to suits of the same character, in consequence of the causes of action having arisen in different countries, or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal." *Huntington v. Attrill*, 146 U. S. 682, 36 L. ed. 1133, 13 Sup. Ct. Rep. 233.

Moreover, the Massachusetts decisions hold, and the opinion of the court agrees, that the statute is in a sense a remedial one; and so it seems that the real objection is not that the statute is strictly and properly a penal statute, under the decisions in either jurisdiction, but that its enforcement would contravene the settled public policy of the state of Connecticut, either because it imposes a minimum recovery of \$500, or because the excess damages, if any, are to be assessed with reference to the degree of the defendant's culpability. I do not think the objection is sound in either branch of it.

We do assess damages in some statutory cases with reference to the degree of the defendant's culpability, as already pointed out. And in actions of tort generally we do assess smart money in addition to actual loss, or legal damages with reference to the degree of the defendant's culpability, not exceeding, however, the probable estimated cost of the trial. "In actions of tort, founded on the misconduct or culpable negligence of the defendant, it is usual and entirely proper for the judge to say to the jury that they are not necessarily confined in assessing damages to the actual loss of property to the plaintiff, but may allow smart money, measured by the circumstances of aggravation, and may, from their general knowledge of the course of the courts, if the case warrants it in their judgment, take into account the expenses of the trial beyond the taxable costs." *Mason v. Hawes*, 52 Conn. 12, 14, 52 Am. Rep. 552.

Damages assessed because of and with reference to the degree of the defendant's culpability may be, and generally are, compensatory in their nature, although they

embrace injuries or expenses not included in strict legal damages, and although (as in the case of statutes imposing a minimum recovery for death resulting from negligence) they include damages only presumptively suffered. Clearly it is not against any general policy of this state to permit the recovery of such damages within the limitations of our own rule on the subject.

Turning to the specific case of death caused by negligence, it is by no means certain that an administrator may not, in some cases, be entitled, within the limitations of our rule, to recover damages assessed with reference to the degree of the defendant's culpability. The damages in such cases are "on the same grounds, and measured 'y the same rule, as if the action had been brought by her intestate in his lifetime." *Wilmot v. McPadden*, 79 Conn. 367, 378, 19 L.R.A. (N.S.) 1101, 65 Atl. 157, 161. Take the case of *Kling v. Torello*, — Conn. —, 46 L.R.A. (N.S.) 930, 87 Atl. 987, where the plaintiff, being mortally injured by an atrocious assault, brought suit in his lifetime, and after his death an administrator entered to prosecute. Or suppose one, mortally injured through the defendant's reckless disregard of the law of the road, should sue in his lifetime, under chapter 216 of the Public Acts of 1905, and the administrator, after his death, enter to prosecute. At least, the law is not so clear as to justify the declaration of a public policy forbidding such recoveries. Assuming that the damages, in excess of the minimum provided for by the statute, are strictly exemplary because assessed with reference to the degree of the defendant's negligence, I am unable to agree that there is any public policy of this state which should prevent the plaintiff from recovering such damages in this action within the limitation of our rule.

As to the minimum recovery of \$500 imposed by the statute, we have had, in the past, statutes imposing a minimum recovery for death caused by negligence, although we have none to-day. Such recoveries are regarded as roughly compensatory, though in any given case they may not be so. *Lamphear v. Buckingham*, 33 Conn. 237. So the Massachusetts court has said of the statute in question that a leading object is "to secure some pecuniary provision for those who may be dependent upon the deceased." *Com. v. Boston & A. R. Co.* 121 Mass. 36, 37. I think these two decisions settle the point that the minimum recovery of \$500 imposed by this statute is not penal, and is compensatory, and that the recovery of the minimum sum of \$500 in this case, together with such additional damages, if any, as the jury might assess with reference to the de-

gree of the defendant's culpability, not exceeding the probable cost of the litigation, would not violate any public policy or legal tradition of the state of Connecticut.

Upon the general question whether we will enforce rights arising under foreign statutes of this kind, I think we are controlled in principle by the decision in *Huntington v. Attrill*, *supra*, which decides that after the original liability under such a statute has passed into judgment in one state, the courts of another state are bound, by the Constitution and laws of the United States, to give full faith and credit to that judgment (so far as any objection founded on the penal nature of the action is concerned), unless the judgment is in its essential character and effect a punishment of an offense against the public as distinguished from a judgment founded on a private civil right. In accordance with that decision we should be bound to give effect to a Massachusetts judgment founded on this statute; and, as it is clear upon principle and authority that "the essential nature and real foundation" of the action is the same, whether reduced to judgment or not (*Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370), I think that, being bound to accept the principle in part, we ought to accept it as far as it is applicable.

ILLINOIS SUPREME COURT.

ABRAHAM KUH et al., Plffs. in Err.,
v.

EUGENE O'REILLY, JR., et al.

(261 Ill. 437, 104 N. E. 5.)

Party wall — right to maintain openings.

1. An agreement for a party wall to be erected between two adjoining lots, to extend throughout the whole distance of the dividing lines, requires a solid wall throughout the entire length and height.

Same — right of one paying for construction.

2. That one of the parties to a party-wall agreement constructs the wall at his own expense, to be reimbursed when the other party makes use of it, does not entitle him

Note. — For right to close windows or other apertures in party wall, see note to *Reynolds v. Union Sav. Bank*, 49 L.R.A. (N.S.) 194. For right to open windows or other apertures, see note to *Coggins v. Carey*, 10 L.R.A. (N.S.) 1191.

The question whether closing or opening windows or other apertures in a party wall amounts to an eviction of a tenant is treated in the note to *Holden v. Tidwell*, 49 L.R.A. (N.S.) 369.

to maintain openings in the wall until the other party uses it.

Interest — on money due under party-wall agreement.

3. That a party to a party-wall agreement contests in good faith his obligation to contribute to the cost of the wall upon making use of it, because the other party has wrongfully made openings in the wall, does not relieve him from the duty to pay interest from the time he made use of the wall, where the openings did not materially interfere with his use of the wall.

Party wall — compelling restoration.

4. Successors in title to one of the parties to a party-wall agreement may compel a restoration of the wall to a solid condition by the other party to the agreement who has made openings therein for windows and steam-pipe exhausts, although the cost of the wall was borne by the latter and the former is not ready to use the portions of the wall where the openings exist.

(December 17, 1913.)

ERROR to the Appellate Court, First District, to review a judgment reversing in part a decree of the Superior Court for Cook County in favor of complainants in a suit to enforce the provisions of a certain party-wall contract. Reversed in part.

The facts are stated in the opinion.

Messrs. Lessing Rosenthal and Leo F. Wormser, with Messrs. Rosenthal & Hamill, for plaintiffs in error:

Even if "party wall" means solid wall, yet the provision that it "shall be and remain a party wall" applies only after it has become a party wall by payment from the O'Reillys.

Beidler v. King, 209 Ill. 302, 101 Am. St. Rep. 246, 70 N. E. 763; Mickel v. York, 175 Ill. 62, 51 N. E. 848; McChesney v. Davis, 86 Ill. App. 380; Tomblin v. Fish, 18 Ill. App. 439; Berry v. Godfrey, 198 Mass. 228, 16 L.R.A.(N.S.) 434, 84 N. E. 304; Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224; Standish v. Lawrence, 111 Mass. 111; First Nat. Bank v. Security Bank, 61 Minn. 25, 63 N. W. 264; Brown v. McKee, 57 N. Y. 684; Masson's Appeal, 70 Pa. 26; Glover v. Mersman, 4 Mo. App. 90; Rugg v. Lemley, 78 Ark. 65, 115 Am. St. Rep. 17, 93 S. W. 570, 8 Ann. Cas. 291; 1 Wood, Nuisances, § 22; Oldstein v. Firemen's Bldg. Asso. 44 La. Ann. 492, 10 So. 928.

In the contract of March 3, 1892, the term "party wall" does not mean solid wall.

Chicago, B. & Q. R. Co. v. Aurora, 99 Ill. 205; Robinson v. Stow, 39 Ill. 568; Witte v. Schasse, — Tex. Civ. App. —, 54 S. W. 275; Field v. Leiter, 118 Ill. 17, 6 N. E. 877; Jackson ex dem. Ludlow v. Myers, 3 Johns. 395; 3 Am. Dec. 504; Bowman v. Long, 89 Ill. 19; Watson v. Gray, L. R. 14 51 L.R.A.(N.S.)

Ch. Div. 194, 49 L. J. Ch. N. S. 243, 42 L. T. N. S. 294, 28 Week. Rep. 438, 44 J. P. 537; Hammann v. Jordan, 129 N. Y. 61, 29 N. E. 294; Mickel v. York, 175 Ill. 62, 51 N. E. 848; Jeannin v. DeBlanc, 11 La. Ann. 465; Lavergne v. Lacoste, 26 La. Ann. 507.

The use which complainants have made of the wall is entirely consistent with the contract.

Weston v. Arnold, L. R. 8 Ch. 1084, 43 L. J. Ch. N. S. 123, 22 Week. Rep. 284; Price v. McConnell, 27 Ill. 255.

Even if the maintenance of window openings be held a breach of the contract, the law of contracts requires the allowance of interest.

Evans v. Howell, 211 Ill. 85, 71 N. E. 854; Keeler v. Herr, 157 Ill. 57, 41 N. E. 750; Shepard v. Mills, 173 Ill. 223, 50 N. E. 709; Warner v. Rogers, 23 Minn. 34; Oakes v. Sennett, 4 W. N. C. 413; Portage v. Cole, 1 Wms' Saund. 320, note, 18 Eng. Rul. Cas. 603; Boone v. Eyre, 1 H. Bl. 273, note 2 Revised Rep. 768, 18 Eng. Rul. Cas. 609; Rubens v. Hill, 213 Ill. 523, 72 N. E. 1127; Palmer v. Meriden Britannia Co. 188 Ill. 508, 59 N. E. 247; Omaha Water Co. v. Omaha, 85 C. C. A. 54, 156 Fed. 922; Langdell, Summary of Contr. 2d ed. §§ 159, 160; Langdall, Brief Survey of Eq. Jur. p. 56; White v. Gillman, 43 Ill. 502; Lighthall v. Colwell, 56 Ill. 108; Weaver v. Sessions, 6 Taunt. 154, 1 Marsh. 505; Stavers v. Curling, 3 Bing. N. C. 355; Long v. Caffrey, 93 Pa. 526; Fame Ins. Co's Appeal, 83 Pa. 396; Prairie Farmer Co. v. Taylor, 69 Ill. 440, 18 Am. Rep. 621; Nelson v. Oren, 41 Ill. 18; Philadelphia, W. & B. R. Co. v. Howard, 13 How. 307, 338, 339, 14 L. ed. 157, 170, 171; White v. Atkins, 8 Cush. 367; Cook v. Johnson, 3 Mo. 239; Matthews v. Jenkins, 80 Va. 463; Behn v. Burness, 32 L. J. Q. B. N. S. 204, 3 Best & S. 751, 9 Jur. N. S. 620, 8 L. T. N. S. 207, 11 Week. Rep. 496, 6 Eng. Rul. Cas. 492.

Even if the maintenance of window openings be held a breach of the contract, the principles governing equitable relief require the allowance of interest.

Lewis's Appeal, 67 Pa. 153; Commercial Nat. Bank v. Burch, 141 Ill. 519, 33 Am. St. Rep. 331, 31 N. E. 420; Bispham, Eq. 2d ed. p. 61; Roche v. Ullman, 104 Ill. 11; Evans v. Howell, 211 Ill. 85, 71 N. E. 854; Penn v. Heisey, 19 Ill. 295, 68 Am. Dec. 597; Byars v. Spencer, 101 Ill. 429, 40 Am. Rep. 212; Cushman v. Sutphen, 42 Ill. 256; Tooke v. Newman, 75 Ill. 215; Gage v. Nichols, 112 Ill. 269; Glos v. Garrett, 219 Ill. 208, 76 N. E. 373.

Interest is allowed on all moneys after they become due on "instruments of writing." Complainants are, therefore, entitled to interest from June 30, 1901.

Keeler v. Herr, 54 Ill. App. 468, affirmed in 157 Ill. 57, 41 N. E. 750; McDonald v. Patterson, 186 Ill. 381, 57 N. E. 1027; Bauer v. Jerolman, 124 Ill. App. 151, affirmed in 222 Ill. 319, 78 N. E. 626; Concord Apartment House Co. v. O'Brien, 228 Ill. 360, 81 N. E. 1038; Heissler v. Stose, 131 Ill. 393, 23 N. E. 347; Pearson v. Sanderson, 128 Ill. 88, 21 N. E. 200; Palmer v. Meriden Britannia Co. 188 Ill. 508, 59 N. E. 247; Sorg v. Crandall, 233 Ill. 79, 84 N. E. 181; Scroggs v. Cunningham, 81 Ill. 110; Phillips v. Reynolds, 236 Ill. 119, 86 N. E. 193; Peoria Malting Co. v. Davenport Grain & Malt Co. 68 Ill. App. 104; McCoy v. World's Columbian Exposition, 186 Ill. 356, 78 Am. St. Rep. 288, 57 N. E. 1043; Rouse, H. & Co. v. Western Wheel Works, 66 Ill. App. 647, affirmed in 169 Ill. 536, 48 N. E. 495; Morris v. Wibaux, 47 Ill. App. 630, affirmed in 159 Ill. 627, 43 N. E. 837; Consumers' Pure Ice Co. v. Jenkins, 58 Ill. App. 519; A. B. Dick Co. v. Sherwood Letter File Co. 157 Ill. 325, 42 N. E. 440; Phillips v. South Park, 119 Ill. 626, 10 N. E. 230; Moll v. Sanitary Dist. 228 Ill. 633, 81 N. E. 147.

Mr. M. J. Dunne, for defendants in error:

A party wall means a solid wall of brick or stone, without windows or other openings, and neither party has the right to make openings or place windows in the wall.

22 Am. & Eng. Enc. Law, 2d ed. 246, 247; 18 Am. & Eng. Enc. Law, 2d ed. 4, and note 1; St. John v. Sweeney, 59 How. Pr. 175; Vansyckel v. Tryon, 6 Phila. 401; Springer v. Darlington, 207 Ill. 238, 69 N. E. 946; Milne's Appeal, 81 Pa. 54; Vollmer's Appeal, 61 Pa. 118; Dauenhauer v. Devine, 51 Tex. 480, 32 Am. Rep. 627; Sullivan v. Graffort, 35 Iowa, 531; Graves v. Smith, 87 Ala. 450, 5 L.R.A. 298, 13 Am. St. Rep. 60, 6 So. 308; Fidelity Lodge No. 59, I. O. O. F. v. Bond, 147 Ind. 437, 45 N. E. 338, 46 N. E. 825; Harber v. Evans, 101 Mo. 661, 10 L.R.A. 41, 20 Am. St. Rep. 646, 14 S. W. 750; Pingrey, Real Prop. § 250; Kiefer v. Dickson, 41 Ind. App. 543, 84 N. E. 523.

A party wall must be built, maintained, and used according to the terms and meaning of the agreement of the parties, and if either party violate such agreement in regard to the erection, maintenance, or use of such wall, he is a wrongdoer and trespasser, and creates a nuisance.

Springer v. Darlington, 207 Ill. 238, 69 N. E. 946; Sullivan v. Graffort, 35 Iowa, 531; Graves v. Smith, 87 Ala. 450, 5 L.R.A. 298, 13 Am. St. Rep. 60, 6 So. 308; Harber v. Evans, 101 Mo. 661, 10 L.R.A. 41, 20 Am. St. Rep. 646, 14 S. W. 750; Vollmer's Ap-

peal, 61 Pa. 118; Mayer's Appeal, 73 Pa. 164; Normille v. Gill, 159 Mass. 427, 38 Am. St. Rep. 441, 34 N. E. 543; Weems v. Mayfield, 75 Miss. 287, 22 So. 892; Cutting v. Stokes, 72 Hun, 378, 25 N. Y. Supp. 365; Vansyckel v. Tryon, 6 Phila. 401, 7 Mor. Min. Rep. 469; Fidelity Lodge No. 59, I. O. O. F. v. Bond, 147 Ind. 437, 45 N. E. 338, 46 N. E. 825; St. John v. Sweeney, 59 How. Pr. 175.

The wall was not built, used, and maintained in accordance with the agreement entered by the owners of the adjoining lands, but was used in a way that makes complainants trespassers and wrongdoers, and the wall a private nuisance.

22 Am. & Eng. Enc. Law, 239-246; Springer v. Darlington, 207 Ill. 238, 69 N. E. 946; Guttenger v. Woods, 51 Cal. 523; Vansyckel v. Tryon, 6 Phila. 401, 7 Mor. Min. Rep. 469.

Equity will grant relief by injunction to prevent and restrain such a violation of a party-wall agreement, and it is not necessary to show any injury to defendants in error or their tenants, nor any damaging effect on the value of their property.

22 Am. & Eng. Enc. Law, 2d ed. 246, and notes; Springer v. Darlington, 207 Ill. 238, 69 N. E. 946; Normille v. Gill, 159 Mass. 427, 38 Am. St. Rep. 441, 34 N. E. 543; Harber v. Evans, 101 Mo. 661, 10 L.R.A. 41, 20 Am. St. Rep. 646, 14 S. W. 750; Weems v. Mayfield, 75 Miss. 287, 22 So. 892; Cutting v. Stokes, 72 Hun, 378, 25 N. Y. Supp. 365; Corcoran v. Nailor, 6 Mackey, 584; Vansyckel v. Tryon, 6 Phila. 401, 7 Mor. Min. Rep. 469; Traute v. White, 46 N. J. Eq. 437, 19 Atl. 196; Sullivan v. Graffort, 35 Iowa, 531; High, Inj. §§ 332, 782, 783; Dauenhauer v. Devine, 51 Tex. 480, 32 Am. Rep. 627; 30 Cyc. 772; Everly v. Driskill, 24 Tex. Civ. App. 421, 58 S. W. 1046; DeBaun v. Moore, 32 App. Div. 397, 52 N. Y. Supp. 1092; Bartley v. Spaulding, 21 D. C. 47.

Although defendants do not use, and may not intend at present to use, that portion of the wall in which complainants made and maintain openings, it does not excuse them for their wrongdoing, even though defendants have not paid any part of the cost of the wall.

22 Am. & Eng. Enc. Law, 2d ed. 246, and case in note; Corcoran v. Nailor, 6 Mackey, 580; Bartley v. Spaulding, 21 D. C. 47; Harber v. Evans, 101 Mo. 661, 10 L.R.A. 41, 20 Am. St. Rep. 646, 14 S. W. 750; Springer v. Darlington, 207 Ill. 238, 69 N. E. 946.

As the complainants were to build and did build this party wall, they should have built, maintained, and used it according to the terms of the agreement, before the de-

defendants were obliged to perform their part of the contract.

2 Parsons, Contr. 626, et seq. 723-811; Bishop, Contr. § 1420; Davis v. Wiley, 4 Ill. 234; Eldridge v. Rowe, 7 Ill. 98, 43 Am. Dec. 41; Dunn v. Moore, 16 Ill. 151; Gilchrist v. Gilchrist, 76 Ill. 283; Paris & D. R. Co. v. Henderson, 89 Ill. 89; People ex rel. Chicago & I. R. Co. v. Glann, 70 Ill. 234; Harber Bros. v. Moffat Cycle Co. 161 Ill. 85, 37 N. E. 676; Schneider v. Turner, 130 Ill. 28, 6 L.R.A. 164, 22 N. E. 497; Stone v. Palmer, 166 Ill. 463, 46 N. E. 1080; Michaelis v. Wolf, 136 Ill. 68, 26 N. E. 384; Clarke v. Shirk, 170 Ill. 143, 48 N. E. 182; Kirby v. Wabash, St. L. & P. R. Co. 109 Ill. 412; Clark v. Mallory, 185 Ill. 227; 3 Am. & Eng. Enc. Law, 867 et seq.

As this wall was not built according to the contract, and is not maintained as a party wall, defendants were not obliged to pay any part of the cost or value of the wall while it was in that condition, but they had a right to use the wall for their own purposes.

Springer v. Darlington, 207 Ill. 238, 69 N. E. 946; Guttenger v. Woods, 51 Cal. 523; Grimley v. Davidson, 133 Ill. 116, 24 N. E. 439; List v. Hornbrook, 2 W. Va. 340; McCord v. Herrick, 18 Ill. App. 427; Mathes v. Dobschuetz, 72 Ill. 439; Matthews v. Dixey, 149 Mass. 595, 5 L.R.A. 102, 22 N. E. 61; Gibson v. Holden, 115 Ill. 199, 56 Am. Rep. 146, 3 N. E. 282.

Regardless of whether or not complainants are entitled to a decree for the value of that part of the wall that defendants are using, they are not entitled to interest on such sum.

Ogden v. Stevens, 241 Ill. 556, 132 Am. St. Rep. 237, 89 N. E. 741; Franklin County v. Layman, 145 Ill. 138, 33 N. E. 1094; Whittemore v. People, 227 Ill. 453, 81 N. E. 427, 10 Ann. Cas. 44; Roberts-Manchester Pub. Co. v. Wise, 140 Ill. App. 443; Street v. Thompson, 131 Ill. App. 546; Moshier v. Shear, 15 Ill. App. 342; Griggs v. Ganford, 50 Ill. App. 172; Buckmaster v. Grundy, 8 Ill. 626; Brownell Improv. Co. v. Critchfield, 197 Ill. 71, 64 N. E. 332; Atchison, T. & S. F. R. Co. v. Chicago & W. I. R. Co. 162 Ill. 632, 35 L.R.A. 167, 44 N. E. 823; Harts v. Fowler, 53 Ill. App. 249, 149 Ill. 592, 36 N. E. 996; Harvey v. Hamilton, 54 Ill. App. 512; Dady v. Condit, 209 Ill. 488, 70 N. E. 1088; Rimmer v. O'Brien-Green Co. 64 Ill. App. 106; Price v. Blackmore, 65 Ill. 386; Brownell v. Steere, 128 Ill. 209, 21 N. E. 3; Ulrich v. Livergood, 95 Ill. App. 640; Harvey v. Hamilton, 54 Ill. App. 512; Keady v. White, 168 Ill. 83, 48 N. E. 314.
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Farmer, J., delivered the opinion of the court:

This case comes to this court by writ of certiorari to review a judgment of the appellate court for the first district, reversing, in part, a decree of the superior court of Cook county, and remanding the cause to that court, with directions.

Plaintiffs in error (hereafter called complainants) filed their bill in chancery in the superior court of Cook county, to enforce the provisions of a certain party-wall contract. At the time of making said party-wall contract, complainants and Eugene O'Reilly owned adjoining parcels of land in the city of Chicago. Defendants in error (hereafter called defendants) have succeeded to the title of Eugene O'Reilly to the lot or parcel of land owned by him at the time said contract was made. Defendants' land was at the northwest corner of the intersection of Van Buren and Franklin streets, and faced 100 feet on Van Buren and 50 feet on Franklin streets. Complainants owned the land adjoining defendants' lot on the north and west. On March 3, 1892, the then owners of the lots entered into a written agreement, the material parts of which are as follows:

"First. That the walls of said building facing the premises of said second party on the north and west ends of said east one hundred (100) feet of said lot one (1) shall be and remain a party wall, and shall be built upon the dividing line between the said premises of the said parties, and shall be of brick, with stone and metal and concrete foundations, . . . and said wall shall stand equally upon their respective parcels of land, . . . and said wall shall extend throughout the whole distance of said dividing lines.

"Second. Said second party may join to and use said wall, or any part thereof, at any time after the same shall have been built, by first causing said wall to be of proper strength and thickness to sustain the weight which he intends that the same shall bear, and further by complying with the other provisions and covenants herein contained."

"Fourth. In case said party wall, original, extended, or restored, shall be totally or partially destroyed, or should it be necessary to repair the same or any portion thereof, either party hereto may repair or rebuild the same, and the expense of rebuilding or repairing shall be borne equally by the parties hereto, their heirs or assigns, as to so much of said wall as they may be using in common. . . ."

"Sixth. Whenever said second party, intends to join to and use said wall, original or restored, as hereinbefore provided, or

whenever thereafter either of the said parties shall use any addition to said wall built by the other party, the one so using shall first pay to the other party, or those claiming under him or them, owners for the time being of the land of the party who built such wall or addition, one half of the value, at that time, of so much of said wall or of such addition, including the foundations under the same, as he or they may use, and in computing the value of said wall or any addition thereto, the service of architects, and labor expended and performed in respect thereof, shall be taken account of and considered."

Within a year after the making of said contract, complainants erected on their south and east lines, dividing their and defendant's property, a wall seven stories high, which was part of a seven-story building erected upon complainants' lot. The wall erected on said division lines was a substantial, solid wall throughout its length and height, and was constructed according to the terms of the agreement. In 1901 complainants, over the protest and objections of defendants, cut six large openings through the wall, placed large windows therein, and attached to the side of the wall, over defendants' premises, hinges upon which they placed iron window shutters which extended and swung over defendants' premises. Complainants also made an opening in the wall, and placed therein a large steam exhaust pipe, which projected $1\frac{1}{2}$ or 2 feet over defendants' premises, from which steam and vapor were expelled. Complainants also placed anchor rods through said wall, with heads about 16 inches in diameter and extending some 4 inches over the premises of defendants. Defendants afterwards, being desirous of using a part of the party wall as a part of a building they proposed to construct upon their lot, notified complainants to remove the anchor rods, steam pipe, window shutters, and hinges, and to close the window openings and reconstruct the wall as it was originally constructed. Defendants also notified the complainants of their intention to erect a building on their lot, and that, unless complainants restored the wall to its original condition, defendants would use part of it as a part of their structure, without paying one half the value of the part so used. Complainants did not comply with this demand of defendants, and shortly thereafter defendants began the construction of a four-story building, and, in so doing, used so much of the party wall as was necessary, but refused to pay complainants anything for the part so used, and thereupon complainants brought this suit.

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The bill, after setting out the ownership of the premises, the party-wall agreement, and the construction of the wall by complainants, alleged that defendants were violating the agreement by using a part of the wall without paying for it. The bill prayed that the defendants be decreed to pay one half the value of the part of the wall used and proposed to be used by them; that the amount, when ascertained, be decreed to be a lien upon defendants' premises; and that defendants be enjoined from using the wall without paying one half the value of the part used by them. Defendants answered the bill, admitting the agreement, but alleging the wall was not a solid wall, as required by the agreement, but contained a number of windows and openings over defendants' premises, which prevented the wall from being a party wall, and further set up the placing of the anchor rods through the wall with heads projecting 4 inches over the premises of defendants, also that a steam exhaust pipe projected about 2 feet over the said premises, from which were emitted steam and vapor, making loud and disagreeable noises. The answer further averred that, by reason of the openings in the wall, defendants' premises were exposed to great danger of fire from complainants' building; that said openings prevented said wall from being a party wall; that complainants were trespassers, and had no right to contribution for any part of the value of the said wall; that papers and rubbish were thrown out from complainants' building over and upon the roof of defendants' building, and that defendants were entitled to compensation for damages by reason of the matters set up in the answer. Defendants also filed a cross bill, praying that complainants in the original bill be enjoined from interfering with the use of the wall by defendants, and that complainants be ordered and decreed to make the wall solid by closing all openings therein adjoining and overlooking defendants' premises, and that they be ordered to remove the projections that encroached upon defendants' premises. Complainants answered the cross bill, and the cause was heard before the chancellor. The decree found that the wall stood equally upon the land belonging to complainants and defendants; that several years after it was built complainants cut six openings through the wall for windows, without the consent and against the objections of defendants; that said windows were more than 15 feet above that part of the wall used by defendants, and did not interfere with the construction of their building. The decree found that the window sills, iron window shutters, steam pipe, iron

bolts and heads, projecting from the wall over and upon the premises of defendants, constituted trespasses that should be removed by complainants, but that defendants were not entitled to any other relief under their cross bill. The decree ordered defendants to pay complainants \$5,034.48, which the chancellor found to be the value of one half of that part of the wall used by defendants, together with \$2,208.21 interest, that being 5 per cent per annum on the amount found due complainants from the 20th day of June, 1901, within twenty days, and that, in default of the payment, the premises of defendants be sold to satisfy said sum. Defendants prosecuted an appeal to the appellate court, and that court held that the superior court erred in refusing to grant the prayer of the cross bill that complainants be required to fill the openings in the wall where the windows were placed, and restore the wall to its original condition by making it a solid wall throughout its entire length and height, and in allowing interest upon the amount fixed as the value of that part of the wall used by defendants. That part of the decree of the superior court finding the value of that part of the wall used by defendants to be \$5,034.48, and that defendants were liable to complainants in that sum, was affirmed. The decree was therefore reversed in part and remanded, with directions to the superior court to grant the prayer of the cross bill that the window openings be filled and the wall restored to its original condition, and, upon it being made satisfactorily to appear that that had been done, the defendants be decreed to pay complainants \$5,034.48, and that the same be made a lien upon defendants' premises.

There is no substantial controversy about the facts. The chancellor found that the wall was originally built in substantial conformity to the written agreement, and that finding was approved by the appellate court. As originally constructed the wall was a solid wall throughout its length and height, and stood one half on complainants' and one half on defendants' premises. It was maintained in that condition seven or eight years before the window openings were made in it and the projections placed on the wall. Previous to those changes defendants had not not used any part of the wall by the erection of a building on their premises. Upon learning that complainants were making openings in the wall, defendants notified them to desist, and demanded that they restore the wall to its original condition, but complainants continued until they had completed the openings and placed windows therein and hung shutters on the 51 L.R.A. (N.S.)

outside of the wall. Afterward they made another opening, from which a steam exhaust pipe projected. Subsequently defendants notified complainants of their intention to erect a building and use a part of the party wall in doing so, and that, because of the violation of the party-wall agreement, and the invasion of defendants' rights, defendants had sustained damages, and that, by refusing to restore the wall to its original condition, complainants had forfeited their right to contribution from defendants for any part of the wall. Thereafter defendants erected a building four stories high, using the party wall to that extent in doing so. The windows made by complainants in the wall were in the sixth and seventh stories, and were therefore above the roof of defendants' building.

Complainants contend that the contract does not expressly require the wall to be a solid wall throughout its entire length and height, and that no such intention of the parties can be fairly implied from the terms of the agreement. The first clause of the agreement provides that the wall shall be built on the dividing line between said premises, and "shall be and remain a party wall," and "shall extend throughout the whole distance of said dividing lines." The second clause authorizes defendants to join to and use the wall, or any part of it, by complying with the provisions of the agreement. The sixth clause authorizes defendants to join to and use said wall upon first paying to complainants one half of the value, at that time, of so much of said wall as they may use. Considering the language of the agreement in connection with the purposes for which it was executed, it seems to us to indicate the wall was to be solid throughout its length and height. It is true it was built and the cost of it paid by complainants. At that time the owner of defendants' property was not intending to build upon it in the near future, but to secure to himself, or to those who succeeded him in title, the privilege of joining to the wall at any time thereafter when it should be decided to erect a building on his lot. He gave complainants permission to place one half the wall on his property. The wall was built for the purpose of being used as a party wall between the premises of the respective parties, and was "to be and remain a party wall." Complainants insist that the phrase quoted does not mean the wall shall be and remain a party wall throughout its entire height, but means only such part of it as the parties may be using in common. The agreement gave the owner of defendants' premises the right to use the entire wall by joining to it if he so desired. There was

nothing in the instrument to indicate that the owner of defendants' property contemplated or intended using only a part of the wall when he should decide to erect a building on his property. The agreement secured to him the right to use it all by joining a building to it, and the agreement was that the entire wall shall be and remain a party wall, and not that such portion of it shall be a party wall as defendants might elect to use. In the absence of any provision in the agreement that complainants should have the right to construct and maintain windows in the wall until such time as defendants desire to use it, we think no such construction can be placed upon the instrument. The agreement required that the wall be and remain a party wall, and, in the absence of some provision to the contrary, its terms will not admit of the construction that it was not intended it should be a solid wall throughout. It seems clear the parties themselves so understood the agreement when the wall was built, for it was built as a solid wall according to plans and specifications, and was so maintained for several years.

It is further contended that, as complainants built and paid for the wall, they were the sole owners of it until such time as defendants made payment for it in accordance with the agreement, and until that time it was not strictly a party wall, and complainants were not required to treat it as such. It was held in *Mickel v. York*, 175 Ill. 62, 51 N. E. 848, that when a party wall is constructed by one lot owner between adjacent lots, resting partly on each, under an agreement with the other to pay one half the value of it when he elects to use it, the builder is the absolute owner of the wall, with the right to have one half of it stand upon the land of the other. If the adjoining owner elects to pay one half the value of the wall and use it, he becomes the owner of the half standing on his land, with an easement in the half standing on the lot of the one who built the wall. *Beidler v. King*, 209 Ill. 302, 101 Am. St. Rep. 246, 70 N. E. 763, states the same rule, and cites and quotes from *Mickel v. York*, supra. But does it follow that because of such ownership complainants had the right to make such openings in the wall as they pleased until payment was made by defendants? We think the answer must be in the negative; for, as we understand and construe the agreement, complainants were obligated to build and maintain a solid wall. The right to violate the agreement did not attend such ownership of the wall. It is necessary, therefore, in the decision of this case to determine how, if at all, the unauthorized acts of complainants in mak-

ing the windows in the wall and in placing projections over and upon defendants' lot affected the rights of the parties, and also whether the defendants are entitled to the relief prayed in their cross bill or any part thereof.

The appellate court affirmed that part of the decree of the superior court finding defendants liable to complainants for one half the value of that part of the party wall used by defendants, but held they were not liable for interest on the amount found due. The appellate court also held that defendants were entitled to the relief prayed under their cross bill. No cross errors have been assigned by defendants, and, while they assert in their brief that they were wrongfully adjudged liable for the value of one half of the wall used, under the state of the record before us they are to be deemed as admitting the correctness of the judgments of the superior court and appellate court that when they joined to and used the wall they became liable to complainants in the sum of \$5,034.48, under the agreement. They insist, however, that they are not liable for interest on that amount, and say they should not be penalized by being required to pay interest, because they in good faith defended against any liability on account of the use made by them of a portion of the party wall.

The three lowest windows in the party wall were in the second story above the roof of defendants' building, and the other three were one story higher. They were wrongfully placed and maintained there, as were also the projections, but they did not prevent or directly interfere with defendants using all that portion of the party wall they desired then to use. While complainants had no right to make the windows in the wall or to extend projections beyond it, their doing so did not authorize defendants to use the part of the wall where there were no windows or projections, without paying for it. In our judgment, they had a remedy against complainants for their wrongful acts, but such wrongful acts of complainants did not absolve defendants from the obligation to pay for the part of the wall they used. The liability of defendants was one arising upon a written contract, and became due when they proceeded to join their building to the party wall. Under the second section of our statute on interest, creditors are entitled to interest at 5 per cent upon money after it becomes due under any instrument of writing. The money became due under an instrument of writing, and complainants were entitled to interest, unless it is shown they have done some act which upon equitable considerations should be held a bar to or

forfeiture of the right to interest. We are of the opinion that no such considerations arise in this case. The wall was built in substantial compliance with the agreement, and all that part of the wall in use by defendants is in the same condition as when originally constructed. Defendants, as hereafter stated, have a right to require the portion of the wall where the changes have been made to be restored to its original condition, but as the changes made in part of the wall not used by defendants do not materially interfere with the use of the part they have elected to use, it appears to us that, disregarding the statute to which we have referred, it would be contrary to the rules of equity to say they could refuse payment, and not become liable for interest. In *Keady v. White*, 188 Ill. 76, 48 N. E. 314, it was said: "Interest, in equity, is allowed because of its equitable considerations, and it gives or withholds interest as, under all the circumstances of the case, it deems equitable and just." *Warner v. Rogers*, 23 Minn. 34, is in its essential features much like this case, and it was held using the wall rendered the party so using it liable from the time of joining to it. It would probably not be contended that, if no changes had been made in any part of the wall, defendants could have used it and not become liable for interest if they refused to make the payment required by the party-wall agreement. The evidence affords no basis for recoupment on account of damages sustained by defendants, and we think they must be held liable for interest. *Phillips v. South Park*, 119 Ill. 626, 10 N. E. 230; *Keeler v. Herr*, 157 Ill. 57, 41 N. E. 750.

We are of opinion the appellate court correctly held defendants were entitled, under the cross bill, to a decree requiring the removal of the projections, the closing of the openings in the wall, and its restoration to its original condition as a solid wall throughout its length and height. While the wall was constructed by complainants, and defendants were not required by the agreement to pay any part of the cost until they desired to use it, as we have before stated, it was built for a party wall, and under the agreement was required to be maintained as a solid wall. The owner of defendants' premises gave one half of the land upon which the wall was built for the privilege of joining to it when he should desire to do so, by paying one half the value of the wall used. He and defendants, as his successors in title, have a right to require performance of and compliance with that agreement.

That defendants have the right to require the restoration of the wall to its original

condition is supported by the case of *Springer v. Darlington*, 207 Ill. 238, 69 N. E. 946. In that case a party wall had been destroyed by fire, and was rebuilt by Springer with a large number of openings in it. Darlington, who was not using the newly built wall, filed a bill praying that the openings in the wall be declared a nuisance, and that Springer be enjoined from maintaining them. The agreement under which the original party wall was built, so far as requiring it to be a solid wall is concerned, is similar to the agreement in this case. The trial court held that the wall had been rebuilt by Springer under the party-wall agreement; that it should have been a solid wall; that the openings in the wall and the projecting window caps and sills were a continuing nuisance to Darlington, and that he had a right to close the openings, remove the projections, and make the wall a solid party wall. That decree was in all respects affirmed by this court. In the opinion the court said it was no answer to the claim of Darlington for the relief prayed to say he was not entitled to it until he had paid one half the expense of constructing the wall, for that would be to require him to pay for a structure that was not erected in compliance with the agreement; that it was unimportant what kind of a structure Darlington might want to build on his lot; that he was entitled to have a compliance with the terms of the contract, and Springer could not say he would not comply with it because Darlington did not intend to use his property in a certain way. The court further said Darlington was entitled to have the aid of a court of equity to place the wall in the condition the contract required it should be, and that no other remedy was adequate.

Complainants attempt to distinguish the Springer Case from this, because there the original party wall was paid for by the adjoining owners, and in rebuilding it Springer used a part of the old foundation. We do not think that furnishes any reasonable basis for distinction. The general principles announced in that case upon the question under discussion we believe to be sound, and, in the absence of any authority upon the question, we would be disposed to hold that defendants have the right to have the wall restored to its original condition. Upon that question the judgment of the appellate court was right.

The judgment of the Appellate Court is therefore affirmed in all respects except as to the allowance of interest on the \$5,034.48 found due from defendants, and that part of the judgment is reversed, and the cause remanded to the Superior Court,

with directions to enter a decree in accordance with the views herein expressed.

Reversed in part and remanded, with directions.

Petition for rehearing denied February 4, 1914.

IOWA SUPREME COURT.

FIRST UNITARIAN SOCIETY OF IOWA
CITY, Appt.,
v.

CITIZENS' SAVINGS & TRUST COM-
PANY, IOWA CITY.

(— Iowa, —, 142 N. W. 87.)

Covenant — against encumbrances — sewer easement.

An easement for a public sewer laid 5 feet beneath the surface of a city lot is not within a covenant against encumbrances in a deed of the property.

(Deemer and Gaynor, JJ., dissent.)

(June 7, 1913.)

A PPEAL by plaintiff for a judgment of the District Court for Johnson County in defendant's favor in an action brought to recover damages for breach of covenant in a warranty deed. Affirmed.

Statement by Evans, J.:

This is an action for damages for breach

of covenant in warranty deed. The case was tried to the court without a jury upon an agreed statement of facts. There was a judgment for the defendant, and plaintiff appeals.

Messrs. Henry Negus and Henry H. Griffiths, for appellant:

An easement is presumed in law to be an encumbrance, and the burden is upon the grantor to establish that it is a benefit.

Harrison v. Des Moines & Ft. D. R. Co. 91 Iowa, 114, 58 N. W. 1081.

Knowledge of encumbrances by the grantee is immaterial.

Doyle v. Emerson, 145 Iowa, 358, 124 N. W. 176; Harwood v. Lee, 85 Iowa, 622, 52 N. W. 521.

Breach of covenants of seisin and of right to convey entitles the grantee to recovery of damages thereby sustained, on a jury trial.

Brandt v. Foster, 5 Iowa, 287; Zent v. Picken, 54 Iowa, 535, 6 N. W. 750; Sturgis v. Slocum, 140 Iowa, 25, 116 N. W. 128.

The sewer is a perpetual servitude, a perpetual easement, as to the lot across which it runs.

Chicago v. Green, 238 Ill. 258, 87 N. E. 417; Alderman v. New Haven, 81 Conn. 137, 18 L.R.A.(N.S.) 74, 70 Atl. 626.

Mr. O. A. Byington, for appellee:

An encumbrance is "a right in a third person in the land in question to the diminution of the value of the land, though con-

Note. — Existence of water right on land at time of conveyance as breach of covenant.

Bennett v. Booth, 70 W. Va. 264, 39 L.R.A.(N.S.) 618, 73 S. E. 909, seems to be the only case, in addition to FIRST UNITARIAN SOC. v. CITIZENS' SAV. & T. CO. which has passed upon the question whether or not the existence of a water right on land at the time of its conveyance constitutes a breach of the covenant in a deed of the land, since the compilation of the note to Schurger v. Moorman, 36 L.R.A.(N.S.) 313, wherein the earlier cases upon the question are treated. In Bennett v. Booth, supra, it was held that a covenant of general warranty of title was not broken by the existence of a visible easement, consisting of a right to maintain a mill pond, upon the land conveyed. This was upon the ground that when an easement is so open and apparent that the contracting parties must have known of it, they are presumed to have contracted with reference to the condition in which the land then was, and that it cannot be supposed that the purchaser agreed to pay any more for the land than he considered it worth with the burden on it.

51 L.R.A.(N.S.)

The conclusion reached in the FIRST UNITARIAN SOC. CASE, to the effect that an easement for a public sewer laid 5 or 6 feet beneath the surface of a city lot is not within a covenant against encumbrances in a deed of the lot, while in keeping with the Iowa rule as to public highways, cannot be reconciled with the great weight of authority upon the question. The majority of the court seemingly proceeded upon the ground that since the drain was a public necessity it must be a benefit to the property, and that therefore the owner was subject to some incidental servitude; but this in itself seems inconsistent with the fact that the property by statute could not have been taken for the purpose without condemnation and payment of damages.

The notes upon the question whether or not the existence of a public highway, a private way, or a railroad right of way across land at the time of conveyance, constitutes a breach of the various covenants in a deed of real estate, which notes are referred to in the earlier note upon the present question, are supplemented by the note to Sandum v. Johnson, 48 L.R.A.(N.S.) 619.

G. J. C.

sistent with the passing of the fee by the deed of covenants."

Barlow v. McKinley, 24 Iowa, 69.

An encumbrance is "a burden upon the land depreciative of its value, such as a lien, easement, servitude, which, though adverse to the interest of the landowner, does not conflict with his covenants of the land in fee."

10 Am. & Eng. Enc. Law, 361.

A public highway is not covered by the covenants of warranty.

Weller v. Fidelity Trust & Safety Vault Co. 23 Ky. L. Rep. 1136, 64 S. W. 843.

A purchaser of land is bound to take notice of the existence of the public highway, and the existence of such an easement is not a breach of covenant against encumbrance.

Clark v. Mossman, 58 Neb. 87, 78 N. W. 399; *Omaha Southern R. Co. v. Beeson*, 36 Neb. 361, 54 N. W. 557; *Chicago, R. I. & P. R. Co. v. Shepherd*, 39 Neb. 525, 58 N. W. 189; *Huyck v. Andrews*, 113 N. Y. 81, 3 L.R.A. 789, 10 Am. St. Rep. 432, 20 N. E. 581; *Wilson v. Cochran*, 46 Pa. 229; *Scribner v. Holmes*, 16 Ind. 142; *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85.

A highway on land conveyed does not constitute a breach of warranty against encumbrance.

Harrison v. Des Moines & Ft. D. R. Co. 91 Iowa, 114, 58 N. W. 1081.

A person is presumed to have purchased real estate with notice of railways, highways, and public easements, and they do not constitute a breach of the covenants of a deed.

Smith v. Hughes, 50 Wis. 620, 7 N. W. 653.

Where lands are conveyed with reference to a recorded plat, streets and alleys over such lands are necessarily exempted from such covenants, and the grantee is chargeable with knowledge of their existence, and they do not constitute a breach of warranty.

Burbach v. Schweinler, 56 Wis. 386, 14 N. W. 449.

A drainage ditch passing through the land does not constitute a breach of covenant against encumbrance.

Stuhr v. Butterfield, 151 Iowa, 736, 36 L.R.A. (N.S.) 321, 130 N. W. 897.

Evans, J., delivered the opinion of the court:

The plaintiff holds its cause of action by assignment. Its assignor was the grantee in a warranty deed executed to it by the defendant on December 14, 1907, and which conveyed to it a certain lot 4 in Iowa City. The deed contains covenants of warranty which will be hereinafter set out. It was averred that the covenants were breached 51 L.R.A. (N.S.)

by the existence of a public sewer traversing said lot to a depth of 6 feet beneath the surface, which sewer had been used and maintained by the public for more than 40 years and was still so used and maintained. It was averred that the plaintiff's assignor was damaged thereby to the sum of \$1,500. The answer admitted the assignment of the cause of action and the existence of the warranty deed and the existence of the public sewer, and denied all other allegations, and especially denied that the existence of said sewer damaged plaintiff's assignor or was in any way detrimental to the value of the lot. In the court below, the parties submitted the case to the court without a jury upon the following agreed statement of facts: "It is agreed as follows: That the defendant was the owner of lot 4 in block 44 of Iowa City, Iowa, and that on the 14th day of December, 1907, by its authorized officers it conveyed said above-described property by a warranty deed to the plaintiff. • The said covenants of warranty being as follows:

"And we do hereby covenant with the Iowa Association of Unitarian and other independent churches that we are lawfully seised of said premises, that they are free from encumbrances, that we have good right and lawful authority to sell and convey the same, and we do hereby covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever, and the grantors aforesaid hereby relinquish all contingent right, including rights of dower, which they have in and to said last-described premises. That at the time of executing said deed and of the conveyance of the said property, there extended across said lot a certain public sewer, which sewer entered the lot about 16 feet west of the northeast corner thereof and extended diagonally southeast, passed out of said lot at a point about 64 feet south of said northeast corner. That said sewer had been in existence for many years and was a public sewer of such a character that the public had rights therein, and the same could not be removed. That the top of said sewer is from 5 feet to 5 feet 6 inches below the surface of the ground, and said sewer is about 3 feet wide and 4 feet deep on the inside and 5 feet and 6 inches wide on top. It is agreed that the court shall determine from the said above facts whether the defendant is liable to the plaintiff for breach of warranty.

First Unitarian Society of Iowa City. Citizens' Savings & Trust. Co."

We think appellant's discussion in the briefs goes quite beyond the facts appearing of record.

Our consideration and discussion of the question presented must necessarily be circumscribed by the agreed statement of facts. The encumbrance charged in this case is the public easement incident to the use and maintenance of the public sewer.

An easement may or may not be an encumbrance. An "encumbrance" has been defined as "a burden upon land depreciative of its value; such as a lien, easement, or servitude which though adverse to the interest of the landowner does not conflict with his conveyance of the land in fee." 10 Am. & Eng. Enc. Law, 361. In *Barlow v. McKinley*, 24 Iowa, 69, it was defined as "right in a third person in the land in question, to the diminution of the value of the land, though consistent with the passing of the fee by the deed of conveyance." The trial court found that the easement in question was not an encumbrance within the meaning of the law. This holding was concededly based upon our previous cases. *Harrison v. Des Moines & Ft. D. R. Co.* 91 Iowa, 114, 58 N. W. 1081; *Stuhr v. Butterfield*, 151 Iowa, 736, 36 L.R.A.(N.S.) 321, 130 N. W. 897.

The real question before us is therefore whether, under the stipulated facts, the doctrine of the cited cases warranted the judgment of the lower court in favor of the defendant. Some of the authorities classify encumbrance as falling naturally into two general classes: (1) Such as affect or relate to the title or to the record thereof; (2) such as affect or relate to the actual physical conditions upon the realty. The first class is illustrated by lien of taxes, judgments, or mortgages. As to such it is uniformly held that they are included in the covenant against encumbrances regardless of knowledge of the grantee. Those relating to physical conditions of the realty may come under a somewhat different rule. Whenever the actual physical conditions are apparent and are in their nature permanent and irremediable, they are sometimes held to have been within the contemplation of the parties in fixing the price, and are deemed not to be included in a general covenant against encumbrances. The distinction in the two classes of encumbrances is recognized by many courts. In *Memmert v. McKeen*, 112 Pa. 315, 4 Atl. 542, this distinction is discussed as follows: "Where encumbrances of the former class exist, the covenant referred to, under all the authorities, is broken the instant it is made, and it is of no importance that the grantee had notice of them when he took the title. *Cathcart v. Bowman*, 5 Pa. 317; *Funk v. Voneida*, 11 Serg. & R. 109, 14 Am. Dec. 617. Such encumbrances are usually of a temporary character and capable of

removal; the very object of the covenant is to protect the vendee against them. Hence knowledge, actual or constructive, of their existence, is no answer to an action for a breach of such covenant. Where, however, there is a servitude imposed upon the land which is visible to the eye, and which affects not title, but the physical condition of the property, a different rule prevails. Thus it was held in *Patterson v. Arthurs*, 9 Watts, 152, that, where the owner had covenanted to convey certain lots free from all encumbrances, a public road, which occupied a portion of such lots, was not an encumbrance within the meaning of the covenant. This is not because of any right acquired by the public, but by reason of the fact that the road, although admittedly an encumbrance, and possibly an injury to the property, was there when the purchaser bought, and he is presumed to have had knowledge of it. In such and similar cases there is the further presumption that, if the encumbrance is really an injury, such injury was in the contemplation of the parties, and that the price was regulated accordingly." To the same effect, see *Desvergers v. Willis*, 56 Ga. 515, 21 Am. Rep. 289; *Whitbeck v. Cook*, 15 Johns. 483, 8 Am. Dec. 272; *Clark v. Mossman*, 58 Neb. 87, 78 N. W. 399; *Weller v. Fidelity Trust & Safety Vault Co.* 23 Ky. L. Rep. 1136, 64 S. W. 843; *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85; *Scribner v. Holmes*, 16 Ind. 142; *Wilson v. Cochran*, 46 Pa. 229; *Huyck v. Andrews*, 113 N. Y. 81, 3 L.R.A. 789, 10 Am. St. Rep. 432, 20 N. E. 581; *Omaha Southern R. Co. v. Beeson*, 36 Neb. 361, 54 N. W. 557; *Chicago, R. I. & P. R. Co. v. Shepherd*, 39 Neb. 525, 58 N. W. 189.

To the foregoing must be added the further proposition that, where public improvements are adopted for the betterment of real estate within a district, such new physical conditions as are necessary and usually incident to such improvement are deemed ordinarily within the contemplation of purchaser and seller, and are not deemed a breach of covenant against encumbrances. Such doctrine has been expressly applied by this court to highways and drainage ditches. *Harrison v. Des Moines & Ft. D. R. Co.* and *Stuhr v. Butterfield*, supra.

All public improvement involves a certain community of interest in all real estate within its district. Such improvement is not available to one piece of property alone, and yet it is essential to its appropriate use and enjoyment. From its very nature it cannot benefit one without benefiting many; and, as an incident to the mutual benefit, it lays also a mutual servitude upon all. The highways carved out of a farm bring such farm into connection with the entire high-

way system of the state. The drainage ditch cut through a farm confers upon such farm the benefit of a complete drainage system, furnishing to it an outlet below for its own surface waters and subjecting it to incident servitude from above.

Is a public sewer such an improvement and betterment to real estate that it comes fairly within the operation of the doctrine announced? City property has need of sewer facilities. Abutting property is taxed therefor as for benefits received. These facilities can be acquired only by inclusion in a sewer system. To become a part of such system is to receive its benefits and to be subject likewise to some degree of servitude. Can such incident servitude be deemed a breach of covenant against encumbrances?

It is argued by appellant that the doctrine of our cases above cited does not apply, because the sewer was underground, and not apparent to observation. This distinction might meet the argument of some of the cases. The doctrine of our own cases, however, has not been made to rest upon the fact that the encumbrance was apparent or known. This court had previously held, in *Barlow v. McKinley*, 24 Iowa, 69, that a railroad right of way operated as a breach of covenant though its existence was apparent and known. The Harrison Case was put upon the broad and practical ground that public improvement and betterment which so benefits abutting property as to render it liable to assessment for the improvement ought not to be deemed ordinarily as depreciating its value. It recognized the fact that such betterment imposed, nevertheless, upon the benefited property a certain mutual servitude, and to that extent created an easement in a legal sense against all property within the benefited district. The holding was that such easement, however, was not ordinarily an encumbrance, because in its entirety it was beneficial, and not detrimental to the value. The following excerpts are from the opinion in that case: "It will be observed that we are to meet a delicate question, and also one of great and very general importance to all parts of the state, from the fact that conveyances of land are generally with covenants against encumbrances, and very few of the number, which is immense, contain exceptions as to public highways. If the rule is to obtain in this state that such highways are encumbrances against covenants of warranty, the effect will be to create almost numberless liabilities where none were thought to exist; for, with a few exceptions, if any, conveyances have been made without an apprehension of such a rule, by either of the parties; and, as 61 L.R.A.(N.S.)

has been said in other states that have denied the rule, it 'would produce a crop of litigation . . . that would be almost interminable.' Such consideration should not influence us to override an established rule of law, and to deny to any party a vested right; but they are important where a rule of law for the state is to be settled upon authority, and is so doubtful that parties acquiring rights may have done so under mistaken apprehensions of what the rule should be. It is conceded that the authorities are not uniform on the question. In *Prichard v. Atkinson*, 3 N. H. 335; *Kellogg v. Ingersoll*, 2 Mass. 97; *Haynes v. Young*, 36 Me. 557; and *Burk v. Hill*, 48 Ind. 52, 17 Am. Rep. 731, it is held that such highways are encumbrances and a breach of such covenants. In *Desvergers v. Willis*, 56 Ga. 515, 21 Am. Rep. 289; *Whitbeck v. Cook*, 15 Johns. 483, 8 Am. Dec. 272; *Patterson v. Arthurs*, 9 Watts, 152; and *Memmert v. McKeen*, 112 Pa. 315, 4 Atl. 542,—the opposite rule is held. Both lines of authorities have support from ruling on kindred questions, and nothing less can be said, on authority, than that the question is one of grave doubt. It should be said that some of the authorities cited against the rule that such an encumbrance constitutes a breach base the conclusion on a broader doctrine than that of the rule applying simply to public highways, and hold that it applies to other easements, where they are open, notorious, and are, or may be presumed to have been, known to the vendee when the purchase was made; as in the case of a right of way for a railroad, when the road was in operation, and the easement created by it known to the grantee. In view of the rule adopted in this state—that knowledge of the easement will not exclude it from the operations of the warranty—if we are to make a public highway an exception to the rule, it must be on other grounds, or at least the conclusion should be aided by other reasons. . . . In general, easements are of such nature that they become encumbrances, in the sense that they are a burden or detriment to the servient estate; because there is nothing in their nature from which the law will presume that they were created in the interest, or for the betterment, of the estate. It is in this view that it has sometimes been said that all easements are encumbrances, and this, as we think, has led, in some cases, to the statement of a broader rule than either public or private interests demand. No easement should be regarded as an encumbrance to an estate, which is essential to its enjoyment, and by which its value is presumably enhanced. Nothing in the record indicates that the highways in ques-

tion do not bear the relation to the land conveyed to the plaintiff that public highways generally do to agricultural lands; and we have no hesitancy in saying that public highways are not depreciative, but, on the contrary, they are highly appreciative, of the value of the lands on which they constitute an easement, and are a means without which such lands are not available for use, nor sought after in the markets. . . . By this system of highways the landed estates become mutually servient, and in such a way that the easements are mutually advantageous and the respective land values enhanced thereby. Such an easement is not an encumbrance. . . . We may say that we make the distinction on the line of what the law will presume to be an encumbrance, in the sense that it is a damage to the estate made servient to the easement. Other easements to which our attention has been called, or which we have been able to consider, are not such that the law will presume them as attaching to an estate, at the instance of the owner, and for its advantage. The consequences of a rule that would hold to a technical liability at law in such cases, and remand parties to proceedings in equity to reform the thousands of conveyances that would fall within its operation, can be better imagined than expressed; and we feel that the announcement of a rule of law decisive of the rights of parties, without such litigation, is correct in principle and in accord with public and private interests."

In the *Stuhr Case*, *supra*, the same doctrine of mutuality of benefit and burden was applied to a drainage ditch. The ditch in question had not been cut nor the land appropriated in a physical sense at the time of the execution of the warranty sued on in that case. The doctrine of the *Harrison Case* is there fully discussed and reaffirmed, and we need not repeat the discussion. It will be noted, also, that the discussion in the *Stuhr Case* is made to apply not only to open ditches, but also to cover the tile drains. Nothing less would be consistent.

In a practical sense, it is hardly conceivable that a purchaser of real estate underlaid with covered tile drains could deem himself damaged thereby as for breach of covenant against encumbrances. Such tile drains are usually laid at great expense and to the great improvement of the property. Necessarily such benefit has its incident servitude and perhaps inconvenience. The landowner must necessarily adapt his use of the land to the use and location of the tile drains. He cannot sink a well or dig a post hole over such drain. If he put a structure upon such ground, he must protect his tile against undue weight. And if

he excavate a basement he must take account of, and make provision for, his tile drain. This is a burden incident to benefit. Is this argument fairly applicable to a public sewer? It is urged that a public sewer is not a benefit to the particular land through which it passes. But it is a matter of common knowledge that proximity to a sewer is one of the first requisites of city property and one of the first conditions to city value. It is true, as argued by appellant, that public sewers are usually laid in streets and alleys. It is also true that it is sometimes a practical necessity to lay them along the course of ravines, because of the topography of the ground, and because their expense might otherwise be prohibitive. The very selection of the cheaper course is in itself in the interest of the property owner, who has need of sewer connection and must needs pay for the improvement. It is further argued that the sewer should be deemed an encumbrance because of the statutory provisions for the condemnation of land for such purposes and for the assessment of damages therefor. But similar statutory provisions are made for condemnation of land for public highways and for public ditches and tile drains. In all such cases the constitutional prohibition against the consideration of benefits applicable, as well as the prohibition against the taking of private property without compensation. Turning to the stipulation of facts before us, we discover nothing therein to take the case out of the operation of the doctrine of the cases here considered. No facts of a special nature are made to appear. Nor does it appear that the plaintiff suffered any damage in fact, unless damage is to be presumed from the mere existence of the sewer. No question of deceit or false representation or mutual mistake is involved. We have before us the only cold question whether the mere existence of a sewer 5 or 6 feet under ground constitutes a breach of covenant against encumbrance.

We think the holding of the trial court is in accordance with our previous cases here considered, and its judgment is therefore affirmed.

Deemer, J., dissenting:

In view of the importance of the legal principle involved, it is unfortunate that the case has been submitted in the manner it has, for I fear that this has unconsciously lead to an announcement of legal doctrines which might not otherwise have been pronounced,—doctrines which I think are a wide departure from previous cases, and from well-settled rules and principles of law formerly-embedded not only in the jurisprudence of this country, but of England as

well. I am led to believe that the case was submitted to the district court simply to secure an opinion as to whether or not a public or private sewer, running across private property, is or may be an encumbrance which will constitute a breach of warranty against encumbrances, or for the quiet enjoyment of the property conveyed. The covenant in plaintiff's deed is as broad as it could be made, and the deed contains no reservations or exceptions. It will be observed that, after giving the description of the sewer which crosses the lot, it is expressly provided in the stipulation of facts that the question to be decided was whether or not defendant is liable to the plaintiff for breach of covenant or warranty.

Mark, the court was not to determine the amount of the damages, but whether or not there was any liability to the plaintiff for breach of warranty. If we find that the district court erroneously decided this question, then, in my opinion, we should reverse the case and remand it for a determination as to the amount of damages, and not assume as a matter of law, as the majority do, that no damages could arise to plaintiff by reason of the presence of the sewer which would be sufficient to sustain an action for breach of covenant.

The rule that we do not reverse for failure to award nominal damages is not applicable to the case; for the parties did not submit the question as to the amount of damages at all, and nothing is said in the stipulation regarding that matter. Plaintiff did not attempt to state the amount of damages claimed to have been suffered by it, and defendant did not claim that the sewer was a benefit to the property, save as any sewer may be so considered.

The nature of the sewer is not shown, save that it is a public one, of large size, set 5 feet to 5 feet and 6 inches in the ground, 5 feet and 6 inches wide on top, and 3 feet wide, and 4 feet deep, on the inside. It is evidently not the ordinary round sewer; and, whether a sanitary or storm sewer, or one to carry off the water from the streets and buildings, does not appear, save by the merest inference. . . . It was not built in the street, as most sewers are, and was evidently an outlet, over the land in question, for some kind of a system of drainage or sewerage, procured either by purchase or condemnation under § 795 of the Code or some similar section of previous Codes. No one would contend that private property could be entered and taken, even for public use, without compensation to the owner.

Ordinarily sewers are laid in the city streets, and, as no additional servitude is created thereby, adjoining or abutting prop-

erty owners may not complain of them. In deed, in such cases they are thought to be a benefit to the property, and assessments may be made to meet the cost thereof. But, in finding an outlet over private property, no such rule exists, no matter what the nature of the sewer. Indeed, the cost of making this outlet cannot be taxed against the property taken, but is added to the cost of the improvement and taxed up against property abutting on the streets in which the sewer is laid. Code, § 795.

The fair inference from the description of this sewer is that it is a storm sewer, although, to my mind, this makes no difference with the legal principle involved.

Again, it does not appear how the right to pass over the property was obtained, that is, whether through purchase or by condemnation; but, however acquired, it is conceded that the same is public in character, that the public have rights therein, and that the same could not be removed.

Conceding, then, that the city either owns the property upon which the sewer lies, or that it has a permanent easement over the lot for the sewer, it follows that the city authorities had the right, at any time, to go upon the lot to make repairs to the sewer, to clean it out, and to see that it was properly maintained. This right followed as of law, even though nothing but an easement was created over the lot. Such is the universal holding of the authorities: *Prescott v. White*, 21 Pick. 341, 32 Am. Dec. 266; *Prescott v. Williams*, 5 Met. 429, 39 Am. Dec. 688; *Doane v. Badger*, 12 Mass. 65; *Morrison v. Marquardt*, 24 Iowa, 68, 92 Am. Dec. 444.

That the right of the third person to pass upon or over land, to dig thereon, or to, in any manner, remove the soil, constitutes a breach of a covenant of warranty in a deed for quiet enjoyment, is, to my mind, too clear for argument, and it is so held in many cases. See *McGowen v. Myers*, 60 Iowa, 256, 14 N. W. 788; *Mitchell v. Warner*, 5 Conn. 497; *Blake v. Everett*, 1 Allen, 248; *Wetherbee v. Bennett*, 2 Allen, 428; *Swift v. Crocker*, 21 Pick. 241; *Johnson v. Knapp*, 146 Mass. 70, 15 N. E. 134; *Cotting v. Com.* 205 Mass. 523, 91 N. E. 900; *Patterson v. Freihofer*, 215 Pa. 47, 64 Atl. 326.

The majority give a definition of an encumbrance with which I do not disagree; but, after giving the definition they proceed to hold, as I understand it, that there is an easement, which ordinarily would be an encumbrance upon and over plaintiff's property; but that this easement is, as a matter of law, a benefit rather than an injury, and that, no matter what the testimony may show, as to actual damages, the law conclu-

sively assumes that there were no damages to the property by reason of the presence of the sewer.

In this connection, I cannot do better than quote from a leading case, upon this subject. As applied to easements of the character mentioned in *Wetherbee v. Bennett*, 2 Allen, 429, the supreme court of Massachusetts said: "These exceptions cannot be sustained. The action is upon the breach of a covenant against encumbrances in a conveyance of land. The encumbrance was a right of way over the land, which subsisted at the time of the conveyance and for some time after. The defendant contended that the evidence showed that the plaintiff had never been disturbed in the enjoyment of his estate by any user of the way, and that the right of way had been extinguished without expense, and asked that the jury should be instructed to return a verdict for nominal damages only; but the judge declined to give these instructions. It does not follow from these facts that no actual damages had been sustained. While the right of way lasted, the plaintiff was precluded from using the part of the land covered by the way as fully as he otherwise might have done. He could not set a tree or a post or a building upon it, or inclose or cultivate it, or sell or lease it to any person to whom such an encumbrance would be objectionable. It was an apparently permanent subtraction from the substance of the estate."

In *Butler v. Gale*, 27 Vt. 739, Chief Justice Redfield said: "In this country, where our tenures are strictly allodial, we are very much accustomed to consider that, if another really possesses any rights in our land, it is so far forth an encumbrance upon our title. Whether it be small or large in amount, whether it be a mortgage or a right to flow a portion or all of the land, for a shorter or longer period during the year, or to draw water from a well or spring, or to water cattle at a brook, or to pass across the land on foot, or with teams, or to draw wood in winter only across the land, or to build and maintain a railway perpetually, or a highway, is certainly of no importance, in determining the mere technical question of encumbrance or no encumbrance. And it can make no difference whether this right is notorious or not. If the question of an encumbrance were to be determined by its notoriety, or, what is the same thing, by its being known to the purchaser, it must, to preserve consistency, be extended to all encumbrances. And, in that view, the grantee could not recover upon this covenant for paying a mortgage which he knew existed at the time of his purchase. But the contrary is perfectly 51 L.R.A.(N.S.)

well established. And in regard to these rights of way, if they existed only in a prior grant, and were not known to the grantee at the time of purchase, no one could claim that they did not constitute a breach of the covenant against encumbrances."

Indeed, according to all the cases at my command, the most that can be said is that, in cases of encumbrances by easements over land, the question is not one of law for the court, but of fact for a jury. They may be of considerable damage, or very inconsiderable in character, and the amount thereof is for a jury. See *Opinion by Parsons, Chief Justice, in Kellogg v. Ingersoll*, 2 Mass. 97. Also, *Hubbard v. Norton*, 10 Conn. 422; *Gilbert v. Bulkley*, 5 Conn. 262, 13 Am. Dec. 57; *Morgan v. Smith*, 11 Ill. 194; *Richmond v. Ames*, 164 Mass. 467, 41 N. E. 671; *Mackey v. Harmon*, 34 Minn. 168, 24 N. W. 702; *Kellogg v. Malin*, 62 Mo. 429.

It is hornbook law that an owner of real estate owns from the highest heavens to the center of the earth, and our fee-simple titles are allodial in character. That is to say, they are free and absolute and held of no superior. Suppose, now, that the owner of this lot wished to bore for coal or oil upon his lot, to dig a well over this sewer, or to erect a building or a church, and that he wished to excavate below the sewer for his foundation walls, or to make a basement; would anyone contend that his absolute right to do so would not be interfered with by the presence of this sewer? As the property was purchased by a church, it is evident that this sewer may be a decided disadvantage, rather than a benefit, to the owner of the land. Not only has another a right to enter upon his premises for repairing, cleaning, or maintaining the sewer, but plaintiff must not, in any way, interfere with or destroy that sewer on penalty of paying damages therefor, if not of being restrained by injunction from in any way interfering therewith.

These illustrations are not forced or strained, but, to my mind, perfectly legitimate in arriving at a proper solution of the case. Although the rule for this state is that knowledge on the part of the grantee of an encumbrance against the property does not deprive him of the right to recover for breach of covenant, the majority quote the Pennsylvania rule as if it had some applicability to the case. The so-called Pennsylvania rule has not only been distinctly repudiated by this court in many cases, but it has been departed from by the Pennsylvania court itself in recent cases. In *Patterson v. Freihofer*, 215 Pa. 47, 64 Atl. 326, decided in 1906, that court said: "When

one protects himself against an encumbrance by a positive covenant that the property is to be conveyed to him clear of all such encumbrance, he is entitled to the benefit of his contract, whether he had knowledge of the existence of the encumbrance or not." This was said with reference to the use of cesspools and privy wells. Again, in *Evans v. Taylor*, 177 Pa. 286, 69 L.R.A. 790, 35 Atl. 635, the same court announced the same rule. There is no room for dispute as to what our own cases hold. I here cite them without quotation: *Billingham v. Bryan*, 10 Iowa, 317; *Van Wagner v. Van Nostrand*, 19 Iowa, 422; *Barlow v. McKinley*, 24 Iowa, 69; *Gerald v. Elley*, 45 Iowa, 322; *McGowen v. Myers*, 60 Iowa, 256, 14 N. W. 788; *Specht v. Spangenberg*, 70 Iowa, 488, 30 N. W. 875; *Flynn v. White Breast Coal & Min. Co.* 72 Iowa, 738, 32 N. W. 471; *Yancey v. Tatlock*, 93 Iowa, 386, 61 N. W. 997; *Pierce v. Houghton*, 122 Iowa, 477, 98 N. W. 306; *Doyle v. Emerson*, 145 Iowa, 358, 124 N. W. 176; *Harwood v. Lee*, 85 Iowa, 622, 52 N. W. 521; *Kostendader v. Pierce*, 37 Iowa, 645. There has been no departure from this rule, so many times maintained.

I cannot myself see any distinction between an encumbrance which is of record, of which all persons must take notice, and one which is visible to the naked eye, but which the parties may or may not have seen. Will the next step be to say that a covenant of warranty does not cover an encumbrance of record? Much confusion will be introduced by a rule which makes the right of action depend upon knowledge. One holding title against which there is an encumbrance may resort to any warranty in his claim of title made after the encumbrance arose. Now, suppose some remote grantor was chosen as a defendant, and he could show that, while plaintiff did not know of the encumbrance, his immediate grantee, or some more remote grantee, did; would this be a defense to suit? I have always understood that the reason why one is so tenacious in insisting upon a warranty deed is for the reason there may be, or he thinks there is, some encumbrance against the land, and often he takes it for the very reason that there is an apparent encumbrance. Is he to be defeated in his action of covenant because he knows of this encumbrance? I think not.

Moreover, this question of knowledge of a physical encumbrance defeating an action for breach of covenant has been distinctly negatived in many of our cases where the easement was known to both grantor and grantee. See *Flynn v. White Breast Coal & Min. Co.* 72 Iowa, 738, 32 N. W. 471; *Bar-*

low v. McKinley, 24 Iowa, 69; *McGowen v. Myers*, 60 Iowa, 259, 14 N. W. 788; *Van Wagner v. Van Nostrand*, 19 Iowa, 422. In each of these cases there was an open and apparent easement on the land, and we expressly disapproved of the Pennsylvania and Wisconsin rule,—the rule adopted by the minority of the courts,—and expressly and definitely held that knowledge of such easements would not defeat the action. Courts and text writers generally disapprove of the rule announced by the majority upon this proposition. See *Jones*, Real Prop. §§ 861 et seq. 873, 882, 886, 910; *Rawle*, Covenants, §§ 79, 88, 191; *Tiffany*, Real Prop. § 397; *Tiedeman*, Real Prop. § 853; 2 *Warvelle*, Vend. & P. pp. 992-998 8 Am. & Eng. Eng. Law, 123-125; 11 Cyc. 1066. If our previous cases are to be overruled, we should do so squarely, and not leave the matter to mere inference.

Coming now to the question of sewers, drains, etc., the cases, without exception, so far as I have been able to discover, hold that they are encumbrances, and the English courts have recently established the same rule.

In *Pemsel v. Tucker* [1907] 2 Ch. 191, 97 L. T. N. S. 86, 71 J. P. 547, 76 L. J. Ch. N. S. 621, it was held that a public sewer, running under property sold, constituted a defect in the title as it was vested in the public authorities. In the instant case, it is conceded that the sewer in question is a public sewer, and it must have been acquired either by grant or condemnation.

In *Cotting v. Com.* 205 Mass. 523, 91 N. E. 900, the supreme court of Massachusetts held that a sewer constitutes an encumbrance on the land; and in *Johnson v. Knapp*, 146 Mass. 70, 15 N. E. 134, the same court held that a pipe to convey water across land is an encumbrance.

In *Smith v. Sprague*, 40 Vt. 43, the court of that state held that a private drain and the accompanying right to enter and clean the same constituted a breach of covenant against encumbrances. The principle, for which I contend, was laid down in an early case in Massachusetts. *Kellogg v. Ingersoll*, 2 Mass. 97, from which I quote the following words of Parsons, Ch. J.: "If the public town road, described by the plaintiff in his assignment, is no legal encumbrance of the land sold, the breach is not well assigned. But the court are well satisfied that the road, as there described, is an encumbrance of the land sold. It is legal obstruction to the purchaser to exercise that dominion over the land to which the lawful owner is entitled. An encumbrance of this nature may be a great damage to the purchaser, or the damage may

be very inconsiderable, or merely nominal. The amount of damages is a proper subject of consideration for the jury who may assess them, but it cannot affect the question whether a public town road is, in legal contemplation, an encumbrance of the land over which it is laid."

In *Huyck v. Andrews*, 113 N. Y. 81, 3 L.R.A. 789, 10 Am. St. Rep. 432, 20 N. E. 581, the supreme court of New York said: "We think the safer rule is to hold that the covenants in a deed protect the grantee against every adverse right, interest, or dominion over the land, and that he may rely upon them for his security. If open, visible, and notorious easements are to be excepted from the operation of covenants, it should be the duty of the grantor to except them, and the burden should not be cast upon the grantee to show that he was not aware of them. The security of titles demands that a grant made without fraud or mutual mistake shall bind the grantor according to its written terms. It should not be incumbent upon the grantee to take special and particular covenants against visible and apparent defects in the title, or encumbrances upon the land, but it should be incumbent upon the grantor, if he does not intend to covenant against such defects and encumbrances, to except them from the operation of his covenants. The distinction which is attempted to be made between encumbrances which affect the title and those which affect merely the physical condition of the land conveyed is quite illusory and unsatisfactory. Easements not only affect the physical condition of the land, but they affect and impair the title. The owners of them have an interest in and dominion over the servient tenement which frequently may largely impair its usefulness and value."

In *Prescott v. Trueman*, 4 Mass. 629, 3 Am. Dec. 246, it is said: "On these principles we are of opinion that every right to, or interest in, the land granted, to the diminution of the value of the land, but consistent with the passing of the fee of it by the conveyance, must be deemed in law an encumbrance. We say consistent with the passing of the fee of the land by the conveyance, because, if nothing passed by the deed, the grantee cannot hold the estate under the grantor. Thus a right to an easement of any kind in the land is an encumbrance. So is a mortgage. So, also, is a claim of dower, which may partially defeat the plaintiff's title, by taking a freehold in one third out of it. And for the same reason, a paramount right, which may wholly defeat the plaintiff's title, is an encumbrance. It is a weight on his land, which must lessen the value of it."

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In *Demars v. Koehler*, 62 N. J. L. 203, 72 Am. St. Rep. 642, 41 Atl. 720, the supreme court of New Jersey said: "Professor Greenleaf declares that a breach of the covenant against encumbrances is shown when the proofs establish that a 'third person has a right to or an interest in the land conveyed, to the diminution of the value of the land, though consistent with the passing of the fee by the deed of conveyance.' 2 Greenl. Ev. § 242. This definition of encumbrance is substantially that given by Chief Justice Parsons in *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 246. It was approved in *Mitchell v. Warner*, 5 Conn. 497, and adopted by Chief Justice Green in *Carter v. Denman*, 23 N. J. L. 260-272. The diminution of value which is thus made a test of an encumbrance is not, however, to be understood as limited to cases where the thing granted is, by reason of some outstanding right or interest in a third person, of less pecuniary worth, but also extends to and embraces cases where the grantee, by reason of such an outstanding right or interest, does not acquire . . . the thing granted which the grant apparently gives, but is or may be deprived thereby of the whole or some part of its use or possession. The diminution of pecuniary value is important in the admeasurement of damages for the breach of this covenant, but does not form the test whether an outstanding right or interest is an encumbrance or not. If the thing granted be, or be liable to be, diminished by the existence of an outstanding right or interest, so that the grantee does not acquire the complete dominion which the grant purports to convey, then, although the diminution of pecuniary worth may not appear, and the damages may be only nominal, such right or interest in an encumbrance. . . . Knowledge of its existence cannot alter its character as encumbrance. The land granted is or may be thereby diminished so that the grantee does not acquire that use and possession which the deed purported to grant. Mr. Rawle, conceding that, if there be a real encumbrance, the purchaser's knowledge of its existence will furnish no defense to an action on this covenant, ingeniously suggests that such knowledge may have a material bearing in determining what was the subject-matter of the contract. Rawle, *Covenants*, 95, 96. With equal ingenuity the opinion below denies the right to recover upon this covenant, because such an encumbrance, known to the grantee, is not within its terms, and consequently no breach of the covenant. With great respect, I deem the reasoning specious and the conclusion insupportable; for knowledge of the existence of an en-

cumbrance not only does not destroy its inherent character as encumbrance, but may and often does lead to the purchaser's requiring the grantor to protect him by covenants. *Smith v. Lloyd*, 29 Mich. 382. When a covenant is made against all encumbrances, without exception, knowledge of the existence of one encumbrance cannot take that encumbrance out of the general terms of the covenant, unless such was the intent of the parties. But knowledge alone does not prove such intent, for a contrary intent is consistent with it. Proof of knowledge, or other proof of the intent of the parties, that a particular encumbrance should be excepted from the general terms of the covenant, could only be admitted by a violation of the canon of evidence which forbids parol proof to vary the terms of a written contract. It results that a grantor who fails to except from his covenant against encumbrances one which is known to the grantee cannot defeat recovery upon that covenant by proof of such knowledge. The grantee is not compelled to require for his protection a special covenant against the known encumbrance, but may rely on the general and unrestricted covenant against all encumbrances. . . . The general rule is that the right of action on the covenant against encumbrances arises upon the existence of the encumbrance, irrespective of any knowledge on the part of the grantee, or of any eviction of him, or of any actual injury it has occasioned him, so that, if he has not paid off or bought in the encumbrance, he is entitled at least to nominal damages. 2 Greenl. Ev. § 242; 2 Washb. Real Prop. 707; *Carter v. Denman*, supra; *Townsend v. Weld*, 8 Mass. 146; *Hovey v. Newton*, 7 Pick. 29; *Harlow v. Thomas*, 15 Pick. 66; *Batchelder v. Sturgis*, 3 Cush. 201; *Spurr v. Andrew*, 6 Allen, 420; *Flynn v. Bourneuf*, 143 Mass. 277, 58 Am. Rep. 135, 9 N. E. 650; *Rickert v. Snyder*, 9 Wend. 416; *Smith v. Lloyd*, supra; *Edwards v. Clark*, 83 Mich. 246, 10 L.R.A. 659, 47 N. W. 112; *Hubbard v. Norton*, 10 Conn. 431; *Prichard v. Atkinson*, 3 N. H. 335; *Van Wagner v. Van Norstrand*, 19 Iowa, 422; *Barlow v. McKinley*, 24 Iowa, 69; *Long v. Moler*, 5 Ohio St. 271."

In *De Rochemont v. Boston & M. R. Co.* 64 N. H. 500, 15 Atl. 131, the supreme court of New Hampshire said: "A way, whether public or private, is an encumbrance upon land. *Prichard v. Atkinson*, 3 N. H. 335; *Haynes v. Stevens*, 11 N. H. 28. It is a legal obstruction to the exercise of that dominion over the land to which the lawful owner is entitled. *Kellogg v. Ingersoll*, 2 Mass. 101; *Blake v. Everett*, 1 Allen. 248; *Wetherbee v. Bennett*, 2 Allen, 428; *Butler v. Gale*, 27 Vt. 742; *Hubbard v. Norton*, 10 51 L.R.A. (N.S.)

Conn. 422. The plaintiffs, having conveyed to the railroad with covenants of warranty against encumbrances, are estopped to deny the truth of the covenants that the premises are free from any encumbrances except what are reserved in the deed, and consequently they are estopped to claim damages for the obstruction of a way which they have covenanted does not exist. *Wark v. Willard*, 13 N. H. 389, 395; *Gotham v. Gotham*, 55 N. H. 440; *Fletcher v. Chamberlin*, 61 N. H. 438, 447, 478."

In *Edmunds's Appeal*, 4 Sadler (Pa.) 485, 8 Atl. 31, the supreme court of Pennsylvania held a party wall an encumbrance, and the same rule obtains in many other states.

In *Johnson v. Knapp*, 146 Mass. 70, 15 N. E. 134, water pipes, running across a lot of land, were held to be encumbrances.

Stuhr v. Butterfield, 151 Iowa, 736, 36 L.R.A. (N.S.) 321, 130 N. W. 897, is not an authority against the propositions for which I contend. The drainage ditch which, in that case, was held not to be an encumbrance, was over land which was within a drainage district, and by reason of that fact it had already been adjudicated that the lands were benefited by the improvement. In the case at bar, there is no showing that the sewer in question was any part of any system of drainage, was ever included in any sewerage district, that it was a sanitary sewer, or that any part of the cost thereof had been taxed against abutting property. There never was any finding that the lot, which it crossed, was benefited thereby, and nothing in this record to show that plaintiff could, or would be permitted to, use it for any purpose whatever. It may have been a storm sewer, which plaintiff would not have been permitted to use for sanitary purposes, or it may have been a sanitary sewer, but, if the latter, it is not shown to be a part of any sewer system constructed by the city. Prima facie, such an easement, over plaintiff's lot, is an encumbrance, and this prima facie showing is not overcome by any testimony in the case. It is assumed, without proof, that it was a benefit to the property, upon the theory that it drained it out in some manner, without any showing that it needed any kind of drainage or that it was a sanitary sewer, with which plaintiff might make connection, should it see fit to do so. There is no proof that it is a sanitary sewer; and, if it was, there is no showing that plaintiff may not reach the sewer in the street in front of its lot, where such sewers are usually laid, with less trouble and expense than on its lot. The sewer could not have been laid across plaintiff's lot without compensation, and, if a

private sewer, the land could not have been condemned for such an improvement. The sewer may manifestly interfere with building operations, for, if a heavy wall is to be constructed over it, the wall must have support, and this will cause extra expense; and, in the end, it may not be in such position that it can be used for drainage or sewerage purposes. When sewers are laid in the street, as they usually are, they do not interfere with building operations, and in no way interfere with the unrestricted dominion which the owner has over his property. That a sewer laid across a private lot does interfere with such dominion is too clear for argument; and we are not justified, I think, in assuming that this restriction, instead of being a damage, is a real benefit to the lot.

It should not be forgotten, in this connection, that the right to locate underground drains through the land of another, except when the public health requires it, is denied in previous cases decided by this court. *Fleming v. Hull*, 73 Iowa, 598, 35 N. W. 673; *Patterson v. Baumer*, 43 Iowa, 477. And this is true, notwithstanding such drain may be of benefit to the land in giving it drainage which it did not have before. Save as the law authorizes the establishment of drainage districts, one man has no right to force his neighbor to put in a drain or tile for the mutual advantage of both, or to go upon his neighbor's land, without his consent, to put in a tile line to connect with his own, in order that both pieces may be benefited.

On the question of benefits, I cannot refrain from referring to two of our cases, which seem to me to be analogous. In *McGowen v. Myers*, 60 Iowa, 256, 14 N. W. 788, the owner of a lot conveyed a part of it, reserving a stairway, which was to be built and used in common between the building erected on his part of the lot and the part conveyed, and for the mutual benefit of the owners of both lots. Afterwards defendant in the case became the owner of the adjoining building, and conveyed it, by deed of general warranty, to the plaintiff. Plaintiff brought action for breach of covenant, and it was held that the right to use the stairway in common was an easement and an encumbrance, and that defendant was liable on his covenants. The same rule was also announced in *Myers v. Munson*, 65 Iowa, 423, 21 N. W. 759. These cases are authority for several propositions in the case. The first is that parol evidence is not admissible to show that the parties did not regard the easement as an encumbrance; second, that knowledge of the physical easement on the part of the grantee was no defense; and, third, that even though

the easement was for the joint benefit of grantor and grantee, still there was a breach of covenant for which damages might be recovered. All that could possibly be claimed in the instant case is that the easement might be for the joint benefit of the original parties or their grantees,—that is, that it was for the benefit of the city, as well as to the lot owner,—but, under the rule heretofore announced, and never since departed from, such benefit will not defeat an action for breach of covenant of warranty.

I cannot subscribe to the doctrine that knowledge on the part of the grantee of an encumbrance which relates to the physical condition of the realty conveyed deprives him of a right of action for breach of covenant of warranty. Such rule is contrary to the great weight of authority and in conflict with so many of our own cases that they should not be overruled by indirection. The text writers generally condemn the doctrine as wrong on principle and without general support. Again, the announcement of such doctrine will tend toward uncertainty and confusion. Suppose the grantee is a nonresident and has not seen the property, or, if a resident, has never been upon the property; or suppose that, as in this case, the sewer is 5 or 6 feet underground with nothing to indicate that a sewer runs across the lot, must the grantee dig down to see if the sewer runs across the lot, instead of out in the street, where he may well suppose it to be? What are the rules for such cases? And suppose a remote grantor is selected as a party defendant, and he can show that, although plaintiff, a remote grantee, did not know of the encumbrance, his defendant's immediate grantee did. Will this be a defense to the suit? Again, suppose a purchaser never learns of the sewer across his lot, and makes his connection with one in the street, and never gets any benefit from the one across his lot, must he bear the burden of the one across his lot?

Harrison v. Des Moines & Ft. D. R. Co. 91 Iowa, 114, 58 N. W. 1081, relied upon by the majority, is not in point. In that case it is said: "In view of the rule adopted in this state,—that knowledge of the easement will not exclude it from the operations of the warranty,—if we are to make a public highway an exception to the rule, it must be on other grounds, or at least the conclusion should be aided by other reasons. . . . An 'encumbrance' is defined to be 'a burden upon land depreciative of its value, such as a lien, easement, or servitude, which, though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee.' 10

Am. & Eng. Enc. Law, 361; 2 Greenl. Ev. § 242; Chapman v. Kimball, 7 Neb. 399; Carter v. Denman, 23 N. J. L. 260. In Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246, the foregoing definition is given in substance, and it is there said: 'It is a weight on land, which must lessen the value of it.' It will perhaps be well for us to treat these definitions as not casting the burden on a grantee to show affirmatively, in addition to the easement, that it is an encumbrance, in the sense of its being depreciative of the value of the land, and, instead, to give him the advantage of what the law will assume from the existence of an easement."

This case announces two propositions: First, that knowledge of the encumbrance is no defense; and, second, that it is not incumbent on the grantee to show affirmatively that, in addition to the easement, it is an encumbrance in the sense of being depreciative of the value of the land. Assuming these rules to be true, I find nothing in the statement of facts, on which the instant case was tried and determined, which shows or tends to show that the sewer was made to benefit the lot in question, or that it is in fact any benefit thereto. It is assumed that because it is called a public sewer it is some benefit to the property. But that fact depends not upon the name given the easement, but upon whether or not it was a benefit to the property across which it passed.

Ordinarily sewers are not so constructed, and, when they are, compensation must be made the owner. There must be some proof, as I think that this sewer was constructed pursuant to some plan to benefit the lot through which it passed, before any presumption will arise that it did so benefit the land. I can conceive how all property within a drainage district may be presumed to have been benefited, as in Stuhr v. Butterfield, 151 Iowa, 736, 36 L.R.A. (N.S.) 321, 130 N. W. 897. But I am not convinced that a public sewer, running across a private lot, not shown to have been a part of any sewer system, and not constructed to benefit the lot itself, is presumptively a benefit to the lot. A private drain running from my land, through the land of my neighbor, may benefit both; but I doubt if the law would compel my neighbor to let me run a tile across his land on the theory that it will be beneficial to him, when done. For a much stronger reason, one cannot construct a tile or sewer over the land of another which does not need such sewer or tile and is in no manner benefited thereby, even with express authority from the legislature.

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The only excuse for this dissent is due to the thought that we are introducing new doctrines, which may arise to trouble us in the future; and I especially dissent from the propositions that knowledge of an encumbrance, whether it be physical or of record, is any defense to an action for breach of covenant; that a large public sewer, no matter whether storm or sanitary, running across a private lot, is presumptively beneficial; and from the thought that without any proof it will be presumed that such a sewer, although not shown to be a part of any system or necessary in any way to the enjoyment of the property through which it runs, is a benefit thereto rather than injury.

On the whole, I think the trial court was in error in dismissing the case, and I would reverse, with instructions to take testimony on the question of damages.

Gaynor, J., joins in dissent.

Petition for rehearing denied.

KENTUCKY COURT OF APPEALS.

JOHN J. MCKEE, Appt.,

v.

WESTERN UNION TELEGRAPH COMPANY.

(158 Ky. 143, 164 S. W. 348.)

Telegram — altered message — liability to sender.

One whose telegram directing purchase of commodities by a broker is changed by the telegraph company so as to require the purchase of a much larger amount than ordered is not bound to protect the broker in obeying the changed order, and if he does so with full knowledge of the facts, he cannot compel the telegraph company to reimburse him for the loss which he sustains thereby.

(March 20, 1914.)

Note. — Right of sender or addressee to recover from telegraph company damages resulting from latter acting upon message changed during transmission.

I. Right of sender.

- a. Telegraph company as agent of sender, 440.
- b. Telegraph company as agent of party who selects it as means of communication, 441.
- c. Telegraph company as independent principal, 441.

II. Right of addressee.

- a. In general, 442.
- b. Telegraph company as agent of sender, 444.

The question under annotation presupposes that the damages sustained, at least

APPEAL by plaintiff from a judgment of the Common Pleas Branch, Third Division, of the Circuit Court for Jefferson County in defendant's favor in an action brought to recover a loss sustained by plaintiff in the purchase and sale of certain grain, alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Paul B. Collins and John T. Bashaw for appellant.

Mr. George H. Fearons, with Messrs. Richards & Harris, for appellee:

A telegraph company cannot be held answerable to the sender of a message er-

roneously transmitted by the company where the sender has not himself acted on the error, and in ignorance thereof.

Postal Teleg. Cable Co. v. Schaefer, 110 Ky. 907, 62 S. W. 1119; Fisher v. Western U. Teleg. Co. 119 Ky. 885, 84 S. W. 1179; Pepper v. Western U. Teleg. Co. 87 Tenn. 554, 4 L.R.A. 660, 10 Am. St. Rep. 699, 11 S. W. 783; Shingleur v. Western U. Teleg. Co. 72 Miss. 1030, 30 L.R.A. 444, 48 Am. St. Rep. 604, 18 So. 425; Harrison v. Western U. Teleg. Co. (Tex.) 10 Am. & Eng. Corp. Cas. 600; Western U. Teleg. Co. v. Peter & Neylon, — Tex. Civ. App. —, 160 S. W. 991.

by one of the parties, was the proximate result of an error in transmission for which the telegraph company was responsible; the point being whether the liability of the company is to the sender or the addressee, or possibly to both.

Although courts differ widely in the reasons assigned therefor, they seem to be in accord in holding that the telegraph company is liable to the sender either for breach of contract or for tort. They are not quite so harmonious with respect to the rights of the sendee, but they all agree that he has a right of action against the telegraph company in tort, at least.

I. Right of sender.

a. Telegraph company as agent of sender.

Several courts take the position that the telegraph company is the agent of the sender. Under this theory the sender is responsible in contract to the sendee, and the former, therefore, has a right of action against the telegraph company, not only for damages suffered directly by him, but also for those of the sendee. (As to the effect of this theory upon the right of the addressee to maintain the action, see *infra*, II. b.)

Upon this theory the telegraph company has been held liable to the sender for the damages sustained in consequence of the addressee acting upon the telegram as changed—

—where a telegram quoting a price was changed in transmission. *Western U. Teleg. Co. v. Shotter*, 71 Ga. 760. The court says: "Whether the telegraphic operator be the agent of the sender of a despatch, so as to bind him, is a debatable question in the courts, the English authorities being to the effect that he is not; and the American mainly that he is. We agree with the American doctrine, at least to the extent that commercial transactions being now conducted to so great an extent through the telegraph, a merchant would lose business and credit if he did not settle in accordance with the offer actually made, though by mistake of the agency he used to convey it, and when he does so

settle in good faith, and is induced to do so by the negligence of the telegraphic company, through its servants, that company should respond to him in damages, whether absolutely bound by his contract or not."

—where telegram quoting a price was changed in transmission. *Western U. Teleg. Co. v. Flint River Lumber Co.* 114 Ga. 576, 88 Am. St. Rep. 36, 40 S. E. 815. The rule was followed on the grounds of long acquiescence, it being conceded that the underlying principle is subject to criticism.

—where a telegram directing a broker to purchase 100 shares was changed in transmission to 1,000 shares. *Sherrerd v. Western U. Teleg. Co.* 146 Wis. 197, 131 N. W. 341. The court said in effect that upon the purchase of the 1,000 shares they became the property of the sender without any further action on his part; and that no question of ratification could arise. In both the Georgia cases above cited the goods had been delivered by the sender before discovery of the error, although no point seems to have been made of the fact.

But, where a prospective purchaser of distillers' grits telegraphed a cereal company asking for a quotation on 5,000 sacks of that commodity, and the telegram containing the quotation of the cereal company was changed during transmission so as to offer it at a lower rate than that quoted, and the prospective purchaser answered that he would take 2,000 sacks at the price named in the telegram received, and the cereal company replied that it would furnish 2,000 sacks, but not at that rate, there was no completed contract, and the cereal company could not compel the telegraph company to reimburse it for the loss sustained in furnishing the grits at the lower price, with knowledge of the error, even upon the assumption that the telegraph company was the agent of the cereal company. *Postal Teleg. Cable Co. v. Akron Cereal Co.* 23 Ohio C. C. 516.

As shown *infra*, I. c, many, probably the majority, of the cases, affirmatively adopt a theory opposed to that now under discussion. The three cases next cited, denying the sender's right to recover, also reject this theory, but do not appear to affirmatively adopt any other.

One whose telegram quoting prices on

It was appellant's duty to reduce his damages as much as possible.

Western U. Teleg. Co. v. Matthews, 113 Ky. 188, 67 S. W. 849.

The measure of damages is the difference, if any, between the price appellant was forced by appellee's error to pay for the oats and their market price immediately after the mistake in transmission was discovered.

Western U. Teleg. Co. v. Fischer, 133 Ky. 768, 119 S. W. 189; *Postal Teleg. Cable Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119.

Appellant should have acted promptly on his legal rights as soon as the mistake in

transmission was discovered; and he alone is charged with the result of his failure so to act.

Marr v. Western U. Teleg. Co. 85 Tenn. 529, 3 S. W. 496; *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 263, 4 Am. Rep. 673, 1 Daly, 474.

Settle, J., delivered the opinion of the court:

The appellant, John J. McKee, complaining that he was damaged by the failure of the appellee, Western Union Telegraph Company, to transmit and deliver, in the form and words in which it was received from

oranges is changed by the telegraph company so as to offer them for a lower price than quoted is not bound to furnish oranges at the price stated therein to the sendee, who knows of the mistake in the telegram, and acts in bad faith in ordering in accordance therewith, and he cannot compel the telegraph company to reimburse him for the loss which he sustains thereby. *German Fruit Co. v. Western U. Teleg. Co.* 137 Cal. 598, 59 L.R.A. 575, 70 Pac. 658.

So, the sender of a telegram constitutes the telegraph company his agent for the transmission of the message just as it is sent, and no further, and one whose telegram offering shares of stock to a broker at a certain price is changed by the telegraph company so as to offer them for less is not bound to protect the broker in fulfilling contracts to sell such stock, made in pursuance of the terms of the erroneous telegram, and if he does so, he cannot compel the company to reimburse him. *Pegram v. Western U. Teleg. Co.* 100 N. C. 28, 6 Am. St. Rep. 557, 6 S. E. 770.

And it is held, in *Harrison v. Western U. Teleg. Co.* (Tex.) 10 A. & E. Corp. Cas. 600, that one whose telegram directing a broker to purchase cotton is changed in transmission so as to order the sale of such cotton is not bound to protect the broker in obeying the changed telegram, and, where he does so, he cannot compel the telegraph company to reimburse him for the loss which he sustains thereby.

For cases which apply this theory by holding that the addressee cannot recover from the telegraph company, see *infra*, II. b.

b. Telegraph company as agent of party who selects it as means of communication.

In *Ayer v. Western U. Teleg. Co.* 79 Me. 493, 1 Am. St. Rep. 353, 10 Atl. 495, it is held that, between the sender and addressee, the party who selects the telegraph as a means of communication is liable to the other for the loss resulting from errors in transmission, so that a dealer who selects the telegraph to communicate a quotation of prices on lumber, and whose telegram is changed so as to offer it for less, is bound to furnish it at the lower price, and may 51 L.R.A. (N.S.)

recover from the telegraph company the damage resulting from so doing.

So, one whose telegram directing the purchase of shares of stock by his broker is changed by the telegraph company so as to permit the purchase at a higher price than that specified is bound by the terms of the telegram as delivered, and the right of action for damages resulting from such purchase accrues to him, and not to the sendee. *Yunker v. Western U. Teleg. Co.* 146 Iowa, 499, 125 N. W. 577. This is upon the theory that "the party who selects the telegraph as a means of communication must bear the loss caused by error in transmission."

Although in both the cases just cited the result was the same as if the theory first discussed had been adopted, since it was the sender who originally selected the telegraph as a means of communication, the theory upon which they were decided, *viz.*, that the telegraph company is the agent of the party selecting it as a means of communication, would produce a different result as applied to a case where the addressee of the telegram in which the error occurred had expressly or by implication designated the telegraph as the means of communication between the parties.

c. Telegraph company as independent principal.

One of the best reasoned theories is that which considers the telegraph company an independent principal. Under this theory either the sender or addressee may recover directly from the company the damages accruing to him. Neither of them may, therefore, compel the company to reimburse him for voluntarily protecting the other. *McKee v. Western U. Teleg. Co.* falls within the last-named principle.

So, produce dealers whose telegram quoting prices on meat is changed in transmission so as to state a lower price than that quoted are not bound to furnish the meat at the lower price, inasmuch as the telegraph company is an independent contractor; but where the meat has been shipped before the discovery of the mistake, they may exercise reasonable skill and diligence in disposing of it, and recover their dam-

him, a telegram addressed to Henning, Chambers, & Company, brokers, of Louisville, with the concurrence of appellee, submitted to the decision of the court below upon an agreed case, as allowed by § 637, Civil Code, the question whether it was liable for the damages claimed by appellant.

In addition to the agreed facts, the record consists of the petition and answer; the first alleging the delivery by appellant of the telegram to appellee's Lawrenceburg agent; that, as so delivered, it instructed Henning, Chambers, & Company, brokers, of Louisville, to purchase at the opening of the market the following day 5,000 bushels May oats for appellant, but that the telegram as delivered by appellee to Henning, Chambers, & Company, at Louisville contained a direc-

tion to them to buy for appellant 50,000 bushels of oats, instead of the 5,000 actually ordered by appellant; that the brokers, acting upon this mistaken order, made a purchase for appellant of 50,000 bushels of oats, which was 45,000 bushels more than he had ordered; that, upon being notified by a letter from the brokers of their purchase of the 50,000 bushels of oats, which gave appellant the first notice he received of the mistake that had been made by appellee's agents in transmitting and delivering his telegram, he notified appellee, through its Louisville agents, of the mistake that had been made, and demanded of it its correction, and that it take off his hands the excess of 45,000 bushels in the purchase of oats made by the brokers by reason of its

age from the telegraph company. *Pepper v. Western U. Teleg. Co.* 87 Tenn. 554, 4 L.R.A. 660, 10 Am. St. Rep. 699, 11 S. W. 783.

And where a telegram quoting prices on live stock is changed during transmission so as to offer it for a lower price, and it is shipped in pursuance of the contract, the shipper is bound only to take such steps to avoid loss as a reasonably prudent man would take to avoid loss from his own error, and the telegraph company is liable for the damages, in spite of the fact that it is not the agent of the sender, but merely an independent party. *Strong v. Western U. Teleg. Co.* 18 Idaho, 389, 30 L.R.A.(N.S.) 409, 109 Pac. 910, Ann. Cas. 1912A, 55.

Brokers whose telegram ordering the sale of cotton at a certain price is changed so as to authorize a sale at a lower price cannot be required to deliver the cotton at the lower price, inasmuch as the telegraph company is an independent principal, and not the agent of the brokers, and where the latter do deliver the cotton at the lower price after learning of the mistake, they are without remedy against the telegraph company. *Shingleur v. Western U. Teleg. Co.* 72 Miss. 1030, 30 L.R.A. 444, 48 Am. St. Rep. 604, 18 So. 425.

But where a telegram quoting prices on lumber is changed by the telegraph company so as to offer it at a lower price than that quoted, and the lumber is shipped and received before the mistake is discovered, the sender may recover his damage from the telegraph company. *Fisher v. Western U. Teleg. Co.* 119 Ky. 885, 84 S. W. 1179.

In *Eureka Cotton Mills v. Western U. Teleg. Co.* 88 S. C. 498, 70 S. E. 1040, Ann. Cas. 1912C, 1273, however, the court, while proceeding upon the theory that the telegraph company is an independent contractor and the agent of neither the sender nor sendee, yet held, where a telegram quoting prices on yarns was changed during transmission so as to offer the yarns at a lower price than that quoted, and the sender thereof voluntarily furnished them at the lower price, that he could compel the tele-

graph company to reimburse him for the loss which he sustained thereby, inasmuch as a failure to protect his correspondents would have resulted in loss of trade.

Thus, one whose telegram quoting prices on potatoes is changed by the telegraph company so as to offer them at a lower price is not bound to deliver them at the lower price, inasmuch as the telegraph company is not his agent; but where the potatoes are shipped before the mistake is discovered, the shipper may recover damages resulting from the disposal of the potatoes with ordinary care in the market to which they were shipped. *Postal Teleg. Cable Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119. While it does not appear clearly from the language of the court in this case that the telegraph company is considered an independent principal, *McKee v. Western U. Teleg. Co.* states that such is the theory of the case.

II. Right of addressee.

a. In general.

Generally as to the right of addressee of a telegram to sue for delay in delivery, see note to *Anniston Cordage Co. v. Western U. Teleg. Co.* 30 L.R.A.(N.S.) 1116.

In many cases, the courts, without definitely referring the result to any of the theories previously discussed, have held that the addressee may recover from the telegraph company the damages sustained by him in consequence of acting in reliance upon a telegram changed during transmission. *New York & W. Printing Teleg. Co. v. Dryburg*, 35 Pa. 298, 78 Am. Dec. 338, affirming 3 Phila. 408 (the court said that the company was liable regardless of whether it is the agent of both the sender and sendee, or merely the agent of the sendee); *Wolf Co. v. Western U. Teleg. Co.* 24 Pa. Super. Ct. 129 (error reducing estimate of price of machine, in reliance upon which addressee made a contract to erect a light plant); *Joshua L. Bailey & Co. v. Western U. Teleg. Co.* 227 Pa. 522, 43 L.R.A.(N.S.) 502, 76 Atl. 736, 19 Ann. Cas.

negligence in failing to transmit and deliver the telegram as received by it from appellant; that appellee refused to make any correction of the mistake, or to take the excess of oats off his hands; and that he thereupon ordered the brokers to sell to the best advantage the 45,000 bushels of oats not ordered by him, with which order they complied, but, in doing so, appellant sustained a loss of \$205, for which judgment was prayed against appellee, with costs. The answer simply traversed the allegations of the petition.

The agreed facts are as follows:

"First. On September 5, 1911, John McKee delivered to the agent of the Western Union Telegraph Company at Lawrenceburg, Kentucky, a telegram addressed to Henning,

Chambers, & Company, in Louisville, and paid the charges for transmitting and delivering same. Said telegram was in words and figures as follows:

"Lawrenceburg, Ky., Sept. 5, 1911.

"Henning, Chambers, & Company,

"116 S. Fifth St.,

"Louisville, Ky.

"Buy five thousand bushels May oats at the opening of the market to-morrow and report by letter and not by telegram.

"(Signed) Jno. McKee."

"Second. The said telegram when delivered to the addressee, Henning, Chambers, & Company, in Louisville, read: 'Buy fifty thousand bushels,' etc.; the difference be-

895 (an action by a commission merchant for loss sustained by being compelled to fill orders for dry goods under contracts made by him with his customers in reliance upon a telegram from the manufacturer in which the prices had been changed during transmission. The court said that "it is settled in this jurisdiction and by the great weight of authority in this country that a telegraph company is liable in tort to the addressee for injuries arising out of the negligent transmission of an intelligible message."); *Wolfkehl v. Western U. Teleg. Co.* 46 Hun, 542, 12 N. Y. S. R. 555 (telegram refusing to employ the addressee changed so as to apparently offer him employment. The court based its decision upon the ground that the service and the duty of a telegraph company are undertaken for both sender and sendee, and that "either party sustaining damages from the negligent performance of such duty should have remedy by action against the company for their recovery"); *Western U. Teleg. Co. v. Lyon*, 93 Miss. 590, 47 So. 344 (where the addressee received and paid for a quantity of apples without knowledge of an error in transmission of message quoting price).

In *Ferrero v. Western U. Teleg. Co.* 9 App. D. C. 455, 35 L.R.A. 548, in holding that, where a telegram quoting the price of potatoes was changed so that the potatoes were offered at a lower price than that quoted, the addressee could compel the telegraph company to reimburse him for the loss resulting from fulfilling sales made in reliance upon the telegram received, the court, without assigning any particular reason for its decision, said: "With apparent unanimity, the courts of our states have upheld the right of the receiver of a telegraphic message to maintain an action on the case, as for a tort committed, whenever he shall have sustained actual damage, without his own fault, by reason of the negligent alteration of the message in the process of its transmission. . . . As will be seen on examination of their decisions, the American courts have not all agreed upon a common reason for the rule 51 L.R.A. (N.S.)

so generally adopted. The majority, apparently, have rested it upon the idea that the telegraphic agency is engaged in the exercise of a public franchise, having relation to the commerce of and between the states, and in consequence owes to the sender of the message a double duty,—one by reason of the contract, the other by virtue of the general obligation to perform the assumed undertaking; and to the person addressed a single duty, by virtue of the same general obligation. Others take the ground that the person addressed may be the beneficiary of the contract made upon its delivery to the transmitter, and that his right of action does not depend upon whether the sender had been constituted his agent for the purpose, but upon the question who was to be served in the transaction, and who has been damaged. Others, again, assign for reason that the act of the telegraph company, in altering the message, is the misrepresentation of a fact which, if reasonably resulting in injury to the receiver, entitles him to an action for his damages."

The sendee of a telegram, who has a cause of action against the telegraph company for an error in the transmission of the message, must seek his remedy in tort, and not in contract, where there is no contract relation between him and the telegraph company. *Western U. Teleg. Co. v. Dubois*, 128 Ill. 248, 15 Am. St. Rep. 109, 21 N. E. 4. The court says: "Telegraph companies are the servants of the public, and bound to act whenever called upon, their charges being paid or tendered. They are, in that respect, like common carriers, the law imposing upon them a duty which they are bound to discharge. The extent of their liability is to transmit correctly the message as delivered. . . . Hence, when the receiver of a despatch suffers loss from the careless and negligent performance of its duty by such a company, he is entitled to recover damages for the tort, and the proper remedy is an action on the case."

In *Rose v. United States Teleg. Co.* 3 Abb. Pr. N. S. 408, 34 How. Pr. 308, a telegram authorizing the sale of a certain

tween the telegram as received and as delivered being that the word 'five' before the word 'thousand,' as written in the telegram received by the company's agent at Lawrenceburg, was changed to read fifty.'

"Third. Said telegraphic order to buy oats was executed by plaintiff's brokers, the addressee, Henning, Chambers, & Company, in the terms in which said telegram was delivered to said addressee, to wit, 50,000 bushels, and not in the terms written by this plaintiff, to wit 5,000 bushels.

"Fourth. When notified by Henning, Chambers, & Company, of this purchase of 50,000 bushels of May oats, said McKee notified the defendant corporation and its manager at Louisville, Kentucky, and requested and demanded said corporation and its said manager to correct said mistake and wrong done him, which was refused.

"Fifth. Thereupon said McKee accepted said excess of 45,000 bushels of oats, and ordered his brokers, said Henning, Chambers, & Company, to sell to the best advan-

number of barrels of oil by the sender's broker was changed by the telegraph company so as to authorize the sale of a much larger number of barrels. The action was brought by the broker to recover damages which he would sustain in fulfilling the contracts of sale made in reliance upon the number of barrels stated in the telegram. The court held that, inasmuch as the telegraph company was not the agent of the sendee, his action would have to be in tort for the actual damage sustained, and that, as the principal, and not the broker, was liable on the contracts of sale made by the latter, he was not damaged and had no cause of action at all.

It is held in *Anniston Cordage Co. v. Western U. Teleg. Co.* 161 Ala. 216, 30 L.R.A.(N.S.) 1116, 135 Am. St. Rep. 124, 49 So. 770, that where the telegraph company is not informed by the sender of a message that it is for the benefit of the sendee, and the wording of the message is not such as to charge the company with knowledge of that fact, the addressee cannot recover from the company in tort for a mistake in the transmission of the message. This is upon the theory that all actions by the sendee, whether in tort or contract, must be based upon the contract of transmission.

Where a telegram quoting the price of potatoes is changed in transmission so as to offer them for a lower price than that quoted, and the addressee, with knowledge of the mistake, accepts the potatoes at the price quoted, he has no right of action against the telegraph company for the loss thus sustained, whether it be considered the agent of the receiver or sender of the message. *Joynes v. Postal Teleg. Cable Co.* 37 Pa. Super. Ct. 63.

b. Telegraph company as agent of sender.

The theory discussed in I. a, that the telegraph company is the sender's agent, has been applied in some cases by holding that the addressee could not recover against the telegraph company.

Thus in *Playford v. United Kingdom Electric Teleg. Co. L. R. 4 Q. B. 706*, holding that the addressee [an ice dealer] of a telegram containing an offer for ice which was raised in transmission could not

recover against the telegraph company although he delivered the ice without knowledge of the error, the court said: "The offer was sent by them [the purchasers] on their own behalf and in their own interest. In so doing they acted, it is true, on the invitation of the plaintiff, but not as his agents or as representing him; and the circumstance that there was an implied understanding between them that, in the event of his accepting their offer, he should reimburse them the expense of making it, in no way alters the relation between the two parties, which was that of seller and buyers, and not that of principal and agents. It follows that the plaintiff, who is a stranger to the contract with the company, cannot maintain an action against them for the breach of it."

So, the telegraph company is the agent of the sender, and the sendee must look to the latter for reparation for damages sustained as the result of the erroneous transmission of a telegram. *Brooke v. Western U. Teleg. Co.* 119 Ga. 694, 46 S. E. 826. This case, like some of the other Georgia cases, is based upon the establishment of the rule rather than the correctness thereof.

The preceding case was cited and followed in *Richmond Hosiery Mills v. Western U. Teleg. Co.* 123 Ga. 216, 51 S. E. 290, where it was held that, on the theory of the relationship of agency existing between the sender and the telegraph company, the sendee might hold the sender according to the terms of the telegram as received, and that the sendee's release of the sender from such contract did not give the sendee a right of action against the telegraph company for errors made in the transmission of a telegram.

However, it is held in *Stewart, M. & Co. v. Postal Teleg. Cable Co.* 131 Ga. 31, 18 L.R.A.(N.S.) 692, 127 Am. St. Rep. 205, 61 S. E. 1045, that, although the sendee may hold the sender according to the terms of the communication received, he is not confined to that remedy, but may sue the telegraph company in tort. The court says that in so far as the preceding case of *Brooke v. Western U. Teleg. Co.* "denies the right of action *ex delicto* to an addressee of a telegram against a telegraph company for damages proximately caused by an error in transmission, it is disapproved."

E. L. D.

tage the said 45,000 bushels of oats not originally ordered by him.

"Sixth. Said Henning, Chambers, & Company sold said 45,000 bushels of oats pursuant to said McKee's instructions, and to his loss in the sum of \$205.

"Seventh. Said 45,000 bushels of oats were bought by said Henning, Chambers, & Co. at 49 cents on the morning of September 6th. Between the time of purchase and the time of sale the highest price quoted on the Chicago market for such oats was 49½ cents a bushel; and there was no time at which the same could have been sold at a price which would have realized a sum equal to their purchase price, plus the commission of said Henning, Chambers, & Company, on the purchase thereof.

"The plaintiff, McKee, contends that the Western Union Telegraph Company is liable to him for the loss sustained by him in the purchase and sale of the said 45,000 bushels of May oats. The defendant, Western Union Telegraph Company, contends that there was never a meeting of minds between said McKee and said brokers, Henning, Chambers, & Company, that said McKee was not bound to accept more than the 5,000 bushels of oats actually ordered by him; that his acceptance of the 45,000 bushels not ordered by him was a voluntary act on his part, and for any loss resulting to him because of said acceptance and sale the said telegraph company disclaims all responsibility."

A trial by jury was waived, and following the submission of the case to the court, judgment was entered dismissing the petition at appellant's cost; and, from that judgment, he has appealed.

It is conceded by the parties that the appellee, Western Union Telegraph Company, is neither the agent nor servant of the sender or addressee of a telegram transmitted by it, but that its relation to both is that of an independent contractor or public carrier. Upon looking, however, to the authorities upon this subject, we find them far from harmonious. Some of them hold that the telegraph company is the agent of the sender alone, and that he is bound by the message as delivered by the company; others, that the telegraph company is the agent of both the sender and addressee, and therefore liable to both in contract; yet others, that the telegraph company is the agent of neither the sender nor addressee, but an independent principal, and liable to either for the proximate result of its negligence. The latter doctrine obtains in England, in many of the states of this country, and was approved by this court in *Postal Teleg. Cable Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119, in the opinion of 51 L.R.A. (N.S.)

which it is said: "It is the contention of appellees that appellant was their agent in sending the telegram to Bernstein & Company and that the delivery of the erroneous message created and gave rise to a valid and enforceable contract on their part to deliver the potatoes to the sendee at the price named, and this view seems to have been taken by the Ohio magistrate, who presided in the trial of the suit instituted by Bernstein & Company against plaintiff; but, in our opinion, this view of the law is an erroneous one, and is in conflict with the great weight of authority both in England and in this country. Gray, in his treatise on Communications by Telegram (page 189) says: 'A telegraph company may perhaps be called a "special agent," since it is employed to do a particular act, namely, to communicate a certain message. If so, the employer is responsible on the message as delivered only where that message is the one which he authorized the company to communicate, as distinguished from a certain message.' And he refers to Story on Agency, 8th ed. §§ 126-133. The same author also says: 'A person who employs a telegraph company authorizes it and holds it out as authorized, only to communicate a certain message; and, while he is responsible upon the message if the company duly delivers it, he is not responsible upon any other message which the company may deliver in its stead.' This exact question was fully considered in the case of *Pepper v. Western U. Teleg. Co.* decided by the supreme court of Tennessee, and reported in 87 Tenn. 554, 4 L.R.A. 661, 10 Am. St. Rep. 699, 11 S. W. 783.

But, without further considering this aspect of the case, it seems to be well settled that while a telegraph company must answer to the sender of a telegram erroneously transmitted by the company, where the sender has himself acted in good faith on the error, to his injury, it is, on the other hand, equally well settled that no responsibility can be made to rest upon the telegraph company for the erroneous transmission of a telegram where the sender, after discovery of the error of the company, gratuitously assumes the responsibility for the addressee's action in obeying the instructions contained in the telegram as erroneously transmitted by the company, as seems to be the situation presented in the instant case. Appellant, as sender of the telegram to Henning, Chambers, & Company, was not bound by its terms as erroneously transmitted and delivered to them by appellee, and when advised by Henning, Chambers, & Company, of the action taken by them pursuant to the erroneous advice contained in the telegram, appellant could

have refused to be bound for the overpurchase of oats made by them, and thereby saved himself from loss; but, instead of doing this, according to the agreed facts, he directed them to sell on the best terms possible the excess over 5,000 bushels of the oats purchased by them, and demanded of appellee that it correct the mistake it had made in the telegram, and assume responsibility for the loss he sustained resulting, as claimed, from its erroneous transmission and delivery of the telegram to the addressee. It cannot therefore be said that appellant acted reasonably and in good faith on the error committed by appellee, to his prejudice. If, without knowledge of the error committed by appellee in transmitting and delivering the telegram to Henning, Chambers, & Company, he had directed the sale of the oats they purchased for him, and by such sale suffered loss, appellee would, in that event, have been liable to him for the damages he thereby sustained, the measure of which would have been the difference, if any, between the price he was forced by appellee's error to pay for the oats and their market price immediately after the mistake was discovered; but when, after discovering the mistake, he accepted and approved what had been done by Henning, Chambers, & Company, in obedience to the telegram as erroneously transmitted and delivered to them by appellee, and directed them to sell the oats, he condoned the error committed by appellee in the transmission and delivery of the telegram, at least to the extent of releasing them from liability for the loss sustained by him in the sale of the oats.

The precise question before us does not seem to have been decided in this jurisdiction, but it has elsewhere been passed on. But only one of these decisions (*Eureka Cotton Mills v. Western U. Teleg. Co.* 88 S. C. 498, 70 S. E. 1040, Ann. Cas. 1912C, 1273) can be said to sustain appellant's contention, which is that appellee, as an independent principal or public carrier, is under a liability to reimburse appellant for whatever loss he sustained resulting from its erroneous transmission of the telegram, regardless of the fact that he was not bound by what the addressee did in acting upon the erroneous telegram, and of the further fact of his acceptance of such action of the addressee after he received notice of appellee's erroneous transmission of the telegram. In *Eureka Cotton Mills v. Western U. Teleg. Co.* supra, the facts seemed to be that the plaintiff received a telegram from the Jenks Spinning Company inquiring if they would authorize the spinning company to sell for it on commission 100,000 pounds of yarn at 24 cent a pound. By way of re-

ply, the plaintiff delivered to the telegraph company a telegram which informed the spinning company that it would sell the yarn at 24½ cents a pound. But, as delivered to the addressee, the words "at 24½ cents" were omitted. Upon receiving this altered telegram, the spinning company assumed an acceptance of their inquiry or offer to sell the yarn at 24 cents, and proceeded to dispose of it at that price. When notified of the mistake, the plaintiff at once refused to ship the yarn at 24 cents, but finally did so. It was held by the court that the telegraph company was liable to the plaintiff as a common carrier is liable to either sender or addressee for any damage occurring by the company's negligence, but the reasoning of the opinion is brief and unsatisfactory, and the question whether the loss suffered was the result of the error in transmission of the telegram or plaintiff's own voluntary act does not seem to have been considered; and, after all, it merely held that a telegraph company is an independent principal, liable in tort to either party for the direct and proximate result of its negligence, if its breach of duty resulted directly or indirectly in injury to the sender.

The case of *Western U. Teleg. Co. v. Shotter*, 71 Ga. 760, also relied on by appellant, falls short of sustaining his contention. While the language of the opinion, considered apart from the facts, apparently justifies its citation by the brief of counsel, it does not really do so, because it appears, from the facts stated therein, that the supposed offer by the sender of the telegram had, in fact, been accepted by the addressee, and the merchandise actually shipped by the sender of the message before the mistake was discovered. It will also be found from an examination of the opinions in *Postal Teleg. Cable Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119, and *Fisher v. Western U. Teleg. Co.* 119 Ky. 885, 84 S. W. 1179, cited by appellant's counsel, that they likewise fail to support his view of the law attempted to be applied to this case. In the *Schaefer* Case a telegram was sent by the appellee to brokers in Cleveland, offering potatoes at \$1.70 a barrel. The addressees replied: "Telegram received ship two cars your price." On receipt of this telegram, appellee shipped two carloads of potatoes to the addressees at Cleveland, and mailed invoice and draft with bill of lading attached. The discovery was then made that appellee's message, which had been written \$1.70 per barrel, had been erroneously delivered to the addressees reading \$1.07 per barrel. Following the discovery of the mistake, the addressees refused to take the potatoes at \$1.70, and the appellee refused to

take \$1.07 for them. Upon the arrival of the potatoes in Cleveland, the addressees sued Schaefer for the difference between the price of \$1.07, claimed by them, and the market value of the potatoes, and attached the potatoes in the hands of the railroad. The telegraph company, though informed of the situation, refused to enter into the controversy. The appellee made defense in the suit in Cleveland'. In the meantime the potatoes, which remained in the freight car, were spoiling, and, by reason thereof, the railroad company sold them for the freight, and held the balance of the price obtained pending the termination of the Cleveland suit. Appellee, having lost that suit, brought an action against the telegraph company for the value of the potatoes, plus the cost of the Cleveland suit, less the sale price of the potatoes at Cleveland, with freight deducted. On the appeal we held that, while there was no contract made between the sender and the addressees of the message erroneously transmitted, and the former was not bound by the terms of the message as delivered, he was entitled to recover from the telegraph company any damages incurred as the direct and proximate result of its negligence; the measure of recovery being the difference between the market value of the potatoes at Louisville when shipped and at Cleveland when the mistake was discovered. It will be observed, however, that the mistake was discovered while the potatoes were in transit, and before any delivery had been made to the consignee, so the telegraph company was never relieved of liability for its mistake in transmitting the message by any act upon the part of the sender condoning the mistake, and, after all, the principal question decided in the case was that, where a telegraph company negligently delivers a different message from that it was authorized to deliver, so that the sender was represented as offering goods at a lower price than that at which he had in fact offered them, and the supposed offer was accepted in ignorance of the mistake, there was no contract, and the sender was not bound to deliver the goods at the lower price at which the addressee of the message mistakenly supposed he was to get them, and the latter was not bound to accept the goods at the higher price at which the message, as delivered to the telegraph company, proposed to sell them; therefore the sender had the right to look to the telegraph company for the loss sustained, as it resulted solely from its negligence.

In *Fisher v. Western U. Teleg. Co.* the facts were that the plaintiff's offer to sell lumber at \$35 per thousand was negligently transmitted by the telegraph company so as 51 L.R.A. (N.S.)

to read \$25 per thousand, and was accepted and the lumber furnished by the seller without knowledge of the mistake in the transmission of the message. The company also received the lumber without knowledge of the mistake in the message, and believing that they were to get it at \$25 per thousand. As the sender was able to collect of the latter only that price for the lumber, it was held he had the right to recover of the telegraph company the loss resulting to him from its mistake, which was the difference between the price its negligence compelled him to receive for the lumber and its fair market value at the place of delivery.

It will readily be seen wherein the facts of the instant case differ from those of the two cases last cited. Here the loss was sustained by the appellant, not because of the mistake made by appellee in transmitting and delivering his telegram to the addressee, but because of appellant's gratuitous act in seeing fit, after his discovery of the mistake, to assume the responsibility of the addressee's action; and, applying the rule announced in the *Schaefer* and *Fisher* Cases to the facts of the instant case, it is evident that appellant was not bound to take the 45,000 bushels of oats mistakenly bought for him by Henning, Chambers, & Company, or any excess of the 5,000 bushels actually ordered by him, and, if he had repudiated instead of ratifying his brokers' purchase of the excess, it would have saved him from loss, and enabled the latter to recover of appellee whatever loss they may have sustained upon the 45,000 bushels of oats they were induced to purchase through its erroneous transmission of the telegram delivered to it by appellant.

Of the several cases cited by appellee in support of its contention as to its nonliability in this case, that of *Shingleur v. Western U. Teleg. Co.* 72 Miss. 1030, 30 L.R.A. 444, 48 Am. St. Rep. 604, 18 So. 425, seems to be directly in point. In that case the plaintiffs, by a telegram to their agents, authorized a sale of cotton at 8½ cents a pound. As transmitted and delivered by the telegraph company, it erroneously authorized the sale of the cotton at 8¼ cents a pound, and the addressee entered into a contract of sale with third parties at that price. After notice of the mistake in the telegram, as received by the addressee, the plaintiffs, considering themselves bound by the message, delivered the cotton to the addressee at the lower price. It was held by the court that the plaintiffs were not required to deliver to the addressee under the erroneous message the cotton to be sold, and that their voluntary act in so doing, and not the negligence of the telegraph company in erroneously transmitting the telegram, was

the proximate cause of the loss sustained by them in the sale of the cotton. In the opinion it is said: "But, whether looked at in the light of contract or of tort, plaintiffs' case comes inevitably to this: That plaintiffs, at a time when they knew fully of the mistake in the telegram, and when they could have delivered or refused to deliver the cotton, and when,—the minds of the plaintiffs and of Appleton, Dixon, & Company [addressee] never having met, and there being, as to this sale, no contract made between them, plaintiffs being therefore under no legal liability to deliver the cotton,—nevertheless, acting on the sentiment that they would themselves protect their agent (already fully protected by the liability in fact of the company to such agent), and maintain their business credit, did deliver the cotton anyhow, and, having done so, now seek to hold the company. . . . Here, appellants had shipped no goods, had incurred no legal liability, had merely to refuse to comply with the terms of a contract they had never made, and remit Appleton, Dixon, & Company to their adequate remedy against the company. Their payment was voluntary and gratuitous, and cannot, on any sound or just principle, create for them a cause of action where none existed prior to such voluntary payment."

To the same effect is the case of *Harrison v. Western U. Teleg. Co.* decided by the Texas court of appeals, reported in 10 Am. & Eng. Corp. Cas. 600. In that case a telegram by which the plaintiff ordered the purchase of cotton was erroneously changed in its transmission to sell. A settlement was made between the plaintiff and addressee upon the terms of the erroneous message, and the former sued the telegraph company for the resulting loss. In holding that the telegraph company was not liable, the court in part said: "The mistake which occasioned the loss, if any was sustained by Latham, Alexander, & Company [addressee], was a mistake of the telegraph company, and not of plaintiffs, and plaintiffs were not bound to pay or make good said loss to Latham, Alexander, & Company; and, if they made such payment, were not liable or responsible therefor; they could not hold the company liable over to them for repayment."

Perhaps the latest decision of this question to which our attention has been called is that of *Western U. Teleg. Co. v. Peter & Neylon*, 160 S. W. 991, decided by the Texas court of civil appeals November 28, 1913, from which it appears that in a telegram sent by plaintiffs to their brokers the latter were instructed to sell cotton futures for their account. In its transmission the telegram was so changed by the telegraph

company as to direct the brokers to buy instead of sell. Immediately following the receipt of the telegram, the addressee purchased cotton for the senders' account. The plaintiffs, with knowledge of the mistake made in the transmission of the telegram, accepted the purchase, and resold it at a loss. It then sued the telegraph company for its loss, but the court said, in reversing the judgment of the lower court: "It appears that, if appellees, when first apprised of this purchase, had repudiated it, no loss would have resulted. . . . Notwithstanding the appellant in the present case was negligent on account of its mistake in transmitting the message, yet we think that, if plaintiffs knew of such fact, or were charged with notice thereof, and could have prevented the loss by resort to available means within their power, and failed to do so, and such failure proximately contributed to such loss, they would be guilty of contributory negligence, and could not recover."

As appellant could not have been held to the terms of the telegram to his brokers as erroneously transmitted and delivered to them by appellee, and he would have suffered no loss on the purchase and sale of the oats but for his own act in accepting, after discovery of the mistake, the brokers' purchase of the oats in excess of the quantity actually ordered by him, it necessarily follows that the negligence of the appellee complained of was not the proximate cause of the damages he sustained; and, as this was the conclusion reached by the Circuit Court, the judgment is affirmed.

LOUISIANA SUPREME COURT.

W. K. HENDERSON, Jr., Appt.,
v.
SHREVEPORT GAS, ELECTRIC LIGHT,
& POWER COMPANY.

(— La. —, 63 So. 616.)

Contract — public — enforcement by individual.

1. A city ordinance which is a contract between the city and a quasi public cor-

Headnotes by SOMMERVILLE, J.

Note. — No case other than *HENDERSON v. SHREVEPORT GAS, E. L. & P. Co.* seems to have passed directly upon the question as to who is a manufacturer within the meaning of an ordinance or contract regulating the rates of public service corporations. At least an extended search discloses no electricity, gas, steam, telegraph, telephone, or water supply case which has passed upon this point.

A case which may be of interest, how-

poration, and which fixes terms upon which the said corporation shall supply gas and electricity to inhabitants of the city, will be enforced in favor of the inhabitants of that city.

Trial — court — construction of contract.

2. Where such ordinance undertakes to divide the inhabitants into three different classes, terming the first "domestic consumption," the second for "public institutions," and the third "manufacturers," and the business of a certain inhabitant does not technically fall within any one of the three classes, it is a question for the court, when appealed to, to construe the contract and to determine within which class said inhabitant and his business shall be placed.

Gas — rate — generation of electricity.

3. A person who owns and conducts an automobile garage in which he uses a gas engine for the purpose of generating an electric current to supply light for a large building in which he carries on his business, to charge electric automobiles and storage batteries, to run lathes and emery wheels, to make parts for cars, to put other parts of automobiles into good condition, to grind valves of cars, and do other work in that connection, will be placed in the class denominated "manufacturers," rather than in either of the classes denominated "domestic consumption" or "for public institutions," and be held obligated to pay the rate fixed for "manufacturers."

(November 17, 1913.)

A PPEAL by plaintiff from a judgment of the Judicial District Court for the Parish of Caddo in defendant's favor in an action for an injunction to restrain defendant from refusing to furnish gas to plaintiff at manufacturers' rates, and for the recovery of the amount paid by him through error on previous monthly bills. Reversed.

The facts are stated in the opinion.

ever, is *St. Louis Brewing Asso. v. St. Louis*, 140 Mo. 419, 37 S. W. 525, on rehearing in 140 Mo. 432, 41 S. W. 911. In that case it was held, construing a city ordinance under which the charges for water were against the person, which provided a certain rate per hundred gallons for supplying water "for purely manufacturing purposes," if the total amount used per year was over a certain amount, and a greater rate if a less quantity was used,—that the total amount of water used in disconnected breweries owned by the same association determined the rate payable, rather than the amount used by each separate brewery. Later this ordinance was amended, so as to render the rate payable determinable by the amount of water consumed by a "manufacturing plant" located in one or more adjoining city blocks, it being held that in such case the brewery association was entitled to the lower rate only where the amount of water consumed by breweries in

Messrs. Scheen & Blanchard, for appellant:..

By using this gas for power for the purpose of generating an electric current for use in his business, plaintiff is entitled under the franchise to the rate named for manufacturers.

26 Cyc. 519; *Beggs v. Edison Electric Illuminating Co.* 96 Ala. 295, 38 Am. St. Rep. 94, 11 So. 381; *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880; *People ex rel. Brush Electric Mfg. Co. v. Wemple*, 129 N. Y. 543, 14 L.R.A. 708, 29 N. E. 808; *Com. ex rel. McCormick v. Keystone Electric Light, Heat & P. Co.* 193 Pa. 245, 44 Atl. 326.

There can be no discrimination in charges that are not based upon difference in service, and where the service is the same, the charges must be uniform.

Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 100, 45 L. ed. 769, 21 Sup. Ct. Rep. 561; 20 Cyc. 1159; *Portland Natural Gas & Oil Co. v. State*, 135 Ind. 54, 21 L.R.A. 639, 34 N. E. 818; *Twin Village Water Co. v. Damariscotta Gaslight Co.* 98 Me. 325, 56 Atl. 1112; *Snell v. Clinton Electric Light, Heat & P. Co.* 196 Ill. 626, 58 L.R.A. 284, 89 Am. St. Rep. 341, 63 N. E. 1082; 30 Am. & Eng. Enc. Law, 2d ed. 426; *Griffin v. Goldsboro Water Co.* 41 L.R.A. 240, and note, 122 N. C. 206, 30 S. E. 319; *Owensboro Gaslight Co. v. Hildebrand*, 19 Ky. L. Rep. 983, 42 S. W. 351; *Cincinnati, H. & D. R. Co. v. Bowling Green*, 57 Ohio St. 336, 41 L.R.A. 422, 49 N. E. 121; *Thornton, Oil & Gas*, p. 578, §§ 526 et seq.; *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; *Danville v. Danville Water Co.* 180 Ill. 235, 54 N. E. 224; *State ex rel. Latshaw v. Water & Light Comrs.* 105 Minn. 472, 127 Am. St.

adjacent blocks exceeded the total set by the ordinance, and that breweries not so located, which did not use a quantity of water exceeding such amount, must pay the higher rate. It should be noted that this case decides what constitutes a "manufacturing purpose" or "manufacturing plant" within the meaning of the ordinance, rather than the question whether or not brewing beer, etc., is manufacturing. It seems to have been assumed, however, that the brewery association was engaged in manufacturing.

Generally, as to definition of the word "manufacturer," or its derivatives, for taxation purposes, see note to *Williams v. Warren*, 64 L.R.A. 33, on "Taxation of manufacturing corporations;" and, specifically, as to whether an electric company is a manufacturing company for purposes of taxation, see note to *Kentucky Electric Co. v. Buchel*, 38 L.R.A. (N.S.) 907.

G. J. C.

Rep. 581, 117 N. W. 827; *Armour Packing Co. v. Edison Electric Illuminating Co* 115 App. Div. 51, 100 N. Y. Supp. 605; *Kennebec Water Dist v. Waterville*, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6; *Wiener v. Louisville Water Co.* 130 Fed. 251; *Baily v. Fayette Gas-Fuel Co.* 193 Pa. 175, 44 Atl. 251; *Miller v. Wilkes-Barre Gas Co.* 206 Pa. 254, 55 Atl. 974; *Shepard v. Milwaukee Gaslight Co.* 15 Wis. 318, 82 Am. Dec. 679; *West Hartford v. Water Comrs.* 68 Conn. 323, 36 Atl. 786; *Griffin v. Goldsboro Water Co.* 122 N. C. 206, 41 L.R.A. 240, 30 S. E. 319; *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 662, 44 S. E. 410; *Mobile v. Bienville Water Supply Co.* 130 Ala. 379, 30 So. 445; *Horsky v. Helena Consol. Water Co.* 13 Mont. 229, 33 Pac. 689; *Dittmar v. New Braunfels*, 20 Tex. Civ. App. 293, 48 S. W. 1114; *State ex rel. Wood v. Consumers' Gas Trust Co.* 157 Ind. 345, 55 L.R.A. 245, 61 N. E. 674; *Westfield Gas & Mill. Co. v. Mendenhall*, 142 Ind. 538, 41 N. E. 1033; *Claffin v. Chicago*, 178 Ill. 549, 53 N. E. 339; *State ex rel. Webster v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237; *Sammons v. Kearney Power & Irrig. Co.* 77 Neb. 580, 8 L.R.A.(N.S.) 404, 110 N. W. 308; *Richmond Natural Gas Co. v. Clawson*, 155 Ind. 659, 51 L.R.A. 744, 58 N. E. 1049; *Notes to New York Teleph. Co. v. Siegel-Cooper Co.* 36 L.R.A.(N.S.) 560.

Messrs. Alexander & Wilkinson, for appellee:

Plaintiff is not a manufacturer.

New Orleans v. LeBlanc, 34 La. Ann. 596; *New Orleans v. Ernst*, 35 La. Ann. 746; *State v. New Orleans R. & Light Co.* 116 La. 144, 40 So. 597, 7 Ann. Cas. 724; *New Orleans v. Mannessier*, 32 La. Ann. 1075; *Cohn v. Parker*, 41 La. Ann. 894, 6 So. 718.

The significance of the term "domestic" must always be determined with reference to the subject-matter and the relation in which it appears, and thus viewed in a contract for supplying gas, it applies to churches, opera houses, stores, offices, shops, and a garage.

Erie v. Erie Gas & Mineral Co. 78 Kan. 348, 97 Pac. 468; *Kimball v. North East Harbor Water Co.* 107 Me. 467, 32 L.R.A.(N.S.) 805, 78 Atl. 865.

In the absence of statute, a lesser charge by a public service corporation for the performance of its functions to one individual than is charged to another is not illegal or an unjust discrimination where it appears that its charge is a reasonable one, especially when the lesser rate is given to persons not engaged in the same kind of business as the complainant nor in any sense his competitor.
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5 Am. & Eng. Enc. Law, 179; *DeMenacho v. Ward*, 23 Blatchf. 505, 27 Fed. 529; *Johnson v. Pensacola & P. R. Co.* 16 Fla. 623, 26 Am. Rep. 734; *Ex parte Benson*, 18 S. C. 38, 44 Am. Rep. 566; *Parsons v. Chicago & N. W. R. Co.* 167 U. S. 454, 42 L. ed. 234, 17 Sup. Ct. Rep. 887; *Cowden v. Pacific Coast S. S. Co.* 94 Cal. 470, 18 L.R.A. 221, 28 Am. St. Rep. 142, 29 Pac. 873; *State ex rel. Ferguson v. Birmingham Waterworks Co.* 164 Ala. 586, 27 L.R.A.(N.S.) 674, 137 Am. St. Rep. 69, 51 So. 354, 20 Ann. Cas. 951; *Brown v. Birmingham Waterworks Co.* 169 Ala. 230, 52 So. 915; *Boerth v. Detroit City Gas Co.* 152 Mich. 654, 18 L.R.A.(N.S.) 1197, 116 N. W. 628; *Concord & P. R. Co. v. Forsaith*, 59 N. H. 122, 47 Am. Rep. 181; *Killmer v. New York C. & H. R. R. Co.* 100 N. Y. 395, 53 Am. Rep. 194, 3 N. E. 293; *Bayles v. Kansas P. R. Co.* 13 Colo. 181, 5 L.R.A. 480, 2 Inters. Com. Rep. 643, 22 Pac. 341; *Forman v. New Orleans & C. R. Co.* 40 La. Ann. 446, 4 So. 246.

Where plaintiff is charged a reasonable rate for services rendered by a public service corporation, he cannot demand to be placed in a class in favor of whom he alleges the public service corporation has unjustly and illegally discriminated. The remedy, if any, is to raise the rates of those in favor of whom discriminations are made.

Chouteau v. Union R. & Transit Co. 22 Mo. App. 286.

Where there is competition between public service corporations, a lower rate may be given by either of the competing companies at points of competition, without being guilty of an illegal or unjust discrimination.

Thornton, Oil & Gas, 579; *Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission*, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 803, 167 U. S. 633, 42 L. ed. 306, 17 Sup. Ct. Rep. 986; *East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516.

Sommerville, J., delivered the opinion of the court:

Under an ordinance of the city of Shreveport, the defendant company was granted the right to operate a natural and artificial gas plant, and lay gas pipes through the streets and alleys and other public places in the city, and to charge for the gas consumed. The consumers were divided into three classes, with a certain charge for each class. The first class covers "domestic consumption," for which a maximum charge of 25 cents for 1,000 cubic feet of gas, less a discount for prompt payment, is fixed. The next class is for "public institutions,"

which may be charged a maximum of 20 cents per 1,000 cubic feet, less a discount for prompt payment. And the third class is that of "manufacturers," which may be charged a maximum of 11 cents per 1,000 cubic feet, less a discount for prompt payment. The price to be paid by manufacturers was also graduated, so as to permit a larger discount where certain designated cubic feet of gas were used.

Plaintiff owns and conducts an automobile garage, in which he uses a gas engine for the purpose of generating an electric current to supply the lights for a large building, to charge electric automobiles and storage batteries, to run his lathes and emery wheels, with which he makes parts for cars when necessary, and places other parts of automobiles in condition so that they can be used, and to grind the valves of cars, and other work in this connection.

Defendant has classed plaintiff under the second paragraph of the 1st section of the ordinance, headed "domestic consumption," and has charged him the highest rate permitted by the ordinance for the natural gas furnished by it. Plaintiff complains that the charge made by defendant is illegal, unreasonable, and excessive. He claims that his business falls within the fourth paragraph of the 1st section of the ordinance, headed "manufacturers," and that he should be charged the rate therein established. He asked for an injunction restraining defendant from refusing to furnish gas to him at the rate fixed for "manufacturers," and for a moneyed judgment for the amount paid by him through error on his previous monthly bills. There was judgment dissolving the injunction and dismissing plaintiff's suit; and he appeals.

The ordinance which is the basis of and a part of the contract between the city of Shreveport and the defendant company is very short, and it undertakes to provide certain rates for all the gas consumed by the inhabitants of the city. And they are divided into only three classes, with a different rate or charge for each class before stated. Defendant, being engaged in furnishing the city of Shreveport with gas and electric power for lighting, heating, and power, is in the nature of a quasi public service corporation, it is being operated under a franchise granted by the common council of the city of Shreveport, and under an ordinance which undertakes to say that defendant shall supply gas and electricity to the inhabitants of the city at certain maximum rates, with the proviso: "That a less amount may be charged by the said company on its own motion, but no greater amount shall be charged."

In thus undertaking to provide the 51 L.R.A.(N.S.)

rates to consumers for gas and electricity to be furnished by the defendant, and plaintiff's business not being specifically mentioned in the ordinance, the question presented for consideration is: Within which class does a person fall who conducts an automobile garage in which he uses a gas engine for the purpose of generating electricity to be used in his business, and where that engine is supplied with fuel gas by the defendant company? The question may be solved by a process of elimination; for it is clear that plaintiff is entitled to get gas from the defendant company, and that he must pay one of the rates established in the ordinance which grants to the defendant company the right to furnish and charge for gas.

The first class provides for "domestic consumption." "Domestic" is defined by Webster to be: "Of or pertaining to one's house or home, or one's household or family; relating to home life; as domestic concerns, life, duty, happiness, worship, service." See also 3 Words & Phrases, 2164. The word "domestic" therefore excludes the idea of business, unless one pursues his vocation or calling within his home. The Century defines "domestic" to be: "Relating or belonging to the home or household or to household affairs; pertaining to one's place of residence, or to the affairs which concern it, or used in the conduct of such affairs."

And it is this commonly accepted meaning that the council of the city of Shreveport had in mind when it passed the ordinance referred to, and provided a price to be paid for the "domestic consumption" of gas. Plaintiff does not operate his automobile garage in his home or residence. It is a separate and distinct place of business, where he uses a gas engine for the purpose of generating electricity to be used there by him in the conduct of his business. He is not therefore a domestic consumer, and he cannot be charged the rates for "domestic consumption" of gas.

The next paragraph provides for "public institutions" which use gas. A "public institution" is: "One which is created and exists by law or public authority" (32 Cyc. 787), such as an asylum, charity, college and university, hospital, schoolhouse, etc. Plaintiff's business is not a public institution.

The fourth and last paragraph in the ordinance provides prices or rates to be paid by "manufacturers." And so we are forced to the conclusion that the city council of the city of Shreveport intended to embrace in this paragraph all forms of business, except those of public institutions. The word "manufacturers" appears to have

been used to distinguish the use of gas for cooking, heating, and lighting homes and residences, and again for cooking, heating, lighting, and power purposes in "public institutions," from the use of gas for power purposes, which is more generally and largely used in manufacturing than in other businesses.

There is not a doubt that, when the council passed the ordinance and used the term "domestic consumption," it referred to the consumption of gas for cooking, heating, and lighting in homes and residences, which are the ordinary domestic purposes to which gas may be put; and, in the absence of any clause to the contrary, it is quite clear that the council did not contemplate that gas should be charged for as for domestic consumption when it was used for power purposes.

And, while the use of gas for power purposes does not in every instance result in the manufacture of some article, yet, in the instant case, the gas used by the plaintiff in his business does generate electricity which produces light for the purposes of his business of carrying on an automobile garage, where he further uses the electricity for his lathes and other implements in that business.

It has been held that "the production of electricity by artificial means in a condition fit for use is generally held to be manufacture, and the theory that it is merely the gathering and use of a gift of nature is disapproved." 26 Cyc. 522. And in the case of *Beggs v. Edison Electric Illuminating Co.* 96 Ala. 295, 38 Am. St. Rep. 94, 11 So. 381, the court said: "According to the above definitions of the word manufacture, we are constrained to consider and declare an electric light company a manufacturing corporation to all intents and purposes. It is no answer to this argument to say that electricity exists in a state in nature. . . . It is the produce of capital and labor, and in this respect cannot be distinguished from ordinary manufacturing operations." *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880; *People ex rel. Brush Electric Mfg. Co. v. Wemple*, 129 N. Y. 543, 14 L.R.A. 708, 29 N. E. 808; *Com. ex rel. McCormick v. Keystone Electric Light, Heat & P. Co.* 193 Pa. 245, 44 Atl. 326.

In the case of *State v. New Orleans R. & Light Co.* 116 La. 144, 40 So. 597, 7 Ann. Cas. 724, where that company claimed exemption from license taxation, we say: "An electric light company is not a 'manufacturer' in the sense of the exemption clause of article 229 of the Constitution of 1898, authorizing the legislature to impose license taxes." We further say there: "In the ordinary popular meaning of the word, a 51 L.R.A. (N.S.)

corporation which operates gas or electric works is not a 'manufacturer,' and is not so styled, though, scientifically speaking, gas or electricity may be a product of manufacture."

And we therein apply the rule that tax exemptions are strictly construed, and hold that the light company is not exempt from taxation under the provisions of the Constitution which exempt manufacturers from taxation.

On the other hand, we have held that a cooper is a manufacturer, and exempt (*New Orleans v. Le Blanc*, 34 La. Ann. 596); that rice millers are also manufacturers, and exempt from the payment of license taxes (*New Orleans v. Ernst*, 35 La. Ann. 746); that refiners of sugar are manufacturers and exempt (*State v. American Sugar Ref. Co.* 108 La. 603, 32 So. 965, 973; see also *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249, 254); that a publisher of a newspaper is a manufacturer and exempt (*State v. Dupre*, 42 La. Ann. 561, 7 So. 727); and that a sawmill is exempt (*State ex rel. Browne v. A. W. Wilbert's Sons Lumber & Shingle Co.* 51 La. Ann. 1223, 26 So. 106).

Other jurisdictions have been equally lenient in holding certain businesses as being within the term "manufacturers," and in not restricting the term to those who produce some material substance or article from the raw material, such as a bridge building company, an asphalt company, a boiler maker, packing of beef, milling, etc.

And under the express provisions of Laws (III.) 1893, p. 99, the words "manufacturing establishment, factory, or workshop," wherever used in such act, which declares that no female shall be employed in any manufacturing establishment, factory, or workshop, etc., more than eight hours in any one day, etc., shall be construed to mean any place where goods or products are manufactured or repaired, cleaned, or sorted, in whole or in part, for sale or for wages. *Ritchie v. People*, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454.

It has also been held that every person who purchases, receives, or holds personal property of any description, for the purpose of adding to the value thereof by any process of manufacturing, refining, rectifying, or by a combination of different materials, with a view of making a gain or profit by so doing, shall be held to be a "manufacturer" for the purposes of the revenue act.

"The primary meaning of the word 'manufacture' is something made by hand, as distinguished from a natural growth; but, as machinery has largely supplanted this

primitive method, the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. Ordinarily the article so manufactured takes a different form, or at least subserves a different purpose, from the original materials, and usually it is given a different name. Raw materials may be, and often are, subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product." 5 Words & Phrases, 4348.

All definitions of the term "manufacture" or "manufacturing" limit them to the production of material substances. And it is held in some jurisdictions that, because electricity is not a material substance, the electric companies are not manufacturers; while the opposite view is held in other jurisdictions.

As has been before seen, plaintiff is engaged in the automobile garage business, where he uses the gas furnished by the defendant for the purpose of generating electricity which is used by him for lighting purposes in his business, for charging electric automobiles and storage batteries, to run his lathes and emery wheels, with which he makes parts for cars when necessary, and places other parts of automobiles in condition so that they can be used, and to grind valves of cars and other work in that connection. And, while the electricity used by him from the gas furnished by defendant may not be a material substance, it is a very necessary substance in his business; and as that business is not provided for in the ordinance under consideration, and as he is entitled to receive gas from the defendant company, and he is obliged to pay for same in accordance with the contract between the city of Shreveport and defendant, he must fall within one of the three classes found in the ordinance or contract.

In construing the terms of contracts we do not apply the rule of strict construction applicable to exemptions from taxation. Plaintiff comes nearer being a manufacturer than he does a domestic consumer or a public institution; and he must pay the rate established in the ordinance for gas used by "manufacturers."

The judgment appealed from is annulled, avoided, and reversed; and it is ordered, adjudged, and decreed that there be judgment in favor of plaintiff and against defendant in the sum of \$181.53; and that the injunction herein issued be reinstated and maintained, with costs in both courts.

Petition for rehearing denied December 15, 1913.
51 L.R.A. (N.S.)

MICHIGAN SUPREME COURT.

BERTHA GRANGER, by Next Friend, Plff.
in Err.,
v.

WALTER S. FARRANT.

(— Mich. —, 146 N. W. 218.)

Evidence — repairs to automobile — self-serving declarations.

1. Upon the question of negligence of the owner of a garage in driving a car against another on the highway, repair tickets issued by the garage showing the nature of repairs made upon his car are not admissible in evidence, nor is a private letter from him relating to repairs made just prior to the accident admissible, since they are mere self-serving declarations.

Highway — negligent driving of automobile — forcing other car off from road.

2. The driver of an automobile who overtakes and passes another car at such speed, and returns to the right side of the road so close to it as to disconcert its driver by striking the car and causing it to swerve over the embankment, is liable for the injury thereby inflicted upon the occupants of the car, although the blow was not sufficient to propel the car over the embankment.

Negligence — of driver of automobile — imputation to guest.

3. The negligence of the owner of an automobile in not properly controlling it when another machine is brought into collision with it, by reason of which it leaves the road and injures a guest riding in the machine, is imputable to the guest.

(March 26, 1914.)

Note. — Automobiles: liability for crowding automobile off the road.

Little authority has been disclosed upon the question of liability for injuries resulting from crowding an automobile off the road. The instruction of the trial court in GRANGER v. FARRANT to the effect that if the defendant's car hit the one in which the plaintiff was riding, but the hitting did not send it over the embankment and cause the injury, then the defendant's negligent act would not be the proximate cause of the injury, and no recovery could be had, does not appear to be sound, but it would seem that in such case, as was held by the appellate court, a recovery should be allowed if it is found that, by reason of the defendant's driving his car in contact with that in which the plaintiff is riding, the driver of the latter is taken unaware, and in seeking to avoid injury to the defendant's car he is compelled to go so near an embankment as to lose his balance and go over, by reason of which the plaintiff was injured.

In Mark v. Fritsch, 195 N. Y. 282, 22 L.R.A. (N.S.) 632, 133 Am. St. Rep. 800, 88 N. E. 380, where damages had been sus-

ERROR to the Circuit Court for Kent County to review a judgment in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Ellis, Colwell, & Ellis, for plaintiff in error:

A party in a suit cannot suppress the real evidence, and place in evidence, in its place and stead, his self-serving entries, letters, and statements.

1 Wharton, Ev. §§ 100, 101; Kerr v. Bennett, 109 Mich. 547, 67 N. W. 564; Vanneter v. Crossman, 42 Mich. 465, 4 N. W. 216; Kehrig v. Peters, 41 Mich. 475, 2 N. W. 801; Baumgardner v. Henry, 131 Mich. 240, 91 N. W. 169; Roseboom v. Billington, 17 Johns. 182; Schermerhorn v. Schermerhorn, 1 Wend. 119; Bowie v. Maddox, 29 Ga. 285, 74 Am. Dec. 61; Anthoine v. Coit, 2 Hall, 40; Ligon v. Orleans Nav. Co. 7 Mart. N. S. 682; Watson v. Osborne, 8 Conn. 363; Bruce v. Dyall, 5 T. B. Mon. 125; Romig v. Romig, 2 Rawle, 241; State Bank v. Clark, 8 N. C. (1 Hawks) 36; Cook v. American Luxfer Prism Co. 93 Ill. App. 299; Brown v. Bronson, 93 App. Div. 312, 87 N. Y. Supp. 872; Smith v. Rentz, 131 N. Y. 169, 15 L.R.A. 138, 30 N. E. 54; Wangner v. Grimm, 169 N. Y. 421, 62 N. E. 569; Frike v. Orr, 109 Ill. App. 200; Work Bror v. Kinney, 8 Idaho, 771, 71 Pac. 477; Dundas v. Lansing, 75 Mich. 499, 5 L.R.A. 143, 13 Am. St. Rep. 457, 42 N. W. 1011; Lord v. Detroit Sav. Bank, 132 Mich. 510, 93 N. W. 1063; Jones v. Portland, 88 Mich. 605, 16 L.R.A. 437, 50 N. W. 731; Whitney v. Houghton, 125 Mass. 451; Marcy v. Barnes, 16 Gray, 161, 77 Am. Dec. 405; Lucas v. Trumbull, 15 Gray, 306; Nourse v. Nourse, 116 Mass. 101; Comstock v. Georgetown Twp. 137 Mich. 561, 100 N. W. 788; Drake Coal Co. v. Croze, 165 Mich. 120, 130 N. W. 355; Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 544, 31 Am. Rep. 321; Burley v. German American Bank, 111 U. S. 216, 28

L. ed. 406, 4 Sup. Ct. Rep. 341; Holbrook v. Murray, 20 Vt. 525; Winner v. Bauman, 28 Wis. 563.

The court had no legal right to determine the question of negligence.

Scharman v. Bay County Bridge Commission, 158 Mich. 77, 122 N. W. 1098, 123 N. W. 1106; Fox v. Spring Lake Iron Co. 89 Mich. 387, 50 N. W. 872, 16 Am. Neg. Cas. 31; St. Clair Mineral Springs Co. v. St. Clair, 96 Mich. 463, 56 N. W. 18; Central R. Co. v. Thompson, 76 Ga. 781; Montgomery & W. P. R. Co. v. Boring, 51 Ga. 582, 2 Am. Neg. Cas. 358; Florida, C. & P. R. Co. v. Pitts, 112 Ga. 846, 38 S. E. 85, 9 Am. Neg. Rep. 463; Green v. Michigan C. R. Co. 168 Mich. 104, 133 N. W. 956, Ann. Cas. 1913C, 98; Flynn v. Staples, 34 App. D. C. 92, 27 L.R.A. (N.S.) 792.

When there is evidence tending to support the claim of a party litigant, the case should be submitted on his theory, as well as on that of his opponent.

Miller v. Miller, 97 Mich. 151, 56 N. W. 348; Wildey v. Crane, 69 Mich. 17, 36 N. W. 734; Poole v. Consolidated Street R. Co. 100 Mich. 379, 25 L.R.A. 744, 50 N. W. 390, 4 Am. Neg. Cas. 169; Schroeder v. Flint & P. M. R. Co. 103 Mich. 213, 29 L.R.A. 321, 50 Am. St. Rep. 354, 61 N. W. 663; American Cushman Teleph. Co. v. Noble, 98 Mich. 67, 56 N. W. 1100; Potter v. Moran, 61 Mich. 60, 27 N. W. 854.

Messrs. Dunham & Dunham, for defendant in error:

Records of the factory were admissible in evidence.

Wigmore, Ev. §§ 1525, 1526; Ganahl v. Shore, 24 Ga. 14; Nelson v. First Nat. Bank, 16 C. C. A. 425, 32 U. S. App. 554, 69 Fed. 805.

Unless it is definitely alleged that the violation of some duty contributes in some manner to an injury, it is not a good allegation, and it is not competent for a court to allow a mass of testimony to go before a jury and leave them to decide each for

tained through an overtaking automobile attempting to pass one ahead, the defendant contended that the plaintiff unnecessarily and intentionally crowded in toward the defendant as the latter attempted to pass, and the plaintiff on the other hand claimed that the defendant unnecessarily and intentionally crowded in toward him until, under the fear of collision, even though it did not actually occur, he was forced from the roadway and his machine injured. The court held that if either party did the things charged against him by the other, he was guilty of gross misconduct, which, if it was the plaintiff, would bar him from any right of recovery, and said: "The gen-

eral rules governing the movement of automobiles, except as modified by statute, are the same as those which, as the result of long usage, have been formulated for the government of simpler vehicles, such as wagons. The fundamental principle of conduct is that of reasonable care and accommodation, measured by the immediate circumstances of each case, and exercised by each traveler for the purpose of affording to the other his just and reasonable rights in the highway. When two cars meet, it is the duty of each, so far as practicable, to yield to the other the space and opportunity necessary for its safe and convenient passage."

J. T. W.

himself what is legal negligence and what is not.

Schindler v. Milwaukee, L. S. & W. R. Co. 77 Mich. 136, 43 N. W. 911, *Mitchell v. Chicago & G. T. R. Co.* 51 Mich. 236, 38 Am. Rep. 566, 16 N. W. 388, 4 Am. Neg. Cas. 37; *People v. Adams*, 52 Mich. 24, 17 N. W. 226.

Stone, J., delivered the opinion of the court:

In this case the plaintiff, a married woman, under twenty-one years of age at the time of bringing suit, seeks to recover damages against the defendant for injuries claimed to have been received on the 30th day of July, 1910, in the afternoon of that day, while the plaintiff was riding, by invitation, with one Frank Skinner and his wife, in a Reo automobile on the highway in Ionia county near Lake Odessa. They were traveling in a northwesterly direction, and, at a railroad crossing of the highway, it is the claim of the plaintiff that defendant, operating and driving a Chalmers automobile, came up behind Skinner's automobile, in which the plaintiff was riding, driving at an unreasonable and unlawful rate of speed, and without warning passed them on the left, then swerved suddenly to the right, ahead of Skinner's automobile, and forced it over an embankment, throwing the plaintiff out and severely injuring her, by breaking her arm and inflicting permanent injuries.

All of the occupants of the Reo car testified, in substance, that the defendant, just as Skinner's automobile was going onto the railroad crossing, without blowing his horn or giving warning, suddenly ran up beside them at the west end of the crossing, and went diagonally across the road in front of the Reo car, striking it, as they judged by the jar and grating sound. There was an intersecting road immediately ahead of them at this point known as the "Lansing" road.

It is the claim of the plaintiff that the Reo car, in which she was riding, crossed the east end of the planks on the railroad crossing, and, in order to follow the road to Lake Odessa, which he desired, it was necessary for Skinner to turn a little to the left. It was while he should have been making this angle that it is claimed the defendant's automobile ran down diagonally across the road in front of him, cutting off all space on the Lake Odessa road.

The declaration, after alleging the duty of defendant, contains the following averments:

"And the said defendant, totally disregarding his duties as provided by statute, and his reasonable duties in the premises, 51 L.R.A. (N.S.)

after crossing the said railroad crossing, and at the intersection of the highways, did operate and direct his automobile, which said automobile was then running at the rate of speed of 30 to 40 miles an hour, diagonally across said highway, so that his said automobile struck and came in contact with the front wheel of and otherwise came in contact with the said automobile so driven by the said Frank Skinner, and so occupied by the said plaintiff, thereby causing the said automobile so driven by the said Frank Skinner, and so occupied by the said plaintiff, to leave the highway and run down a bank, to wit, 6 feet high, over rough and impassable ground, so that the automobile came to a sudden stop, and the said plaintiff and the other occupants of the said automobile were thrown from said automobile to the ground."

"And the said defendant, further disregarding his duty in the premises, when he passed the said automobile so run by the said Skinner and occupied by the plaintiff, as aforesaid, did not slow down to a reasonable rate of speed and run in and upon the space at the left side of the middle of the traveled portion of the highway, and in such manner as not to come in contact with or interfere with the peaceable and lawful rights of the said Skinner and the plaintiff, and did not slow down and run his automobile at a reasonable rate of speed, and did not pass through and over the space between the automobile so run by the said Skinner and occupied by the plaintiff and the westerly side of the highway over the space left by said Skinner for that purpose; but, on the contrary, carelessly and negligently, and without any caution, or taking any means to protect the rights of this plaintiff, ran and drove his automobile close to and against and struck the automobile so run by the said Skinner and occupied by the said plaintiff, so that the said automobile run by the said Skinner and occupied by the said plaintiff left the highway and ran down an embankment, thereby causing great injury to this plaintiff as hereinafter set forth."

"And the defendant, further disregarding his duties in the premises, when approaching the automobile so run by the said Skinner, and so occupied by the plaintiff and Mrs. Skinner, gave no warning of his approach, and did not ask or communicate his desire to pass; but, on the contrary, with great force and violence, carelessly and negligently ran his said automobile with great speed at and against the said automobile so run by the said Skinner and occupied by the said plaintiff."

Frank Skinner, the driver of the Reo automobile, testified, among other things,

as follows: "I just got nicely on the railroad track, and I heard a sound at the left-hand side of me. It sounded to me like a motor sounds when you are driving along at a high rate of speed and your engine is speeded up. You release the clutch, your engine takes the surplus power without anything connected with it, and that is the way it sounded to me and as I heard it. I turned my head, and I saw an automobile aside of me, right onto me, and they seemed to be coming in an angling way across the track towards me, and, just as I got across the track, they hit the front end of our machine, and the blow was pretty hard. It sounded to me like the fenders coming together. And that is the last I knew what it was until I picked myself up from under the car. Q. What effect did it have on the car; where did it go? A. It took it right off from the bank, right down into the ditch. I was thrown out of the car, and found myself under the car, under the running board. Mrs. Granger was lying on her back with her head near my feet. . . . This other machine was on the left-hand side of me, and when it ran across and in front of me, it came so close to the east side of the road that it pushed the sand right down the side of the road that way. It practically shut me off so that I could not turn at all. If my machine ran, it either would have run into that machine or go down off the bank."

Mrs. Eva Skinner, wife of Frank Skinner, speaking of defendant's car, testified, in part, as follows: "We were just going on the railroad track when I noticed it. I should think that the front of their machine at that time was just about where Mrs. Granger and I sat, even with our back seat. They cut right in ahead of us just after we left the crossing. They ran right towards the front of our machine. I remember that they gave a bound, and it seemed as though their fenders struck ours. I know I heard a noise, and I wondered what would become of us. I heard a noise of the machines coming together; and the next I knew I was going over the bank, and the next was picking myself up." She then testified that defendant's car did not stop, but pushed on rapidly towards Grand Rapids.

The plaintiff upon this subject testified as follows: "I was sitting in the Skinner machine on the left-hand side in the back seat with Mrs. Skinner. I do not know how I happened to notice the machine back of us; do not remember of hearing anything. I just looked around and saw it. Mrs. Skinner spoke about the same time that I looked around about the machine. The next that I saw the automobile that

was following us was just before we struck the railroad track. We were just a little way—just a short distance—from the railroad crossing. At that time it was behind us. I looked towards the center. I think Mrs. Skinner looked around when I did. As to the distance I was from the railroad crossing I cannot tell. It seemed to me that we were nearly to the tracks. Then, shortly after that, we heard the machine. It was immediately, and we were then on the track. We were on the right-hand side going across the railroad track, I think so, and the other machine was on the left-hand side of us, very close. At that time I noticed a big noise, a very loud noise, and I noticed a terrible bound, and everything else happened at once. I heard the noise and felt a jar. The noise, as I remember it, seemed to me as a metallic sound, a sort of grating. Just an instant, and a jar and everything was all at once. The last I remember was I kind of caught my breath. . . ."

Q. What can you say, witness, as to whether or not the machine struck you?

A. Why, I heard the noise and a sound and a jar.

Q. Now, when was the next thing you knew, that you can remember about the transaction?

A. Why, I do not remember any more about that. The next I remember I was in bed.

Witness then described her injuries, and claimed that she received permanent injuries at that time.

To show that the cars came in contact, the plaintiff offered evidence showing the location of the tracks, the condition of the hub cap on the machine in which the plaintiff was riding, and the condition of the fenders; and also showed that they made an immediate effort at Grand Rapids, where the defendant resided and owned a public garage, to see the defendant's machine, but did not succeed, as it appeared that the defendant had secreted his automobile.

On the other hand, the defendant claimed, and gave evidence tending to support his claim, that he did not pass the Skinner car at the place named, but that he passed it before reaching the railroad crossing; that he did not touch or run against the Skinner machine at all, but passed 5 feet away from it, 25 or 30 feet south of the railroad crossing; and that his machine was not broken or injured in any way. The defendant learned on his arrival in Grand Rapids the same day of the injury that information had been conveyed by telephone to police headquarters; that the plaintiff was seriously injured; and that it was claimed the

defendant had caused the injury. This suit was begun by *capias ad respondendum*, and defendant arrested thereon on August 8, 1910.

It was conceded that the factory number of the Chalmers automobile operated on the day in question by the defendant was 13055. Defendant's said automobile was taken from the public garage on the evening of the accident, and placed in his barn at his residence in Grand Rapids, and remained there nearly all the time until it was sold on the 13th day of August following. As tending to show that this machine was not injured and had no marks upon it, the defendant was permitted, over the objection and exception of the plaintiff, to introduce in evidence certain cards or tickets which, it was claimed, were made at his garage or place of business, showing when any work was done on a car; that these cards or tickets were kept at defendant's place of business, and were filed in numerical order. Many of these tickets or cards were offered and received in evidence.

Exhibit 20 is a fair sample: "Repair and Sales Record. August 10, 1910. Owner: Roadster 13055. Instructions: Drain all oil out of motor and put in fresh; clean clutch disk thoroughly with kerosene. Lubricate clutch properly with about 2½ oil in clutch case, mixed with about ¼ kerosene. Tighten clutch slightly and evenly. Date: Workman: H. E. Time: 2 hours. Oil ½ pt. K. 3-4. 12 10c. Inspected: H. E. 1 8-15."

The following objection was made by plaintiff's counsel: "I object to this ticket. I do not know of any case that makes this kind of matter, after the transaction has occurred, competent. What Mr. Farrant did after that time, his own acts or his bookkeeper, does not matter in any way. It is not an outside bookkeeper's business; it is just what Farrant did. It is incompetent evidence; I think what he did is self-serving; matters done by him or his agents after this transaction."

Defendant's counsel: "I think it competent. It has been held that, where regular files are kept connected with a business, where the business is of such volume that regular files are kept, and these files are produced, such as railroad company files, or any business that requires a large number of such things to be made, and requires help to do it, that these are competent evidence."

Court: "I will receive it."

Plaintiff's counsel: "Note an exception."

Another ticket offered and received in evidence bore date the 11th day of August, three days after the case was commenced. It was objected to as a self-serving declaration. 51 L.R.A. (N.S.)

tion made by the defendant, or by his help. It was the claim of defendant's attorney that they all referred to work done on the machine.

It appeared that the defendant was the agent at Grand Rapids of the Chalmers Motor Car Company of Detroit; that on the occasion of the injury to the plaintiff the defendant was returning from a visit to the Chalmers Motor Car Company at Detroit; that, while in Detroit, the radiator upon the automobile which he was driving had been changed by the said company by reason of a leak or defect in the radiator, and one of a different color had been placed upon the machine. Just what materiality there was in this circumstance it is difficult to discover.

The trial court, however, allowed the defendant to introduce in evidence a letter reading as follows:

W. S. Farrant.

Grand Rapids, Mich., Aug. 10, 1910.

My Dear James:—

This is purely personal. I want to get your advice. You remember the exchange of radiators,—putting on an unpainted one in place of the one that had been defective and leaking since received. I to-day received invoice R—45487 for labor and expense repairing radiator exchanged on car, net \$15, and six hours' labor \$3, total \$18. I do not mind the labor. We do not charge our customers for labor or parts, when they have defective parts. Is this right or is it an error? Tell me how you view it and how you would handle it, and I would appreciate the favor very much, and I will then write to the proper department.

Your very truly

Farrant.

Mr. Jean Bemb,

Chalmers Motor Co., Detroit, Mich.

This letter was objected to by plaintiff's counsel as irrelevant, immaterial, and a self-serving statement made after the injury of the plaintiff. It was received over the objection and an exception.

The case was submitted to the jury, and in the course of its charge the court instructed the jury as follows:

"It is not necessary for me to say anything further to you about the claims of negligence, because of the theory of the defendant, and because it is conceded by the defendant through his attorneys, that if he (the defendant) ran his car diagonally across the road from the left side to the right, and struck the Reo car, so as to cause it to be deflected from its course and to run over the bank, that he was negligent, and is liable in this action for any damage

that the plaintiff sustained. I charge you, as a matter of law, that, if you find by a fair preponderance of the evidence that the defendant, Walter S. Farrant, handled, managed, and controlled his Chalmers car in the afternoon of July 30, 1910, and drove it diagonally across the highway north of the railroad track, and struck the front hub of the Reo car, so as to cause it to turn to the right and run over the bank, and that the plaintiff suffered injury and damages by reason thereof, then the defendant, Farrant, was negligent, and is liable to the plaintiff in this action."

"So you will understand, gentlemen of the jury, that, as to the first question you have to determine,—that is, the alleged negligence of the defendant,—the question is: Did the defendant, Walter S. Farrant, run his car diagonally across the highway into the car in which the plaintiff was riding, and, by reason of striking it on the left hub, drive it off the road and over the bank? Plaintiff cannot recover unless she convinces you by a fair preponderance of the evidence that the defendant, Farrant, did so negligently drive his car. If you do not find by a fair preponderance of the evidence that the defendant, Farrant, did so run his car as to strike the Reo car and drive it over the bank, then you need not further consider the case; for in such event your verdict must be no cause of action."

This language was, in substance, reiterated a number of times in the charge. The court, however, called the jury's attention to the statutory duties of a person operating a motor vehicle upon a public highway as to rate of speed and proper management.

There was an averment in the declaration that the conduct of the defendant had been wanton, reckless, and wilful, and the court instructed the jury on that subject as follows:

"These statutory duties and any violation thereof, if you find there were any, you may consider in determining this question of added damages. I have mentioned these things to you for the application that they had in this case on the question of added damages. They have no application to the first question,—the question of defendant's negligence,—that is, as to his liability for his negligent act. A violation of these provisions of the statute is evidence of negligence, but, under the circumstances of this case, as I have before explained to you, you may consider such violation only in determining that the defendant acted wantonly, wilfully, and recklessly. . . .

"And, gentlemen of the jury, I charge you, as a matter of law, that the defendant, Walter S. Farrant, is not here on trial

because he did not slow down his automobile, and is not on trial for the purpose of determining whether he did or did not run his car at a reasonable and moderate rate of speed; neither is he on trial for the purpose of determining whether or not he expressed a desire to the occupants of the Reo car to pass, either by tooting his whistle or calling to them and asking the driver, Skinner, to let him pass; that, so far as the defendant is concerned, in the first instance,—that is, the alleged negligence of the defendant,—your inquiry is limited to the one single question as to whether or not he did so run and operate his car, after crossing the railroad track, as to run it into the Reo car with such force as to drive the Reo car from the highway. I told you that these various alleged violations of the statute were to be considered by you as bearing on the question of added damages. On the question of defendant's negligence in passing the car, I have explained to you that these various statutory duties do not under the circumstances in this case apply."

The jury, after being out for a time, returned into court and asked for further instructions. The following occurred:

The Court: "Gentlemen of the jury, are you having some difficulty in regard to the law in this case?"

Foreman: "We are. If Farrant's car hit this Skinner car, but not hard enough to knock it out of its course, what were your instructions?"

After ascertaining that this was the definite question, the court proceeded as follows:

"Mr. Farrant would not be liable unless his act was the proximate cause of the injury; that is, the cause that produced the injury. I said to you that the plaintiff must convince your minds by a fair preponderance of the evidence, first, that the defendant was negligent, and that his negligence was the proximate cause of the injury. Now, if his car hit the other car, but did not send it over the bank,—if his car hit the other car, but the hitting of the car did not produce the injury,—then, though he were negligent, his negligent act would not be the proximate cause of the injury, and he would not be liable. Do I make that plain to you?"

A juror: "It is to me."

Thereupon the jury again retired, and, after being absent for a time, returned into court and rendered a verdict of no cause of action, and judgment was entered accordingly for the defendant.

The plaintiff has brought the case here upon writ of error, and, while there are many assignments of error, we shall not

find it necessary to consider them all in detail.

(1) By appropriate assignments of error, it is claimed that the court erred in permitting the introduction in evidence of the tickets or cards and letter which have been referred to.

The question as to the condition of these cars after the alleged collision was material. Did the court err in receiving in evidence the cards and letter above mentioned? If this evidence had any materiality whatever, it was its tendency to show the condition of the Chalmers car after the injury complained of. The effort is made by these cards to show by elimination that no repairs were made upon this car, except such as are mentioned in the respective cards, which show nothing by way of repairs to the fenders or the hub caps. It has already been noted that these cards were prepared at defendant's garage after the alleged injury, and some of them after the commencement of this suit. We think that such cards and letter were incompetent, as well as immaterial, and were self-serving statements made after the fact.

That certain work was done on this car was no evidence that there were not other defects which required repairs, even if the evidence was competent. As was said by this court in *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537, at page 544, 31 Am. Rep. 321: "The general rule in regard to other classes of hearsay evidence and statements admitted upon the same principle is that they must have been made *ante litem motam*, which is interpreted to mean not merely before suit brought, but before the controversy exists upon the facts."

In *Vanneter v. Crossman*, 42 Mich. 465, at page 468, 4 N. W. 216, this court said: "The declarations of a party may be given against his own interest, and, when a part of an entire statement or conversation is so given, he may adduce whatever has been omitted which bears in any way upon the rest. But he cannot, by collateral statements outside, make evidence for himself,"—citing authorities.

See also *Kehrig v. Peters*, 41 Mich. 475, at page 478, 2 N. W. 801, where this court said: "There was no error in excluding exculpatory remarks made by Kehrig to third persons, in no way constituting parts of transactions which would give them the character of *res gestæ*. He could not make testimony for himself by telling third persons he was innocent." *Dundas v. Lansing*, 75 Mich. 499, 5 L.R.A. 143, 13 Am. St. Rep. 457, 42 N. W. 1011; *Jones v. Portland*, 88 Mich. 598, 605, 16 L.R.A. 437, 50 N. W. 731; *Baumgardner v. Henry*, 131 Mich. 240, 91 N. W. 169; *Lord v. Detroit Sav. Bank*, 51 L.R.A. (N.S.)

132 Mich. 510, 93 N. W. 1063; *Comstock v. Georgetown Twp.* 137 Mich. 541, 561, 100 N. W. 788; *Drake Coal Co. v. Croze*, 165 Mich. 120, 130 N. W. 355.

In the case last cited we undertook to state the rule in this state, and referred to many authorities upon the subject. We there said: "This court has repeatedly held that a self-serving statement is not admissible on behalf of the party making it, and that the corroborating of the party in a material part of the case by his own statement is not permissible,"—citing authorities.

In *Burley v. German American Bank*, 111 U. S. 216, 28 L. ed. 406, 4 Sup. Ct. Rep. 341, it was held that entries in the books of one party to a transaction, not contemporaneous or made in due course of the business as a part of the *res gestæ*, but made after the rights of the other party had become fixed, are not competent evidence.

We are constrained to hold that the trial court erred to the prejudice of the plaintiff in admitting in evidence the cards and letter above referred to.

(2) This brings us to the assignments of error relating to the charge of the court in connection with that part of the declaration above referred to.

It is true that the evidence on the part of the plaintiff sought to show that the defendant's car collided with the car in which the plaintiff was riding. But the evidence of the plaintiff was not confined to the claim that, by reason of the collision, the car in which the plaintiff was riding was forced or pushed over the embankment. We think it was material for the plaintiff to show that the defendant was operating his car at an unreasonable and unlawful rate of speed, and that, without notice or warning, he came upon and passed the Skinner car, and forced his car across and in front of the Skinner car in such a manner as to disconcert the driver, and cause his car to go over the embankment, to the injury of the plaintiff; and that defendant might be liable, even if the jury should have found that the impact was not sufficient to forcibly throw the Skinner car out of its course.

If, for instance, it should appear in a given case that A struck at or hit B in such a manner as to cause B impulsively or instinctively, without time to consider, to step back into a deep hole to his injury, he being taken unawares, could it be said that A was not responsible for the injury? So here, had the jury found that, by reason of the defendant bringing his car in contact with the Reo car, Skinner was taken unawares, and, seeking to avoid injury to the

defendant's car, he was compelled to go so near the embankment as to lose his balance and go over, can it be said that there was no liability on the part of the defendant? We think not. We think that the court, in its instructions, narrowed the issue to the prejudice of the plaintiff's case, and it is apparent from the colloquy between the court and jury at the time they returned for further instructions, that they were having difficulty upon the identical point we are here considering. We think it was competent for the jury, under the evidence and the law, to consider the course and conduct pursued by the defendant, as bearing upon his negligence, and that there might have been a recovery if the jury found that the defendant negligently hit the Skinner car, but not with force sufficient to push it over the embankment. If the jury became satisfied that the coming in contact with the Skinner car, by improperly swerving to the right on the part of the defendant, was the proximate cause of the injury, then, we think, the plaintiff might recover in this case, even if the car in which she was riding was not pushed over the embankment by the defendant.

The evident object of the statute regulating the driving of automobiles in public highways was to prevent danger of collision and like accidents which are likely to occur where the statute regulations are not observed. *Potter v. Moran*, 61 Mich. 60, 27 N. W. 854.

In *National Casket Co. v. Powar*, 137 Ky. 156, 125 S. W. 279, it was held that the statute of Kentucky, similar to ours, limiting and regulating the speed of automobiles approaching the intersection of highways, and requiring warnings of approaching travelers, is declaratory of the common law of negligence, and adds to it certain standards of care on the part of operators of automobiles, and that a violation thereof is negligence *per se*, and forms a sufficient basis for an action for injuries caused thereby to another using the highways. Probably the better rule is that such violation would be evidence of negligence. The only matter left to the jury by the trial court was the force of the blow or collision. In this we think there was error.

The trial court seemed to be of the opinion that the immediate cause of the injury was the car running over the bank, and that this was the proximate cause of the injury. We think the proximate cause of the injury may have been, as above indicated, that which preceded the going over the embankment, and that the defendant cannot evade liability if it is made to appear that the injury was the natural result 51 L.R.A. (N.S.)

of his negligent conduct in thus causing the collision.

Whether the plaintiff's driver, Skinner, was guilty of contributory negligence in not stopping or controlling his car, was, we think, a fair question for the jury, under proper instructions; and if the jury should find the driver was guilty of contributory negligence, such negligence might, under our decisions, be imputed to the plaintiff. *Colborne v. Detroit United R. Co.* — Mich. —, 143 N. W. 32; *Mullen v. Owosso*, 100 Mich. 103, 23 L.R.A. 693, 43 Am. St. Rep. 436, 58 N. W. 663.

In our opinion the court erred in thus narrowing the issue, and the same was prejudicial error.

The other questions urged by appellant are not likely to arise upon a new trial, in view of what we have already said.

For the errors pointed out, the judgment of the Circuit Court is reversed, and a new trial granted.

MICHIGAN SUPREME COURT.

LILLIE BELLE BOWEN, Appt.,

v.

GEORGE M. BOWEN.

(— Mich. —, 146 N. W. 271.)

Divorce — cruelty — failure to entertain wife.

A divorce will not be granted for nonsupport or extreme cruelty, because an out-door laborer earning \$35 a month consumes a portion of it for liquor and cigars, paying only the grocery, meat, and coal bills, and when he reaches home after his work prefers to read or go to bed rather than to talk to his wife, or take her out to entertainments or to visit friends.

(March 27, 1914.)

Note. — Failure to entertain wife or unsociability as ground for divorce.

No general rule can be laid down that will control the question under annotation, which really resolves itself into whether such failure on the part of the husband amounts to cruelty or indignity as cause for divorce.

In determining what constitutes cruelty, regard must be had to the provisions of the statute and the circumstances of each particular case, keeping always in view the physical and mental conditions of the party and their character and social status. 14 Cyc. 599.

In refusing to state a positive definition of legal cruelty, the court in *Evans v. Evans*, 1 Hagg. Consist. Rep. 35, said that mere austerity of temper, petulance of manner, rudeness of language, a want of civil atten-

A PPEAL by complainant from a decree of the Circuit Court for Kalamazoo County dismissing her bill for a divorce. Affirmed.

The facts are stated in the opinion.

Mr. D. O. French for appellant.

Moore, J., delivered the opinion of the court:

The complainant and defendant were married at the city of Kalamazoo, on the 19th day of January, 1901. The complainant was thirty-seven years of age, and had been previously married. Several years before her marriage to defendant she obtained a divorce from her first husband. The defendant was of the age of forty-seven years, and had not been previously mar-

ried. No children were born to the couple. The parties lived together until the latter part of April, 1912, when the complainant left the defendant, and applied for a divorce on two grounds, *vis.*, nonsupport and extreme cruelty, and asked for relief as to the title to certain real estate. The defendant filed his answer, denying the charges of complainant and insisting that she had clandestinely associated with other men. He did not ask for any affirmative relief. The case was tried in open court, and a decree entered dismissing the bill, and complainant has appealed.

The trial judge filed a written opinion, from which we quote:

"The complainant in her bill of complaint alleges, as a ground for divorce from her

tion and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. And further said that it must not be an apprehension arising merely from an exquisite and diseased sensibility of the mind. Petty vexations applied to such a constitution of mind may certainly in time wear out the animal machine, but still they are not cases for legal relief; people must relieve themselves as well as they can by prudent assistance by calling in the succor of religion and the consolation of friends; but the aid of the courts is not to be resorted to in such case with any effect.

In *Rice v. Rice*, 6 Ind. 100, the trial court refused the following instruction: "The conduct necessary to constitute cruel treatment must be not only habitual and continuous, but it must be aggressive in its character. Mere indifference or inattention of a husband, not accompanied with an omission to provide the necessities of life, although habitual, cannot of themselves constitute cruel treatment." The appellate court, in commenting on the refusal, said: "We may remark of this instruction that it seems to contemplate an entirely physical, sensual view of the marriage relation; and if that relation has no aim to the social happiness and mental enjoyments of those united in it, the instruction should have been given. But if it is otherwise, if it be true that we are possessed of social, moral, and intellectual natures, with wants to be supplied, with susceptibilities of pain and pleasure; if they can be wounded and healed, as well as the physical part, with accompanying suffering and delight, then we think that conduct which produces perpetual social sorrow, although physical food be not withheld, may well be classed as cruel, and entitle the sufferer to relief. And, in point of fact, we have no doubt that mere cold neglect, such as is assumed in the instruction, has sent broken-hearted to the grave hundreds of wives, where the dagger, poison, and purposed starvation have sent one. Men generally supply a sufficiency of food to their brute animals."

Refusal to speak to the wife or go out
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with her, coupled with other acts of cruelty, was held sufficient in *Downey v. Downey*, 135 Mich. 265, 97 N. W. 699.

So, also, in *Sharp v. Sharp*, 116 Ill. 509, 6 N. E. 15, where it was held that acts of physical violence in connection with harsh and unkind treatment constituted "extreme" and "repeated" cruelty, justifying divorce, the court, in referring to the fact of the husband's continued refusal to speak to her after her written appeal to him to break his silence, said that "it was a great wrong to the wife for the husband longer to remain silent, in comparison with which the bruises made upon her person by his hand and foot are as nothing. Although these parties resided in the same house for two years after this letter was written, it does not appear from this record he ever addressed a single word to her either in anger or in kindness. This treatment ill accords with the duty a husband owes to his wife, and surely is not that conjugal kindness implied in every act of condonation. It is difficult to imagine anything more disagreeable and exasperating than the presence of one who, from mere sullenness, will not utter a word. The veriest solitude, where no living creature is visible, would be preferable. There is no more important right of the wife than that which secures to her in the marriage relation the companionship of her husband and the protection of his home. This right of companionship, so essential to all happiness, was withheld from the wife for a most unreasonable time by her husband, after she had invited and solicited it, both verbally and by writing. It is not necessary to inquire whether defendant's conduct in this respect amounted to wilful desertion for a period of more than two years, under the provisions of the statute. It is enough that his ill-treatment of his wife in the manner the proof shows constitutes a breach of that kindly usage which she had a right to expect from her husband, and she is not therefore barred from obtaining a divorce on the ground of extreme and repeated cruelty arising from acts done before, and although some years have since elapsed."

husband, failure to support and extreme cruelty, and asks to have the interests of both parties determined by the court in a certain house and lot on Seminary street, to which they hold the title as tenants by the entireties, as husband and wife. The defendant is a target man on Harrison street at the Michigan Central crossing, and has worked for the company for a great many years, and was crippled many years since while in the company's employment, so that his left hand has become comparatively useless, so far as ordinary manual labor is concerned. That the defendant receives an income of \$35 a month, and works from early in the morning until late in the evening. He was engaged in the same employment when the marriage took

place between complainant and defendant, so that the complainant knew of his circumstances and income and ability to provide. The complainant charges extreme cruelty; namely, for the reason that he has not taken her out in society or to entertainments, or visited with her at any place except at their own home. Such a charge as this might well be regarded as cruelty under some circumstances; but under the testimony produced in this case it would seem that the defendant did not have any time to do differently. That every day in the week, including Sundays, he was busily employed. It would also seem that he could not provide a very luxurious support on a salary of \$35 a month. Both parties claim that they furnished a portion of the funds

And in *Reinhard v. Reinhard*, 96 Wis. 555, 65 Am. St. Rep. 66, 71 N. W. 803, it was held that as marriage implies companionship and is supposed to be based upon mutual regard and affection, a divorce for cruel and inhuman treatment is warranted where the husband and wife live and sleep in the same house, eat at the same table food prepared by the wife without the husband speaking to the wife, except in anger, for a period of three months at a time.

So, also, in *Zweig v. Zweig*, 48 Ind. App. 594, 93 N. E. 234, in affirming a judgment of divorce granted for cruel and inhuman treatment, where the allegations were that the husband for over two years refused to speak to, or hold any conversation with, his wife, or to permit her to in any manner converse with him, and when she attempted to do so, would say that he wanted to have nothing to do with her, and that he refused to visit the neighbors with her, and would not permit the neighbors to visit her, the court said that whatever threatens to or does impair either or both the mind or body endangers health or life, and constitutes "cruel and inhuman treatment" as ground for divorce.

And in *Paterson v. Paterson*, 3 H. L. Cas. 308, it was held that a cause for divorce *a mensa et thoro* for cruelty and maltreatment was set forth where the allegations of the complaint were that the husband, "instead of behaving himself toward the pursuer with tenderness and humanity, conducted himself towards her in a cruel manner, so that her life had been rendered a burden to her, and might have been endangered if she had continued to live with him; that his whole conduct had been influenced by a desire to expel her from his house, . . . and since about six weeks after the date of the celebration of the marriage he ceased to hold any intercourse with her, did not speak to her, and never entered her apartment, but treated her in the most contemptuous and insolent manner, and did so openly in the presence of servants and others."

In *Brubaker v. Brubaker*, 16 Pa. Co. Ct. 314, an action for divorce because of such 51 L.R.A. (N.S.)

indignities to the person of the wife as rendered her condition intolerable and her life burdensome, and thereby forcing her to withdraw from his house and family, the court in defining indignities said: "The result of the authorities we understand to be as follows: Indignities to the person are a kind of legal cruelty, less extreme than cruel and barbarous treatment. A single offer of indignity will not support a proceeding for divorce; a decree can only be justified when indignities have been practised often enough to be fairly described as a course of conduct. The body need not be physically touched; they may be offered to the person just as truly by a course of insult, of wilful neglect, of contemptuous and humiliating treatment, or by any other method in which hatred or revenge or a settled malice may find expression. The 'person' meant by the statute is the indivisible personality joined by the union of body and spirit, and indignities offered to either are necessarily offered to both. But some indignities must be borne; indeed, all must be borne, until they render the condition of the sufferer intolerable and her life burdensome, and thereby force her to withdraw from her husband's house and family. Obviously, however, mere withdrawal (which is easy to accomplish) is not satisfactory evidence that she has endured up to the requirement of the law; she must show further that her bodily or mental health was either impaired or endangered by the treatment by which she was subjected. This is a practical and somewhat arbitrary test; but it rests upon experience and observation, and is the safest within our reach, because it is the hardest to evade. The burden of proof is upon the libellant; she is bound to show that her condition has been rendered intolerable and her life burdensome, and it is not unreasonable to require her to prove as the most probable and most visible sign of that condition that her health is either broken or is likely to break." And it was held that all these requisites were present in the case at bar, where the evidence, as set forth in the opinion, was that "he declared afterwards

that went into the purchase and rebuilding of the home on Seminary street.

"The first question in the case is as to whether or not the complainant has made out a case for a divorce. I do not believe that, under the law of this state, the defendant could be charged with a wanton and wilful failure to support, and with gross and extreme cruelty under the facts as alleged and proven in this case. Therefore the second question becomes unnecessary to decide. They still hold as tenants by the entirety, and the court cannot, in the absence of a decree of divorce, determine their respective interests therein."

The case in some respects is a peculiar one. The complainant is a hard-working, industrious woman, a good housekeeper, and

ambitious to get along. She worked out by the day without the knowledge or desire of her husband. She was able to do this because he went to work early, taking his midday luncheon with him, and did not return from his work until late. Complainant admits that defendant paid the grocery bills, meat bills, and coal bills all the time they lived together, but denies he contributed anything further to her support. She also alleged that he wasted a good deal of money for Duffy's malt whisky and tobacco and cigars; that he bought the whisky by the quart and consumed more than was good for him. She admits that he brought the whisky home and did his drinking there. Defendant insists that he contributed his full share toward the sup-

that he knew before the wedding that he was making a mistake, and that he would not marry his wife if he had to do it again. To other witnesses he said that he had made a mistake when he married her, that he could not respect her, and that it was impossible to treat her as a wife; and finally, after separation had taken place, he declared that he could not live with her, and that if she had not left him he would have left her. He gave no reason for this aversion, and none appears now upon the testimony. Cherishing this feeling, it is not surprising to learn that even during the brief honeymoon (which was spent at a hotel in Philadelphia) he was with his bride as little as possible, remaining away nearly all day and returning late at night, often under the influence of liquor. When he was with her he was usually sullen, and rarely spoke except to say that if it was not so expensive he would have a room to himself. During the railroad journey from Philadelphia to their home, in Millersburg, he accompanied her over the house, explained the working of the furnace and stoves, telling her that she was to attend to them in the future, and showed her two bedrooms, pointing out one as hers and one as his own. This life thus inauspiciously begun was continued on these lines for about four months. During all this time he was away from home as much as possible, habitually returning late at night. When he was at home, he was usually in a room by himself, drinking and smoking; if his wife entered the room he would leave it, and he rarely spoke to her or answered her questions. Except when visitors were in the house, he compelled her to sleep in a separate room. She often implored him to explain how she had displeased him, promising to do what he would suggest, but his only response was to leave her without a word. At their meals together he helped himself to food, but did not help her; and he carried this so far as to neglect to serve her even when visitors were at the table. On one occasion during this period she was sick for about a week, and although she was confined to her room all that time

he paid no attention to her condition, came to the room but once during the week, and then only upon the urgent request of the servant, and even when there did not go in, but simply looked through the doorway and turned back without saying a word. On another occasion when she was not well she brought a bucket of coal from the cellar and asked him to put it on the fire, but he refused, saying: 'What did I get you for?' As an occasional visitor at the house testified, speaking of another instance of harshness in the presence of others, 'He treated her more as a servant than as his wife.'

Right to divorce for acts of cruelty which have been condoned is not revived by the fact that the husband, who was a fisherman and preparing to start the next morning for Alaskan waters on a fishing expedition, refused at 9 o'clock in the evening to accompany his wife to the theater after she had visited a moving-picture show, and left her downtown. *Johnsen v. Johnsen*, — Wash. —, 139 Pac. 189.

But in *Robbins v. Robbins*, 100 Mass. 150, 97 Am. Dec. 91, right to maintain an action for divorce for acts of extreme cruelty which were condoned, and which were sufficient to sustain a decree, was held to have been revived by proof that for a period of six weeks beginning only a fortnight after the last act of extreme cruelty proved, the husband, while living in the same house with his wife, wholly and continuously refused to speak to her, the court stating that such evidence of persistent and enduring unkindness and ill temper warranted the wife or court in inferring that his smothered anger would break out again into acts of cruelty.

In *Walmesley v. Walmesley*, 69 L. T. N. S. 152, 1 Reports, 529, action for divorce because of cruelty and adultery, it was held that such cruelty as, coupled with adultery, entitled the wife to a divorce, was shown where the uncontradicted evidence of the wife was that within a few days after the marriage the husband refused to occupy the same bed with his wife, never went anywhere with her, and refused to speak to her unless an answer from him was abso-

port of the family, and that he drank whisky in moderation at his home, because he thought it ~~was~~ good for him, as his work exposed him to all sorts of weather from early in the morning until late at night. A striking peculiarity of the case is that defendant never took with him to his work any intoxicating liquors, and it is not claimed he consumed any except at home, nor is it shown that he drank in such quantities that it interfered with his work. It is not shown that the parties ever quarreled with each other, unless one occasion may be regarded as an exception, and as to that occasion the facts are in dispute. On the day when complainant left defendant she prepared his breakfast for him, and made no suggestion to him that he would not find her at home when he returned from his work. The record discloses beyond any question that defendant was a hard-working person, who had a hand badly lacerated many years ago while coupling cars, and for nineteen years had been gate tender at railroad crossings, keeping very long hours, working daily, though the hours were not so long on Sunday.

A careful reading of the record satisfies us that complainant was disgusted with defendant, because, after he came from his work, he preferred, after doing work in and about the yard, to read or go to bed, in-

stead of going with her for walks or calls or to places of amusement. The humdrum of their lives palled upon her.

We quote some of the averments of the bill of complaint:

"(e) She further shows that he is no companion for her or anyone else; that he never talks or has anything to say, and she cannot longer endure it to be tied down with a load on her neck; that he is morose and sullen, and sometimes even jealous, and generally very disagreeable.

"(f) Your oratrix shows that she did many times talk with him about his unkind treatment of her, and about her monotonous life, and has for years tried to arouse him from his dumb and sleepy condition, but she has been unable to arouse him, and she can no longer endure it.

"(g) She shows that for years she has lived a wretched life, and her home has been a most unhappy one, and she can no longer endure it, nor can she longer tolerate the said defendant."

We have no doubt the life of complainant has, from her point of view, become a very uncomfortable one, but she has failed to show such conduct on the part of defendant as would justify the court in granting a divorce.

The decree is affirmed.

lutely necessary; that he took no notice of their child when it was born, and refused to allow it to be called by his own Christian name; that he declined to take things from his wife when she handed them to him, and in one house where they were staying, rather than eat his meals with his wife, he took them in the kitchen.

But in *Cousen v. Cousen*, 11 Jur. N. S. 656, 4 Swabey & T. 164, 34 L. J. Prob. N. S. 139, 12 L. T. N. S. 712, action for divorce on a ground of "cruelty and adultery," it was held that the husband's indifference and neglect, his aversion to his wife's society, and the cessation of matrimonial intercourse, where there was no allegation of personal violence or word of menace, did not amount to legal cruelty, although the husband was carrying on an adulterous intercourse with a servant in the house in which he was living with his wife, and so a decree was denied, as, under the statute, the adultery alone was insufficient.

That want of civil attentions is not sufficient ground for divorce for extreme and repeated cruelty was held in *Trenchard v. Trenchard*, 245 Ill. 313, 92 N. E. 243.

And in *Wood v. Wood*, 80 Ala. 254, it was held that allegations of a bill which make a case of an absence of the common attention; a nonobservance of the most ordinary courtesies; heartless neglect; an unfeeling indifference to the comfort and relief of the wife in sickness; a disregard of the obligation of marital vows; holding the wife in the capacity of a menial servant 51 L.R.A.(N.S.)

when able to relieve her from such service instead of an equal and companion in life; viewing the marriage relation as merely physical and sexual,—while making a case of treatment and conduct disgraceful to the husband and deplorable to the wife, productive of domestic unhappiness, do not involve the kind and degree of cruelty necessary to constitute a cause of divorce "in favor of the wife, where the husband has committed actual violence on her person, attended with danger to life or health, or when from his conduct there is reasonable apprehension of such violence," there being no allegation of actual violence or threat or conduct from which there is reasonable apprehension of such violence.

Also in *Wile v. Wile*, 48 Pa. Super. Ct. 494, it was held that there being no evidence of physical violence, a wife who is separated from her husband will not be granted divorce on ground of indignities to the person, because, as the wife testified, "he was brusque, curt, moody, had a queer disposition; his manner was not gracious; he was bored as if it was an effort for him to talk. He never bought any presents; he had not any affection whatever. I might as well have been married to a block of stone. He would turn his cheek to be kissed; I tried to be very affectionate; very demonstrative and very agreeable, when he would reply, 'Oh don't worry me.'"

Generally as to what constitutes grounds for divorce, see Index to L.R.A. Notes, Divorce and Separation, §§ 20-29. J. H. B.

MINNESOTA SUPREME COURT.

ROBERT LASSMAN, Resp't.,
v.
TOLLEF JACOBSON et al., Appts.
(125 Minn. 218, 146 N. W. 350.)

Usury — registry fee.

A loan for which the borrower paid the maximum interest, and in addition paid the mortgage registry tax upon the mortgage given to secure the same, held not usurious.

(Brown, Ch. J., and Hallam, J., dissent.)

(March 20, 1914.)

APPEAL by defendants from a judgment of the District Court for Cass County in plaintiff's favor in an action brought to recover the amount of an alleged usurious loan which the borrower was compelled to pay to an innocent holder. Reversed.

The facts sufficiently appear in the opinion.

Messrs. Constant Larson and Gunder-son & Leach, for appellants:

Services necessarily rendered and expenses reasonably incurred in making the loan, provided they are necessary and the amount thereof reasonable and rendered in good faith, may be charged to the borrower, and such charge does not render the loan usurious even though the highest legal rate

Headnote by HOLT, J.

Note. — Usury: requiring mortgagor to pay mortgage or recording tax.

Cases like Union Mortg. Bkg. & T. Co. v. Hagood, 97 Fed. 360; Kidder v. Vander-sloot, 114 Ill. 133; Home Ins. Co. v. Dun-ham, 33 Hun, 415; and Sloane v. Lucas, 37 Wash. 348, 79 Pac. 949, where the agreement related to the payment of taxes upon the entire estate in the real property as such, are not within the scope of the note.

It is not usurious to contract for or to require payment by the mortgagor of a simple recording "fee" in addition to interest at the maximum lawful rate. Gault v. Thurmond, 39 Okla. 673, 136 Pac. 742; American Mortg. Co. v. Woodward, 83 S. C. 521, 65 S. E. 739.

As stated in the opinion in LASSMAN v. JACOBSON, the holding of that case that the payment by the mortgagor of a recording "tax" in addition to the maximum rate of interest is not usurious, is sustained by the decision of the special term of the supreme court in Moore v. Lindsay, 61 Misc. 176, 114 N. Y. Supp. 684. The omission of the statute involved in that case to specify who was to pay the tax was especially significant not only for the reasons mentioned in the quotation in the opinion in the LASS-MAN CASE, but also because the statute 51 L.R.A.(N.S.)

of interest is exacted on the loan, exclusive of such charges and expenses.

Daley v. Minnesota Loan & Invest. Co. 43 Minn. 517, 45 N. W. 1100; Cox v. Massa-chusetts Mut. L. Ins. Co. 113 Ill. 385; Goodwin v. Bishop, 145 Ill. 421, 34 N. E. 47; American Mortg. Co. v. Woodward, 83 S. C. 521, 65 S. E. 739, 39 Cyc. 981.

Mr. Fred W. Smith, for respondent:

The burden of paying the tax imposed under the 1907 act is by its terms specifical-ly impressed upon the mortgagee; and when by specific agreement in advance and as part of the contract of loan he insists that it shall be sustained and paid by the mort-gagor, in addition to the highest rate al-lowed by law, a condition of usury is plain-ly made out.

Mutual Ben. L. Ins. Co. v. Martin Coun-ty, 104 Minn. 179, 116 N. W. 572; Liver-pool & L. & G. Ins. Co. v. Board of Asses-sors, 44 La. Ann. 760, 16 L.R.A. 56, 11 So. 91; Green v. Grant, 134 Mich. 462, 96 N. W. 583.

Holt, J., delivered the opinion of the court:

This suit is by a borrower against the lenders to recover the amount of an alleged usurious loan, which the borrower was com-pelled to pay to an innocent holder of the debt and security. To pass on the question presented this will be a sufficient statement of the facts: In December, 1909, plaintiff borrowed from defendants \$350, to be repaid within five years, with 10 per cent interest,

was an amendment of earlier statutes im-posing an "annual tax" on debts secured by mortgage on real property, which expressly provided that any agreement by which the mortgagor became bound to pay the tax or any part thereof should be usurious and void. There was an alternative ground for the decision in the Moore Case, namely, that the recording tax was not paid or de-ducted from the principal sum constituting the loan, in pursuance of any mutual agree-ment between the parties, but, without the knowledge of the mortgagee, was deducted by a title company from the proceeds of a check representing the full amount of the loan delivered to the borrower, and indorsed by him to the title company. Both the LASSMAN CASE and the Moore Case rejected the contention based on that provision of the act imposing the tax, by which the pay-ment of the tax relieves the lender of the obligation to pay the personal property tax to which the debt secured by the mortgage might otherwise be subject.

But where the maximum lawful rate of interest is charged, an agreement by the mortgagor to pay a "personal-property" tax assessed against the mortgagee on account of the debt has been held usurious. Green v. Grant, 134 Mich. 462, 96 N. W. 583 (*obiter*), followed as authority in Stack v.

payable semiannually. To secure the loan plaintiff gave mortgages on land in Beltrami county, and agreed to pay, and did pay, the mortgage registry tax of \$2.50 and the recording fee of like amount. After the loan was made, defendants assigned the main part thereof to an innocent good-faith purchaser. Thereafter plaintiff paid the debt. No point is made that part of the debt was not assigned, but was paid to defendants direct. The court below held the transaction usurious, and gave plaintiff judgment for the full amount paid, being the entire loan. Defendants appeal from the judgment.

There was no finding that in the agreement there was any corrupt intent to violate or evade the usury law; and that, per-

haps, is unimportant, since there was no misunderstanding or mistake concerning the amount to be paid. The parties must be held to know that the stipulated interest was the maximum allowed by law, and hence, if the recording fee or the mortgage registry tax agreed to be paid by plaintiff is to be considered as something received by the defendants for the loan of the money, the contract was as a matter of law tainted with usury.

The test of a usurious contract is: Will its performance result in producing to the lender a greater return for the use of the amount loaned than is allowed by law, and was that result intended? *Smith v. Parsons*, 55 Minn. 520, 57 N. W. 311. Expenses incident to making the loan and

Detour Lumber & Cedar Co. 151 Mich. 21, 16 L.R.A.(N.S.) 616, 114 N. W. 876, 14 Ann. Cas. 112; *Vandevelde v. Wilson*, 176 Mich. 185, 142 N. W. 553.

The same rule was applied in *Meem v. Dulaney*, 88 Va. 674, 14 S. E. 363, where the mortgagee, upon the earnest solicitation of the borrower, withdrew his money from an investment in nontaxable United States bonds, and put it into the personal bonds of the borrower, bearing interest at the same rate, upon an undertaking in a separate agreement by the latter to save him harmless from all taxes and assessments thereon. (Compare quotation from *Moore v. Lindsay* in *LASSMAN v. JACOBSON*.)

In *Green v. Grant*, supra, the court said: "When defendant pays a tax, as in this case, on account of complainants' ownership of the mortgage indebtedness, he is not making a payment to preserve the security, but he is paying money for the complainants' benefit. . . . The payment of the tax relieves the lender from an obligation which clearly rests upon him."

In *Norris v. W. C. Belcher Land Mortg. Co.* 98 Tex. 176, 82 S. W. 500 (on rehearing in 98 Tex. 183, 83 S. W. 799), the court said that a contract which binds the mortgagor to pay the taxes which the law imposes on the lender would necessarily be usurious if it would, with the interest reserved, necessarily make the charge for the use of the money exceed the maximum rate.

But it has been held that even where the agreement was to pay taxes in addition to the maximum legal rate, the question of the intent to take usury may be considered. In *Mortimer v. Pritchard*, Bail. Eq. 505, no taxes were ever assessed and no usury actually taken, but it was contended that the contract was void because it provided that the mortgagor should pay the tax in addition to lawful interest. The court was of the opinion that the contention was correct, but as the matter was not free from doubt and the parties had taken the advice of counsel before action, its decision was that there had been no intent to take usury and the contract would not be void by reason of the mistake of law. The ground of 51 L.R.A.(N.S.)

this decision is somewhat doubtful in view of the language of the cases cited above.

And *Union Trust Co. v. Radford*, 176 Mich. 50, 141 N. W. 1091, seems to be an authority contrary. In that case the mortgage was on a "committee form" containing the clause in question. It was contended that there was no intent to take usury, because, although the tax rate was known to exceed the difference between the interest charged and the maximum rate allowed by law, the mortgagees believed and still contended that these particular bonds were nontaxable. The court held otherwise, and also found the contract usurious; since "the parties must be deemed to have intended the result expressed by the contract," where it is unambiguous and "its legal meaning clear."

But in *Dubose v. Parker*, 13 Ala. 779, where a general tax upon loans was involved, the court arguing that there was no reason why the return upon loans should be less than that upon other debts, held that the legislature did not intend the tax to be taken out of the lender's profit, and that a contract by the borrower to pay the tax was permitted by the revenue measure. As in *Moore v. Lindsay*, and upon much the same grounds (see quotation in *LASSMAN v. JACOBSON*), the court went further and said that even apart from the implied permission conferred by the revenue act, the exaction of the tax in addition to the maximum lawful interest would not be usurious, since the usury law aims to permit "as profit 8 per cent per annum," and by the contract in question, "he receives no more." This language has been effectively criticized in *Green v. Grant*, supra.

In *Banks v. McClellan*, 24 Md. 62, 87 Am. Dec. 594, the single statement was made: "We consider that the charges for taxes on the mortgage, with simple interest on each item from the time it was paid, are allowable, Mr. McClellan having agreed to pay them, and the law authorizing such payments without incurring usury." But no light is given as to what authority of law the court found.

In *First Nat. Bank v. Glenn*, 10 Idaho, 224, 109 Am. St. Rep. 204, 77 Pac. 623,

furnishing the lender satisfactory security for its repayment can in no sense be considered compensation for the use of the money loaned. Therefore it is generally held that any sum paid by the borrower towards the reasonable and legitimate disbursements made by the lender in investigating the physical and legal value of the security offered, and also in placing it in lawful form to protect the lender, is not to be considered in determining whether the contract is tainted with usury. *Daley v. Minnesota Loan & Invest. Co.* 43 Minn. 517, 45 N. W. 1100; *Smith v. Wolf*, 55 Iowa, 555, 8 N. W. 429; *Goodwin v. Bishop*, 145 Ill. 421, 34 N. E. 47; *Webb, Usury*, § 323, and cases therein cited. In *Stein v. Swensen*, 46 Minn. 360, 24 Am. St. Rep. 234, 49

N. W. 55, it is said: "But, as usury consists in taking or contracting for a greater rate than the law permits for forbearance of money, it must be apparent that, if the taking or contracting be for something else than forbearance—than for the use of the money,—it is not usury." This would exclude from consideration all necessary and reasonable disbursements incidental to placing the security agreed to be given in legal shape.

As we understand the record, neither the court below nor the counsel for plaintiff believed that any usury taint inhered in the borrower's agreement to pay \$2.50 for recording the mortgages. This is virtually conceded to be an expense, incident to furnishing the security, which the lender may

where the mortgage called for the highest lawful rate of interest, and also for the payment by the mortgagor of all taxes on the mortgage and the debt secured thereby, the statute in force when it was given provided that any contract whereby the mortgagor agreed to pay taxes on the money loaned was as to such agreement null and void. The court took the position that as the particular stipulation in question was void, the contract did not call for more than lawful interest, and was not usurious. In this case no taxes were ever collected from the mortgagor, and there was no intent to contract for usury, since the mortgagee testified that he did not know the tax stipulation was in the mortgage until long after its execution.

In *Detroit v. Board of Assessors* (*Detroit v. Rentz*) 91 Mich. 78, 16 L.R.A. 59, 51 N. W. 787, where the tax was imposed not upon the debt secured by the mortgage, but upon the mortgagee's interest or estate in the realty, the court said that there was no obstacle, either in this act (citing *Hammond v. Lovell*, 136 Mass. 185) or in the usury law, to prevent a mortgagor from agreeing to pay all taxes assessed against all interests in the realty, since this "is in the nature of an agreement to preserve the estate which constitutes the security, and is no more unlawful than an agreement to keep the property insured with a similar purpose." In *Green v. Grant*, supra, the court distinguished between a tax upon the mortgagee's interest in the real property and a tax upon the debt as personal property.

Even when it is held or assumed, as in cases previously cited, that a reservation of the maximum rate of interest with an agreement on the part of the mortgagor to pay taxes on the debt as personal property is necessarily usurious, the question may arise as to whether an agreement to pay such taxes is usurious *per se* when the rate of interest agreed upon is less than the maximum rate, but the total of the interest and the taxes proves to be in excess of the maximum interest allowable.

In *Green v. Grant*, supra, the court was 51 L.R.A. (N.S.)

of the opinion that under the circumstances, it could not be presumed the mortgagees knew that the aggregate of taxes when added to the interest would exceed the lawful rate, and it was held that the contract was not usurious. The court enforced the clause for payment of taxes although the effect was to allow a greater return to the lender than the maximum lawful interest. *Hooker, Ch. J.*, while agreeing with the majority that the agreement was not usurious, was of the opinion that the mortgagee should only be allowed for taxes to an amount which, with the interest reserved, would not exceed the legal rate of interest.

So, in the similar case, *Norris v. W. C. Belcher Land-Mortg. Co.* 98 Tex. 176, 82 S. W. 500 (rehearing in 98 Tex. 183, 83 S. W. 799), where the difference between the interest reserved and the maximum lawful rate was 1 per cent, the court said that it could not be laid down as a broad proposition that the mortgage was usurious; but as it was common knowledge that the tax rate had uniformly been more than 1 per cent (compare *Green v. Grant*, supra), the finding of usury by the trial court was justified. But it was also held that, under the pleadings, evidence should have been received to show that, through a mistake, the writing did not express the real understanding of the parties, there being no intention that the provision as to payment of taxes should apply to existing personal-property taxes on the "bonds and coupons," but to "any tax or assessment that might be imposed by Texas legislation during the life of the mortgagor, whereby the mortgagee would be taxed on the landed security only to the value of his equity therein." The latter was not, however, as in *Green v. Grant*, and *Detroit v. Board of Assessors* (*Detroit v. Rentz*), supra, distinguished in kind from a tax on the debt as personal property; but the court was of the opinion that if such was the real contract there could have been no intent to take usury, since the mortgagee could not know that such a tax, if imposed, would exceed 1 per cent.

C. F. L.

require the borrower to bear, without thereby being held to have increased the stipulated interest or profit for the use or forbearance of the money loaned. *American Mortg. Co. v. Woodward*, 83 S. C. 521, 65 S. E. 739, considers the fee for recording the mortgage not to bear on the question of usury.

It is difficult to see why the \$2.50 paid as mortgage registry tax does not stand on the same basis. Defendants had the perfect right to receive legal security on land for the repayment of the loan. They could obtain no protecting, enforceable security on land unless a real estate mortgage thereof is duly recorded; and it cannot be recorded until the mortgage registry tax is first paid. But it is contended that by the payment of the mortgage registry tax the lender is relieved of the obligation to pay personal property tax on the money or credit represented by the loan. But we think this a mere incident flowing out of the payment by the borrower of a necessary expense connected with the giving of a real estate mortgage, and which expense has not by law been placed upon the lender. It is said the security belongs to the mortgagee, and he should pay the tax thereon. This is true; but he is under no obligation to accept it or make the loan until he receives a valid, enforceable mortgage, and it is not such until the tax is paid and it is recorded. A recorded security is not thereafter subject to tax.

We think the right of plaintiff to prevail in this action must depend entirely upon finding in the mortgage registry act some provision which imposes a duty or obligation upon the mortgagee to pay this tax, or which forbids the lender from saddling this necessary expense connected with real estate security upon the borrower, for as before stated there is no finding here of any corrupt intent to violate the usury statute. There is in chapter 328, Laws of 1907 (Gen. Stat. 1913, §§ 2301-2309), no command to pay the registry tax or record the mortgage, and, of course, no penalty against failure to do either. The mortgagee is under no legal obligation to pay the tax. He may, if he choose, omit to record the mortgage. The legislature was undoubtedly intent on securing revenue from this source, but evidently assumed that there was sufficient inducement to accomplish the desired result in the provision that the mortgage could not be recorded, legally enforced, or used as evidence, unless the tax was paid by someone. Gen. Stat. 1913, § 2307. We may assume that the legislature was aware of the practice of money lenders to place the expenses connected with a secured loan upon the borrower. If, therefore, there had been any

intention to shield the mortgager from the burden of the registry tax, we should expect to find apt language indicative of such intent in the statute. But it is absolutely silent upon that point. So it is in regard to the payment of the tax on executory contracts for the sale and conveyance of land. This tax is neither a charge against a person, nor against the security. It is not a tax upon the debt, but it becomes such upon the real estate security when anyone desires to record it or use it for some legal purpose. *Mutual Ben. L. Ins. Co. v. Martin County*, 104 Minn. 179, 116 N. W. 572. That we are unable to spell out any intention from the mortgage registry tax law to place the legal obligation upon either party to a mortgage, or to an executory contract for the sale of land, to pay this tax, is sufficiently indicated in *Mason v. Fichner*, 120 Minn. 185, 139 N. W. 485, and *First State Bank v. Hayden*, 121 Minn. 45, 140 N. W. 132. Someone must pay the tax, and unless that is done there is no usable, valid, or enforceable mortgage or contract. We therefore conclude that there was no intention to legislate as to who should bear the burden of the mortgage registry tax, a necessary expense connected with the giving of valid real estate security, but the parties are free to contract with reference thereto without thereby affecting the question of usury.

These cases relied on by the plaintiff depended upon statutes which unequivocally imposed the duty upon the lender to pay taxes which by the loan contract he required the borrower to pay in addition to the highest legal interest. *Green v. Grant*, 134 Mich. 462, 96 N. W. 583; *Vandervelde v. Wilson*, 176 Mich. 185, 142 N. W. 553; *Norris v. W. C. Belcher Land Mortg. Co.* 98 Tex. 176, 82 S. W. 500, 83 S. W. 799; and *Meem v. Dulaney*, 88 Va. 674, 14 S. E. 363. For that reason we do not regard them of great weight as precedents under the reading of our registry tax law. *Dubose v. Parker*, 13 Ala. 779, and *Banks v. McClellan*, 24 Md. 62, 87 Am. Dec. 594, are to the contrary, and more than support the position we have taken. The court in the former says: "The payment of the tax upon the loan is not very dissimilar from the payment of expenses for conveyances, which are usually borne by the borrower."

A case very similar on the facts, and under a statute like our own in declaring real estate securities subject to tax, but omitting to specify who is to bear the burden, is *Moore v. Lindsay*, 61 Misc. 176, 114 N. Y. Supp. 684. With reference to the omission alluded to the court says: "These omissions are very significant, and may properly be considered in construing the

enactment. It has been an almost immemorial practice for a mortgagor to bear all the expenses incurred in searching of the title to premises mortgaged by him, including the fee for recording the mortgage; and it has been held that, where a party loaning money to another is put to trouble and expense in procuring it, a charge for such trouble and expense will not be deemed an act of usury." And referring to the contention there made, as here, that the mortgagee, by exacting payment of the registry tax from the mortgagor, secures exemption from the payment of the tax he otherwise would have to pay on the money loaned or on the credit arising to him therefrom, the court proceeds: "If the defendant's contention be sound, a nonresident mortgagee might with impunity exact payment of the recording tax from a mortgagor, since in his case, it may be assumed that no advantage could come to him by virtue of the exemption provided for in the act; whereas a resident mortgagee under similar circumstances would *ipso facto* be subject to the penalties of an usurious agreement. We may also suppose the case of a resident having his money invested in nontaxable securities, which he has converted into cash for the purpose of making the mortgage loan. Would any advantage be derived by the mortgagee in such a case by reason of the exemption clause? There is not the slightest evidence that the plaintiff would necessarily obtain any advantage by reason of the exemption above referred to. A mere possible, incidental, or indirect advantage that he might derive will not taint the transaction."

Our usury statute is drastic. The present case illustrates this, where the entire expense for a real estate loan of \$350 for five years is only \$5. Nevertheless, if plaintiff's agreement to pay this trifling amount is a violation of the law, it forfeits the whole loan. Such results ought not to flow from a statute which is silent or doubtful as to whose is the obligation to pay the tax in question.

The judgment is reversed.

Brown, Ch. J., dissenting:

I am unable to concur in the views of the court in this case, and therefore dissent. Usury is the taking of greater compensation for the loan of money than that allowed by law, namely, interest at the rate of 10 per cent per annum. If a greater rate be intentionally taken, the law pronounces the transaction usurious, without further inquiry into the motives of the parties. The corrupt intent sometimes said to be necessary to a violation of the statute arises by implication of law from the fact that an ex-

cessive rate of interest is intentionally reserved by the contract. No evidence of a corrupt bargain, or of an intention to violate the statute, need be produced. The sole question is: Does the contract intentionally reserve to the lender excessive compensation for the loan? In the case at bar the borrower was required to pay for the loan the highest legal rate of interest, and in addition thereto the expense of recording the mortgage securing the loan and also the mortgage registry tax. In my opinion this rendered the transaction usurious, at least as respects the payment of the registry tax. It was clearly the intention of the legislature in the enactment of the mortgage tax statute, that the tax so imposed should be paid by the mortgagee, and by requiring as a condition of the loan the payment thereof by the mortgagor the mortgagee thereby exacted greater compensation for the loan than allowed by the law, and the contract was usurious and void. *Green v. Grant*, 134 Mich. 462, 96 N. W. 583; *Vandervelde v. Wilson*, 176 Mich. 185, 142 N. W. 553; *Norris v. W. C. Belcher Land Mortg. Co.* 98 Tex. 176, 82 S. W. 500, 83 S. W. 799; *Meem v. Dulaney*, 88 Va. 674, 14 S. E. 363, 39 Cyc. 984.

Hallam, J.:

I concur in the conclusion of the Chief Justice.

MISSISSIPPI SUPREME COURT.

MAYOR & ALDERMEN OF CITY OF VICKSBURG, Appt.,

v.

MARY HOLMES et al.

(— Miss. —, 63 So. 454.)

Negligence — injury through collapse of building — liability of contractor.

A municipal corporation which raises a building to conform to the grade of a street is not liable for injury to a stranger by its collapse after it has been turned over to the owner, if any defects which might have existed in the work were plainly visible and there was no concealment of a dangerous condition by the municipality.

(December 8, 1913.)

APPEAL by defendant from a judgment of the Chancery Court for Warren County overruling a demurrer to the com-

Note. — As to liability of contractor to third person for defects in his work after its completion and acceptance, see notes to *First Presby. Congregation v. Smith*, 26 L.R.A. 504, and *Thornton v. Dow*, 32 L.R.A. (N.S.) 968.

plaint in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Anderson, Vollor, & Kelly for appellant.

Mr. J. B. Dabney, for appellees:

Defendant is liable for the injuries to plaintiffs.

Huset v. J. I. Case Threshing Mach. Co. 61 L.R.A. 305, 57 C. C. A. 237, 120 Fed. 865; *Schubert v. J. R. Clark Co.* 49 Minn. 331, 15 L.R.A. 818, 32 Am. St. Rep. 559, 51 N. W. 1103; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Woodward v. Miller*, 119 Ga. 618, 64 L.R.A. 932, 100 Am. St. Rep. 188, 46 S. E. 847; *Carson v. Godley*, 26 Pa. 111, 67 Am. Dec. 404; *Lewis v. Terry*, 111 Cal. 39, 31 L.R.A. 220, 52 Am. St. Rep. 146, 43 Pac. 398; *Ives v. Welden*, 114 Iowa, 476, 54 L.R.A. 864, 89 Am. St. Rep. 379, 87 N. W. 408, 10 Am. Neg. Rep. 590.

Messrs. Hudson & McKay, also for appellees:

The city is liable to the complainants for their personal injuries resulting from the collapse of the church building, which was raised by the city through a building contractor.

Wade v. Gray, — Miss. —, 43 L.R.A. (N.S.) 1046, 61 So. 168, 29 Cyc. 478; *Lewis v. Terry*, 111 Cal. 39, 31 L.R.A. 220, 52 Am. St. Rep. 146, 43 Pac. 398; *Craft v. Parker, W. & Co.* 96 Mich. 245, 21 L.R.A. 139, 55 N. W. 812; *Schubert v. J. R. Clark Co.* 49 Minn. 331, 15 L.R.A. 818, 32 Am. St. Rep. 559, 51 N. W. 1103; *Huset v. J. I. Case Threshing Mach. Co.* 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865; *Bragdon v. Perkins-Campbell Co.* 66 L.R.A. 924, 30 C. C. A. 567, 58 U. S. App. 91, 87 Fed. 109, 5 Am. Neg. Rep. 277; *Langridge v. Levy*, 2 Mees. & W. 519, 6 L. J. Exch. N. S. 137, 4 Mees. & W. 337, 1 Horn & H. 325, 7 L. J. Exch. N. S. 387; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 67; *Pennsylvania Steel Co. v. Elmore & H. Contracting Co.* 175 Fed. 176.

Cook, J., delivered the opinion of the court:

In changing the grade of certain streets in the city of Vicksburg, appellant undertook to raise the church building of the King David Baptist Church, a colored organization, to the new grade, and employed a contractor to do the necessary work. The bill of complaint alleges that "on account of the insufficient number and size of the pillars put under the said building, and the poor material used therein, and the negligent and imperfect workmanship, the 51 L.R.A. (N.S.)

said church was not safe for the purposes for which it was intended; that, in addition to the above, the said pillars were set upon the surface of the ground, so that they were likely to be undermined and weakened by water flowing under said church, all of which should, and could, by the exercise of ordinary care and diligence, have been known to said defendants." It is further alleged that after the building had been turned over to its owners, and "when a funeral was being held from said church, the floor thereof gave way, and complainants, along with a number of others, were precipitated to the ground, some 12 or 15 feet below, with a mass of broken timbers, benches, hot stoves, and humanity, and were bruised and maimed," etc. The complainants were strangers to the contract between the city and the King David Baptist Church, and when the collapse of the building occurred they were attendants at the funeral obsequies of one deceased. The city demurred to the bill of complaint, which demurrer was overruled, and the city prosecuted this appeal.

Appellant does not challenge the jurisdiction of the court to try this cause. We will consider only one of the grounds of the demurrer, viz., "(2) that under the facts stated and alleged in said bill, complainants are not entitled to the relief sought for, or any relief." "The general rule is that, after the contractor has turned the work over, and it has been accepted by the proprietor, the contractor incurs no further liability to third parties by reason of the condition of the work; but the responsibility, if any, for maintaining or using it in its defective condition, is shifted to the proprietor." 32 L.R.A. (N.S.) 969.

Before the city can be held liable to complainants, it must be shown that there was some element of deceit, or concealment of the dangerous instrumentality. It is not sufficient to allege negligent construction. It must also be alleged that there was a concealment of this dangerous condition when the building was turned over to its owners and accepted by them. We think the bill of complaint may reasonably be construed to mean that the negligent construction and poor material used in the building was obvious, and that the owner accepted the work without demur; and, if this be true, it follows that the owner knew of the defect when it accepted the building. It must be shown that the owner was unaware of the danger, and it must be shown that the city, or its agent, concealed the defective material and workmanship. For a collation of the authorities, we cite *Thornton v. Dow*, 32 L.R.A. (N.S.) 968, and note, 60 Wash. 622, 111 Pac. 899; *O'Brien*

v. American Bridge Co. 110 Minn. 364, 32 L.R.A.(N.S.) 980, 136 Am. St. Rep. 503, 125 N. W. 1012.

The demurrer should have been sustained. Reversed and remanded.

MISSISSIPPI SUPREME COURT.

A. G. RUSSELL, Appt.,

v.

PALATINE INSURANCE COMPANY.

(— Miss. —, 63 So. 644.)

Principal and agent — authority to collect account — institution of criminal proceedings — liability.

An agent to settle the accounts of another agent of the common employer has no implied authority to institute criminal pro-

Note. — Liability of principal for malicious prosecution, false arrest, or false imprisonment by agent authorized to collect a debt.

Generally as to liability of master for malicious prosecution by servant, see notes in 14 L.R.A. 791, and 27 L.R.A. 195.

As to liability of municipality for malicious prosecution by its officers, see note in 32 L.R.A.(N.S.) 36.

So far as an exhaustive search is concerned, this note as indicated in its title is limited to cases where the agent is employed to procure the payment of a debt. A few cases not involving the collection of a debt are included, where the transaction is so analogous as to warrant an inclusion of the case. The rules of agency apply in this class of cases whether, as is subsequently shown, the agent is a partner or an attorney at law; and the question of liability depends upon whether or not the prosecution or arrest was within the scope of the agent's authority or employment.

The general rule appears to be in accord with *RUSSELL v. PALATINE INS. Co.* that the authority conferred upon an agent to settle accounts or collect a debt does not imply authority to cause an arrest, so as to render the principal liable in an action for malicious prosecution or false arrest or imprisonment, in the absence of ratification or adoption of the agent's act.

Thus, in *Thompson v. Bank of Nova Scotia*, 32 N. B. 335, it was held no part of the ordinary banking business for an agent to lay a criminal information and to have a warrant issued, for one of the bank's customers. Consequently, where an agent in charge of a branch of a bank criminally prosecuted a customer who had failed to pay certain notes, the court, in the above case, held that the agent acted without authority, and that the bank was not liable for malicious prosecution.

So, the chief secretary and treasurer of a corporation having control, management

ceedings against him for embezzlement, so as to render the employer liable for malicious prosecution because of his act in so doing.

(December 15, 1913.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Warren County in favor of defendant in an action brought to recover damages for alleged malicious prosecution. Affirmed.

The facts are stated in the opinion.

Messrs. J. C. Bryson, Anderson, Vollor & Kelly and Hirsh, Dent & Landau for appellant:

Klein was not stating merely the fact of his agency or relating the history of past transactions, but he was actually engaged in the service of the Palatine Company and his statements had reference to the im-

of the receipts, and disbursements of corporate funds, cannot arrest a person for embezzlement in the name of the state so as to render the company liable for malicious prosecution. *Gillett v. Missouri Valley R. Co.* 55 Mo. 315, 17 Am. Rep. 653.

Nor has an agent or servant intrusted with the custody of the goods or money of a corporation implied authority to cause the arrest of a person for embezzlement, so as to render the corporation liable for malicious prosecution or false imprisonment. *Carter v. Howe Mach. Co.* 51 Md. 290, 34 Am. Rep. 311.

And it is held in *RUSSELL v. PALATINE INS. Co.* that an agent authorized to employ all appropriate means to collect a debt is not authorized to prosecute for embezzlement. The court observing that it cannot be said that a criminal prosecution is a means appropriate to the collection of debts.

So, an agent authorized to collect money due a corporation, and even to bring suits, is not thereby authorized to charge the corporation with his own malicious acts in setting in motion the criminal procedure of the state, from the legitimate result of which the corporation could derive no benefit. If his motive was to obtain for the corporation a benefit from the abuse of the process, the corporation would not thereby be charged, even if the prosecution was in the line of his duty, as he understood it, since his duty or authority in fact was not extended by his understanding of either. *Cleveland Co-op. Stove Co. v. Koch*, 37 Ill. App. 595.

To the same effect is *Springfield Engine & Threshing Co. v. Green*, 25 Ill. App. 108, an action for malicious prosecution, where it is held not to be within the express or implied authority of an agent employed to collect a note to prosecute the maker for forgery.

It does not appear just what the authority of the agent was in *Dally v. Young*, 3 Ill. App. 39. The case, however, holds that

mediate business on hand, and were, therefore a part of the *res gesta* and in the nature of admissions against interest.

1 Am. & Eng. Enc. Law, 2d ed. 691; Eagle Iron Co. v. Baugh, 147 Ala. 613, 41 So. 663; Gazzam v. German Union F. Ins. Co. 155 N. C. 330, 71 S. E. 434, Ann. Cas. 1912C, 362.

The criminal prosecution was a mere means to an end and that end was the collection of what Russell & Moore owed his company. This was the business of his company and whatever he did in reference thereto was and is imputable to it.

Williams v. Planters' Ins. Co. 57 Miss. 759, 34 Am. Rep. 494, 60 Miss. 916; King v. Illinois C. R. Co. 69 Miss. 245, 10 So. 42; Richberger v. American Exp. Co. 73 Miss.

161, 31 L.R.A. 390, 55 Am. St. Rep. 522, 18 So. 922; Rivers v. Yazoo & M. R. Co. 90 Miss. 196, 9 L.R.A.(N.S.) 931, 43 So. 471, 93 Miss. 557, 46 So. 705.

The several acts detailed tend to establish an agency in Klein sufficiently comprehensive to bind the Palatine for commencing the criminal prosecution.

1 Am. & Eng. Enc. Law, 2d ed. 988, 989, 1151; Germania L. Ins. Co. v. Bouldin, 100 Miss. 660, 56 So. 609; Fisher v. Westmoreland, 101 Miss. 180, 57 So. 563; Lynch v. Metropolitan Elev. R. Co. 90 N. Y. 77, 43 Am. Rep. 141; Gulf, C. & S. F. R. Co. v. James, 73 Tex. 12, 15 Am. St. Rep. 743, 10 S. W. 744; Ruth v. St. Louis Transit Co. 98 Mo. App. 1, 71 S. W. 1055; Dwyer v. St. Louis Transit Co. 108 Mo. App. 152, 83 S.

the general agent of a sewing-machine company is not liable for a criminal prosecution commenced by a subagent without his knowledge or consent, the charge being embezzlement of funds and notes belonging to the sewing-machine company. The court applied the principle that where an agent institutes a malicious prosecution without the instigation or direction of his principal, the latter will not be liable unless he adopts and continues the same with knowledge of all the circumstances.

In Murrey v. Kelso, 10 Wash. 47, 38 Pac. 879, it is held that an agent employed to search for lost property and to take all legal steps necessary to its recovery has no authority to cause the arrest of a person for larceny so as to render the principal liable for malicious prosecution.

A mortgagee's agent having possession of a stock of salable merchandise, his principal duty being to do whatever was necessary to convert the same into money, was held in Laird v. Farwell, 60 Kan. 513, 57 Pac. 98, to have clearly exceeded his authority so as not to render his principal liable for his acts in causing the arrest of a person on the charge of perjury in making an attachment affidavit in an action wherein some of the goods were seized and taken from the possession of such agent.

While the general superintendent of a telegraph company has authority to arrest a person for obtaining, by false pretenses, money sent for transmission, so as to render the company liable for a wrongful arrest, a mere subordinate employee, has no such authority. Consequently, where the proof was conflicting as to whether the superintendent or subordinate caused the arrest, a failure to submit this issue, to the jury was held error in Western U. Teleg. Co. v. Thompson, 75 C. C. A. 334, 144 Fed. 578.

It is held in Powell v. Champion Fiber Co. 150 N. C. 12, 63 S. E. 159, that the superintendent of a corporation, having authority to collect debts, has no implied authority to arrest a debtor's wife on account of the debt, so as to render the corporation liable for such unauthorized or unratified act.

31 L.R.A.(N.S.)

If an agent who makes the affidavit and bond in an attachment proceeding acts maliciously in doing it, his malice will not be imputed by presumption to his principal, though his bad judgment in wrongfully suing out the writ will be. Wallace v. Finberg, 46 Tex. 35; McCullough v. Walton, 11 Ala. 492.

It was held in Thompson v. Bell, 11 Tex. Civ. App. 1, 32 S. W. 142, that in the absence of evidence that a principal either participated in the malice of his agent in suing out an attachment for a debt, or that with knowledge of his malice, acquired since the levy of the attachment, the principal approved or ratified it, the court is not warranted in submitting to the jury the issue of the principal's liability for exemplary damages.

In Dupre v. Childs, 52 App. Div. 306, 65 N. Y. Supp. 179, affirmed in 169 N. Y. 585, 62 N. E. 1095, however, the proprietors of a restaurant were held responsible for the act of the general manager in procuring the arrest of a person who, before being served, had left the restaurant without stopping at the cashier's desk. The court, in answer to the contention that the defendants were not liable for what was done outside of the restaurant,—because there was a general rule that the manager should not go out of the restaurant until he had been relieved by someone else, said: "He was there as the *alter ego* of the defendants, and to do precisely those things which the defendants might have done and would do if present; and if in the performance of those duties it became necessary for him, in order to collect a bill, to step outside the restaurant and to procure payment from the person who had not paid his bill inside, there is no doubt that he might not only properly do it, but was expected to do it. The rule that he should not leave the premises was made, undoubtedly, to require him to stay in charge of the restaurant until he was relieved, but it was not intended nor could it be intended, to restrain him from doing on the steps of the restaurant just what he might do inside by way of collecting a bill."

W. 303; Schmidt v. New Orleans R. Co. 116 La. 311, 7 L.R.A.(N.S.) 162, 40 So. 714; Evans v. Atlantic Coast Line R. Co. 105 Va. 72, 53 S. E. 3; King v. Illinois C. R. Co. 69 Miss. 245, 10 So. 42; Richberger v. American Exp. Co. 73 Miss. 161, 31 L.R.A. 390, 55 Am. St. Rep. 522, 18 So. 922; Rivers v. Yazoo & M. R. Co. 90 Miss. 196, 9 L.R.A.(N.S.) 931, 43 So. 471; Western Cottage Piano & Organ Co. v. Anderson, 97 Tex. 432, 79 S. W. 516; White v. Apsley Rubber Co. 194 Mass. 97, 8 L.R.A.(N.S.) 484, 80 N. E. 500; Livieratos v. Commonwealth Secur. Co. 57 Wash. 376, 106 Pac. 1125.

If a criminal procedure is instituted to collect a debt, it will support a finding that the procedure was without probable cause. Lueck v. Heisler, 87 Wis. 644, 58 N. W.

1101; Clark v. Folkers, 1 Neb. (Unof.) 96, 95 N. W. 328; Morgan v. Duffy, 94 Tenn. 686, 30 S. W. 735; Sebastian v. Cheney,— Tex. Civ. App. —, 24 S. W. 970; Neufeld v. Rodeminski, 144 Ill. 83, 32 N. E. 913; White v. Apsley Rubber Co. 194 Mass. 97, 8 L.R.A.(N.S.) 484, 80 N. E. 500; MacDonald v. Schroeder, 214 Pa. 411, 6 L.R.A.(N.S.) 701, 63 Atl. 1024, 6 Ann. Cas. 506; White v. International Textbook Co. 144 Iowa, 92, 121 N. W. 1104; Paddock v. Watts, 116 Ind. 146, 9 Am. St. Rep. 832, 18 N. E. 518; Motes v. Bates, 80 Ala. 382; Jones v. Jenkins, 3 Wash. 17, 27 Pac. 1022; Moneyweight Scale Co. v. McCormick, 109 Md. 170, 72 Atl. 537; Richter v. Koster, 45 Ind. 440.

So, where a sewing-machine agent, having full authority to represent the company, sell machines, and collect the money, procured the illegal arrest and detention of a person in attempting to recover a machine conditionally sold, the company was held liable in Wheeler & W. Mfg. Co. v. Boyce, 36 Kan. 350, 59 Am. Rep. 571, 13 Pac. 609, for false imprisonment, the agent's act, although wrongful, being within the scope of his employment. The arrest was incidental to the replevin suit brought by the agent, and was made to compel the delivery of the machine under a statute providing for the commitment of a person who should conceal property replevied.

So, an express agent charged with the duty of receiving goods and collecting charges thereon was held in Cameron v. Pacific Exp. Co. 48 Mo. App. 99, to be acting within the scope of his implied authority so as to render his employer liable for malicious prosecution, where, with a view of recovering the property or the charges thereon, he instituted a criminal prosecution against a person who had taken a C. O. D. package without paying the charges. The court observed that if the agent had caused the arrest in order to punish the offender for the commission of a crime, instead of adopting such means to recover the property or charges thereon, the company would not have been liable; for in such case he would not have been acting for the company, but for the state.

In Stalker v. Drake, 91 Kan. 142, 136 Pac. 912, a money lender was held liable for malicious oppression, acting through his agent, in seeking to enforce usurious and unlawful claims against plaintiff, who had borrowed a sum of money.

It was held in White v. International Textbook Co. 150 Iowa, 27, 129 N. W. 338, an action against a corporation and its agent for malicious prosecution, that a verdict in favor of one and against the other was inconsistent and therefore erroneous, since the corporation could not have been found to have been actuated by malice unless the agent also was actuated by the same bad motive. It is only by imputing 51 L.R.A.(N.S.)

the malice of the agent to the principal that a corporation may be held amenable to a suit for malicious prosecution. If the agent was not malicious in what he did, there was no malice to impute to the company. On the other hand, if the company is chargeable with malice the agent must have entertained an evil motive in doing what he did. Manifestly, the verdict in finding for one defendant and against the other was fundamentally contradictory, and was necessarily erroneous as to one or the other. (In this connection, see notes in 54 L.R.A. 649; 9 L.R.A.(N.S.) 880, and 30 L.R.A.(N.S.) 404, as to verdict or judgment in favor of servant as a bar to an action against master.)

Partner as agent.

Generally as to liability of partner for malicious prosecution, false arrest, or false imprisonment by copartner, see note to Bernheimer v. Becker, 3 L.R.A.(N.S.) 221.

The liability of a partnership for the wilful and malicious torts of an individual member is discussed in note to Page v. Citizens' Bkg. Co. 51 L.R.A. 463.

As a general rule a partner is not liable for malicious prosecution instituted by his copartner, unless committed in the course of, and for the purpose of transacting, the partnership business.

Thus, a partner is not liable for the malicious arrest and imprisonment of a debtor of the firm by his copartner where it was done without his knowledge, consent, or participation, and the act was of no benefit to him or the firm. Rosenkrans v. Barker, 115 Ill. 331, 56 Am. Rep. 169, 3 N. E. 93. The court in the above case observed that if the partner, after knowledge of the arrest, approved of what had been done, he would only be liable for the real injury sustained, and not for vindictive damages. Citing Grund v. Van Vleck, 69 Ill. 478.

A partner is not liable for the malicious suing out of an attachment for debt by his copartner, where he did not advise or actively co-operate in procuring the writ,

The act of Klein was the act of his company, and both are responsible.

Moneyweight Scale Co. v. McCormick, 109 Md. 170, 72 Atl. 537; Hazzard v. Flury, 120 N. Y. 223, 24 N. E. 194.

Messrs. McLaurin, Armistead, & Brien, for appellee:

A special agent, authorized to establish agencies and to see after their proper remittance of premiums has not the power to indict the local agent for which his principal would become responsible.

Fisher v. Westmoreland, 101 Miss. 180, 57 So. 563; Mangum v. Ball, 43 Miss. 288, 5 Am. Rep. 488.

ratify, or derive any benefit from it. Swenson v. Erickson, 90 Ill. App. 358.

Attorney.

Where a claim is sent to an attorney with no specific instruction as to its collection, it is not within the scope of the attorney's duty in making collection to arrest the debtor, so as to render the client liable for malicious prosecution, unless the client advised, consented to, or ratified the act. Moore v. Cohen, 128 N. C. 345, 38 S. E. 919; West v. A. F. Messick Grocery Co. 138 N. C. 166, 50 S. E. 565.

The rule is laid down in Burnap v. Albert, Taney, 244, Fed. Cas. No. 2,170, that if a debtor is maliciously prosecuted and imprisoned by an attorney without probable cause, a client is not responsible unless he directed the attorney's act. But if the client afterwards refuses to stay the proceedings or discharge the party from imprisonment, from the desire to obtain thereby, unjustly, any pecuniary advantage to himself, and knows or believes at the time of his refusal that such proceeding and imprisonment have been procured maliciously and without any probable cause, he is liable. If, however, in refusing to interfere, he is actuated by honest motives is seeking and deserving by legal means to recover money which he believes due him, and is guided in his course by advice of counsel whom he believes trustworthy, he will not be liable.

The mere fact that one is acting as the agent of another in collecting a debt will not make the latter liable for his act in maliciously suing out an attachment. Consequently, where a firm sent a claim for collection to an attorney, who maliciously sued out an attachment, the members of the firm were held not liable in Oberne v. O'Donnell, 35 Ill. App. 180, where they in no manner aided, abetted, advised, or consented to, or adopted or ratified, such acts.

Where an attorney at law is instructed to collect a note by suit it is within the scope of his authority to sue out an attachment, and his client is liable if the attachment is wrongfully sued out; but the client is not responsible in any greater degree if the attorney was influenced by malicious motives. Kirksey v. Jones, 7 Ala. 622. 51 L.R.A.(N.S.)

A mere authority of Klein to collect this money from Russell & Moore did not make him a vice principal of the Palatine Insurance Company in any sense.

Fox v. Fisk, 6 How. (Miss.) 328; Bush v. Southern Brewing Co. 69 Miss. 200, 13 So. 856.

A special agent, such as Klein was in this case, "is one who is appointed for a particular purpose and under a limited authority."

Planters' Bank v. Cameron, 3 Smedes & M. 609; Malone v. Robinson, — Miss. —, 12 So. 709; Fox v. Fisk, supra; Thompson v. Beacon Valley Rubber Co. 56 Conn. 493, 16

If an attorney and client, acting in concert, procure an unauthorized order of attachment, operating injuriously upon a debtor's rights, both are liable; but if a client proceeds under the advice of his counsel, which he confides in and honestly believes to be correct, being ignorant, as it may be presumed of the law and of the forms of judicial proceedings, the implication of malice, arising merely from the want of probable cause or *crassa ignorantia*, which would justify a finding against him, may be repelled. Wood v. Weir, 5 B. Mon. 544.

So, both client and attorney are liable for false imprisonment, where an attorney, at the request of his client, causes a debtor to be imprisoned on an illegal execution. Barker v. Braham, 3 Wils. 368, 2 W. Bl. 866; Sleight v. Leavenworth, 5 Duer, 122.

So, where a debtor was arrested upon a ca. sa. issued upon a discharged judgment at a client's special instance and request, both client and attorney who issued the execution were held liable for false imprisonment, regardless of whether or not they were notified of the discharge. Deyo v. Van Valkenburgh, 5 Hill, 242.

So, clients are held liable in Guilleaume v. Rowe, 94 N. Y. 268, 46 Am. Rep. 141, affirming 63 How. Pr. 175, for the arrest of a debtor upon an unauthorized execution, although they did not direct the issuing of the execution or the arrest. The court said the retainer of the attorney was by these defendants, the issuing of the execution was within the scope of his implied authority, and the arrest of the judgment debtor was for the purpose of compelling payment. This was enough to make them liable. There was, however, evidence tending to show actual knowledge on the part of the defendants, and, at any rate, acquiescence by them in the course adopted by their attorney.

In Anderson v. Canaday, 37 Okla. 171, — L.R.A.(N.S.) —, 131 Pac. 697, where a creditor, through his attorney, garnished a debtor's exempt wages, the court stated that where an attorney is himself actuated by malicious motives in bringing an action or proceeding for his client, he is liable for damages for bringing such action or proceeding equally with his client. J. D. C.

Atl. 554; *Bush v. Southern Brewing Co.* supra.

Plaintiffs are required to prove want of probable cause in order to maintain their action.

McNulty v. Walker, 64 Miss. 198, 1 So. 55; *Planters' Ins. Co. v. Williams*, 60 Miss. 916; *Brown v. Mason*, 40 Vt. 157; 26 Cyc. 40, 86; *Ray v. Patrick*, 1 Miss. Dec. 162; *Threefoot v. Nuckols*, 68 Miss. 116, 8 So. 335; *Greenwade v. Mills*, 31 Miss. 464; *Whitfield v. Westbrook*, 40 Miss. 311.

Want of probable cause and malice must conjoin before a suit for malicious prosecution can proceed.

Greenwade v. Mills, 31 Miss. 464; *Whitfield v. Westbrook*, 40 Miss. 311; *Ray v. Patrick*, 1 Miss. Dec. 162; *Threefoot v. Nuckols*, 68 Miss. 125, 8 So. 335.

Cook, J., delivered the opinion of the court:

Appellant filed this suit against the Palatine Insurance Company, appellee, and W. B. Klein, the special agent of said company, for malicious prosecution. At the close of the evidence the court instructed the jury to find a verdict for each of the defendants. This appeal is from the judgment in favor of the Palatine Insurance Company; no appeal having been instituted from the judgment for Klein.

Many interesting questions are presented by the able and exhaustive briefs filed by counsel for both sides of this controversy, but we deem it only necessary to discuss the point which is necessarily determinative of this appeal.

Appellant was the local agent for the insurance company and fell behind in the payments of his accounts due to the company for premiums on policies issued by him, which premiums he had collected from the policy holders or he owed to the insurance company by his contract with it.

W. B. Klein was the special agent of the insurance company, and as such he was authorized to suspend, check up, and settle with the local agents of the company. The scope of his agency is assumed for the purpose of this appeal, for as a matter of fact, it is not altogether clear from the record what authority Klein actually had to act for the insurance company. His authority is largely established by proof of his declarations and acts, but we will consider him as the authorized agent of appellee for the purposes mentioned.

"From the natural improbability that one should voluntarily, without authority, assume to act for another, settling his obligations for a considerable period of time, and from the fact that such conduct would naturally come to be known by the assumed 51 L.R.A. (N.S.)

principal, the fact of agency may be presumed." *Neibles v. Minneapolis & St. L. R. Co.* 37 Minn. 151, 33 N. W. 332.

Klein checked the books of appellant, and the amount due the company was ascertained and agreed upon. Various efforts were made to collect the balance, and various expedients were suggested by appellant and by Klein whereby this end could be reached, none of which "panned out" anything. The effort to collect and the conferences between Klein and appellant seemed to have ended some time near the 1st of March, 1911.

The grand jury at the April term, 1911, indicted appellant for embezzlement of the company's funds; this indictment having been returned solely on the evidence of Klein, who appeared before the grand jury voluntarily, never having been subpoenaed as a witness. The jury at the trial of this indictment acquitted appellant, and it is upon this prosecution this suit is based.

There is nothing in the record to suggest that the insurance company was advised of this indictment, or that they ratified the action of Klein in bringing about the prosecution; but it is earnestly insisted that Klein acted within the scope of his authority when he volunteered as a witness against appellant.

This court in *Fisher v. Westmoreland*, 101 Miss. 180, 57 So. 563, cited with approval *Daniel v. Atlantic Coast Line R. Co.* 136 N. C. 517, 67 L.R.A. 455, 48 S. E. 816, 1 Ann. Cas. 718. In that case the supreme court of North Carolina held: "The appointment of one as cashier at a railway station, with power to collect money, give receipts, sell tickets, take care of the money received, and forward it to the treasurer of the company, does not empower him to arrest persons whom he suspects of having stolen money which has come into his possession, so as to render the railroad company liable in case he causes the arrest of an innocent person." Judge Walker, speaking for the court, said: "The circumstances under which they pursued this man, without the warrant of the law, even to his bed-chamber and at the silent hour of midnight, arousing him from his peaceful slumbers, invading the sanctity and privacy of his room, which the law surrounded with its protection as much so as if it had been his home or his castle,—subjecting him to such indignities as no self-respecting man could submit to, even under compulsion, without feeling that he had been humiliated if not degraded by them, marching him through the office of the hotel and down a public street where any and all might see the infamy and disgrace which they had fastened upon him,—all these things and more

they did which made their offense against him, if the evidence be true, a very serious one, and to him they and all who participated in causing his arrest are responsible before the law, and they must reckon with him if he sees fit to call them to account. But we must not allow any feeling of indignation at the grievous wrong inflicted upon the plaintiff (which cannot be too severely condemned, if, as we must assume, he is an innocent man) to withdraw our attention from those principles of that same law by which the defendant's rights are guarded."

It will be seen from this graphic description that plaintiff in that case was most outrageously treated and gratuitously humiliated by the agent of the railroad company. The court then states the plaintiff's contention and the court's response thereto as follows: "The plaintiff's sole contention is that what Atkinson did at Greenville, and Meacham at Kinston, was within the line of their duty and the scope of their employment, and therefore they had implied authority from the defendant to do what they did, upon the theory, we suppose, that every authority carries with it, or includes in it, as an incident, all the powers which are necessary, proper, or usual as means to effectuate the purposes for which it was conferred, and that consequently when an agency is created for a specified purpose, or in order to transact particular business, the agent's authority, by implication, embraces the appropriate means and power to accomplish the desired end. He has not only the authority which is expressly given but such as is necessarily implied from the nature of the employment. Story, Agency, 9th ed. ¶ 97. This is the general rule, and the doctrine of *respondet superior* is a familiar one. But in our opinion it has no application to the facts of this case. If we should hold that it is so broad in its scope as to include a case like this one, it would lead to most dangerous consequences. For us to say that an agent can by his acts subject his principal to liability in damages to anyone injured by his said acts, done when he was not about his master's business, and had no express or implied authority to do them, but was merely seeking to avenge a supposed wrong already committed or to vindicate public justice, would be carrying the doctrine of *respondet superior* far beyond its acknowledged limits. A servant intrusted with his master's goods may do what is necessary to preserve and protect them, because his authority to do so is clearly implied by the nature of the

service; but when the property has been taken from his custody or stolen, and the crime has already been committed, it cannot be said that a criminal prosecution is necessary for its preservation or protection. This may lead to the punishment of the thief or the trespasser, but it certainly will not restore the property or tend in any degree to preserve or protect it. It is an act clearly without the scope of the agency, and cannot possibly be brought within the limits of the implied authority of the agent."

In the case of Markley v. Snow, 207 Pa. 447, 64 L.R.A. 635, 56 Atl. 999, also cited in Fisher v. Westmoreland, supra, it is held that "Employees of a mining partnership, who are charged with the care and management of its property, do not act within the scope of their employment in causing, long after the commission of the crime, the arrest, for the purpose of vindicating the law, of one who is suspected of having set fire to a building belonging to the partnership, so as to render the partnership liable for malicious prosecution in case the arrest proves to have been without justification."

An express company is not liable for the wrongful acts of its agent at its office in a city, in charge of its business there, in causing the arrest of one for larceny from the office, unless it authorized or ratified the act. Minter v. Southern Exp. Co. 153 N. C. 507, 69 S. E. 497.

Mr. Klein was employed by the insurance company to collect its claim against appellant, and he was authorized to employ all appropriate means to accomplish this end; and while the agent is employing appropriate means to carry out his master's business, the master is responsible for his acts. Certainly it cannot be said that a criminal prosecution is a means appropriate to the collection of debts. In Dally v. Young, 3 Ill. App. 39, it is said: "Where an agent institutes a malicious prosecution of his own head, and without the instigation or direction of his principal, the latter will not be liable for the same, unless he adopts and continues the same with knowledge of all the circumstances."

Should we hold that appellee was responsible for the acts of Klein, it would be to hold, when an authority to collect a debt is shown, the law will imply the authority to institute criminal proceedings against the debtor in case the debtor fails or refuses to pay. We do not believe that this is sound in reason or in law.

Affirmed.

Petition for suggestion of error denied.

OHIO SUPREME COURT.

PETER ANDERSON, Plff. in Err.,
v.
UNITED REALTY COMPANY et al.
(79 Ohio St. 23, 86 N. E. 644.)

Removal of cause — withdrawal of bond — dismissal as to petitioner — effect.

1. Upon the filing in a state court of the requisite petition and bond for the removal of the suit to a Federal court, the state court is divested of jurisdiction; but a party who procures the withdrawal of the petition and bond by the party who filed it, before any action in the Federal court, and then dismisses his action in the state court as to the party who filed the petition for removal, and by agreement with the remaining parties prosecutes the suit in the state court, cannot be heard, after judgment against him, to assert that the jurisdiction of the state court had not been restored.

Will — death without lineal descendants — estate created.

2. Where in a will there is a devise to a son, and, if he dies without lineal descendants living at the time of his decease, then over, these words are not, by themselves, without assistance from other parts of the will, sufficient to create an estate by implication in the lineal descendants, but the son takes a fee defeasible upon his death without lineal descendants living at the time of his decease; and, in the event of lineal descendants living at the time of the son's decease, his fee becomes absolute, and such descendants have no interest under the will as against his grantee.

(Davis, J., dissents.)

(November 10, 1908.)

ERROR to the Circuit Court for Lucas County to review a judgment affirming a judgment of the Court of Common Pleas in defendants' favor in an action brought to recover possession of certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Rhea P. Cary, C. A. Thatcher, and C. H. Trimble for plaintiff in error.

Messrs. King, Tracy, Chapman, & Welles, for defendants in error:

Under Anderson's will, his sons took an estate in fee simple.

Niles v. Gray, 12 Ohio St. 320; Piatt v. Sinton, 37 Ohio St. 353; Devecmon v. Shaw, 70 Md. 219, 16 Atl. 645; Widows' Home v. Lippardt, 70 Ohio St. 261, 71 N. E. 770, 1 Ann. Cas. 875; Van Horne v.

Campbell, 100 N. Y. 287, 53 Am. Rep. 166, 3 N. E. 316, 771; James v. Pruden, 14 Ohio St. 251; Ohio Rev. Stat. § 5970; Stokes v. Weston, 142 N. Y. 433, 37 N. E. 515; Washbon v. Cope, 144 N. Y. 287, 39 N. E. 388; Colby v. Doty, 158 N. Y. 323, 53 N. E. 35; Karker's Appeal, 60 Pa. 141; Clarke v. Clarke, 46 S. C. 230, 57 Am. St. Rep. 675, 24 S. E. 202; Finlay Brewing Co. v. Dick, 13 Ohio Dec. 581; Melson v. Cooper, 4 Leigh, 408; St. Mark's Lodge, F. A. M. v. Darrow, 78 Ohio St. 397, 85 N. E. 1131, 53 Ohio L. J. 83; affirming 16 Ohio Dec. 120; Robbins v. Smith, 72 Ohio St. 9, 73 N. E. 1051; Shaw v. Hoard, 18 Ohio St. 227; Carter v. Reddish, 32 Ohio St. 1.

The decision of the supreme court of Ohio in the case at bar controls the Federal courts.

McGoon v. Scales, 9 Wall. 23, 19 L. ed. 545; Brine v. Hartford F. Ins. Co. 96 U. S. 827, 24 L. ed. 858; DeVaughn v. Hutchinson, 165 U. S. 566, 41 L. ed. 827, 17 Sup. Ct. Rep. 461; Clarke v. Clarke, 178 U. S. 186, 44 L. ed. 1028, 20 Sup. Ct. Rep. 873; Orr v. Gilman, 183 U. S. 287, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; Chanler v. Kelsey, 205 U. S. 466, 51 L. ed. 882, 27 Sup. Ct. Rep. 550; East Central Eureka Min. Co. v. Central Eureka Min. Co. 204 U. S. 266, 51 L. ed. 476, 27 Sup. Ct. Rep. 258.

Messrs. George A. Bassett, Oliver B. Snider, Rathbun Fuller, Elmer E. Davis, Rhoades & Rhoades, and Clayton W. Everett also for defendants in error.

Summers, J., delivered the opinion of the court:

In the court of common pleas of Lucas county this was an action by Peter Anderson against several defendants to recover the possession of several city lots, or parcels of real estate, in the city of Toledo. The title of Peter Anderson to the lands in question depends upon the construction to be given to his grandfather's (Henry Anderson's) will. Henry Anderson, the grandfather, made his will on February 28, 1846, and died on the 3d day of April following. He left two children only, William, born February 12, 1828, and James H. born June 25, 1831. William died in 1850 intestate, unmarried, and without issue. James H., the other son, died in 1902, intestate, and left surviving him as his only child, and only heir at law, the plaintiff, Peter Anderson, who was born August 27, 1859, and he is the grandson, and the only grandchild, and only living descendant, of the said Henry Anderson.

The testator gave all of his property, both real and personal, to certain persons

Headnotes by SUMMERS, J.

See note post, 485.
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in trust, and the will then reads as follows:

"Item. It is my will that when my son William arrives at the age of twenty-one years, the trustees of the first and general trust shall deliver to him a settlement of the affairs of the trust, and if my debts are then paid, and as soon as that takes place, they shall put him in possession of one half of my property, reserving thereout two-fifths parts of said moiety by valuation, which my said trustees shall hold in trust and properly invest and pay over to him at the age of twenty-five years. If my interest in the American Land Company be not brought into the general trust at the time William becomes twenty-one, but is brought in at any time before he arrives at twenty-five, so soon as brought in, two fifths shall be deducted therefrom and invested and paid over to him at twenty-five, the other three fifths he shall have as soon as paid in. I find the above does not express my will in this: When I say two fifths shall be deducted from the interest I may have in the land company for investment, and three fifths to be paid to him, I mean two fifths of a moiety shall be deducted, and three fifths of a moiety paid over.

"And it is my will that my said trustees hold and invest and pay over the remaining moiety of my estate to my son James at the respective periods of twenty-one and twenty-five years of age, being governed as to the amounts to be paid at each of the respective periods by the same rules and directions as are above laid down in the bequest to William, and to be governed in all other respects by the regulations laid down concerning the same.

"If either of my sons die without lineal descendants, the one surviving shall take his estate above bequeathed, and, if the survivor dies without lineal descendants, then one half both of the decedent's original portion, as well as one half of the portion taken by survivorship, shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such surviving son. If my brother Peter be not living at the time of the death of my surviving son, so dying without lineal descendants; then the share he would have taken, if living, shall go to his children, living at the time of the decease of my said son, and if there be no children surviving, then the share shall go to my other brother and sisters surviving at the time of such decease of my son. I make the following explanation: The limitation over on the death of my surviving son without lineal descendants is intended to take effect if there be no

lineal descendants living at the time of the decease of such son. Nothing in the foregoing will shall be construed as to deprive either of my sons disposing of their portions by will on their attaining the age of twenty-one years, respectively. The above limitations over shall give way to the provisions of such wills."

This will was duly probated in Mississippi, and an authenticated copy of the will and of the probate thereof was thereafter duly filed in the probate court of Lucas county, Ohio, where the will was duly admitted to probate and record as a will from another state. On April 7, 1860, James H. Anderson, the father of the plaintiff, and the then surviving son of the testator, executed and delivered to one Charles Butler a quitclaim deed of all the real estate involved in this action, which deed was duly signed, sealed, acknowledged, and executed by him in the presence of two witnesses, who signed the deed as such, and which deed was duly recorded in the recorder's office of Lucas county, Ohio, on May 3, 1860. The defendants derive their title from Charles Butler. In 1838 the land in controversy was owned in fee simple by one Edward Bissell, who then mortgaged it to Charles Butler to secure the payment of his bond for a large sum due in one year. In 1841 Butler assigned the bond and mortgage to Henry Anderson as collateral security for the payment of his note to Anderson, and, in default of payment, Anderson in 1843 filed his bill in chancery in the court of common pleas of Lucas county, Ohio, to foreclose the Bissell mortgage. The land was bid in by Anderson at the master's sale in 1844, and he received the deed therefor. He then entered into an agreement with Butler, which, in effect, so it is contended, made the land the property of Butler, and vested the title in Anderson merely as security for the payment of Butler's note to Anderson. Butler thereafter obtained quitclaim deeds from Bissell and from Anderson's trustees and from William and James H. Anderson, and it is also contended that the proof shows that the payments made by Butler to Henry Anderson and to his trustees discharged the note, but it is not necessary to narrate the facts in detail; for, if the title was in James H. Anderson, his quitclaim deed conveyed it to Butler, and it did not descend from James H. Anderson to his son, the plaintiff, and these facts become material only in the event the plaintiff took an estate in the land under his grandfather's will. The facts are set out in detail in the opinion of the circuit court. 9 Ohio C. C. N. S. 473, 27 Ohio C. C. 267.

The petition in this case was filed August

17, 1905. The defendants were not tenants in common, but each held a lot in severalty. Some of the defendants by answer objected to the petition, on the ground that separate causes of action against several defendants were improperly joined, and on August 25, 1905, one of the defendants, a corporation, filed its petition and bond for removal into the next circuit court of the United States to be held in the northern district of Ohio, western division. The petition for removal averred that the corporation was the owner, and in exclusive possession, of one of the lots; that it had no interest in any of the other lots, and that none of the other defendants had any interest in its lot; that the corporation was a citizen of Michigan; that plaintiff was a citizen of Tennessee, and that the controversy in said suit between the corporation and the plaintiff was a separable controversy, wholly between it and the plaintiff, relating to the ownership and right to possession of the real estate described as lot 332 in Port Lawrence Division, Toledo, Ohio, and the rents and profits to the same; and that the value of the real estate in controversy, exclusive of interest and costs, exceeded the sum of \$2,000. The transcript does not show any action by the court upon the petition for removal or upon the bond, but it does appear that on the 6th of November, 1905, the plaintiff dismissed his action, without prejudice, as to that defendant, and that in consideration thereof such defendant withdrew its petition for removal, and on the same date there is this docket entry, "Petition for removal withdrawn." The action was dismissed also as to some other defendants. Thereafter, on January 2, 1906, the plaintiff and the remaining defendants entered into a stipulation that the defendants waived the misjoinder of causes of action in the plaintiff's petition, and that all the parties consented and agreed to try together all of the causes of action set forth in the petition. Thereafter the action was tried in the court of common pleas, and a verdict was directed for the defendants, and each of them, and the petition was dismissed. On July 14, 1906, the plaintiff filed a petition in error in the circuit court, and assigned, as his first ground of error, that the common pleas court lost jurisdiction of the action with the filing of the petition and bond for removal. Other errors are assigned. The circuit court affirmed the judgment of the court of common pleas, and the case is brought here on error to reverse the judgment of the lower courts.

Upon the filing of such petition and bond the Federal statute makes it the duty of the state court to accept them, and to pro-

ceed no further in the suit. Thereupon the state court is divested of jurisdiction of the suit, and its subsequent orders are *coram non jure*, unless its jurisdiction be restored. *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 28 L. ed. 643; *National S. S. Co. v. Tugman*, 106 U. S. 118, 27 L. ed. 87, 1 Sup. Ct. Rep. 58; *Madisonville Traction Co. v. St. Bernard Min. Co.* 186 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251. In this case we think the jurisdiction was restored as to the remaining defendants by the withdrawal of the petition for removal by the defendant that filed it, and the dismissal by the plaintiff of his action against that defendant, before any action upon the petition and bond had been taken in either court. The state court had jurisdiction of the subject-matter and of the parties, but under the Federal Constitution and laws it was the privilege of one of the defendants to have the suit transferred to a Federal court, and when he filed the requisite petition and bond, the jurisdiction of the state court was suspended. The Federal court could, with the consent of the parties, restore the jurisdiction by remanding the suit, and we see no good reason why the jurisdiction of the state court may not be restored by the withdrawal of the petition for removal before any action upon it has been taken. In the Federal court, to which the case was sought to be removed on the ground of an alleged separate cause of action against one of the defendants, it would be, as a matter of course, remanded to the state court upon the entry of a discontinuance as to him (*Texas Transp. Co. v. Seeligson*, 122 U. S. 519, 30 L. ed. 1150, 7 Sup. Ct. Rep. 1261), or upon settlement of the controversy between him and the plaintiff. *Torrence v. Shedd*, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726. There was merely an irregularity in the mode of restoring the jurisdiction, of which the plaintiff will not be heard to complain. In *Garrozi v. Dastas*, 204 U. S. 64-72, 51 L. ed. 369-376, 27 Sup. Ct. Rep. 224, 227, Mr. Justice White says: "The assertion of the want of jurisdiction in the court below rests, however, not upon a denial of power in that court to have entertained the controversy if the suit had been originally brought there, but upon the contention that, as a defendant other than the husband was a resident and citizen of Porto Rico, the cause was improperly removed from the local court. And the proposition goes to the extent of insisting that such want of jurisdiction may be asserted by the person who procured the removal, who resisted the effort to remand, and when the want of jurisdiction is only suggested after the trial and final decree." And the conclusion was

that, even though the removal was irregular, the party who caused the removal could not be heard, after judgment against him, to assert that the United States court was wanting in jurisdiction solely on the ground that the case was erroneously removed. And if the conclusion in *Baltimore & O. R. Co. v. Fulton*, 59 Ohio St. 575, 44 L.R.A. 520, 53 N. E. 285, that where a suit is removed to the Federal court, and then dismissed without trial, no subsequent suit upon the same cause of action can properly be brought in the state court, is not correct, as seems to be the opinion in *Gassman v. Jarvis* (C. C.) 100 Fed. 146 (and see note to *Young v. Southern Bell Teleph. & Teleg. Co.* 7 L.R.A.(N.S.) 501, where the cases are collected, 75 S. C. 326, 55 S. E. 765, 9 Ann. Cas. 940), then, in effect, the withdrawal of the petition and bond for removal, and the trial of the suit in the state court by agreement of all the parties, was the prosecution of a new suit upon the same cause of action.

The remaining question, what estate did the plaintiff take under the will? would not, perhaps, have consumed much time, for the leading text-books and the cases are in accord that he took none, had not the circuit court of appeals reached a different conclusion in *Anderson v. Messinger*, 7 L.R.A.(N.S.) 1094, 77 C. C. A. 179, 146 Fed. 929, where the same will was construed. It is there held that James H. Anderson, the surviving son, took a life estate, with the remainder to his son, Peter Anderson, the plaintiff. In *Underhill on the Law on Wills*, § 468, it is said: "Where real or personal property is given to a person absolutely, but if he should die without leaving children, then over, the primary devisee takes a common-law fee conditional, which is defeasible on his death without leaving children, though the children, if he leave any, take no estate as purchasers under the will by implication. If the first taker shall die leaving children him surviving, by which event the remainder is defeated, they will take by descent from their parent, and not as purchasers under the will. He has an estate in fee, with full power of disposal, and the only effect of mentioning the children in the will is to indicate the contingency upon which his estate in fee is to be defeated." At common law it was settled, says Mr. Jarman (*Jarman, Wills*, 6th ed. *521), that a devise to a person indefinitely, with a limitation over in case he died without issue, or words of similar import, conferred an estate tail on such person, and on the ulterior devisee a remainder in fee expectant on the estate tail in such prior devisee, on the ground that, by postponing the ulterior devise until the fail-

ure of the issue of the prior devisee, the testator afforded an irresistible inference that he intended that the estate to be taken by the prior devisee under the indefinite devise should be of such a measure and duration as to fill up the chasm in the disposition, and prevent the failure of the ulterior devise, which, as an executory devise to take effect on the general failure of issue, would be void for remoteness. And in like case, where there was an express estate for life in the first taker, he was held to take an estate tail. In *Stanley v. Leonard*, 1 Eden, 87-95, the lord keeper said: "Where a man, by his will, makes one tenant for life, with remainder to one, two, three, four, five, etc., of the issue of the tenant for life, and then for want of issue of tenant for life, limits the estate over, this will be an estate tail in the first taker for life by necessary implication, and this, because of the word 'then' before the limitation over, which, though sometimes an adverb of time, yet is sometimes a word of relation, and signifies as much as 'in such case,' and must have this effect: That upon the first, second, third, fourth, fifth, etc., limitations failing, the remainderman could not take it because of the words 'for want of issue;' and therefore, unless the tenant for life was construed to have an estate tail, it would descend, in the meantime, to the heir at law, because the contingency on which the remainderman was to take had not happened. But as the testator certainly intended to dispose of his whole estate, it has been construed a necessary implication that the tenant for life should take an estate tail to carry the testator's intent into execution. But where there is an express estate for life, the court never enlarges this estate for the sake of the tenant for life himself, but merely for the sake of other persons who are intended to take by the will. To this it is objected that you will introduce an estate tail, which will give the party an opportunity of defeating the limitations over; but this proves too much, for so it happened in all the cases that have been cited at the bar; for you cannot supply the defect and omission in the will without giving the tenant for life power to destroy the remainders over." This result follows from interpreting the words "die without issue," or words of similar import, to mean an indefinite failure of issue. But in 1837 an act was passed (St. 1 Vict. chap. 26, §§ 28, 29) by which it was provided that a devise of real estate without any words of limitation shall be construed to pass the fee simple, or other the whole estate and interest which the testator had power to dispose of by the will, and "that in any devise or bequest of real or

personal estate the words 'die without issue,' or 'die without living issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will." And so Mr. Jarman says (*522): "Under this clause, coupled with the preceding section, which makes a devise confer an estate in fee without words of inheritance, it will generally happen, in cases in which, according to the old law, the prior devisee would have been tenant in tail, by the effect of words devising over the property on the failure of his issue, that he will, under the new rule of construction, take an estate in fee simple, subject to an executory devise in the event of his dying without leaving issue at his death." And then, speaking of the advantages attending the present mode of construction, he says (*523): "Secondly, that, by excluding the implication of an estate tail in the person whose issue is so referred to, where he takes an estate under the will, or where he or the express devisee happens to be the heir at law of the testator, the new construction has the effect of exempting the interest of the ulterior devisee from its liability to be defeated or destroyed by the act of the prior devisee; the result being that, instead of the ulterior devisee having (as formerly) a remainder in fee expectant on an estate tail in such prior devisee (which, of course, the latter might have barred by a disentailing assurance), he takes by executory devise ingrafted on a preceding fee simple, to arise on the event of the first devisee dying without leaving issue at his death, the estate of such prior devisee being absolute in the alternative event." Now, the pertinency of this statement that, in such a case under the new rule of construction, the prior devisee takes an estate in fee simple, subject to an executory devise in the event of his dying without leaving issue at his death, is apparent when it is stated that in this state the common-law rule never was adopted, but was rejected, and the modern rule was adopted. Parish v. Ferris, 6 Ohio St. 563; Niles v. Gray, 12 Ohio St. 320.

Where there is a devise to A for life and in case he should die without issue to B, it has been urged, in case A dies leaving issue, the issue take by implication, on the ground that it would be absurd in the testator to make the estate of the ulterior devisee depend on the contingency of there not being issue, and yet, in the alternative

event, to give the property neither to A himself nor to such issue, but to leave it to devolve to the heir at law or residuary devisee. Mr. Jarman says (*522): "There is, however, no authority for implying an estate in the issue living at the death, and the contrary conclusion is supported by Monypenny v. Dering, 7 Hare, 588, 14 Jur. 1083, where it was argued that a devise over in default of issue of A, a tenant for life, to some only of whose issue an estate was expressly given, showed that the intention must have been that, not some only, but all the issue, should take; but Sir J. Wigram, V. C., said that, admitting such to be the intention, it furnished no sufficient ground for supplying estates by purchase to the omitted issue. He had asked for, but did not get, any authority for such a proposition." It may be added that there is no such absurdity, for in cases of bequests for life, with gift over in default of children, it is held that the children do not take by implication. In Jarman on Wills (*524) it is said: "As no implied estate to the issue arises (as we have seen) from a limitation over in case of the prior devisee or legatee dying without leaving issue at his decease, it should seem that there is the same absence of authorized ground for implying a gift to children from a similar limitation over in default of these objects. Accordingly, in several cases it has been considered that a bequest to a person, and, if he shall die without having children, or without leaving children (which means without having had a child born, or without leaving a child living at his decease), then over, does not raise an implied gift in the children; but the parent takes an absolute interest, defeasible on his dying without having had, or without leaving, a child, as the case may be. The rejection of the implication in such a case is not (as already pointed out) productive of any absurdity; for it supposes the testator, by making the interest of the legatee indefeasible on his having or leaving a child, to intend that, if there are children, he shall have the means of providing for them. And even where the language of the will necessarily confines the interest of the parent to his life, the children will not generally be held to take by implication. It is extremely probable that the testator intended a benefit to them, but *si voluit non dixit*."

Before the making of this will an act was passed (March 3, 1834 [32 Ohio Laws, p. 41] 1 Curwen, p. 145, now § 5970, Rev. Stat.) which declared that, in any will thereafter made, a devise of lands shall be construed to be a fee simple, "and the devisee shall take all the estate which the deviser had in the property or thing de-

vested, unless it appears by express words the manifest intent that a lesser estate was intended." And before the passage of this act it had been decided by this court that words of inheritance are not necessary in a will to pass an estate in fee simple. So that Henry Anderson, by the direction in his will to his trustees to put his son William, when he arrived at the age of twenty-one years, in possession of one half of his property, excepting two-fifths part of said moiety, which they shall pay over to him at the age of twenty-five years, and by a similar direction as to his son James, vested in them a fee simple title of all the estate he had in real property, unless it appears by express words or manifest intent that a lesser estate was intended. There are no express words, unless the son died without lineal descendants living at the time of his decease, which was not the event at the decease of the surviving son, James. But it is contended that, by making the limitation over contingent upon the death of the son without lineal descendants living at the time of his decease, the testator manifested an intention that the son, in the event he died with lineal descendants living at the time of his decease, should take only an estate for life, and that the lineal descendants should take a remainder. The answer to this is that it is settled, as already shown, that the limitation over in the event of nonexistence of lineal descendants does not of itself imply a devise to the lineal descendants. The alternative of the devise over is an indefeasible estate in the son. To say that the testator must have intended the grandchildren to take is merely conjecture. The testator may have supposed that the son's children would inherit the son's property, or that the son would give it to them. This is the most that can be implied from his mention of them; and if he acted upon that belief, and after the devise of his property to the sons, attempted to provide only for the contingency of their death without surviving lineal descendants, then not only can it not be said that he intended to devise it to grandchildren, but a reason for his not doing so is apparent. In this will not only is there nothing from which to imply an estate in grandchildren, but such an implication is precluded by the explanations of the testator. He says: "Nothing in the foregoing will shall be construed as to deprive either of my sons disposing of their portions by will on their attaining the age of twenty-one years, respectively. The above limitations over shall give way to the provisions of such wills." This is not the gift to the sons of a power to dispose of the estate by will. In the contemplation of the testator that power

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they already had upon attaining the age of twenty-one years, for he says they are not to be deprived of it. If it be said that this explanation merely qualifies the limitation over, then it does not help the plaintiff; and if taken literally, then the sons, upon attaining the age of twenty-one years, could dispose of their estates by will, even though they had children, which is inconsistent with an intention of the testator to make the grandchildren objects of his bounty. The evident intention of the testator was to give his sons absolute estates, to be divested only in case they died without issue living at the time of their decease, and without having disposed of the estate by will.

In *Dowling v. Dowling*, L. R. 1 Eq. 442, the testator directed that the interest from his residuary estate should be divided half-yearly between his four sons, "and at the decease of either without lawful issue, such share to revert to the remainder then living, or their child or children." *Stuart, V. C.*, held that the sons took only a life estate, and that the children took a remainder by implication, but on appeal (L. R. 1 Ch. 612) his decree was overruled, and it was held: "That each of the four sons took an absolute interest in his share, subject to be divested in case of his dying without leaving issue, and that there was no gift by implication to the children of any who might die leaving issue." In the opinion, *Turner, L. J.*, says (615): "There is therefore in my opinion an absolute gift to the sons; but this absolute gift is subject to this condition, that upon the death of either of them without issue, the share is to revert to the remainder then living, or their child or children. It appears to me, upon the construction of the whole will, that the children are not to take any interest as against their parents. If the parents are out of the way, then the children are to take in their place; but, so long as there are parents, the children are to take nothing. The testator thought that in that case he had done enough for them, for the parents might provide for their own children."

In *Re Rawlins*, L. R. 45 Ch. Div. 299, it is held: "Where in a will there is a gift to A for life, with a gift over 'on the death of A without leaving children,' those words are not, by themselves, without assistance from other parts of the will, sufficient to create a gift by implication to the children." This case went on appeal to the House of Lords, where it was affirmed, under the name of *Scale v. Rawlins* [1892] A. C. 342. There it was contended that the construction below led to an absurdity, and that either the niece took an absolute interest in fee simple in the houses, subject to defeasance if she left no children, or there

was an implied gift to the children. Lord Halsbury, L. C., says: "It is manifest that, taking either alternative proposition put forward by the appellants, this House, if it is called upon to give that effect to the instrument, must put words into the will in order to do it. The thing has not been done; and I am not aware of any authority which would lead your Lordships to come to the conclusion that, because the testator had at some time or other the intention in his mind to give this property to the person in question, you are justified in saying that he has done so by the instrument which he has executed." Again he says: "Then it is said that he intended to make a gift to the children. Again I say that he does not do so. I cannot say that he had not the intention, but all I can say is that he has not expressed it, and your Lordships cannot put in words, simply because you may have some suspicion that in making his testamentary disposition that was the intention in his mind."

In *Doe ex dem. Barnfield v. Wetton*, 2 Bos. & P. 324, there was a devise to S. S., her heirs and assigns forever; but, if she shall happen to die leaving no child or children, lawful issue of her body, living at the time of her death, then to F. B. and his heirs, and it was held that the devise in fee to S. S., who was not restrained by the subsequent words to an estate tail, and that the devise over to F. B., was a good executory devise. In the opinion Lord Eldon, Ch. J., says: "It has been argued in this case that it was manifestly the testator's intention that the children and grandchildren of S. Saunders should be benefited. But however that may be, the question is whether the testator intended that the children and grandchildren should be benefited by this will, or by some disposition to be made by S. Saunders. If she had any children living at the time of her death, the estate being given to her in fee, she would have abundant power to provide both for children and grandchildren. Nothing, however, is given to them by this will. They are merely named in the description of the contingency on which the estate is to go over."

In *Dcn ex dem. Sinnickson v. Snitcher*, 14 N. J. L. 53, where there was a devise to a son, and, if he should die without issue, then at his decease over, Hornblower, Ch. J., says (59): "It appears to me hardly possible that any intelligent mind, unembarrassed by technical rules and legal refinement, can entertain a doubt upon the plain reading of this will that the testator intended his son Samuel should have the whole of the plantation in fee simple in case he had issue, and that at all events

he should be the absolute and unconditional owner of one half of it. He did not intend to give the estate to Samuel's issue, but he intended to give it to Samuel if he had issue." Again he says (60), referring to the statute of that state providing that a devise without the word "heirs" shall convey an estate in fee simple: "Let us then inquire: First. Did Joseph Copner devise to his son Samuel any lands, etc., without using the words 'heirs and assigns?' He certainly did; and, if he had stopped there, the whole plantation, under the influence of the act of assembly, would have passed in fee simple to Samuel, the devisee. Secondly. Has the testator used any expressions to show that he intended to give Samuel 'only an estate for life,' in all the lands devised to him? Or, to change the form of the interrogatory, Has the testator used any expressions to show that he did not intend that Samuel should have a fee simple in any part of the lands devised to him? I consider these questions of exactly the same import; for, since the act has declared that a devise to A, without words of perpetuity or inheritance, is a devise in fee simple, we must presume the testator used the words understandingly, and so intended to give the land in fee simple, unless he has used some expressions inconsistent with such intention, or qualifying the general gift, and showing that he did not mean to give the devisee either the whole, or any part, of the land in fee simple."

In *Kinsella v. Caffrey*, 11 Ir. Ch. Rep. 154, the master of the rolls, after reviewing a number of cases, says: "I apprehend, therefore, that the authorities may be classed under three heads: First. Where there is an indefinite bequest to the parent, and, if he die without having or leaving children, to B. In that case it is clear that the children do not take any interest by implication. Secondly. If there is a bequest to the parent for life, and, if he die without having or leaving children, to B, if the parent dies leaving children, they are not entitled by implication. Thirdly. If, however, in a case such as I have last mentioned, there are matters on the face of the will to raise an inference in favor of the children, the court is at liberty to consider these circumstances in connection with the bequest over in the event of the parent dying without having or leaving children, although such bequest over, by itself, is not sufficient to justify the court inferring a gift in favor of the children." These rules of construction are expressly approved in *Re Rawlins*, supra.

The case of *Shaw v. Hoard*, 18 Ohio St. 227, supports the contention of plaintiff, but it is contrary to the current of authorities, and appears to have been disposed of with-

out reference to any decisions, and upon the conjecture that the testator supposed the property would descend to the children of the wife and daughter, and that this was sufficient to give it to them by implication. The case was decided in 1868, long after the making of the Anderson will, and so cannot be insisted upon as controlling the decision in this case. It is in conflict with other well-considered decisions of this court. In *Niles v. Gray*, 12 Ohio St. 320, where the testator gave real estate to his daughter, and provided that, if she died without any legitimate heir, her part of the real estate should go to his eldest son, and the daughter had children, and conveyed away the land, it was held, in a suit to quiet title by the grantees against the children, and in which the children claimed that the mother took only a life estate, and they took a fee simple, that the mother took an estate in fee simple, subject to be determined by the contingency of her dying without issue living at the time of her death, on the happening of which the estate would pass over to the eldest son by way of executory devise. This case is followed and approved in cases decided subsequently to *Shaw v. Hoard*.

The judgment is affirmed.

Price, Ch. J., and Shauck and Spear, JJ., concur.

Davis, J., dissenting:

It seems to have been conceded at every stage of this case that *Shaw v. Hoard*, 18 Ohio St. 227, if adhered to, would control the judgment in the present controversy; but the circuit court passed over it with the remark that it had been ignored, if not substantially overruled, in cases following *Niles v. Gray*, 12 Ohio St. 320. It is also stated, in the conclusion of the majority opinion above, that *Shaw v. Hoard* is in conflict with *Niles v. Gray* and subsequent cases which follow the latter. I have no difficulty in distinguishing, to my own satisfaction, *Shaw v. Hoard* from *Niles v. Gray* and cognate cases. Indeed, it has always seemed to me that the distinction was very plainly indicated by the court itself, by Scott, J., in *Carter v. Reddish*, 32 Ohio St. 1, as follows: "The English rule that a devise to A and his heirs, followed by a devise over in case A die without issue, will be cut down to a fee tail in A, and the word 'heirs' be construed as meaning issue, is owing to the fact that in that country the words 'dying without issue' are construed as meaning an indefinite failure of issue. 2 Jarman, Wills, 301. In this state, however, it is well settled that the words 'dying without issue' import a dying without issue living at the 51 L.R.A. (N.S.)

death of the prior devisee. *Parish v. Ferris*, 6 Ohio St. 563; *Niles v. Gregory* [misprint for *Niles v. Gray*] 12 Ohio St. 320. Still, we should have no hesitation in finding, from the language of the will before us, that the testator intended a life estate only for the first devisees, if the sole condition of the limitation over to the nephews and nieces had been the dying of his children without issue, and without reference to the time when they should so die. But such is not the language of the will," etc. An examination of the cases referred to by Judge Scott, as well as the other decisions of this court relied on by the majority, will disclose the fact that he has stated the doctrine of this court with admirable precision and conciseness; and he cannot be presumed to have misunderstood the decisions to which he refers, for he participated in and concurred in both of them. And we will not underrate the authority of the distinction outlined in *Carter v. Reddish*, when we remember that the personnel of the court which made it was not one whit inferior to the highest standards of this court as to breadth of learning, depth of insight, sound discrimination, and analytic power. And still, in *Carter v. Reddish*, notwithstanding those decisions, the court would have had "no hesitation in finding that the testator intended a life estate only for the first devisees," under conditions such as are found in *Shaw v. Hoard* and the case now at bar, but said that such conditions did not exist in *Carter v. Reddish*.

But I waive further elucidation of this proposition, because from my point of view the question as to the nature of the estate devised by this will is merely academic. It is a matter of indifference whether it be a life estate or a determinable fee, because in either case the only power of disposition apparently intended by the testator is by will, as provided in this clause: "Nothing in the foregoing will shall be construed as to deprive either of my sons disposing of their portions by will on their attaining the age of twenty-one years, respectively. The above limitations over shall give way to the provisions of such wills." That is to say, the testator gives to his sons the power of appointment by will, and, except in that way only, the property devised cannot be diverted from the family line prescribed by the testator. Whether each of the sons took an estate for life with a contingent remainder over or a fee simple, determinable on the happening of the contingency, he could not defeat the devolution of the property within the family, as prescribed by the testator, except by appointment in a will. I will not discuss this proposition further than to say that this clause of the

will stands out as prominent as the Washington Monument, and it cannot be ignored in any fair construction of the will.

The sons of the testator never executed the power of appointment by will. Charles Butler, from whom the defendants in error claim title, by a course of procedure which is, to say the least, very suspicious, obtained from one of them, who had succeeded to the rights of the other, a quitclaim deed for a consideration of "one dollar and other considerations." This deed, as I think I have shown, he had no power to make, even if the transaction was free from fraud. Butler also, at or about the same time, procured from the executors of Henry Anderson a quitclaim upon a like expressed consideration, in which it is recited that, "it being understood that the above-described premises were conveyed to Henry Anderson in fee, but held by him in his lifetime as a mortgage to secure the payment of a certain sum of money due from Charles Butler to Henry Anderson, which fact, after his death, was duly acknowledged under

seal by William Anderson and James H. Anderson, his only heirs at law," etc. As I construe the will, neither the sons of the testator nor his executors and trustees had power to divert the estate by these deeds; and I am constrained to believe that they executed the deeds under mistake and misinformation as to both the law and the facts.

I will not unnecessarily consume space by making any argument of my own to show that not a remnant of title, legal or equitable, remained in Butler after Anderson bought the property at the master commissioner's sale, even after the agreement between Anderson and Butler on October 4, 1844. For brevity's sake I refer to the opinion in *Anderson v. Messinger*, by Severens, J., 7 L.R.A.(N.S.) 1094, 77 C. C. A. 179, 146 Fed. 929. I might add something to that, but it would be fruitless.

Affirmed by the Supreme Court of the United States, December 4, 1911 (222 U. S. 164, 56 L. ed. 144, 32 Sup. Ct. Rep. 50).

*Note. — Effect of limitation over in case the person to whom property is given in the first instance dies without lineal descendants, issue, children, heirs of the body, etc., to give to his issue an interest by implication either by way of remainder, executory devise, or substitutional gift.*¹

- I. Introduction, 485.
- II. Gift of remainder by implication, 498.
- III. Implied gift of contingent remainder, or by way of executory devise, 514.
- IV. Substitutional gifts by implication, 515.
- V. Summary, 517.

I. Introduction.

Although it is true, as the courts are fond of remarking when confronted by decisions which they do not wish to follow, that no will has a brother, it is equally true that in reviewing cases involving the same question it is possible to make certain deductions having a general application, and to note the considerations which have influenced other courts in construing similar phraseology. Without the aid to be derived from such observations, the task of construing a will would be like adventur-

ing, without map or compass, into a pathless wilderness of conjecture.

It is accordingly the function of the present note to collect, and to set forth as fully as may be necessary to show the reasoning of the courts, the decisions dealing with the question of testamentary construction indicated by its title; to indicate the relation of such question to other questions which may arise out of the same form of limitation; and to state the general principles to be derived from a study of the cases.

The presentation of cases includes those in which a limitation over has been made in phraseology substantially equivalent to that indicated in the title of this note; including cases in which the class of persons in default of whom the property is given to another are also mentioned in the primary gift, *e. g.*, where the gift is to A and his children, but if he dies without children, then to B. The note does not include cases in which the question whether a gift to the class of persons in default of whom the property is given over may be implied was not discussed, although the effect of the decision is to deny the existence of such a gift,—as where it is held that the person to whom the property is given in the first instance takes a base fee defeasible upon dying without issue, or a fee conditional, or a fee tail (the issue in the two cases last mentioned taking, not as purchasers, but *per formam doni*). It does not, of course, include cases in which the question is whether a gift to the person named as progenitor may be implied from

¹For a statement of the general principles and rules by which the courts have been guided in determining the existence of devises or bequests by implication, see note to *Conner v. Gardner*, 15 L.R.A.(N.S.) 73. 51 L.R.A.(N.S.)

the existence of a gift over in case of his death without issue.²

The question whether there is a gift by implication to the offspring of the person to whom the property is given in the first instance arises in three aspects:

First: Where the person named as progenitor has died in testator's lifetime, leaving descendants, in which case the form of the question is whether his descendants are substituted by implication.

Second: Where the person named as progenitor has survived the testator, but has died before the time when the gift vests in possession,—e. g., during the continuance of an antecedent estate,—leaving descendants, in which case the question is whether a gift to them taking effect as an alternative contingent remainder or by way of executory devise may be implied. And

Third: Where the person named as progenitor has survived to take possession, in which case the question is as to the existence of a gift by implication of a remainder to his offspring.

The first problem which one confronted with the necessity of working out the construction of a will containing the phrase in question has to solve is to determine

whether or not the term "lineal descendants" or "issue" or "heirs of the body" (as the case may be) is used to designate an indefinite succession of issue. In doing so, he will be aided in most jurisdictions by a statute declaring that, in the absence of evidence of a contrary intention, such phrase shall be construed to mean heirs or issue living at the death of the person named as ancestor. If, however, such term is used to designate an indefinite succession of issue, it is not a word of purchase; and the question of the existence of a gift to them by implication cannot arise, because the only mode in which they can take in the indefinite succession which the term connotes is by devolution, thereby necessitating the treatment of the term as one of limitation.³

Where the condition of the limitation over is found to denote an indefinite failure of issue, its presence has certain effects upon the estate taken by the primary devisee, of which notice may here be taken.

Where the subject of the gift is real property, and the statute *de donis*⁴ is in force, the effect will be to give the first taker, even though his estate is expressly limited to one for life,⁵ a fee tail by implica-

² For an instance of this sort, see *McAlpin's Estate*, 211 Pa. 26, 60 Atl. 321.

³ "Issue" is *nomen collectivum*, and a word of very extensive import. It embraces descendants of every degree existent at every period, and cannot be satisfied by being applied to objects at a given period. The only mode, therefore, by which a gift to the issue can be made to run through the whole line of objects comprehended in the term, is by construing it as a word of limitation, synonymous with *heirs of the body*, by which means the ancestor takes an estate tail; an estate capable of comprising in its devolution, though not simultaneously, all the objects embraced in the word "issue" in its largest signification. *Powell, Devises*, *507.

⁴ The statute of Westminster II., commonly called the statute *de donis*, was enacted for the purpose of avoiding the effect of a construction placed by the courts upon a grant to one and the heirs of his body. By such a grant, under the common law as it stood prior to this statute, the first taker was held to take a fee conditional, the condition being that it should revert to the donor if the donee had no heirs of his body; but if he had, it should then remain to the donee, descending, however, not to his heirs generally, as in the case of a fee simple, but to the class of heirs described *per formam doni*. By "a subtle finesse of construction," as Blackstone terms it, the courts held, with the laudable purpose of avoiding "the inconveniences which attended these limited and fettered inheritances," that upon the birth of issue the con-

dition, being performed, was thenceforth entirely gone, and therefore that the tenant in fee conditional might, by aliening the land, bar not only his own issue, but also the donor of his interest in the reversion; and so, by afterward repurchasing the lands, might himself become possessed of a fee simple absolute. Thereupon the nobility, to enable them to perpetuate their possessions in their own families, procured the enactment of the statute *de donis*, which, by providing that where tenements should be granted to one and the heirs of his body, they should at all events go to the issue, if any, or if none, should revert to the donor, gave rise to the estate known as fee tail. For a more detailed statement of the above matters, see 2 Bl. Com. pp. 110 et seq.

⁵ A very clear explanation of this was given by Lord Thurlow in *Knight v. Ellis*, 2 Bro. Ch. 570, who said: "A man, by his will, devises to A for life, there being plainly an interest only for life given; if that were all, the disposition would end there as to A, and any other gift would be effectual after his death. The testator then gives the same fund over to B after failure of issue of A. What is the court to do? It is clear that a life interest only is given to A. It is clear that no benefit is given to B while there is any issue of A. The consequence is that, as no interest springs to B, and no express estate is given after the death of A, the intermediate interest would be undisposed of, unless A were considered as taking for the benefit of his issue as well as of himself; and, as the words in this case are capable of such amplification,

tion,⁶ by operation of the rule in Shelley's Case.⁷ The reason for this is that, as an intention to benefit the issue of the first taker is inferable, the only way in which such intention may be given effect is by enlarging the estate of their progenitor. The fee tail thus vested in the first taker may, by operation of the various statutory provisions in force in different states, be turned into a fee simple; or into a life estate with remainder to those to whom the property would pass at his death; or may be retained as a fee tail in the first taker, with remainder in fee to his issue.

But where the statute *de donis* is not regarded as part of the common law, or has been expressly abrogated, the older doctrine comes into play that a gift to one

with a limitation if he dies without issue creates a conditional fee with a limitation over by way of executory devise.⁸ If there is issue born alive, capable of inheriting the estate, the tenant in fee conditional has the right of alienation,⁹ and his conveyance, whether made before or after birth of issue, is good as against them; though if he does not alien, the estate will descend to them, not according to the ordinary course of descent, but (to use the technical expression) *per formam doni* to the particular class of heirs named in the condition.¹⁰

Where the subject of the gift is personal property, and the gift is indefinite, with a gift over in default of descendants, issue, etc., of the first taker, the first taker will

the court naturally implies an intention in the testator that A should so take, that the property might be transmissible through him to his issue, and he was therefore considered as taking an estate tail, which would descend on his issue."

⁶ If a devise be made to one without specifying any estate, and in case of an indefinite failure of his issue, a devise over, the first devisee shall take an estate tail, for it is manifest that the testator intended a benefit to the issue, and that the estate should not cease but on a general failure; and this intention can be effected only by declaring the estate a fee tail in the ancestor. *Per Story, J.*, in *Lippett v. Hopkins*, 1 Gall. 454, Fed. Cas. No. 8,380, citing *Forth v. Chapman*, 1 P. Wms. 664; *Rex v. Rumball*, Cro. Jac. 448; *Wyld v. Lewis*, 1 Atk. 432; *Denn v. Slater*, 5 T. R. 335; *Hope v. Taylor*, 1 Burr. 268; *Sonday's Case*, 9 Coke, 127; *Milliner v. Robinson*, F. Moore, 682; *Rex v. Melling*, 1 Vent. 231; *Newland v. Shephard*, 2 P. Wms. 194; *Blackborn v. Edgley*, 1 P. Wms. 605; *Comyn's Dig.* "Devise," note 5; *Blaxton v. Stone*, 3 Mod. 123; 1 Rolle, Abr. 837; *Fen ex dem. Lowndes v. Lowndes*, 4 Burr. 2246; *Green v. Armsteed*, Hobart, 65; *Greeve v. Dewel*, Cro. Jac. 599; *Brice v. Smith*, Willes, Rep. 1. Continuing, the same authority said: "And even where the estate to the first devisee has been expressly limited for life, and a devise over upon a like failure of his issue, the same construction has prevailed. *Forth v. Chapman*, 1 P. Wms. 667; *Target v. Gaunt*, 1 P. Wms. 432, Gilb. Eq. Rep. 149, 10 Mod. 402; *Brice v. Smith*, Willes, Rep. 1. And so where no estate whatsoever has been directly devised, upon the implication arising from the devise over on the failure of his issue, the devisee has been permitted to take an estate tail. *Goodright ex dem. Goodridge v. Goodridge*, Willes Rep. 369, 7 Mod. 453; *Walter v. Drew*, 1 Comyns, Rep. 372. These are cases of an estate tail arising by implication."

"It is as well settled that a devise to one and his heirs, and if he die without issue, then over to another, creates an estate tail, as if the principal devise had been in the 51 L.R.A. (N.S.)

most technical language, to him and the heirs of his body. The words of the devise over, 'if he die without issue' then over to another, limit the generality of the term 'heirs' in the principal devise, and lead us to the inevitable conclusion that the testator intended heirs of the body only, and not heirs generally. And whenever this intention can be collected from the whole will, taken together, let the phraseology in the particular clauses of it be what it may, it has been always construed to make an estate tail." *Den ex dem. Harris v. Taylor*, 5 N. J. L. 413.

But "where the limitation over is to take effect, not on an indefinite failure of issue of the prior taker, but on a failure of children only, or on a failure of issue within a given time, there the limitation over will not raise an estate tail by implication in the prior taker, but he will have a life estate with a contingent remainder over, or a life estate with a limitation over of a springing interest, or a fee with a conditional limitation over, as the case may be." *Smith, Executory Interests*, p. 301.

"It is an established rule of law that a devise to one, and if he die without heirs of his body, then over to another, creates an estate tail in the first taker whatever the actual intention of the testator may have been; but words qualifying such a devise, which show that the testator had in mind a definite failure of issue on the decease of the first taker, and made provision for that, will defeat such a construction." *Schmaunz v. Goss*, 132 Mass. 141.

⁷ See note on Rule in Shelley's Case, 29 L.R.A. (N.S.) 1073.

⁸ As to the validity of a limitation over upon an indefinite failure of issue, see note to *Merrill v. American Baptist Missionary Union*, 3 L.R.A. (N.S.) 1143.

⁹ In the case of a conditional fee simple at common law, the parent on the birth of a child had the *jus alienandi*; the condition was thereby performed, and the estate was alienable prior to the statute *de donis*. *Weakley v. Rugg*, 7 T. R. 322.

¹⁰ See note 4, *supra*.

take an absolute estate under the well-established rule of construction that where personal estate is given in terms which, if applied to real estate, would create an estate tail, it vests absolutely in the first taker.¹¹ For this rule there seem to be two reasons, first, that the term used indicates a clear meaning on the part of the testator that the property shall go in a course of devolution till there is an exhaustion of heirs of the body, which intention cannot be carried into effect,¹² an estate in chattels not being transmissible to the issue in the same manner as real estate, nor capable of any kind of descent; and, second, that, as the gift over can take effect, if at all, only as an executory bequest,¹³ it is void for remoteness, leaving the estate of the first taker unaffected. And as the use of words of inheritance is unnecessary to pass an absolute interest in personal property, his estate therein stands unqualified.¹⁴ It may be remarked in passing, however, that in order to render the gift over good, the courts are inclined to construe the limitation as intending a definite failure of issue.¹⁵

But where a gift of personalty is to one for life, and if he dies without issue, etc., over, an absolute interest will not be given him by implication,¹⁶ though, if the property had been real estate, he would have taken an estate tail by implication under the rule in Shelley's Case, as herein before pointed out.

The practical application of what has been said of the consequences which follow the employment, in a limitation over of

real property, of the terms "lineal descendants," "issue," etc., as denoting an indefinite succession, is this: That, though persons answering the description at the death of their progenitor cannot, *ex necessitate rei*, take directly, they may at common law take the property as tenants in tail, or, under some of the statutes abolishing fees tail, a remainder in fee. Or, where the statute *de donis* is not in force, they may, if their ancestors have not aliened the property, take it *per formam doni*. With cases involving these consequences the present note has no concern.

From what has been said, it will be apparent that the question whether the class in default of whom the property is given to another take by implication can arise only where, as a result of the preliminary inquiry above suggested, it is found that the phrase "lineal descendants" or "issue" or "heirs of the body" or "children" was used by the testator, not as signifying an indefinite succession, but as designating persons answering to the description at the death of the person named as ancestor.¹⁷ But even then the question may not arise if the operation of the contingency is so confined as to give the primary devisee an absolute estate at some time prior to his death.¹⁸

II. Gift of remainder by implication.

With reference to the decisions comprised in this note the following general observations may be made:

Where the question is whether descend-

¹¹ See Jarman, Wills, *1366; Theobald, Wills, 477; Powell, Devises, 632; Ex parte Wynch, 5 De G. M. & G. 188, 23 L. J. Ch. N. S. 930, 18 Jur. 659.

¹² Ex parte Wynch, supra.

¹³ The reason why the gift over can take effect only as an executory bequest is that, as the statute *de donis* applies only to real property, and as the gift is absolute, subject only to be defeated upon a future contingency, there remains to the donor only a possibility of reverter, which cannot be limited over by way of remainder, and therefore must take effect, if at all, as an executory bequest. But as an executory gift to take effect upon an indefinite failure of issue is void for remoteness (see note in 3 L.R.A.(N.S.) 1143), the gift is not operative.

¹⁴ That, where the words "dying without issue" are held to import an indefinite failure of issue, the gift over may be void for remoteness, and consequently will not operate to reduce the estate given by the words of the original gift, see Webster v. Parr, 28 Beav. 237.

¹⁵ See Forth v. Chapman, 1 P. Wms. 663; Target v. Gaunt, 1 P. Wms. 432, Gilb. Eq. Rep. 149, 10 Mod. 402.
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¹⁶ Theobald, Wills, p. 477. "The utmost that can be made out of a limitation over of personal estate in default of issue of the legatee for life, or if he should die without issue, or leaving no issue, is an implication of a bequest to the issue." Sheet's Estate, 52 Pa. 258.

¹⁷ In other words, the effect of a decision that the phrase was used by the testator to connote an indefinite succession is to preclude any further inquiry into the intention of the testator, since, for reasons hereinbefore given, an indefinite succession of issue cannot take as purchasers. For cases in which the existence of a gift by implication to children of the primary devisee has been denied on this ground, see note 46, infra.

¹⁸ See, in this connection, note in 25 L.R.A.(N.S.) 1045, on Time to which the contingency of a legatee or devisee without child or issue, upon which a gift is conditioned, is referable; also note in 37 L.R.A.(N.S.) 164, on the question whether the contingency of death without issue, children, etc., imports their survival of the first taker.

ants take a remainder by implication at the death of their ancestor, it is settled that a fee given in apt terms¹⁹ to the primary devisee will not be cut down to a life estate for the purpose of letting in such a remainder, since it would be a violation of the intention of the testator to give the descend-

ants anything as against their progenitor; and because the implication in such case is wholly unnecessary, it being within the power of one who takes absolutely to provide for his descendants.

The same is of course the case where, though technical terms are not used in the

¹⁹In *Goldsby v. Goldsby*, 38 Ala. 404, where a testator devised lands and slaves to each of his children, adding, "All of the above property is given and bequeathed to my children and the heirs of their body, and for their proper benefit and use, and not to be disposed of by the husbands of my said daughters Eliza and Elizabeth, and to revert to my family in all cases where my children may die without issue. This item is merely intended to entail the property given to my sons, as far as can be done consistently with the laws of the country," it was held that the provision quoted did not create a remainder in favor of the children of a son; but that the son took a fee qualified as to the executory devise over in the event of his dying without issue, but pure and absolute as to his heirs or the heirs of his body; and that as he did not die without issue, his death consummated his title discharged of the contingent estate, and gave to his heirs a fee simple absolute, not by virtue of a remainder created by the will, but by inheritance from their ancestor.

In *Lee v. Shivers*, 70 Ala. 288, testator devised lands to his son "to have and to hold the said described lands to him, the said R. H. Lee, and to his heirs and assigns forever, together with all the appurtenances thereunto belonging." In a subsequent item of the will he provided: "It is my will and desire that, if my sons, or either of them, named in this will, should die without children or a child; or if they, or either of them, should die leaving children or a child, and such children or child should die without a child or children, then, and in that event, the real estate and the slaves given to my said sons by this will, or such of them as may die without children or a child, or having died leaving children or a child, and such children or child shall die without a child or children, shall go to the surviving brothers of said sons, or their children." It was held that, as the language of the disposing clause, taken alone, would create a fee simple estate in the son, the effect of the subsequent provision was simply to convert this interest into a qualified or determinable fee, with a limitation over by way of executory devise, and therefore that a child of the son took nothing under the will by implication.

In *English v. McCreary*, 157 Ala. 487, 48 So. 113, the testator provided that the respective shares given to his several daughters "are given to them and their bodily heirs, or the lawful heirs of their bodies" (which clause, if it stood alone, would have created a fee tail, which a statute would have converted into a fee simple), and further provided: "Should any of my young-

est children die before having or leaving any heir, then their shares to be divided between the remainder or surviving part of said four younger children." It was held that the latter clause did no more than postpone the vesting of the fee until the having of a child, and therefore that the title taken by the grantee of a daughter was good as against her children.

In *Friedman v. Steiner*, 107 Ill. 125, where a testator devised the residuum of his estate to his wife "and unto her heirs and assigns forever, to the total exclusion of any and all person or persons whatsoever: Provided, however, upon the express condition hereby made by me in case the said Rebecca Steiner after my decease shall die intestate and without leaving her surviving lawful issue, . . . that then and in such event" the property given to her should be converted into money and paid to certain legatees,—it was held that the wife took not merely a life estate with power of disposal, but a determinable fee, it being clearly the intention of the testator to give her an estate which might descend to her surviving lawful issue and thereby become in them an estate in fee simple absolute.

In *Greer v. Wilson*, 108 Ind. 322, 9 N. E. 284, where a testator devised to his daughter "and to her heirs and assigns forever, the fee simple of all said real estate of which I may die seised," and further provided: "It is further, however, my will that in case my said daughter shall die without any heir of her body surviving, or in case of such heir and it do not survive to full age," then over,—it was held that the daughter took an estate in fee simple determinable on a future contingency, and not merely a life estate with a remainder over to her children contingent upon their arriving at full age.

In *Whayden v. Wilson*, 4 Ky. L. Rep. 827, it was held that under a devise to E. "and her heirs forever," and in case E. should die without any heir, the land to belong to A. and her heirs, E. took the absolute fee liable to be divested if she should die without heirs; and therefore that a purchaser from her was entitled to hold as against her children.

In *Rothwell v. Jamison*, 147 Mo. 601, 49 S. W. 503, a testatrix who had only one child, a daughter, who was at the time of her mother's death about eight or nine years of age, devised to the daughter "and her children" certain property, with the proviso: "And if my said daughter . . . shall die without issue, it is my will that all the property which I do hereby devise to her shall be equally divided, after the death of the said [daughter], equally be-

words of gift, the language of the testator imports (without the aid of the statutory

presumption presently to be referred to) the gift of a fee²⁰ or absolute interest.²¹

tween my brothers and sisters." The words "and her children" were, in view of the daughter's tender years, construed by the court as words of limitation, and not of purchase, and it was held that it could not be said from anything appearing in the will that it was the intention of the testatrix to devise any less estate to the daughter than a fee.

In *Carter v. Reddish*, 32 Ohio St. 1, a testator having two infant children gave and bequeathed to each of them certain real estate, adding: "Each of my aforesaid children to have and to hold the same during their natural lives, and to their heirs, and in case of the decease of both my aforesaid children before they may be of maturity according to law, and without lawful issue, then the whole of the aforesaid real estate, as also all the real and personal estate, or any property whatsoever which may be coming to them through this my last will, to be left to" the children of a brother and sister. He continued: "I give and bequeath to my children as aforesaid the whole of my remaining property, whether real or personal, . . . to be equally divided between the said Sarah and Stevenson, at the time the said Sarah becomes of age," and directed that upon the division taking place the share of the son should be retained by his guardian until he should become of full age. It was held that the children took a fee defeasible only upon death without issue during minority, and not a life estate with remainder by implication to their issue.

In *Cudworth v. Thompson*, 3 Desauss. Eq. 256, 4 Am. Dec. 617, a testatrix bequeathed certain slaves to her nephews, "their heirs and assigns forever; but in case both my nephews shall die without leaving issue of their bodies, then I give and bequeath the said slaves with the future issue and increase to Mr. Thomas Hamlin, their heirs and assigns forever. My will further is that until the contingency aforesaid shall happen the said slaves shall remain and be in the charge of and under the direction of [the executors] whom I hereby nominate and appoint executors of this my last will, who are hereby directed annually to pay over the profits arising from the labor of the said slaves to the said [nephews] equally for their exclusive use and benefit." It was held that the language used was apt to give the legatees an absolute estate with cross remainders by implication; and that no presumption of an intent to restrain the estate of the first legatees to a mere life estate, so as to let in their children as purchasers, was furnished by the provision that the slaves should remain in charge of the executors.

²⁰ In *Mitchell v. Campbell*, 94 Ky. 347, 23 S. W. 656, testator devised the bulk of his estate to his mother and sister, to be held as a means of support for themselves, and to enable them to care for the children

of a deceased sister. He further provided that in case the sister died before those children were raised, his brothers should take charge of the children and property, in conjunction with his mother if living, and carry out his wish in regard to them, and ultimately to dispose of the estate for the benefit of testator's heirs; but that if the sister should live until the children mentioned were "raised and old enough to no longer require care of guardians and support," "she is to continue the ownership of the estate, and do as she pleases with it at her death, provided she leaves heirs of her own body, which heirs are to take it. But if she dies without leaving heirs of her own body, then my will is, that brothers John and Murry Walker are to dispose of the estate for the benefit of my heirs at law." The court held that the sister took, not a life estate, but a defeasible fee, saying: "We do not think there is much difficulty in determining what was the testator's plan for disposing of his estate; for it was evidently well considered and matured. The term 'ownership,' used to describe the quantity of estate he intended his sister Maria Jane to have, according to its common signification, comprehends a fee, and cannot be properly restricted so as to mean a mere life estate. And the proviso of her leaving heirs of her own body, who were to take the estate, was obviously intended to be operative only in case she died intestate, and not to limit the estate already given to her. For their absolute right to take it cannot be at all reconciled with her unqualified power to do as she pleased with it at her death. Moreover, if the testator had intended to restrict the devise to a life estate, it is a reasonable supposition he would have used the word 'children' instead of 'heirs,' to indicate who were at all events to take at her death."

In *Cleveland v. Cleveland*, 5 Ky. L. Rep. 56, a testator who had been married twice devised to his only child by his first wife a tract of land, "to her and her heirs forever," and then said: "My six children not provided for (naming them) are to have the balance of my estate not disposed of. In case of the death of any of my children without bodily heirs, their landed estate to revert back to their brothers and sisters." It was held that, as the devise to the daughter by the first wife clearly gave her the fee, and as no reason appeared upon the face of the will or from the language used that would lead to the conclusion that it was the purpose of the testator to limit the estate given to the others, they should be regarded as taking a defeasible fee, and not a life estate with remainder to their children.

In *Richardson v. Noyes*, 2 Mass. 56, 3 Am. Dec. 24, where testator gave to his three sons certain lands, adding, "Also my will is that if either or any of my three

last-named sons, John, James, or William, should die without children, the survivor or survivors to hold the interest or share of each or any of them dying without children as aforesaid," it was held that the will did not give an estate for life to a son with remainder to his children, if he should have any, but a fee determinable upon dying without issue, the court adding in support of this conclusion expressions in the will showing an intention to give the sons a fee, and the fact that a different construction would produce an inequality of distribution among grandchildren. In the course of its discussion the court said: "The fee was certainly intended to vest in children or grandchildren. Whether any of the latter existed, at the time the will was made, or not, we are ignorant. But, in either case, no motive is suggested why the testator should entertain a more favorable regard for his grandchildren, and make a better provision for them, than for his own children."

In *Yocum v. Siler*, 160 Mo. 281, 61 S. W. 208, a testator provided: "To my well-beloved son [name], my natural son, I bequeath absolutely [certain realty], and further, with the express understanding and restriction, namely, that if my said son dies without legal issue, descendants of his, legitimate issue of his, said land shall pass to" certain sisters, nieces, and a nephew. It was held, though by a divided court, that it was the intention of the testator to give the devisee a fee simple absolute, subject to be determined or defeated if he should die without legal descendants, the effect of words appropriate to the creation of a fee simple in the devisee not being subject to diminution by inference of an intent to give the devisee a life estate with remainder to his descendants.

The construction of the same will was also under consideration in *Yocum v. Parker*, 130 Fed. 722, in which it was held that the son took, not a life estate with remainder to his children, but a fee which became absolute on birth of issue, the court saying: "After the birth of such children, to limit the son's interest to a mere life estate would be to read out of the granting part of the devise the word 'absolutely,' and to import into the grant the customary apt words essential to the creation of an estate in remainder in the children." The foregoing decision was reversed by the circuit court of appeals upon the ground that there was no affirmative showing in the record of jurisdiction (66 C. C. A. 80, 130 Fed. 770), but upon motion for rehearing it was satisfactorily shown that, in the preparation of the transcript of the record of the court below, an error had been made in the copy of the petition, and that in fact it contained the necessary jurisdictional averments; whereupon the court proceeded to a consideration of the merits of the controversy and affirmed the decision of the court below, both on the ground that the construction given to the will was a proper one, and on the ground that it was the duty

of the Federal court to follow the decision of the state court above set forth. 66 C. C. A. 227, 134 Fed. 205.

In *McLoughlin v. Maher*, 17 Hun, 215, where testator gave the residue of his estate to his children, share and share alike, and directed that the share given to a daughter "be taken and held by her free from any control of her husband, and that in case of her death without issue that then and in that case such share shall go to my surviving children," it was held that the daughter did not take a life estate with remainder to her surviving brothers, but a fee with a contingent limitation over to them on her dying without issue. The court said: "To construe the will as vesting her with a life estate only would necessarily impute to the testator the intention to disinherit her children for the benefit of her brothers, to whom he had by the same will given an equal share of his estate. Such a construction would be wholly unwarranted. But the only effect of changing the estate of Mrs. De Forest into one for life would be to make the brothers remaindermen instead of executory devisees. The estates under the will would then be a life estate in Mrs. De Forest, and a remainder in her brothers. The children of Mrs. De Forest could in no event take any estate under the will in the lands devised to their mother."

The question herein under discussion received very extensive consideration in a series of South Carolina cases arising out of the following testamentary provision: "The rest and residue of my estate, both real and personal, to be equally divided between my grandsons Wilson and Thomas, and delivered to them at the age of twenty-one years, but should they die leaving no lawful issue, in that case I give and bequeath the whole of my estate, both real and personal, to" certain persons. One of the grandsons died under age and without issue, by which his moiety went over to the other by way of cross remainder by implication. The surviving grandson sold portions of the property, both real and personal, so devised to him; and afterward died leaving several children, who set up a claim to such property on the theory that their father took only a life estate, and that they took the remainder by implication. It was held by the court of appeals at law that the grandson took an absolute estate (*Carr v. Jeanneret*, 2 M'Cord, L. 66); and by the court of appeals in equity, that the legal effect of the words of gift was controlled by subsequent provisions of the will and the implications arising therefrom of an intention in the testator to provide for the issue of his grandsons if they should leave any (*Carr v. Green*, 2 M'Cord, L. 75). Not long thereafter these two courts were abolished, and a court of appeals was established having final appellate jurisdiction in all cases. A case involving the same will having been brought to this court, the reasoning of the former cases was reviewed, the authorities elaborately examined, and the conclusion arrived at, both

upon authority and upon the evidence of the testator's intention afforded by the wording of the will, that the grandson took an estate transmissible to his issue by descent, and that there was therefore no necessity for implying a direct gift to them (*Carr v. Porter*, 1 M'Cord, Eq. 60).

21 In *Hill v. Alford*, 46 Ga. 247, the testator directed property to be held by his executor until his youngest child should marry or become of age, when it should be divided among all his children equally, adding: "My further will and desire is that should all my children die without leaving children at the time of their death, that all my property shall be made a poor school fund of, to be placed under the control of the 'inferior court of Putnam county.'" The two elder children died without issue before the youngest became of age or married. The youngest having survived to become of age, it was held that he took a fee determinable in the event of his not leaving children surviving, and that therefore his children could not claim as remaindermen, the court saying: "It was said, on the argument, that it was the intention of the testator that his grandchildren should take his property in the event his sons died leaving children, but there are no words in the testator's will which will authorize a court to say so; for, as it was said by this court in *Wright v. Hicks*, 12 Ga. 156, 'Courts are not permitted to give effect to the will of a testator contrary to the plain and obvious terms used by him, upon a mere conjecture as to his intention.'"

In *Hill v. Terrell*, 123 Ga. 49, 51 S. E. 81, the provisions of a will by which a testator directed property to be held for the benefit of his grandchildren, their respective shares to be paid to them as they should respectively come of age or marry, and in the event that any of them should die before marriage or arriving at the age of twenty-one years, his or her share to be equally divided between the surviving grandchildren or the children of any deceased, adding: "It is also my will, desire, and intention that if either of my daughter's children should depart this life after marriage, and should die without leaving any child or children at the time of his or her death, that his or her share of all or any part of the property or the proceeds thereof . . . shall revert to and be equally divided between her surviving children and their legal representatives,"—were held to give to a granddaughter an estate in fee, subject to be divested if she should die after marriage without leaving child or children, rather than a life estate with a remainder by implication to such children as she might have at the time of her death; the court also holding that there was nothing in the limitation over in the event of a grandchild's dying before marriage or arriving at twenty-one years of age, or in the use of the word "also" in the expression "it is also my will," with which the provision above quoted begins, or in a direction that

the executors should hold the property devised to the testator's female grandchildren in trust for them, to alter this construction.

In *Webster v. Webster*, 93 Ky. 632, 21 S. W. 332 (petition for rehearing overruled in 22 S. W. 920), testator bequeathed to each of his daughters various sums of money, and gave the residue of his estate to be equally divided among them, further providing "in case either of my daughters [naming two of them] should die without children, then in that event it is my will and I so direct that the estate of the one dying shall be equally divided among all my then living children." He also appointed a trustee for the daughter, the nature of whose interest was in question. It was held that the daughter did not take a life estate only, but an absolute estate, subject to be defeated by her death without living children before the time of the distribution of the estate.

In *Howell v. Gifford*, 64 N. J. Eq. 180, 53 Atl. 1074, where testator provided: "After the death of my said wife . . . I will that the principal sum of my estate, with the accumulations thereof, . . . be divided among all my children, each to have an equal share thereof; the parts or shares thereof going to my sons to be paid to them. . . . Should any of my said children, son or daughter, die without leaving lawful issue him or her surviving, then the share of the surviving son in such decedent's portion of my estate so held by my executors shall be paid said son or his heirs or legal representatives." It was held that the children of a son took no estate by implication, but that the share of each vested, subject to be divested only by his death in his mother's lifetime without leaving issue, the court saying: "The argument is that, as testator had not, in terms, provided for the case of children dying leaving issue, and has only given the estate over in case they die without leaving issue, he must have intended the issue to take if he left any, and consequently he must be assumed to have given it to the issue. It is difficult to put this contention in plausible form as applied to a cause like the present, for we at once ask ourselves, why imply an estate in the issue of the son when, in express words, we find it given to the son himself?"

In *Rewalt v. Ulrich*, 23 Pa. 368, testator provided: "My granddaughter (Elizabeth) shall have one-seventh part in right of her deceased mother, my daughter Elizabeth. Should, however, my granddaughter die without heirs, her seventh part shall then be equally divided among my six children before named or their heirs." The granddaughter having brought an action for the legacy, it was contended by the executors that her title was only for her life with a quasi remainder to her children or to the testator's children, and therefore that she was not entitled to the legacy without giving security; but it was held that the legatee was absolutely entitled, the court saying: "It is not at all likely that he intended her children not yet born or his

In one instance only²³ has the implication arising from the terms of the gift over been permitted to overcome the effect of the use of words of inheritance, but in this case the circumstances were such that the children would not have received a benefit through their parent had the latter been given the fee.

But where the gift to the primary devisee is in general terms which, by virtue of statute, will be presumed to carry the fee in the absence of an expression of a contrary intention, there is a difference of opinion, illustrated by the conflicting conclusions reached by the Ohio supreme court in *ANDERSON v. UNITED REALTY Co.* and by

legatees over after them to have the principal benefit of this gift. That the gift is to her proves that, as to it, she was the principal object of his bounty."

In *Manigault v. Holmes*, Bail. Eq. 298, a testator bequeathed a third of his negroes to his daughter Ann "during her natural life, and her heirs lawfully begotten, forever; and the other remaining two-thirds parts . . . be equally divided betwixt my said two daughters, Susannah and Mary Summers, share and share alike. But in case it shall happen that either of my said three daughters, Ann Olney Summers, Susannah Summers, and Mary Summers, shall die, or depart this life, without leaving issue lawfully begotten, then, and in such case, it is my will, and I do hereby give, devise, and bequeath, that part, or share, of my estate, real and personal, hereinbefore given, devised, and bequeathed, to such my daughter, or daughters, so dying, unto the survivors, or survivor of them, and to their respective heirs lawfully begotten, forever." Mary Summers having died leaving issue, the question arose, as between such issue and creditors of her husband, whether she took an absolute and unconditional property in the slaves bequeathed to her, which vested in the husband by virtue of his marital rights, or whether she took only a life estate with a limitation over to her children as purchasers. It was held that the fact that the first-named daughter, Ann, took a life estate with a remainder over, did not show that the other daughters should take the same estate; and that the reference to the issue in the limitation over gave them no remainder by implication, as "it would be a violation of the intention of the testator to give them anything as against their parent."

In *M'Lure v. Young*, 3 Rich. Eq. 559, testator gave to a daughter, without words of limitation, certain personal property, and in another clause of his will provided that in case of her death without issue living at the time of her death, the property bequeathed to her should be equally divided between others of his children. It was held that the limitation over could not have the effect to vest anything in the issue.

In *Dowling v. Dowling*, L. R. 1 Ch. 612, reversing L. R. 1 Eq. 442, testator directed his residuary estate to be invested, "the interest therefrom to be divided half yearly between my four sons above named and at the decease of either without lawful issue, such share to revert to the remainder then living or their child or children." It was held that under the rule that an unlimited gift of the interest of a fund will pass the

capital, the sons took absolute interests, subject to be divested in the event of their dying without leaving issue, *Turner L. J.*, saying: "It appears to me, upon the construction of the whole will, that the children are not to take any interest as against their parents. If the parents are out of the way, then the children are to take in their place; but so long as there are parents, the children are to take nothing. The testator thought that in that case he had done enough for them, for the parents might provide for their own children. I do not understand that there is a difference between us and the learned vice chancellor as to the general rule of construction; but he has drawn an inference in favor of the children from the fact of the gift over being to the surviving sons or their children. But if the gift over is only to take effect in favor of the children if the parents are out of the way, no inference can be drawn from it in favor of the children of a son dying leaving issue as against the parents of such children. I am therefore of opinion that the general rule of construction must prevail, and that there is nothing in the context to take the case out of it."

²³ *Wetter v. United Hydraulic Cotton Press Co.* 75 Ga. 540, where testatrix provided that should her daughter live to attain the age of twenty-one years, she would then become the absolute owner of all the property of the testatrix, "to have and to hold the same, and her heirs forever," adding: "Second. It is further my will, that if my said daughter should depart this life leaving no issue or lineal heirs, that the whole of the estate herein bequeathed should go and belong to my mother and my sister, as tenants in common, and their heirs forever, and should they two be survived by my said daughter, and she, my said daughter, subsequently die without issue as aforesaid then living, then it is my will that the whole of my estate vest in and belong to my own next of kin then living and their heirs forever." It was held that, as the will was manifestly drawn without reference to technical rules, the doctrine that in construing a will the testator's intention must be diligently sought for and allowed full operation was especially applicable; that the natural effect of the language employed, the disposition manifested by the testatrix in reference to her estate, and the fact that such a construction would give to the estate such a direction as natural affection would suggest, supported the construction which gave to the daughter's children a remainder by implication. The court adduced in support of this construction the argument that

the Federal circuit court of appeals in construing the same will,²³ as to whether there is such an implication in the terms of the

if the will should be construed as vesting the whole estate in the daughter at twenty-one, subject to be determined upon her failure to leave issue, and she did reach that age, then by virtue of her marriage it passed immediately to her husband free from all contingency whatever, and, being thus his, would be subject to the possible perils of improvidence, bad judgment, second marriage, or whatever else on his part might prevent her children from enjoying it.

Wetter v. United Hydraulic Cotton Press Co. supra, is distinguished in *Matthews v. Hudson*, 81 Ga. 120, 12 Am. St. Rep. 305, 7 S. E. 286, upon the ground that the consideration last above adverted to therein was not applicable in the case of the devise to a son, the court saying: "The will involved in that case was made in 1839, when the old law prevailed both as to marital rights and sole inheritance by the husband, and the legatee, then an infant, was the daughter of the testatrix, and by the will took the whole of her estate, real, personal, and mixed." And after reviewing the provisions of the will in the *Wetter* Case, the court continued: "Such was that will, and that it presents a very powerful case in favor of an estate in fee, defeasible on the contingency of death without leaving children, cannot be doubted or denied. I need not pass in review the reasons which the court gave for deciding otherwise, but those which present themselves to my own mind are briefly these: The legatee was an infant, and whether she would have capacity to provide by marriage contract, discreetly or judiciously, for her offspring, or even for herself, the testatrix did not and could not know. If she failed so to provide, her fortune, both as to her and her children, would be at the mercy of her husband, who by reducing it to possession would own it all. Should he not do this, he would, in case of her death during the coverture, be her sole heir at law, and as such take it all, unless she died testate, which could not happen without his consent. In the face of these legal possibilities, it would be rational, if not necessary, to imply a remainder in behalf of the daughter's children. None of the reasons here indicated are operative in the present case, in which a son, and not a daughter, was the immediate object of the mother's bounty. Though his age is not disclosed by the bill (and on the bill alone was the judgment we are reviewing predicated), he had reached years of discretion, and the mother's confidence in his discretion was manifested by appointing him trustee for her other children. His marriage would not result in clothing his wife with his rights of property; he could make a will without her consent, and on his death intestate leaving children, she would not in-

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gift over as will limit the estate of the primary devisee to one for life,²⁴ the preponderance of opinion being that no gift

herit his whole estate, but take only dower or a child's part in realty, and a child's part in personality. Such, to say nothing of other distinctions, are the differences between the two cases in respect to causes for imputing to the testatrix by mere implication an intention to provide for grandchildren by way of remainder."

And in *Hill v. Terrell*, 123 Ga. 49, 51 S. E. 81, it is said that if the decision in the *Wetter* Case can stand at all, it must be upon its own peculiar facts.

²³ See *Anderson v. Messinger*, in note 24, infra.

²⁴ In *Shaw v. Hoard*, 18 Ohio St. 227 (which is disapproved in *ANDERSON v. UNITED REALTY CO.*), a testator who left him surviving a widow and an only daughter devised to them "all the real estate of which I may be seised at the time of my death, to each one half. On the death of either my wife or daughter, then the survivor shall have all the property left them by me; and if both die without leaving any heirs of their body, then and in that case said property shall be given to my wife's brother David Campbell." The widow married again and died leaving issue of her second marriage. The daughter died without issue. Three contentions were made, by the various parties interested, first, that it was not the intention of the testator that his daughter or children of his wife's second marriage should be considered as issue, and therefore that the gift over to David Campbell took effect; second, that as the gift over was upon the contingency of the death of both the wife and daughter without leaving any heirs of their body, and as such contingency had not happened, the property descended to testator's heirs at law; and, third, that there was a devise by implication to the heirs of the body of the mother or daughter. The court held that the surviving issue of the wife was entitled to take the property under the will, either as a remainder or an executory devise, saying: "The will was not drawn with technical completeness, but the disposition that the testator intended to make of his estate is clearly discernible from the language he has employed in his testament. It does not admit of doubt that he devised at least a life estate to his wife and daughter. It would seem to be just as clear that he intended, in case of the death of both his wife and daughter without issue, that, if David Campbell survived them, he should take the property, instead of his brothers and sisters, his present heirs at law. He certainly intended to prefer him over them. Whether he did so for a good reason, we do not know, nor is it material that we should, since such is his clearly declared will and purpose. If he preferred Campbell to the defendants in error, much more does his preference extend to the issue of his wife

and daughter, since Campbell can take under the will only on default of such issue. It is also very clear that the testator did not intend that Campbell should have the property unless 'both' his wife and daughter should die without leaving issue; for 'then, and in that case' only, does he give it to him. Although there are no words in the will expressly giving the estate to the issue of his wife and daughter, it is manifest he intended that their issue should have it after their decease. It would seem that he regarded it as not to be doubted but that the property would pass to the children of his wife and daughter, if they died leaving children. He was therefore careful only to direct what disposition should be made of his property in the event that both should die 'without leaving any heirs of their body.' It follows, by clear implication, that he intended to give the property to the issue of his wife and daughter after their decease, if they left issue surviving them, to the exclusion of all other heirs, and of Campbell even, who is preferred in the will to them."

As is noted in *ANDERSON v. UNITED REALTY Co.*, the same will therein involved was construed with a different result by the Federal circuit court of appeals in *Anderson v. Messinger*, 7 L.R.A.(N.S.) 1094, 77 C. C. A. 179, 146 Fed. 929. Briefly stated, the difference of opinion between the two courts is this, that while the Ohio supreme court holds that the effect of words sufficient, standing alone, to give a fee to the primary devisee, is not to be diminished by any implication drawn from the subsequent provision of the will, where the general purpose of testator can be given effect without drawing such implication, the circuit court of appeals asserts the right to determine the testator's specific purpose from a consideration of the whole will, without being embarrassed by the presumption that the testator intended to give each of his sons a fee. The reasoning of the court is shown by the following excerpts: "Now, we cannot but think that to the common understanding this language would convey the meaning that in the other alternative—that is, if the sons should leave lineal descendants—it was intended that they should take, and that it was only in the event of their not leaving lineal descendants that the estate should go over to collateral relatives. The reason which gives force to the familiar rule of construction that the inclusion of one alternative is the exclusion of the other, and *vice versa*, would tend to confirm the impression. Moreover, the whole paragraph shows beyond doubt that the testator intended to prefer his lineal descendants to the collateral branches of his family. After providing that his sons should take the estate by moieties, his mind went forward to the time of their death. The working of the natural instinct to keep the property in the family becomes evident. He does not say, if either of my sons shall die 'without heirs,' but without 'lineal descendants.' He evidently chose his

words, and the distinction is clear. It would not comport with his idea that the lineal descendants should take as heirs. Nor did he intend so wide a class. He made a distinct blunder if he discarded the familiar term 'heirs' and employed the selection of 'lineal descendants,' if he had in mind a succession by inheritance, and not by purchase. We are now considering this paragraph as if it stood unaffected by anything else in the will, and we cannot but be much impressed by the considerations which tend to the conclusion that the testator intended that, if the survivor of the sons should die leaving lineal descendants, they should take the remainder. Then, if this were doubtful, there is a long established rule of construction of devises in the law of real property, one of such as were referred to in the early part of our discussion of this subject, that, when a devise can, without doing violence to the language of the testator, be construed as creating a remainder, it shall not be construed as being an executory devise. . . . The contention of the defendant rests upon the assumption that the language of the will imports a devise of an estate in fee simple to the sons of the testator, and this assumption would probably be well taken if we looked only to that part of the will which devises the property to them. It is true there is no mention of heirs, but it would in the case supposed be implied that the testator intended to devise the whole estate. But the implication is removed if, from other provisions in the will, it is seen that the testator did not intend to devise an unqualified estate. And it is to be observed that the defendant's contention proposes to cut down the fee simple which the earlier parts of the will are said to devise to the sons, by a condition that the sons shall leave lineal descendants. So, in either construction of the parties, the implication which would arise from the unqualified language of the devise to the sons cannot prevail." And, after reviewing a number of decisions, the court continued: "There is another consideration which must not be ignored. The authorities recognize a more significant purpose in an implication which tends to cut down a larger estate to a life estate, where the remainder thereby passes to a person who is in the line of descent, than it would if it were to pass to a stranger. This results from the stronger motive which the testator would have to prefer the former to the latter class. The gift of the power to dispose of the property by will when the sons should reach the age of twenty-one does not enlarge a life estate. *Jones v. Shields*, 14 Ohio, 359; *Baxter v. Bowyer*, 19 Ohio St. 490; *Stableton v. Ellison*, 21 Ohio St. 527; *Huston v. Craighead*, 23 Ohio St. 198. We are therefore of opinion that the intention of the testator was that the lineal descendants of the surviving son should take an estate in remainder at his decease."

[In connection with the foregoing case, its subsequent history may be of interest: Upon a second trial the court again in-

of a remainder is in such a case ordinarily to be implied.²⁵

In some instances in which the gift was of personalty, the presumption of an inten-

structed a verdict for the defendant upon a ground not involving the interpretation of the will, but its judgment was again reversed and a new trial awarded, in 85 C. C. A. 468, 158 Fed. 250, in which the court declined to reconsider the question of the construction of the will. Upon the third trial in the court below, the defendant interposed a plea in bar arising out of the judgments of the Ohio courts which are affirmed in *ANDERSON v. UNITED REALTY Co.* The circuit court of appeals, in 96 C. C. A. 445, 171 Fed. 785, declined to adopt the construction placed upon the will by the Ohio supreme court, on the ground that the law of the case had been determined by its previous decision, and on the further ground that in the decision of the Ohio supreme court no rule of property was stated necessarily conflicting with the opinion of the circuit court of appeals, saying: "This court found 'assistance from other parts of the will' in reaching the conclusion we did, as will be seen by consulting the opinion. It will also be noticed that the opinion of the Ohio court, as exhibited by that of Judge Summers, does not deal with circumstances to which we attached importance." This latter decision, was reversed on certiorari by the United States Supreme Court in 225 U. S. 436, 56 L. ed. 1152, 32 Sup. Ct. Rep. 739, where it was held that, even apart from the effect of the state judgment as an adjudication, it should have been followed because, at least as against the decision of the circuit court of appeals, it was right, the court saying: "We should lean toward an agreement with the state courts, especially in a matter like this. In the present instance we see no sufficient reason for refusing to follow their judgment, even if, for any cause not pointed out to us, it did not finally adjudicate the question of title as between these parties in such wise as to be binding upon every court before which that title subsequently might be discussed." For a statement of the opinion of the Supreme Court as to the proper construction of the will, see note 25, *infra*.]

See also, in this connection, *Carr v. Green*, 2 M'Cord, L. 75, set forth in note 20, *supra*.

For similar decisions in cases involving personal property, see note 26, *infra*.

As to whether a gift over in event that the person first named shall die without children or issue will prevent the application of a statute declaring that estates given by will in general terms, without the use of the word "heirs" or its equivalent, will pass a fee if there is no further devise of the premises after the decease of the first devisee, see also *Steward v. Knight*, 62 N. J. Eq. 232, 49 Atl. 535, in which it is said the decisions are not entirely harmonious.

²⁵ The conclusion reached by the Ohio court in *ANDERSON v. UNITED REALTY Co.* is approved by the United States Supreme Court in *Measenger v. Anderson*, 225 U. S. 436, 56 L. ed. 1152, 32 Sup. Ct. Rep. 739, 51 L.R.A. (N.S.)

in which it is said: "The latter clauses that we have quoted from the will make a difference, it is true, according to whether the sons leave lineal descendants at their death or not. But the interest thus exhibited in descendants is satisfied by the probability that they would inherit the property or be provided for out of it. It is not shown to be so definite and paramount as to cut down the gifts imported by the previous words, except in the single event in which the will does so in terms. On the contrary the still later provision that nothing shall be construed to 'deprive' the sons of the power to dispose of 'their portions' by will indicates that the testator meant the sons to be owners of his estate, subject to the divesting clause."

In *Matthews v. Hudson*, 81 Ga. 120, 12 Am. St. Rep. 305, 7 S. E. 286, it is said that the general rule is that a devise or bequest to a child, though followed by a contingent limitation over, is not to be construed as a direct provision for grandchildren, unless so expressed, but as means to enable the child to provide for his own children in a way suitable to himself; and that unless some sufficient reason appears why this latter object, alone or with others, is not to be expressed, it is not sound construction to attribute to the testator an object which he has not declared.

In *Burton v. Black*, 30 Ga. 638, a will gave property to B., and if B. should die "without children," then to R. The question before the court was not whether there was a gift by implication to the children, but whether the limitation over was valid, which depended on whether or not the first taker took an estate tail. It was held that the term "children" did not describe a class having succession from generation to generation, and therefore that the first taker did not take an estate tail, but a fee simple determinable upon the condition expressed. In stating its conclusion the court incidentally remarked that the children were not intended to take in any event, except to take their chances as heirs or legatees of their father.

In *Sumpter v. Carter*, 115 Ga. 893, 60 L.R.A. 274, 42 S. E. 324, where a testator devised his whole estate to his wife for life, and at her death to be equally divided between his six children, adding: "My said effects thus going into the hands of my said daughters not to be subject to the control of any husband, but the same to belong to my said daughters and their children. And in case either of my said six children should depart this life without leaving issue, then their part of my estate to be equally divided between my other children, to be controlled in the same way as first above directed," it was held that the children of a son of the testator took no estate under the will, either expressly or by implication, the court saying that the rule that estates by implication are not favored applied to the

case in hand with especial force, as there was no intent whatever on the part of the testator to give his son a lesser estate than a remainder in fee in his whole share, which was only to be divested in favor of the testator's other children and remaindermen, upon the contingency of dying without issue.

In *Post v. Rohrbach*, 142 Ill. 600, 32 N. E. 687, where a testator who had devised certain real estate to a daughter, further provided that should any of his children "die without issue, or should either or any of them leave surviving them no children or child, nor the issue of such children or child, or should any or either of my said children die leaving surviving them a child or children, and all of such children of either of my deceased children, as aforesaid, shall die without issue, then and in that case it is my will that the respective portions of my said property hereby bequeathed of any of my said children deceased, as aforesaid, shall descend or revert to such of my children as shall then be living, and to such children or child as shall then be living of any of my deceased children, as aforesaid, said property so reverting to be divided among them according to the laws of descent of the state of Illinois," it was held that the language used admitted of no construction other than that the daughter took a defeasible estate, and not a life estate to be followed by a life estate in her child.

In *Holt v. Wilson*, 82 Kan. 268, 108 Pac. 87, testatrix gave the residue of her estate to her husband for life and at his decease to her adopted son, William N. Holt, "if he be living at the time, but if he dies before that time and leaves a child or children living, then the said residue of my estate is bequeathed to said child or children, but if the said William N. Holt shall die without issue either before or after the first legatee's estate expires, then and in that case, I direct that the whole of said estate be and the same is bequeathed and given to Martha M. Wilson or her heirs. (The intention of this will is to bequeath to William N. Holt, after the first legatee's tenure expires, the whole of my said estate, and to his children after his death, but if he should die childless, then the same to go to the said Martha M. Wilson or her heirs.)" It was claimed by the ultimate devisee that William N. Holt took a life estate only, with remainder to his child or children who survived him, and in default thereof to Martha M. Wilson or her heirs; or that if he took a fee, it was a conditional one, subject to limitation over by executory devise in the alternative,—that is, to his child or children if any survived him, otherwise to Martha M. Wilson. The court held, however, that the devise was in clear language sufficient to convey an absolute fee, which was not cut down to a mere life estate with a vested remainder by the provision relative to dying without issue. In order to reach this conclusion, the court held that the son had an absolute right to dispose of the property, and sub-

stituted a period for a comma following the phrase, "then the said residue of my estate is bequeathed to said child or children," in the provision above quoted; and further held that the direction that the property should go over if the son should die without issue after the first legatee's estate expired was void as inconsistent with the absolute interest given him.

In *Parrish v. Parrish*, 86 Ky. 84, 4 S. W. 819, a testator gave the residue of his estate to his wife during widowhood, or until his son should arrive at the age of twenty-one, from and after either of which events a certain provision was made for the wife, and the son was given the balance of the estate "in fee simple." Testator further provided: "Subject to the interest devised by this will to my wife, I give the whole of my estate to my son, . . . but should he die without lawful children or grandchildren living at the time of his death, then in that event the whole of the estate devised to him is to go and belong to my wife." It was held that, whether the estate devised to the son was an absolute or a defeasible fee, his children could in no possible event take any interest therein as devisees under the will.

In *Dorsey v. Maddox*, 103 Ky. 253, 44 S. W. 632, it was held that under a devise of lands to testator's granddaughter, "to her sole and separate use," "free from the control of any husband she may marry, with remainder over to [others] in case she should die without issue," with the further proviso that the right and title to such land should not rest in the granddaughter until her father should surrender the note of the testator held by him, the granddaughter took a defeasible fee, subject to be defeated by her death without issue living at the time of her death; and therefore that her conveyance passed the title as against her surviving son.

In *Smith v. Phelps*, — Ky. —, 121 S. W. 656, it was held that testator's grandchild took nothing under a will by which testator devised lands to his three youngest sons, "to be equally divided between them as they become of age," with the further proviso, "I further will and desire that should any of my children die without legal heirs or heir, the portion allotted to him or her be equally divided between my other children or their heirs,—my meaning in this my last will and testament by heirs is my sons and daughters, and not their wives or husbands, or the children of my sons and daughters."

In *Easton v. Miller*, — Ky. —, 128 S. W. 1091, it was held that under a will by which testator gave a share of his estate to his wife, and gave one third of the remainder to a daughter, with the proviso: "It is my will that in case she should die before her husband without any living issue, that after the death of her husband that portion of my estate that she inherits by this will or such portion of it as may then be remaining, if any, shall revert back to the children that are now living of her two sisters,"—the

daughter took a defeasible fee, and not a life estate with a power of disposal. The fact that testator devised other shares of his estate to another daughter, and to the children of a deceased daughter absolutely, and also provided that if his wife should die before him, the provision made for her should be divided among his children and the children of a deceased daughter, was relied on by the court as indicating an intention on his part not to create a limited estate.

In *Elkins v. Thompson*, 155 Ky. 91, 159 S. W. 617, it was held that under a devise to testator's son of a half of his estate, with the proviso that if such son should die without leaving heirs of his body, the portion devised and bequeathed to him should go over, the son took a defeasible fee, and not a life estate with remainder over to his children.

In *Whalin v. Bailey*, 29 Ky. L. Rep. 1048, 96 S. W. 1105, it was held that under a devise to testator's three sons of a farm, "all to use said land for their use and benefit, and I further stipulate in the bequest of my real estate that if either of my sons die without heirs, then their interest in said land to go to my surviving sons or son unto the last remaining one or their heirs," each of the sons named took a fee defeasible upon dying without issue, and not a life estate with remainder to his issue, failing which, to his brothers and their issue.

The question whether the devisee took a fee defeasible in event of dying without children, or a life estate with remainder to children, was adverted to, but not decided, in *Miller v. Carlisle*, 90 Ky. 205, 14 S. W. 75.

In *Devecmon v. Shaw*, 70 Md. 219, 16 Atl. 645, where testator, after giving his daughter certain real and personal property without words of limitation, added: "But in case my said daughter should die without leaving any child or children at the time of her death, or if leaving such child or children, such child or all such children should die before arriving at the age of twenty-one years, then all the real estate and personal estate devised to my said daughter shall go to my sister . . . and her children and grandchildren then living," it was said that it was quite clear that the children the daughter might have could take nothing as devisees or legatees under the will.

In *Whitby v. Jump*, 94 Md. 185, 50 Atl. 701 testator gave his residuary estate to his wife and youngest son during their natural lives, to be equally divided between them. In case the wife should survive the son and the son should die without children, the property given to the son was to be equally divided among the children of testator's daughters; and in case the son survived the wife, testator provided that whatever should remain of the property bequeathed to her during her life should then descend to the son, and in case of his death without children the whole should be equally divided among the children of testator's 51 L.R.A. (N.S.)

daughters. It was held that the son took a fee defeasible upon dying without children, and not a life estate with remainder to his children, if any, the court saying: "If the appellant's contention is sustained and we hold that Wm. Elbert took only a life estate under the will, there would be an intestacy as to the whole residue of the estate, upon his death without [erratum for "with"] children, the contingency upon which alone there was any devise over, his death without children, not having happened; and the testator's children and grandchildren, who were intended to be excluded, would all participate in the residue of the estate."

In *Schmaunz v. Göss*, 132 Mass. 141, the testamentary provision under construction was as follows: "As heirs of what I leave, I hereby ordain and appoint my sister Magdalena Schubert, John Göss, Jacob Göss, and Betti Schmaunz, to the effect that each of these four persons should take a quarter of all I leave, in equal rights and portions. . . . Likewise, the half of the portion which the said Betti Schmaunz receives out of what I leave shall fall to John Göss and Jacob Göss and their descendants, in two equal parts, if Betti Schmaunz deceases without heirs of her body; otherwise, she is succeeded by her descendants alone, as also John Göss and Jacob Göss leave to their legitimate descendants their portions received and to be received out of what I leave, so that if John or Jacob Göss should decease before me, their children step in the place of their father as heirs, respectively, of one quarter of what I leave." It was held that the words, "otherwise she is succeeded by her descendants alone," were too indefinite and ambiguous to cut down the estate first given in fee to Betti Schmaunz, either to an estate for her life with remainder in fee in her descendants or children if she die leaving heirs of her body, or to an estate tail; and that she took an estate in fee simple determinable upon the event of her dying without leaving at her death heirs of her body, with an executory devise over dependent upon that contingency.

In *Halsey v. Gee*, 79 Miss. 193, 30 So. 604, testator devised to his two grandsons a tract of land, adding: "And in the event that either of my said grandsons should die without issue, then it is my will and I hereby direct that the land herein devised to him shall go to the surviving grandson, and in the event that both of them die without issue surviving, then it is my will that the land herein devised and bequeathed to them, together with all the bequests hereinafter made to them, revert to" a son and daughter. It was held that the children of a grandson took nothing under the will; but that the grandsons took the fee as tenants in common, with cross remainders over contingent on the death of either without issue, and with an ulterior limitation if both should die without issue.

In *Re New York, L. & W. R. Co.* 105 N. Y. 89, 59 Am. Rep. 478, 11 N. E. 492, testatrix gave her daughter all her proper-

ty, subject to the payment of certain legacies, with the direction that in case the daughter should die without issue, the property should go to testatrix's husband and sister for life, with remainder to her brothers, "the devise over to my husband, sister, and brothers to depend upon the contingency of my daughter Minnie dying without issue." It was held that the daughter took a base or conditional fee defeasible by her dying without leaving issue living at the time of her death; that her issue, should she leave any, would take by inheritance from her, but a conveyance by her in her lifetime would be effectual as against them.

In *Beck v. Ennis*, 54 Hun, 126, 7 N. Y. Supp. 264, a testatrix, after dividing her property among her children, provided that if a daughter "should marry and die without children, or die previous to her brother or sister, then the property given or bequeathed her shall revert to her brother . . . and her sister . . . or their heirs." It was held that the daughter took a conditional fee defeasible by her dying without leaving issue before the death of either her brother or her sister; that her issue, should she have any, would take by inheritance from her, but a conveyance by her in her lifetime would be effectual against them.

In *Whitfield v. Garriss*, 131 N. C. 148, 42 S. E. 568, testator devised realty to a grandson, adding: "And in the event of the death of the said [grandson] leaving no heirs of his own body, then and in that event the above described land and other property shall descend to" certain other grandchildren, or the survivor of them, and in case of the death of the last survivor without descendants, to be equally divided among all testator's grandchildren. It was held that the devisee's children took nothing under the provision above set forth. On rehearing, reported in 134 N. C. 24, 45 S. E. 904, the contention was strongly urged that the grandson took an estate for his life only, with remainder in fee by implication to his children if any. The court, after saying that, in order to support this contention, plaintiffs must make out a very strong case, said: "It is provided by our statute that when real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall in plain and express words show, or it shall be plainly intended by the will or some part thereof, that the testator intended to convey an estate of less dignity. The Code, § 2180. By force of this statute, which is the act of 1784, Franklin Whitfield took an estate in fee, unless it was 'plainly intended' by the testator that he should have a less estate. It surely cannot be contended by the plaintiffs that it appears 'in plain and express words' the testator intended that he should not have an estate in fee simple, or that he should have only a life estate. We have found no expression in the will, nor can we discern therefrom any intention of the testator, which precludes the construction the statute places upon its words, or which

prevents the full operation of the statute in vesting a fee when inheritable words are not used. The plaintiffs encounter not only the strong leaning of the law against their construction, but also the positive requirement of the statute that the devise shall be held to be in fee unless the testator plainly intended by his will that an estate of less dignity should pass to the beneficiary. An intention contrary to that implied by the statute must be gathered from the will, and the burden, of course, is upon the plaintiff to show that it exists. Instead of there being any evidence of such an intention in the will, we think that the terms of the devise plainly evince the purpose of the testator to have been to vest in Franklin Whitfield an estate in fee; or, at all events, the limitation that, if he died without heirs of his body, the property should go over to the ulterior heirs' devisees, does not rebut the intendment of the statute. The deviser must be presumed to have known the law which was in force at the time his will was written, and, acting upon this presumption, there must be inserted in the will the provision of the statute, so that it will read: 'I devise to my grandson, Franklin Whitfield, and his heirs, that part of my lands,' etc. He thereby acquired a fee simple estate, unless the words, 'in the event of his death, leaving no heirs of his body,' are sufficient to restrict the estate devised to one of less duration than a fee, or, in other words, to a life estate, and thereby prevent the insertion of inheritable words in the devise. Why should we assume that the testator was ignorant of the law, and therefore intended, by his failure to use words of inheritance, to devise only a life estate? Is not the provision for the estate to go over in the event of his death without heirs of his body fully explained and the intention executed by allowing his surviving children to take as heirs, that is, by descent from him; and is not this construction perfectly consistent and in harmony with the requirement of the statute that inheritable words shall not be necessary to create an estate in fee simple by will?"

The doctrine of *Whitfield v. Garriss*, supra, was applied in *Wilkinson v. Boyd*, 136 N. C. 46, 48 S. E. 516, to a devise to a daughter with a proviso that if she should die without leaving lawful heirs begotten of her own body, the property should go to testator's other three children and their heirs.

In *Moore v. Feig*, 17 Ohio C. C. 27, 9 Ohio C. D. 660, testator, after devising the bulk of his property to his son John, provided: "Now, if my said son John shall have an heir of his own body, then all title and interest in and to my real estate with power to convey and sell shall vest in him. But if said John should die leaving no heir of his own body, then said estate shall pass to my son Thomas, subject to the same requirements, restrictions, and limitations pertaining to John. And in case Thomas should die and leave no heir of his own body, then it is

my will that my said real estate pass absolutely to my son James and his heirs forever, with power to sell and convey. But in no case shall John or Thomas sell or dispose of said real estate, unless they shall have an heir of their own bodies." It was held that John did not take merely a life estate with remainder by implication to his descendants, but that, upon the birth of a child to him, he became the owner of the realty in fee; such construction being strengthened by the circumstance that John was required by the will to pay a considerable sum of money to other persons as a condition upon which he should hold whatever estate was granted to him in the will, and by the provision that in no case John or Thomas should sell or dispose of said estate unless they should have an heir of their own bodies.

In *Thomson v. Peake*, 38 S. C. 440, 17 S. E. 45, testator devised to his three sons certain real estate to be divided in the manner specified by him, adding: "And it is my will and desire that my three sons, H. H. Thomson Jr., J. S. Rowland Thomson, and William Waddy Thomson, shall have all my lands in York and Union districts, as above described and willed to them, to be held by them during their natural lives or life, and that my son, Richard Lewis Thomson, to whom I have willed Pacolet lands, as above described and willed, to him during his natural life. But should any of my four sons die without having any heir or heirs of their bodies, lawfully begotten by them, then the share or shares so willed to them shall be equally divided, share and share alike, among their brothers and sisters then alive, or should any of my children be dead, leaving lawful heirs of their bodies lawfully begotten, then the said child or children shall take the share amongst them which their deceased parent would take were he then living." It was held that the provision that if any one or more of the four sons should die without issue lawfully begotten, then their shares should go over, together with the statement that the sons should hold the land devised to them during their natural lives, did not reduce the estate of the sons to one for life, but to a defeasible fee.

In *Shaw v. Erwin*, 41 S. C. 209, 19 S. E. 499, testator gave to his wife "for her own separate use and behoof" certain lands, called in the opinion the "Saluda tract," and also gave and bequeathed to her "for and during her natural life" his home place, and further willed to his son lands on Turkey creek, adding: "And should my son R. P. Shaw die leaving no child or children and his mother being dead" then to others. "The property before willed to my wife, Mary Shaw, during her natural life, both real and personal, at her death shall return to my son Richard P. Shaw for and during his natural life, and then to his children, the issue of his body . . . and should my wife Mary Shaw die without making disposition by will or otherwise of the Saluda tract of land given to her by the 51 L.R.A. (N.S.)

provisions of this will, and should my son R. P. be also dead leaving no issue, then I desire that the said tract of land should be sold and equally divided between" certain persons or the survivors of them. "And should my son Richard P. Shaw die without issue, then I desire that the property falling to him after the death of his mother shall be sold and equally divided between the nephews and nieces of my wife Mary and myself." It was held that there was no such necessity on the face of the will as would give rise to an implied gift to the son's children, either of the Saluda tract or the Turkey creek tract; but that the language of the will, so far from implying an intention to create an estate in remainder to the son's issue, rather implied the contrary. The court adduced in support of its conclusion the fact that whenever the testator intended to create a life estate he knew how to express such intention.

In *Cowan v. Wells*, 73 Tenn. 682, testator devised lands to a son by words which, taken alone, were sufficient to vest him with an absolute estate, but in a subsequent clause directed that should such son "die without heirs, then and in that case the property that I have hereby given to him shall be equally divided between my three daughters;" it was held that the son's children were not vested with an estate in remainder by implication, but that the son took an absolute title subject to an executory devise over upon the contingency of dying without children.

In *Randall v. Josselyn*, 59 Vt. 557, 10 Atl. 577, a testatrix gave all her estate to her son, who was her only child and heir, "subject to the following conditions and limitations." The first of these provided for the care of the estate until the son should attain the age of twenty-one, after which the will continued: "When my son has attained the age of twenty-one years, or at my decease if thereafter, he is to have the control and management of said property, which I give to him and heirs absolutely, provided he has children or their descendants who can inherit said property, or the avails of the same, from him at the time of his decease; but in the event of the death of my said son without having any child or children, or their descendants who can inherit from him, I then will and direct that all my said property or the avails of the same, if changed into other property or into money, go to and become the property of my nephew . . . and his heirs, or to his child or children and their descendants, in the event of his death before the death of my said son." It was held that if the son should leave children or their descendants they would take the estate given to him, not as an estate under the will, but by descent from him out of the fee devised to him.

In *Daniel v. Lipscomb*, 110 Va. 563, 66 S. E. 850, testator devised to a son the lands in question, "subject to said limitations and restrictions as the will of E. W. Spencer

tion to give an absolute interest has been held to be rebutted by the implication drawn from the limitation over.³⁵

requires." E. W. Spencer had bequeathed to the same person, who was her grandson, and his brother, a share of her estate, to be equally divided between them, declaring that "if either of my grandsons should die leaving no child or descendants surviving him, the share he receives under this will is to go to his surviving brother; and if both of my grandsons die leaving no child or descendants surviving them, then the whole of what is herein given them shall be divided equally between" others. It was held that, as the devise, standing alone, would have invested the devisee with a fee simple estate, the effect of the qualifying language, "if he should die leaving no child or descendants surviving him," was to convert what would otherwise be a fee simple into a defeasible fee; and that in no event could the children of a grandson take as purchasers under the will.

³⁶ In *Tyson v. Blake*, 22 N. Y. 558, a testator bequeathed to his grandchildren the net proceeds of his estate, to be divided equally, share and share alike, adding: "But in case my granddaughter, Mary Emeline, should die without lawful issue, then her share to be equally divided among my three grandsons aforesaid, share and share alike." The granddaughter having died without issue, an action was brought by the executor of the will against her guardian and his sureties for the repayment of advances of the principal of her share, which had been made during her lifetime. It was claimed on behalf of the defendants that the limitation over of the granddaughter's share, in the event of her dying without issue, to the three grandsons, was void as being repugnant to the gift to her of one fourth of the net proceeds of the estate. The court, in upholding the gift over, said that it showed the intention of the testator to have been that the granddaughter should take, in the contingency named, a life estate only in the legacy thus given to her, with an executory bequest of her share to the three grandsons if she died without issue, but that if she should die leaving issue, then such issue would take her share absolutely.

In *Close v. Farmers' Loan & T. Co.* 195 N. Y. 92, 87 N. E. 1005, affirming 121 App. Div. 528, 106 N. Y. Supp. 329, a testator gave a third of his estate to his wife for life or until marriage, with remainder to his children, and directed the remaining two thirds to be divided into six equal parts "and then distributed among my (his) children in the manner following. . . . To my daughter Marie Ema Seward I also give one other equal sixth part of said remaining two thirds, the same also to be invested by my executors for her benefit in such securities as they may elect, and the interest arising therefrom to be paid to her semi-annually, and in the event of the said 61 L.R.A. (N.S.)

Where the primary devisee takes only an estate for life, by necessary construction ³⁷ or the express provisions of

Marie Ema dying without issue, then the proceeds of such share to be divided among her brothers and sisters share and share alike." It was held, though by a divided court, that the daughter did not take a defeasible fee, but an equitable life estate with remainder to her children if any, otherwise to her brothers and sisters. The court said: "We now reach the question as to what disposition was made of the remainder upon the death of the daughters. Here we are aided by two presumptions of law, each founded on long experience and well settled, the presumption against intestacy and the presumption against disinheritance. Read in the light of these presumptions, what did the testator mean when he directed that if his daughter, Mrs. Seward, should die 'without issue,' the remainder should be divided among her brothers and sisters, without making any express provision for the contingency if she should die leaving issue? As he did not give the fee or the principal, for the clause in question covered both real and personal property, to his daughter, and he gave the remainder to her brothers and sisters only if she died 'without issue,' the necessary conclusion, in view of the presumptions mentioned above and the circumstances surrounding him when he made his will, is that he intended to give the remainder to her children, if she died 'with issue.'"

³⁷ In *Nowland v. Welch*, 88 Md. 48, 40 Atl. 875, where testator, after devising property in trust for the maintenance of a grandson, further provided: "If my said grandson shall attain to twenty-two years of age, then my will is that the trustee aforesaid shall convey and transfer all the estate and property, real and personal, so held by him in trust to my said grandson who shall manage and control the same, and if my said grandson should die without leaving children or the issue of such (if any have died), then" to a niece, it was held that the grandson took, at the age of twenty-two, an estate for life with remainder to his children or descendants. The court said: "The intent of the testator obviously was to provide for his grandson and his descendants, and upon his death, without issue, then one of the objects of his bounty was his niece, Mrs. Welch. The use of the language, 'who shall manage and control the same,' taken in connection with the other parts of the will, clearly indicates the character of the estate the testator had in view. There would have been no necessity for the use of such language if the testator had intended to devise a fee simple estate."

In *Eldred v. Shaw*, 112 Mich. 237, 70 N. W. 545, testator devised lands in trust for a grandson "up to the time the said grandson arrives to the age of twenty-one years," directing that the trustee "shall

the will,²² most of the English and some of the American courts have been unwilling to imply a gift of the remainder from the terms of the gift over

use and appropriate no more of the use or income from the said trust estate for the support, education, and maintenance of the said grandson than is made necessary by accident or misfortune, and such use and appropriation is to be entirely under the judgment and discretion of [the trustee]; and in the case of the death of my said grandson without heirs by his body begotten the lands and property above described with all its increase or accretions I give, devise, and bequeath to" sons and daughters of the testator. It was held that testator's intent was to convey an estate to his grandson for his use and benefit during his life, with the fee to the issue of his body if such were living at his death, and if not, then to his sons and daughters.

In *Webel v. Kelly*, 111 App. Div. 521, 97 N. Y. Supp. 1009, testator directed his executor to hold property in trust for the support of an adopted son during minority, giving to such son the total income of the property while he should be between twenty-one and twenty-five years of age, and directed that upon the arrival of such son at the age of twenty-five, the executor should convey the property to him "to be held by him as follows: In case of my said adopted son departing this life before me, or in case of his so departing this life after my death without leaving lawful issue, then I give all my property, real and personal, and of every kind to" a nephew and niece. The foregoing provision was held to give the adopted son a life estate in the property with remainder to his issue.

In *Kreamer v. Showalter*, 1 Pa. Co. Ct. 453, testatrix gave a share of personalty to be held in trust for the maintenance and support of a son, with power to expend any part of the principal for the son's support should it become necessary, and in case the said son "should die without leaving issue the principal sum I order to be paid to the heirs of the said" son. It was held that there was by implication a gift to the children of the son should he have any, the court saying: "A limitation over of personal estate in default of issue of the legatee for life, or if he die without issue or leaving no issue, is an implication of a bequest to the issue. The intent is that the ultimate legatee is not to take while there is issue of the legatee for life, and hence a gift to such issue is implied."

In *Love v. Walker*, 59 Or. 95, 115 Pac. 296, testator directed that his estate should be divided into six parts, which he apportioned among his living children and the offspring of deceased children, directing that it should be kept intact, and not distributed until a certain date. In the course of his will he stated that "it was always my purpose to distribute my property equally between my several children and to the heirs of those of my children who had died leaving children or grandchildren." At the time the will was made, one of the

sons was a widower, and two children of a deceased daughter were his only living issue. He subsequently remarried. Testator by codicil to his will declared that the devise or legacy to a daughter shall be "for her sole and separate use independent of her husband at all times, and that at her death the said devise or legacy to her shall go to her children share and share alike." He similarly limited the share given to a son; and then, with reference to the share of the son in question, provided: "Third. I hereby will, decree and declare that the devise or legacy in my said will, to my son, Green C. Love, shall be for his sole and separate use, independent of his wife, at all times, and that in case of his death without lawful issue, born alive and living at the time of his death, then the said devise or legacy to him shall belong and go [to] the remaining devisees of my said will in proportion as they hold of the shares or parts of my said will." It was held that, in view of the employment of the term "use" in the codicil, and of its other provisions, it clearly evinced an intent to give the son a life estate only, which deduction was strengthened by the provision of the codicil which treats the premises to be partitioned to him as remaining undiminished at his death; and that his issue took by implication a remainder conditional on their surviving him, with an executory devise over if they should not.

²² Decisions denying the existence of a gift.

In *Scale v. Rawlins* [1892] A. C. 342, 66 L. T. N. S. 542, affirming L. R. 45 Ch. Div. 299, a testator gave three houses upon trust to pay the rents and interest to his niece during her life for her separate use, and after her decease, "she leaving no child or children," he gave one of the houses to one nephew and the two others to another. The two nephews were made residuary devisees, so that unless the will was construed either as giving the niece a fee defeasible in event of her dying without children, or as giving her children a remainder by implication, they would, in event of her death leaving children, share equally what, in event of her death without children, was divided between them unequally. It was held that, although such absurdity would follow the construction given, the intention was not sufficiently expressed by the will which would enable the court to give it any other construction.

In *Ranelagh v. Ranelagh*, 12 Beav. 200, testator gave certain sums of money to his daughters and to his sons during their natural lives, adding: "In case of the decease of any of the above parties without legitimate issue, their, his or her proportions to be divided equally amongst the survivors." In discussing the question whether a gift to the children of the first takers might be implied, Lord Langdale, M. R., said: "The question therefore is whether, as against

the residuary legatee, a gift to the children of the particular legatee for life is, in the absence of any expressed gift, to be implied from the circumstance of the gift over being made dependent upon the legatee for life dying without issue living at his death. If the legacy had not been expressly limited to the legatee for life, I apprehend that, in the event which has taken place of the gift over not taking effect, the legatee would have taken the legacy absolutely; the gift to him would not have been defeated, and a gift to the children would not have been implied. In this case the legatee, by the express words of the codicil, takes no interest beyond his life; and if there be no further gift of the legacy, the residuary legatee, who takes subject to all that is not otherwise well given, must be held entitled. The issue of the legatee is named in the codicil only in the description of contingency on which the legacy is given over (*Doe ex dem. Barnfield v. Wetton* 2 Bos. & P. 328); and I am unable to find anything which assists in collecting an intention to give to the children. I can collect no particular intention to give this legacy to the residuary legatee, and I cannot answer the question proposed by Sir Thomas Plumer in *Ex parte Rogers*, 2 Madd. Ch. 449, 17 Revised Rep. 239, why the children were named on the occasion of the gift over. But in that case there seems to have been found some further reason which does not here exist, for inferring an implied gift; and on the whole, my opinion is that the legacy falls into the residue. I think it extremely probable that the testator did mean a benefit to the children; but *si voluit non dixit*. I think that there is not sufficient to raise the implication, and that the legacy falls into the residue."

In *Sparks v. Restal*, 24 Beav. 218, it was held that under a bequest to testator's son of an annuity during his natural life, and in case he should die without child or children lawfully begotten, and from and after his decease that being the case, to others, it was held that the son's children took no interest by implication.

In *Neighbour v. Thurlow*, 28 Beav. 33, testator gave the residue of his property to certain daughters and sons "for their natural lives, namely: They to have the interest during their natural lives, and if any die without leaving issue, in that case to return again for the benefit of my grandchildren to share and share alike." It was held by Sir John Romilly that there was no implied gift to the issue of the testator's three children.

In *Bodens v. Watson*, Amb. 478, testatrix directed moneys to be laid out in the funds for A during his life, "and if he has no heirs," then to his sister. The lord chancellor held that he could not imply a gift to the issue of A as purchasers, as such an implication was not a necessary one.

In *Greene v. Ward*, 1 Russ. Ch. 262, testator devised a sum in trust to pay the interest thereof to his son for and during his natural life, "and in case he should marry

any woman with £1,000 fortune, then my will and mind is that the said £5,500 be settled upon his wife and the issue of such marriage; but in case of my said son's decease leaving no issue of his body lawfully begotten, then" to others. It was held that no gift to the issue of the son could be implied, Lord Gifford, M. R., saying: "If a sum of money is bequeathed to A B for life, and if he dies leaving no issue, then to another, that does not raise any implication in favor of the issue of A B; though if he dies leaving issue, the gift over does not take effect."

In *Re Hayton*, 10 L. T. N. S. 336, 4 New Reports, 55, a testatrix gave a sum of money upon trust to pay the interest to her step-daughter during her life, for her separate use, and after her death to pay the said sum to such persons as she should by will appoint, and, in default of such appointment, to the next of kin of the testatrix living at the step-daughter's death. She further directed that in case the step-daughter should die without issue living to attain the age of twenty-one years, the trustee should divide the sum between certain persons. The step-daughter died leaving a son who attained twenty-one, without having exercised the power of appointment. Wood, V. C., said that where a gift is made to a parent absolutely, followed by a gift over in case of his dying without issue, there can be no reason for implying a gift to the children, as the parent has full power over the property and can dispose of it as he pleases; and that even where the parent has only a life estate, he must now hold, on the authority of *Cooper v. Pitcher*, 16 L. J. Ch. N. S. 24, 4 Hare, 485, 9 Jur. 202, and *Greene v. Ward*, 1 Russ. Ch. 262, 4 L. J. Ch. 99, 25 Revised Rep. 38, that no gift can be implied in favor of the children. He further remarked that the case more nearly resembled that of a gift to the parent absolutely, inasmuch as the step-daughter had an absolute power of appointment by will; her son therefore could take nothing.

In *Seymour v. Kilbee*, Ir. L. R. 3 Eq. 33, testator gave annuities to two of his sons "for and during the term of their respective lives," adding, "and in case either of my said sons . . . die without lawful issue in the lifetime of the other, then my will is, and I hereby direct, that the said annuity of £25 shall go to, and be received by, his surviving brother; . . . provided always, and I hereby direct, and my will is, that such of my said sons [names] as shall so become the survivor and entitled to his said brother's annuity of £25 sterling as aforesaid shall and do pay unto my daughter [name] the yearly sum of £20 for and during the term of her natural life; and in case both my said sons [names] should die without leaving any lawful issue them surviving, then I leave and bequeath the said two annuities" to two other sons, with benefit of survivorship, provided the one first dying should leave no lawful issue him surviving; the survivor also to pay the yearly sum of £20 to the daughter be-

fore mentioned. It was held that no gift to the issue of a son leaving issue surviving could be implied from the gift over only, and that there was nothing else in the will to raise an inference in favor of the issue.

In *Bond v. Moore*, 236 Ill. 576, 19 L.R.A. (N.S.) 540, 86 N. E. 386, it was held that a devise to the children of the testatrix's son could not be implied from a gift to him of all the estate during his lifetime, with power of sale over the real estate, "but should he die without children, then the estate, or so much of it as may remain after his reasonable expenses for living, etc., shall go to my nearest relatives, in such proportions as the law in such cases does provide." The position of the majority seems to be that a devise for life, with a gift over on the death of the life tenant without issue, is not of itself sufficient to create a gift by implication to the children of the life tenant, even though aided by the presumption against intestacy; but that such implication can arise only when supported by some other matter appearing in the will raising an inference in favor of the children. In the majority opinion it was said: "When we undertake by construction to arrive at Mrs. Walker's intention in regard to the disposition of her property at her son's death in case he should happen to leave children, we are left entirely without aid from the will itself. It is a case for which she has not provided,—whether unintentionally or purposely we have no means of determining. We may speculate or conjecture as to what may have been in her mind, but we can find no indication in the will itself to enable us to say that she intended her son's children to take the remainder. It is clear that the testatrix intended her son to have the use and benefit of the property during his lifetime, with a certain power of disposition. It is clear that she intended, if he died without children, that her nearest relatives at the time of his death should have what was left of the property. It is equally clear that it is impossible to determine her intention as to the disposition of the property if he had children. She had confidence in him, and did not refuse to give him the fee and limit his interest to a life estate because she feared he would squander the property; for she made him executor of her will without bond, and authorized him alone, and not in conjunction with his coexecutor, to sell the real estate. She is presumed to have known that her son was her only heir, and that, as such, the property would all descend to him after the termination of the life estate, unless she disposed of it by her will. She may have believed that he would use the property for the benefit of his children, should he have any. She knew the property would naturally descend to them as his heirs. The children yet to be born might be deserving or not deserving. Circumstances, as developed by the future, might make an unequal division of the property among the children just and prop-

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er, or a diversion of a part of it in another direction desirable. It may be that, upon a consideration of all the circumstances of the situation, the testatrix wished to leave to the discretion of her son the disposition of her property, except in the one event of his dying without children. The will shows that in such contingency she wished to control the disposition of such part of the property as might remain after his reasonable expenses for living were satisfied, and she did so by directing it to go to her nearest relatives. There is no word in the will indicating a desire to interfere with the statutory disposition of the property in the alternative of her son's death having children. She may have desired him to have the use of the property during his life, and, in case of his having children, the power to dispose of it as he might in his own discretion think best for the interest of his family, but have also wished the property, in case he had no children, to go to her relatives. It is possible that the testatrix, in case of her son's death having children, desired them to take the property directly from her, but the will expresses no such wish. It is equally consistent with the will that she desired her son to inherit the fee in such event. Being content with the statutory rule of descent, she made no provision to the contrary. It may be said that it will be presumed that the testatrix intended to dispose of her entire estate, and that the will should be so construed, unless this presumption is rebutted by its provisions. It is true that any reasonable construction of a will, consistent with its terms, will be adopted so as to give it effect to dispose of all the testator's property, and not to leave a part intestate, but this rule cannot be carried to the extent of inserting provisions in the will which the testator failed to insert. Clear words are necessary to disinherit an heir; and, even where the intention is clearly manifested, the heir will take, unless the testator devises the property to someone else. *Parsons v. Millar*, 189 Ill. 107, 59 N. E. 606; *Lawrence v. Smith*, 163 Ill. 149, 45 N. E. 259. The court cannot presume a will for a testatrix on mere speculation as to what might have been her intention. It is the intention of the testatrix only so far as she has communicated that intention by her will which is to govern the descent of her estate. The omission to make any gift, in the one case, may have been the intention of the testator as fully as the gift over in the alternative." *Carter, J.*, however, in a vigorous dissenting opinion in which *Hand and Farmer, JJ.*, concurred, criticized the conclusion reached by the majority as manifestly contrary to the plain intent of the testatrix as expressed in the will; as applying to the will a rule of construction which, though supported by English decisions, is opposed by the great weight of authority in this country; and as at variance with earlier utterances of the Illinois supreme court.

In *Addison v. Addison*, 9 Rich. Eq. 58,

testator gave certain real and personal property to trustees for the sole benefit of a son during his natural life, adding: "But if my said son [name] should die without leaving any child or children or representatives of child or children, in that case my will is that the above property be equally divided between" another son and a daughter "or their children or descendants of child or children." It was held upon the authority of *Carr v. Porter*, 1 M'Cord, Eq. 78, and *M'Lure v. Young*, 3 Rich. Eq. 578, that a son of the son took nothing by implication, the court saying, however: "If the testator here, who died before the son Joseph had a child, had foreseen the state of things existing at the son's death, it is probable that he would have expressly provided for that state of things. But the court has no authority to make a will for him, nor to conjecture his intention not expressed, and is limited to the expounding of his will according to the words he has used. Where he designed the issue of his children to take by his gift, as in the case of *Mrs. Mims's* children, he has endeavored to express his purpose, and has not left the matter to implication. I am unable to find the grounds upon which an estate must be necessarily implied in favor of the son of Joseph." But as it was held that the testator's son Joseph took, under the provision above set forth, a fee conditional in the realty by implication, which would pass to his son, the effect of the decision was not wholly to exclude grandchildren.

In *Woodliff v. Duckwall*, 19 Ohio C. C. 564, 10 Ohio C. D. 686, testator devised to his daughter, an only child, all his property "during her natural life . . . and if my said daughter dies without living issue then all the property devised by this will, I desire to revert to my brothers and sisters or their heirs equally." It was held (*Swing, J.*, dissenting) that there was no devise by implication of the remainder to the daughter's children, but that she took the remainder by descent, subject to be divested thereof if she died leaving no issue.

A case which, from the nature of the provision involved, is not exactly in point, but which may profitably be noticed, is *Barlow v. Barnard*, 51 N. J. Eq. 620, 28 Atl. 597, where testator disposed of his property as follows: After giving his wife an estate for life in all his property, with power to use the principal for her support, he provided: "At her death I will it to be kept in the same shape or form, for the support of the children, not of age or married; on the marriage of my four daughters, I will it to be equally divided between the said four girls and the share settled on each of them for their lifetime; all and except one dollar each to my two sons, trusting that they will follow my example of industry to gain what they may require." It was held that, as there was no probability of an intention to give a remainder by implication to the issue of the daughters so strong that an intention contrary to that

thus imputed to the testator could not be supposed to have existed in his mind, there was no such implied disposition of the remainder. The court said: "What was the intention of the testator as to this remainder? It can be reached by adopting the view that he did not attempt to make any disposition of his estate beyond the lives of his wife and daughters. It is a fair inference from his will and the circumstances surrounding its execution, that his first care was for his wife for her life; next, to take care of all his children during their minority unless they were provided for by marriage; then to care for his daughters during their lives, providing first for ample support for his unmarried daughter out of the income of his estate. He took better care of his daughters than of his sons during their lives, because he thought it to be wise to make provision so that his sons should follow his example of industry to gain what they might require, but this did not necessarily involve an intention to disinherit them entirely after the primary purposes in his mind had been fully accomplished. That part of the will which gives the sons \$1 each was where he was dealing with the income of the estate to be divided in four parts among his four daughters for their lifetime. In disposing of this income he first gives \$1 to each of his sons, which is to be all that they are to receive of said income during the life of his daughters. He does not seem to have cared or provided for anything after his daughters had been taken care of during their lives. As between his daughters, he evidently thought that the married ones would have husbands to provide for them primarily, and that if any of them were unmarried, such would have no other source to maintain them except from the income of his estate, so he provided that all of his income necessary for the support of the unmarried daughter should be used for that purpose, and if any was left, that it should be equally divided among his daughters during their lives. There was no reason why he should totally disinherit his sons; such intention is not shown either in the will or by the evidence in the case. He thought his sons were primarily able to take care of themselves, and that they should do so as long as any of his daughters lived. When they were all dead, he no longer had any will as to what was left; he was content to leave that undisposed of,—to be distributed under the intestate laws of the state. This view would not require the court to raise a gift by implication, and it would not require us to find that the father intended to disinherit his sons for the benefit not of his daughters, but for his daughters' children, who might be equally able to gain what they might require by their own industry, as his sons in their old age, or their children."

Decisions affirming the existence of a gift.

See also, in this connection, cases set forth in note 26, *supra*.

In the much criticized case of *Ex parte Rogers*, 2 Madd. Ch. 449, testator, who by his will had given a legacy to a niece, made the following codicil: "Whereas by my last will and testament before mentioned, I have bequeathed to my niece Mary Dudley Rogers of Mile End, £1,000, but she having since indiscreetly married, I mean to withdraw that legacy out of her power to dispose of it, or out of the power of her husband to do so; and therefore I order and direct my executors do secure to her my said niece the annual interest of the said £1,000 independently of her said husband, by placing out that said sum in the public fund or government securities, in trust for her my said niece, she to enjoy the interest or dividends during her natural life; and at her decease without child or children, the principal sum with all interest due thereon, to go and be divided between such of her sisters as may be living at the time of her decease, share and share equally alike." The vice chancellor, in holding that the principal was given to the children of the niece by necessary implication, said: "The £1,000, on the death of M. D. Rogers, must belong either,—firstly, to her personal representatives, which these petitioners, her children, are; or, secondly, to the children as such; or thirdly, it must fall in as part of the residue. The question, therefore, is between the children and the residuary legatees. The residuary legatees cannot take, because the residue only after the payment of this legacy was given to them. It could not go to Hester Chambers, because she was only to take if M. D. Rogers died without children. As the testator did not mean to give it to the residuary legatees, and as he did not mean to die intestate as to any part of his property, to whom could it go but to M. D. Rogers or her children? Why mention children if he did not mean them to take? The existence of children was considered as material; so much so that, if there were any, the legacy was not to go over. By necessary implication, the children must be considered as entitled to the £1,000." Other judges have refused to follow this decision. See *Dowling v. Dowling*, L. R. 1 Ch. 612, 12 Jur. N. S. 720, 15 L. T. N. S. 152, 14 Week. Rep. 1003; *Neighbour v. Thurlow*, 28 Beav. 33. And Mr. Theobald says that this case probably went too far. *Theobald, Wills*, p. 737.

In *Lethieullier v. Tracy*, 3 Atk. 785, it was held that under a testamentary provision that "in case my daughter (to whom testator had in a former part of the will expressly limited an estate for life) shall depart this life without issue of her body living at her decease," such issue took an estate by purchase.

In *Wetherell v. Wetherell*, 4 Giff. 51, testator directed the annual interest only of his residuary estate to be divided into as many equal parts or shares as there might be children living of certain persons, "share and share alike, as each of the said children come of age," adding: "And in case any one of the said children shall die with-

out any children of their own lawfully begotten, then in that case his or her share of the said annual interest (as the case may be) shall devolve to the surviving children, share and share alike, and so on successively until the whole amount of the said interest of the said residue comes into the hands of the grandchildren and great-grandchildren of" the parents. It was held that there was clearly involved in the provision above quoted a gift by implication to the children of a child.

In *Kinsella v. Caffrey*, 11 Ir. Ch. Rep. 154, testator gave annuities to two grandnephews to be paid and payable to them for and during their natural lives, and, in case of the death of either of them leaving issue lawfully begotten, to such issue during their respective natural lives, and in case of the death of either of them without lawful issue living at his death, then the annuity of him so dying to go to the survivor for and during the term of his natural life. The question having arisen as to whether there was a gift by implication of the annuity of the one who died without children to the children of the one who died leaving children, it was held that the fact the testator had directed that, in the event of neither of them leaving issue, the bequest should form part of the residuary fund, and the fact that the limitation over was not merely contingent upon dying without children living at his death; but upon the death of such children before attaining the age of twenty-one, there were circumstances in the case sufficient, taken in connection with the gift over, to justify the court in holding that the children of the one who died leaving children were to take the same interest in the annuity of the other on their father's death as was given to them by the will in their father's annuity.

In *Champ v. Champ*, Ir. L. R. 30 C. L. 72, a marriage settlement was to the use of the intended husband for life, with remainder to his wife for her life, and in case they should both die "without leaving any child or children of the said intended marriage, and they having such, and that all of them should die before they should attain their respective age or ages of twenty-one years or be married," then to others. It was held, upon the authority of *Kinsella v. Caffrey*, supra, that, as the settlement contained a specific provision for revesting the premises in the grantor upon the happening of certain events, which were wholly different from the events which had taken place, and as the gift over was not confined simply to the dying of the first takers without leaving children, but also to their leaving children and all such children dying before the age of twenty-one or marriage, there was sufficient to raise an implication of a gift to children of the marriage attaining the age of twenty-one.

In *Stone v. Franklin*, 89 Ga. 195, 15 S. E. 47, the testator directed that certain of his lands should continue in possession of his wife for and during her life, and at her death be equally divided between his

two daughters, to be conveyed to them by his executors "for and during their natural lives each, and if they or either of them should die leaving no lawful issue, then the said lands are to go to the rest of my children or their legal representatives." It was held that under this clause of the will, whether construed by itself or in the light of the testamentary scheme disclosed by the whole will, the testator most probably intended the surviving children, if any, of a daughter, to take the fee at her death; the court distinguishing *Burton v. Black*, 30 Ga. 638; *Matthews v. Hudson*, 81 Ga. 120, 12 Am. St. Rep. 305, 7 S. E. 236, and other like cases, on the ground that as the estate in each daughter was expressly limited to the duration of her life, she took no fee of any kind, qualified or unqualified; and that as under the statute the words of the limitation over must be taken to import a definite failure of issue, no estate tail could be implied and enlarged into a fee simple.

In *Ball v. Phelan*, 94 Miss. 293, 23 L.R.A. (N.S.) 895, 49 So. 956, testator gave to his wife half of his property "to be hers during her natural life, then to go to my daughter, Julia T. Hunt." By the second item of his will he gave his daughter "during the time of her natural life, the other half of my property, both real and personal, to be hers, free from the control of any future husband, and also free from the debts of any future husband, he is to have no title by curtesy, or any other title by reason of her death, or is to inherit it through the death of any child or children they may have or in any other manner whatever." By the third item of his will he provided: "In case my daughter Julia should die without child, or in case the child or children should die before marrying or become of age, then the whole property given to my daughter Julia, all for her life should go" over. The court, after an extensive review of cases bearing on the question, held that there was a devise by implication to the children of the daughter, saying in part: "What, now, are the considerations or circumstances which the court in this case should look to as showing, since Julia's estate was limited strictly to life, a remainder in fee by implication in the children of Julia? Some of them are as follows: First and chiefly, that Julia's interest was limited strictly to her life. This we regard as controlling in the construction of this will. Second, there was an exclusion, by the terms of this will, of all the marital rights of any husband that Julia might have, and especially an exclusion of any right he might have to inherit through the death of any child of his and Julia's. It would have been far more likely, on the doctrine of probabilities, that such husband might inherit from such child if Julia should be held to take a fee in any view, than if she should be limited strictly to a life estate, and the children should only take the fee absolutely after they became of age or married. The father

would be much more likely to have died when this latter period came around than while Julia herself might live. Again, the fact that Hunt, by his will, provided that Bettie Hunt Selden, if Julia died without child, or if such child died before marriage or before coming of age, should take the limitation over; and he made the same sort of ulterior limitation as regards Julia Moore Driver, the other ulterior limittee. The carefulness and solicitude and anxiety manifested by Hunt to dispose of his estate, not only for life to Julia, but to provide three ulterior destinations in certain contingencies named, signalize his set purpose not to die intestate as to any part of his estate, and, consequently, his necessarily involved purpose that Julia should never take a fee of any sort of inheritance or purchase from him. And unless there was a limitation by implication to the children of Julia, then upon the coming of age or marrying of any such child, which would cut off the ulterior limitation to others, there would result necessarily an intestacy as to the remainder in fee, and Julia would, of course, take that by descent, and not as a purchaser under the will. This cannot possibly be the proper construction of this will; for in that case there would be nothing to prevent the husband from inheriting from Julia, which was most sedulously and stringently guarded against by this testator. . . . Again, it is impossible to read this will without seeing that it was the manifest purpose of the testator to dispose of his whole estate, and not die intestate as to any part thereof. He did not intend that Julia should take anything by inheritance from him arising out of any partial intestacy. It is to be remembered that the rule laid down by Judge Andrews in *Re Vowers*, 113 N. Y. 569, 21 N. E. 690, is strong to show that, where the limitation is over to a third person not related to the testator in blood, it is safely to be assumed that he did intend to preserve his bounty for his own blood, if that construction can reasonably be indulged. If the children of Julia were not intended to take a fee in remainder by implication, manifestly this estate went to strangers to the blood of Hunt, the testator. It must also be kept carefully in mind here that the limitation is not simply over to third persons on the default of children, but on that default plus the other contingency, that such children should die under twenty-one years of age or before they marry,—two contingencies in fact. Less than this was held in *Kinsella v. Caffrey*, 11 Ir. Ch. Rep. 154, to raise the estate by implication."

In *Kendall v. Kendall*, 36 N. J. Eq. 91, testator gave his residuary estate upon trust to pay to his son and daughters "such sums from time to time as in the judgment of the said trustees shall minister to the wants, necessities and comforts of them severally; and in the case of the death of my said son [name] and of my said daughters [names] and their children without leaving any child or children then sur-

living, then I give, devise and bequeath all said residue or remainder of my estate real and personal after the death of my wife to my heirs at law bearing the Kendall name." It was held that, as testator evidently did not intend that the property after the death of his children should go to his heirs generally bearing the name of Kendall, unless neither his children's children nor any children of the latter should be living to take the property, but unquestionably intended that at his children's death their children should take the fee in their parents' shares, and if his grandchildren should not be alive, that his great-grand children should take, a devise to them would be implied.

In *Lytle v. Beveridge*, 58 N. Y. 592, testator by a will, very inartificially expressed, and by which he evidently meant completely to dispose of his property, provided: "I allow my son Joseph to possess by devise of will the farm I now live on [describing it] with all the rights and privileges thereunto belonging as fully and freely as if I had made him a lawful conveyance by full covenant during his natural life, but if he leaves no legitimate heirs then in that case the property according to my will I allow to revert back to my son David, his heirs or assigns forever without hindrance of any person whatsoever as freely and fully as if I had given him a lawful conveyance." He also made provision for Joseph's wife in case she should outlive her husband. At the time the will was made Joseph had been married for several years, but had no children. It was contended that Joseph took the fee by operation of the rule in *Shelley's Case*, but the court, in holding the phrase "legitimate heirs" to refer to children, and not to heirs generally or issue in indefinite succession, said: "Construing and giving effect to the words 'leaving no legitimate heir' as a definite limitation, and the last two words, 'legitimate heir,' as words of purchase, there is no difficulty in giving full effect to the 'mind and will' of the testator. The law would imply a devise in fee to the children of Joseph living at the time of his death, and thus give effect to the intent to provide for them in case any should be left by, that is, who should survive, Joseph, the first taker, and to limit the estate of Joseph to a life estate, and carry the remainder to David upon the happening of the contingency, which did actually happen, that Joseph died leaving no surviving child. It may be that this construction of the will is subject to criticism, and cases apparently in conflict with it may be found, but the same may be said of any construction which could be put upon a will inartificially drawn, regardless or in ignorance of technical rules, or of the artificial and technical meaning of terms. We believe the construction given is required by the terms and general scope of the will, and the manifested and express intent of the testator."

In *Re Moore*, 152 N. Y. 602, 46 N. E. 960, which affirms 88 Hun, 621, 68 N. Y. 51 L.R.A. (N.S.)

S. R. 876, 34 N. Y. Supp. 1144, which affirms without opinion, *Re Stafford*, 11 Misc. 436, 33 N. Y. Supp. 419, testator gave to his two sons, who were his only children and then unmarried, the use and occupancy during their lives of all his real and personal estate, and in case of the death of one of the sons, he gave to the survivor during life the use and occupancy of the whole of the property. He then provided as follows: "After the death of my two sons and their heirs, if they have any, I give my real and personal estate to" sisters and a brother. It was held that as, had the sons died without children, the brother and sisters of the testator would have been their heirs, the heirs of the sons referred to were intended to be the heirs of their body, their lineal descendants; and that as it was not the intention of the testator that his brother and sisters should take until after the death of such descendants, it would seem to follow that such lineal descendants took an estate by implication.

In *Clark v. Kittenplan*, 63 Misc. 122, 118 N. Y. Supp. 404, testator declared: "I give to my said daughter Charlotte during her natural life [certain premises], and in case of her death before my said daughter Nancy, she leaving no issue or children living to the age of twenty-one years, the said property bequeathed to her to go to my said daughter Nancy during her natural life and after her death to her children living to the age of twenty-one years." It was held that, although an estate was not directly devised to the daughter's children, such a devise must be implied from the language of the provision above quoted.

In *Hauser v. Craft*, 134 N. C. 319, 46 S. E. 756, where testator devised to a granddaughter a tract of land, "which is to be hers during her natural life only," adding: "And should the said [granddaughter] die without leaving any child or children, then the property which I have given to her to be divided among the rest of my heirs," it was held that the children of the granddaughter took an estate in remainder by implication, the court saying: "It will be observed that Katherine had only a life estate, and therefore at her death all of her interest ceased and determined. The heirs of the testator could not take unless she died without children, because it is expressly provided by the will that they should take only upon the contingency of her dying without leaving children, and the fact that she died leaving children completely devastated the testator's heirs of all right or title in the land. The presumption is that he did not intend to die intestate as to any of his property, and this presumption is strengthened by the very language of the will, which on its face shows that he intended to dispose of all of it. If the estate of Katherine expired at her death, and the heirs cannot take because she left children, who then can take unless it be the children? *Holton v. White*, 23 N. J. L. 330; *Theobald, Wills*, p. 569. The implication is not only

alone;³⁰ though in such a case they are inclined to do so where the implication is strengthened by other indications,³⁰ such as the fact that the property would pass by descent or by the operation of

the residuary clause of the will to the same person who would have been entitled under the limitation over had there been no descendants,³¹ or the addition of other descriptive terms in expressing the con-

necessary, but irresistible, that in the situation of the parties as now presented to us, and giving to the will of the testator a natural and reasonable construction, it was intended by him that the plaintiffs should be the objects of his bounty and should take the property in remainder after the death of their mother."

In *Bentley v. Kaufman*, 12 Phila. 435, testatrix directed her estate to be converted into money and invested, "the interest to be paid to my son Leon Kaufman during his natural life in half-yearly payments for his sole benefit. If my son Leon Kaufman should die without issue it is my desire that the whole amount of my investment be given to the Children's Orphan Asylum." It was held that the foregoing bequest was a gift of the interest to the son for life, and of the principal by necessary implication to his children, and in default of children to the orphan asylum.

In *Harkey v. Neville*, 70 S. C. 125, 49 S. E. 218, in construing a will by which testator devised property to the widow of his deceased son "for and during her natural life, and in case of her death without issue, then" to others, it was said by Chief Justice Pope, in the course of his discussion of the question whether the first taker's estate for life was enlarged into a conditional fee, that she took only a life estate, unless her issue should be living at her death; in which event the issue of her body then living would receive the estate. But of the three remaining members of the court two merely concurred in the result, while the third expressly dissented from the foregoing statement.

In *Conrad v. Quinn*, 111 Va. 607, 69 S. E. 952, testatrix directed the remainder of his estate to be equally divided between his three daughters, to be held in trust for their benefit "to collect the income arising from the same and pay it over to them as their necessities may require and their interest shall appear as long as they shall live. In the event of the death of either of said daughters Ella V. and Sallie M., or both, without issue, then I direct that her or their portion of my estate be distributed equally between my four sons [naming them] or their legal heirs, and in the event of the death of my daughter, Mary L. Gentry, I direct her portion to go to her children." At the time of the death of testator, his daughter Mary L. Gentry was a married woman with children, while his daughters Ella V. and Sallie M. were unmarried. It was held that, as it was manifest from the will that it was the purpose of the testator to make his three daughters equal, and to put them on the same footing as to the character of the estate each was to have, each of them took a life estate 51 L.R.A.(N.S.)

which, as to the two unmarried ones, was followed by two remainders in a double aspect, the first to the issue of each living at the date of her death, and the second, failing such issue, to the four sons of the testator.

³⁰ See *Scale v. Rawlins* [1892] A. C. 342, 61 L. J. Ch. N. S. 421, 66 L. T. N. S. 542; *Ranelagh v. Ranelagh*, 12 Beav. 200, 19 L. J. Ch. N. S. 39; *Sparks v. Restal*, 24 Beav. 218; *Neighbour v. Thurlow*, 28 Beav. 33; *Bodens v. Watson*, Ambl. 478; *Greene v. Ward*, 1 Russ. Ch. 262, 4 L. J. Ch. 99, 25 Revised Rep. 38; *Re Hayton*, 10 L. T. N. S. 336, 4 New Reports, 55; *Seymour v. Kilbee*, Ir. L. R. 3 Eq. 33; *Bond v. Moore*, 236 Ill. 576, 19 L.R.A.(N.S.) 540, 86 N. E. 386; *Addison v. Addison*, 9 Rich. Eq. 58, —all of which are fully set forth in note 28, *supra*.

In *Kinsella v. Caffrey*, 11 Ir. Ch. Rep. 154, it was said that the authorities may be classed under three heads: First, where there is an indefinite bequest to the parent, and if he die without having or leaving children, to B. In that case it is clear that the children do not take any interest by implication. Secondly, if there is a bequest to the parent for life, and if he die without having or leaving children to B. If the parent dies leaving children, they are not entitled by implication. Thirdly, if, however, in a case such as last mentioned, there are matters on the face of the will to raise an inference in favor of the children, the court is at liberty to consider these circumstances in connection with the bequest over in the event of the parent dying without having or leaving children, although such bequest over by itself is not sufficient to justify the court inferring a gift in favor of the children.

In *Devocmon v. Shaw*, 70 Md. 219, 16 Atl. 645, it is said that where the children are merely mentioned in the description of the contingency on which the property shall go over, they take nothing by implication. For citation of cases *contra*, see note 34.

³⁰ In *Re Blake*, 157 Cal. 448, 108 Pac. 287, it is said that even if it is assumed that the words of limitation over on death "without issue" are insufficient of themselves to raise a gift by implication to the issue, yet that this implication may be drawn from slight circumstances appearing from the will.

³¹ *Kinsella v. Caffrey*, *supra*; *Ex parte Rogers*, 2 Madd. Ch. 449, 17 Revised Rep. 239; *Lytle v. Beveridge*, 58 N. Y. 592; *Hauser v. Craft*, 134 N. C. 319, 46 S. E. 756, —all set forth in note 28, *supra*.

Contra. *Scale v. Rawlins* [1892] A. C. 342, 61 L. J. Ch. N. S. 421, 66 L. T. N. S. 542, set forth in note 28, *supra*.

tingency, such as "legally to inherit"³³ or the attainment by the issue of the age of twenty-one.³³

In other cases, however, the implication of an intention to give descendants, if any, the remainder, seems to have been drawn from the terms of the contingency alone,³⁴—the argument being, "why mention them if they are not meant to take?" The reply made to this argument is that the courts undertake to give effect only to such intentions as the testator has clearly expressed, and will not enter upon the field of conjecture solely for the purpose of preventing an intestacy,³⁵ even though an intestacy will give the remainder to the tenant for life;³⁶ or even for the purpose of preventing an absurdity.³⁷

The circumstance that a different con-

struction will produce an intestacy is, however, treated in several of the American cases as an important factor.³⁸

Other circumstances which the courts have taken into consideration are whether the denial of a gift by implication will bring about an inequality of distribution among those whom the testator, by his scheme of distribution, appears to have intended to take equally;³⁹ and whether its effect would be, by bringing the remainder within the operation of the residuary clause, to work a disinheritance of the blood of the testator.⁴⁰

The implication of an intention to give the first taker's children a remainder seems in some cases to have been supported by a reference to them in the primary gift.⁴¹

And where they are in express terms

³³ See *McClellan v. Simpson*, Ir. L. R. 19 Eq. 528, set forth in note 51, *infra*.

³⁴ See *Kinsella v. Caffrey*, 11 Ir. Ch. Rep. 154; *Champ v. Champ*, Ir. L. R. 30 C. L. 72; *Ball v. Phelan*, 94 Miss. 293, 23 L.R.A. (N.S.) 895, 49 So. 956; *Clark v. Kittenplan*, 63 Misc. 122, 118 N. Y. Supp. 404,—all of which are set forth in note 28, *supra*.

³⁵ See *Ex parte Rogers*, 2 Madd. Ch. 447, 17 Revised Rep. 239, and *Lethieullier v. Tracy*, 3 Atk. 785,—set forth in note 28, *supra*; *Nowland v. Welch*, 88 Md. 48, 40 Atl. 875, and *Eldred v. Shaw*, 112 Mich. 237, 70 N. W. 545,—set forth in note 27, *supra*; *Kendall v. Kendall*, 38 N. J. Eq. 91; *Lytle v. Beveridge*, 58 N. Y. 592; and *Re Moore*, 152 N. Y. 602, 46 N. E. 960,—set forth in note 28, *supra*; *Close v. Farmers' Loan & T. Co.* 195 N. Y. 92, 87 N. E. 1005, in note 26, *supra*; *Weibel v. Kelly*, 111 App. Div. 521, 97 N. Y. Supp. 1009, in note 27, *supra*; *Shaw v. Hoard*, 18 Ohio St. 227, in note 24, *supra*; *Kreamer v. Showalter*, 1 Pa. Co. Ct. 453, in note 27, *supra*; *Bentley v. Kaufman*, 12 Phila. 435, in note 28, *supra*.

³⁶ See *Bond v. Moore*, 236 Ill. 576, 19 L.R.A. (N.S.) 540, 86 N. E. 386, and *Barlow v. Barnard*, 51 N. J. Eq. 620, 28 Atl. 597,—set forth in note 28, *supra*.

³⁷ See *Woodliff v. Duckwall*, 19 Ohio C. C. 564, 10 Ohio C. D. 686,—set forth in note 28, *supra*.

³⁸ See *Scale v. Rawlins* [1892] A. C. 342, 61 L. J. Ch. N. S. 421, 66 L. T. N. S. 542, in note 28, *supra*.

³⁹ See *King v. King*, 168 Ill. 273, 48 N. E. 582, and *Orr v. Yates*, 209 Ill. 222, 70 N. E. 731,—set forth in note 45, *infra*; *Ball v. Phelan*, 94 Miss. 293, 23 L.R.A. (N.S.) 845, 49 So. 956, in note 28, *supra*; *Close v. Farmers' Loan & T. Co.* 195 N. Y. 92, 87 N. E. 1005, in note 26, *supra*; *Hauser v. Craft*, 134 N. C. 319, 46 N. E. 756, in note 28, *supra*.

⁴⁰ See *Re Blake*, 157 Cal. 448, 108 Pac. 287, and *Burch v. Burch*, 20 Ga. 834,—set forth in note 47, *infra*; *Ball v. Phelan*, 94 Miss. 293, 23 L.R.A. (N.S.) 895, 49 So. 956, in note 28, *supra*; *Love v. Walker*, 59 Or. 51 L.R.A. (N.S.)

95, 115 Pac. 296, in note 27, *supra*; *Conrad v. Quinn*, 111 Va. 607, 69 S. E. 952, in note 28, *supra*.

⁴¹ See *Re Blake*, 157 Cal. 448, 108 Pac. 207, in note 47, *infra*; *King v. King*, 168 Ill. 273, 48 N. E. 582; in note 45, *infra*; *Close v. Farmers' Loan & T. Co.* 195 N. Y. 92, 87 N. E. 1005, in note 26, *supra*.

⁴² In *Schaefer v. Schaefer*, 141 Ill. 337, 31 N. E. 136, in which testator's grandchildren were held to take a remainder under a devise to his daughter "for her sole use and benefit, and of her children, or their children thereafter," it was said that further evidence of the intention to give such grandchildren the remainder in fee was amply afforded by the provision that if the daughter "should die and leave no children as heirs to the within-mentioned property," then it should go to another, the necessary implication from this language being that if there were children of the daughter, then primarily the property should go to them and to their heirs and assigns forever.

In *Tyler v. Tyler*, 5 Ky. L. Rep. 936, it was held that under a devise by a testator to his daughter N. "and her children," and to his daughter F. "and her children," with the proviso that if either of the two daughters should die without children or grandchildren, the property devised to her should go to his surviving daughter and her children, and if both should die and either of them have no children, that the property devised to her should go to the children of his other daughter, the two daughters took a life estate and the children the remainder.

In *Cross v. Hoch*, 149 Mo. 325, 50 S. W. 786, the testator bequeathed his whole estate to his wife during her natural life, and provided that after her death it should be divided among his children, as to one of whom he made the following provision: "To my daughter Sarah Cross and her heirs I give [certain realty and a negro], provided that the property here devised to Sarah Cross be subject to the trust, care and control of my son, Turner Maddox, for her use, and should the said Sarah Cross

given a remainder in the share of their parent, a like gift in a share accruing to survivors upon the death of another member of the class without leaving issue may be implied.⁴³

In one case the provision in question has been construed as enlarging the first taker's life estate to a fee upon the birth of issue.⁴³

die without children, then said property shall be divided among my other daughters, and if any of—be dead, to their children such portion as their mother would have been entitled to agreeably to this provision. And should any others of my daughters die without children, then their portion is to be divided as provided for in case of my daughter, Sarah Cross." Having thus provided for his daughters, he made provision for his sons, taking similar precautions to keep the share left to each in the family in the event any of them should die without issue. It was held that, construing the will as a whole, testator's daughter Sarah Cross took an estate for life with remainder to her children absolutely, if she left any surviving her, and if not, then to his other daughters or their children, the context showing that the testator used the terms "her heirs" as synonymous with children, and that he did not use the term as one of limitation, as in every other instance in the will where he intended to give any absolute fee simple estate or property to any of his beneficiaries, he simply employed the term "I give" without any words of inheritance or qualification or limitation.

In *Myrick v. Heard*, 31 Fed. 241, testatrix gave and bequeathed certain real estate "to hold in trust to my niece Abigail Nelson, the daughter of my sister Elizabeth Nelson, and her heirs, and if she, the said Abigail, should die without issue living at her death, then, in default of such issue, to my sister Elizabeth Nelson, the mother of the said Abigail, for life [and] remainder in fee simple to my nephews [naming them]." It was held that the word "heirs" was used as meaning issue; and therefore that the intention of the testatrix was that the niece should take an estate for life, with remainder to her children. This decision seems to have been largely influenced by the consideration that, had the niece been held to take absolutely, her husband, by the law as it then stood, would have been the sole heir, by virtue of his marital rights, to the exclusion of her children.

⁴³ In *Lombard v. Witbeck*, 173 Ill. 396, 51 N. E. 61, a testator devised the bulk of his estate in trust for his three grandchildren, with the proviso that in case of the death of either of them leaving issue or descendants of issue them surviving, the one-third share left to the one so dying should descend to such issue or descendants of issue of each child so deceased, such issue and descendants of issue to take *per stirpes*, and not *per capita*, "and in case any one or more of said last-named three grandchildren shall die without leaving

Where the parent takes, not by words of direct gift, but through a devise to trustees, the courts have manifested the same disposition as where the gift is direct, to construe the gift to the first taker as absolute wherever possible, rather than as one of a life estate with remainder to children.⁴⁴ But a gift of the remainder to children has been

any such issue or descendants of issue, then said one-third ($\frac{1}{3}$) share of my said residue estate shall go to the survivor or survivors of said last-named three grandchildren; and I further provide and direct that in case of the death of all three of said last-named grandchildren without either of them leaving such issue or descendants of issue them surviving, then all of said estate hereby provided for such last-named three grandchildren shall descend to my son John H. Witbeck and his heirs at law." One of the grandchildren having died without issue, the question arose as to whether the survivors were absolutely entitled to his share. It was held that, although ordinarily the language used in the will would lead to the conclusion that the surviving grandchildren took an estate in fee determinable upon both dying leaving no issue or descendants of issue, yet, in order to give practical effect to the clearly expressed intention that, in case of the death of all three without either of them leaving such issue or descendants of issue them surviving, the estate should go over, the interest of the survivors in the accruing share should be owned and enjoyed subject to the same restrictions and conditions upon which the original shares were given. This construction was strengthened by a further provision of the will that "in no case shall any part of the real estate left by me for their use and benefit, or the proceeds thereof if sold, be advanced or conveyed to said grandchildren or any one of them during their lifetime."

⁴⁴ In *Owen v. Hancock*, 1 Head, 563, testator gave to his daughter a negro girl "during her lifetime, and if she should die without any heirs born of her body the said negro girl and her increase to return to my estate and be equally divided among the rest of my children." It was held that the remainder was not given to the daughter's children by implication, but that her life estate became enlarged into a fee upon the birth of a child. In view of the fact that in some cases the circumstance that the husband of the primary legatee would take, by virtue of his marital rights, to the exclusion of her children, has been relied on as ground for implying a gift to the children, it may be noted that such a situation existed in the present case, though it played no part in the discussion.

⁴⁵ By the will under consideration in *Matthews v. Hudson*, 31 Ga. 120, 12 Am. St. Rep. 305, 7 S. E. 286, a testatrix devised to a trustee in trust for her son a certain tract of land, and provided that if the son should die without leaving a child

or children, the trustee should sell the land and make an equal distribution of the proceeds, to be placed in the hands of a trustee of her other children. It was held that the implication of a remainder in behalf of the son's children, while a possible, was not a necessary one, the terms of the will being quite as consistent with an intention on the part of the testatrix to give the absolute fee to her son in case he had children, as to give a life estate only with remainder to such children. The court also pointed out, as indicative of an intention on the part of the testatrix not to diminish the gift to her son in order to provide for his children, the fact that the testatrix made an absolute gift to him of slaves and other personalty; the fact that he was appointed trustee for the other children, showing that there was on her part no want of confidence in his intelligence, discretion, and virtue; and the fact that the gift over was not of the land, but of the proceeds of its sale, showing that she was not swayed by a desire to keep this particular land in the family.

In *McCord v. Whitehead*, 98 Ga. 381, 25 S. E. 767, testatrix devised her entire estate in trust "that that part or portion that may be set apart for each of my daughters may be made over to trustee or trustees for each of them and their children, and not subject to the debts or contracts of said trustee or any husband with which any of them now have or may hereafter intermarry, and in the event of having no children, such as have none are authorized to devise it in any manner they think proper." It was contended that the superadded words defining what was to become of the property if there were no children implied a fee in remainder in the children, if any. In ruling adversely to this contention, the court said: "Estates by implication are not favored, and every conveyance should be construed to convey the fee unless a less estate is mentioned and limited. 'The law inhibits the construction of lesser estates where no words of limitation are used, . . . and where no such intent appears by clear and necessary words in the instrument.' Here we have a will providing for a daughter and her child in terms which, in the absence of anything further, would create in them a fee simple estate in common; and this is followed by the grant of power to such as have no children to dispose of their portions by will. Why this should reduce the estate of the daughter who had a child, and that of the child, to a life estate in the daughter with remainder to the child, we are unable to see."

In *Daniel v. McManama*, 1 Bush, 544, where a devise of land in trust for a son was qualified by a provision that "should he not have a legitimate heir from his body living at his death," the estate should be divided between certain trustees for other children of the testator, it was held that the contingent devise over did not operate to reduce his interest to a life estate (with remainder to his children), but that it was

a conditional defeasance of the title only, depending on the contingency stated.

In *Wurts v. Page*, 19 N. J. Eq. 365, testator gave and devised to trustees all his real and personal estate for the use of his eight living children, share and share alike, and of the two children of a deceased daughter, and after providing for the education and maintenance of children during their minority, directed the payment of their portions to the sons and grandson upon attaining a certain age, but directed the portions of his five daughters to be held in trust for their sole use and benefit, and that they should not be in the power of or subject to the debts, control, or management of their husbands. He then provided as follows: "In case of the decease of any of my said children without issue, the share or shares of such so dying is to be merged in the general fund and to be divided as above directed among my said heirs and subject to the aforesaid conditions and restrictions. In case of the decease of either of my grandchildren [naming them] without issue, his or her portion to go to the survivor subject in all respects to the foregoing restrictions and conditions in regard to each. In the case of the decease of both my said grandchildren without issue . . . the share to pass into the general fund of my estate for the joint and equal benefit of my heirs as above directed." It was held that the provision that the share of any child which may die without issue shall merge did not create a limitation over to the issue by implication, such a construction not being necessary to give effect to the intention and object of the testator manifested by his will; but that each daughter took her share absolutely, with two restrictions, that during her life she should have the interest only to her separate use, and that if she died without issue, it should merge in the general fund.

In *Ramsay v. DeRemer*, 65 Hun, 212, 20 N. Y. Supp. 143, which involved the validity of a bequest in trust for a granddaughter "to be used especially for her interest, and in case she should die without issue, then all such property and interests are to be equally divided among my living children or their heirs," the court said that the provision quoted indicated an intention on the part of the testator that, in case the plaintiff had issue, such issue should take the property, but the context shows that the court did not mean to hold that they would take as purchasers under the will, but by inheritance from their mother, who, it was held, took a fee subject only to be defeated by her dying without issue.

In *Williamson v. Tunis*, 107 Tenn. 83, 64 S. W. 10, it was held that under a will providing that upon the decease of either of testator's daughters, or his grandson, "without leaving living child or children or descendants of such, then the portion allowed for such child or children or grandchildren so dying without leaving child or living descendants of such, to go in equal

implied where the estate of the first taker was incapable of enlargement.⁴⁵

Cases in which the contention that there was a gift of a remainder by implication

proportion to the survivors," the daughter took an absolute estate, subject only to the contingency stated, and not merely a life estate with remainder to her children, notwithstanding some expressions in the will (which are not specified in the report of the case) which were relied upon as indicating an intention upon the part of the testator to limit the estate of the daughters, but which the court considered as going only to the extent of vesting the estate in trustees for the use of the daughters, and in trust for the support and maintenance of their children.

Instances in which a gift made directly has been subsequently directed by the testator to be held in trust are not in point here. Some cases of this sort are set forth in other footnotes.

⁴⁵ In *King v. King*, 168 Ill. 273, 48 N. E. 582, testator gave his residuary estate to his children to be equally divided among those living and the representatives of those deceased, with the exception of the son of a deceased daughter, as to whom the testator provided: "It is my will and desire to vest his portion that he otherwise would receive under this will, in trustees, who shall hold such portion . . . in trust for said William Jones King, and for his wife and child or children, to be paid over to said William Jones King or his wife or children, or such of them as the said trustees, in their discretion, may think proper, so that the said William Jones King and his wife and children may, each of them, at all times have a comfortable support provided for them out of said property so hereby bequeathed to said trustees: Provided, that said property shall not be subject to any debt or debts which may hereafter exist or be created against said William Jones King. And it is my will that in the event of the death of the wife of said William Jones King, and of his leaving no children surviving him, that then and in such case the said trustees, after the death of said William Jones King, shall convey and transfer to my children and their descendants all the estate, both real and personal, then in their hands or remaining undisposed of, to be held by my children in fee and forever, for their own use and benefit." It was held that no equitable fee was vested in William Jones King, his wife and children, but that the plain intention of the testator, evidenced by the general plan of the will, was to devise the trust property after the expiration of the trust to the children of William Jones King should they survive him, the court saying: "Many authorities have been cited and cases commented upon by counsel for appellants upon the question of estates arising by implication under a devise, but an examination of them has shown that they throw but little light upon the

to the descendants of the first taker has been denied, on the ground that phrase used by the testator in the limitation over imported an indefinite succession, do not, for

question under consideration. Whether a devise to one with a limitation over in case of the death of the first taker without issue conferred an estate tail by implication at common law, so that the entail and remainder could be barred and the estate turned into a fee simple, or whether issue would take as purchasers by implication, affords little aid in the decision of this case. Here there was no estate for life or any other estate vested in William Jones King or his wife or children, but only a right to maintenance. Having no estate, he could not make provision for his issue, and the motive for implying an estate tail in such cases, even if estates tail existed in this state, is wholly absent. It is not denied that the clear intent of the testator, as gathered from the entire scope of his will, must prevail. If there is on the face of the will a plain intention of the testator that the estate should go to the children, it should be so held. *Kinsella v. Caffrey*, 11 Ir. Ch. Rep. 154. We think the intention of the testator was that the estate should go to the issue of William Jones King, if he left any. The effect of rejecting this construction would be to leave the property undisposed of, which would be against the presumption of law, and to practically disinherit the issue of Mrs. King, daughter of the testator, which we think would utterly defeat his intention."

In *Orr v. Yates*, 209 Ill. 222, 70 N. E. 731, a testator provided as follows: "I being desirous of providing a competency for my daughter, Mary Maria Yates, and to create a fund that will not be liable for her debts in any manner whatever, and that will secure to her a living, I devise to Jefferson Orr, trustee, [describing the land] said above described tract of land constituting what is commonly known and called the Putz farm, to have and to hold in trust for the sole use and benefit of Mary Maria Yates for and during her natural life; and in the event of the death of the said Mary Maria Yates without child or children or descendants of child, then to have and to hold for the sole use and benefit of Lydia Yates, my wife, if she shall be living, during her natural life, and at the death of Lydia Yates, my wife, and Mary Maria Yates, my daughter (if said Mary Maria Yates dies without child or descendants of child,) the fee to the said last described tract of land known as the Putz place shall be equally divided between my brothers and sisters and their heirs and assigns, as herein provided for the division of my other real estate herein devised, that is to say, in equal parts." The question being raised as to whether a valid trust was constituted by the foregoing provision, the court, in construing the will, said: "The only uncertainty is as to what shall be done with the trust property in case Mary Maria Yates

reasons hereinbefore pointed out (note 17, *supra*), really involve the point under discussion, and are here noted only for the purpose of explaining their bearing, or rather their lack of bearing, upon the subject.⁴⁶

III. Implied gift of contingent remainder, or by way of executory devise.

As above stated, where the parent dies after the testator, but before the gift to

him vests in possession, the question may arise whether a gift to his children may be implied from the fact that the property is limited over in default of children, the gift to them in such case taking effect as an alternative contingent remainder or executory devise. The effect of the decisions seems to be that where the gift to the parent is contingent upon survival until the time of distribution, the children will take by implication; ⁴⁷ otherwise where the gift

dies leaving issue. Will it go to such issue in fee, or will it fall back into the estate as intestate property and descend to the heirs of William H. Yates? Our opinion is that it will vest in the issue of Mary Maria Yates. That seems to be the fair inference from the language used. If she dies without issue, then the trust continues during the life of Lydia Yates and the fee vests in the brothers and sisters. If Mary Maria Yates dies leaving issue, that is clearly the end of the trust, and it seems to be the intention of the testator that the fee shall vest in her issue. This construction is in harmony with the rule of law that where a party disposes of his estate, the presumption is that he intended to dispose of all of it, and courts will so construe the will as to leave no part of the estate as intestate property." But as all persons entitled to be heard on the question had not been made parties, the court declined to decide the question as to where the fee would go in case the first taker should die leaving issue.

⁴⁶ In *Seybert v. Hibbert*, 5 Pa. Super. Ct. 537, it was held that under a devise to the four younger sons of testator "during their natural lifetime to be equally divided amongst them in quantity and quality and providing any of them dies without heirs the share of the deceased shall be divided amongst the surviving ones and at their death to be divided amongst their children and so on from one generation to another," a son took, not an estate for life with remainder to his children by implication, but a fee tail, since the language of the limitation embraces the entire line of descent or lineal succession to the remotest generation.

In *Den ex dem. Emans v. Emans*, 3 N. J. L. 967, where a testator provided that his daughter Mary "shall be partaker of my whole estate, both real and personal,—provided she leaving an issue, male or female; that is to say, my dear and loving wife is to have full possession as long as she lives. . . . Item—my will is that if my daughter Mary should happen to die leaving no issue, then my loving wife shall have my whole estate, both real and personal. Item,—my will is that the issue, male or female, from the body of my daughter Mary shall be next partaker," it was held that Mary took an estate tail general, and not an estate for life only, with contingent remainder to her issue.

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In *Nott v. Fitzgibbon*, 107 Tenn. 54, 64 S. W. 26, testator devised three tracts of land to his wife and son jointly for life, and provided, as to two of them, that in case the son should die without issue, "or my wife should die," the property should go over; and as to the third tract, that it should go to certain persons after the death of the wife and son. It was held that no estate in the two tracts first mentioned was given by implication to the issue of the son, but that he took what at common law would be an estate tail, which the statute converted into a fee; but that in view of the statute providing that the phrase, "die without issue," shall be presumed to mean a definite failure of issue, the fee taken by the son would be determinable or conditional upon his dying without issue. The reasoning of the court in this case in treating the phrase, "die without issue" as importing an indefinite failure of issue, for the purpose of turning an express life estate into an estate tail by implication, and then applying the statute which provides that such phrase shall be taken to mean a definite failure of issue, for the purpose of turning the fee into a conditional one, seems to be unjustifiable. See discussion of this point in *Yocum v. Parker*, 67 C. C. A. 227, 134 Fed. 205.

⁴⁷ In *Re Blake*, 157 Cal. 448, 108 Pac. 287, a testator who left as his heirs at law two daughters and a granddaughter, the child of a deceased daughter, gave the residue of his estate in trust to pay over the net income therefrom in equal proportions to his daughters and granddaughter until they should respectively arrive at the age of thirty years, adding: "And as each of my said daughters and granddaughter arrives at the age of thirty years she shall have the right to demand and receive one third of the rest and residue of my said estate as her distributive share thereof, and to have and hold the same to her and her heirs forever, and if either of my said daughters or granddaughter shall die without issue and before she receives her distributive share of my estate, it is my desire that her share of my said estate shall go to the surviving daughter, daughters or granddaughter as the case may be, share and share alike." The two daughters each attained the age of thirty, but the granddaughter died before reaching that age, leaving issue, so that the happening of the event upon which her share of the corpus

to the parent is vested *in præsentī*, enjoyment only being postponed,⁴⁸—in which case the issue take by inheritance.

IV. Substitutional gifts by implication.

Where, the parent having died in the

lifetime of testator, the question takes the form of whether his issue are substituted by implication, the same difference of opinion as to what will give rise to the implication exists as where the question is whether

was given over became impossible. It was contended on behalf of the daughters that the granddaughter was given a contingent remainder only in the corpus of the trust property, which would not vest until she reached the age of thirty years; that, as she never attained that age, the remainder never vested; that no provision was made in the will for the disposition of the corpus of the trust property in the event which actually occurred, and hence that the testator died intestate as to such property, and it descended and should be distributed to his heirs at law. On behalf of the children of the granddaughter, it was contended either that the granddaughter took a vested remainder in fee, defeasible only upon a condition subsequent, namely, her death without issue and before she received her distributive share, the happening of which had now become impossible, and that on her death the corpus of the trust property passed to her heirs; or, if the gift to her was contingent, that there was a devise of such corpus by implication to them as her issue, so that they would take the property as donees or purchasers under the will itself. The court held that the granddaughter took a contingent and not a vested remainder; but that there was a gift to her issue by implication, saying: "While, of course, conjecture and speculation cannot be indulged in to import into the will of a testator something which no language used by him warrants, simply because he seems to have omitted something which it is reasonable to assume should have been provided for, still, when he has used language which can be reasonably interpreted to raise a devise, it should be so construed. Looking at this devise over, it would appear to be absurd to say that while the testator provided that in the event of death 'without issue' of a contingent devisee, a remainder over is to take effect, yet if the contingent devisee leave issue the devise over shall be defeated and without benefit to either parent or child. To defeat attributing to the phrase such a purposeless effect, courts, as said in 1 Jarman on Wills, 'will lay hold of slight circumstances to raise a gift in the child and thereby avoid imputing to the testator so extraordinary an intention as that the devisee or legatee over is to become entitled if the first taker have no child, but that the property is not to go to the child, if there be one, or its parents.' And, as said in Underhill on Wills, § 463: 'The court accordingly will raise an estate by implication in favor of a surviving child upon slight indication of an intention to that effect.' " The arguments employed by the court in support of this conclusion were that such a construction would prevent an

intestacy; that in the preceding portion of his will, the testator, in providing for the payment of legacies to relatives and friends, specified that (except in two instances) if any of the legatees should die before the testator, the legacies should go to the lineal descendants of such legatees, and that lapsed legacies should revert to his estate,—the inference drawn therefrom being that the testator would be more solicitous for the welfare of his lineal descendants than for the lineal descendants of his friends; that a different construction would produce a gross inequality among his lineal descendants, who by the trust devise are treated with equal favor, the shares taken by the daughters being increased at the expense of the children of the granddaughter; and that it might result in diverting the greater part of the testator's estate away from his line into the hands of strangers.

In *Burch v. Burch*, 20 Ga. 834, testator gave the whole of his estate to his wife during life or widowhood, and directed that at her death or marriage the whole of the estate should be sold and one-third part thereof divided between his brothers and sisters, to be "to them my said brothers and sisters, share and share alike, forever," adding: "But if either of my said brothers or sisters should decessae leaving no child or children then and in that case my will is that their part of said legacy be equally divided betwixt the whole of my brothers and sisters above named and is to each of them forever." It was held that, as the testator clearly meant to dispose of the whole of his property, and as the limitation over did not take effect where a brother or sister died leaving children, it followed that the child or children of brothers and sisters who died prior to the time when the estate was divided were under the circumstances of the case the manifest objects of the testator's bounty, and took, by necessary implication, the share which their parents would have taken if living. The court said that though legacies by implication are not favored as against the heir at law and residuary legatees, there was no residuary legatee in this case, and that the implication was in favor of the equal provision that the testator intended to make for his heirs at law.

⁴⁸ In *Petty v. Moore*, 5 Sneed, 126, where testator gave his entire estate to his wife for life, with remainder to his eleven children equally, adding: "I do will and declare if any of my eleven children shall die without an heir of their body, that all of the property that shall ever descend to them, from me, shall return and be equally divided among the remainder of my heirs that shall be living," it was held that the

there is an implied gift of a remainder. The English and Canadian cases⁴⁹ hold that no substitutional gift can be implied

from the terms of the limitation alone; while the American courts appear to have been more liberally inclined.⁵⁰ And in the

share of a son dying after the decease of the testator, but before the termination of the life estate, leaving children, would not vest in such children by implication of law, but that the parent was vested within an immediate absolute interest liable to be devested only upon the contingency of his dying without children.

⁴⁹ In *Addison v. Busk*, 14 Beav. 459, testatrix gave her residuary personal estate upon trust for J. L., but if he should die in her lifetime without leaving any child or children him surviving, then to another. J. L. died in the lifetime of the testatrix, leaving children, who claimed to be entitled by implication to the bequest, but Sir John Romilly, M. R., said: "I think this case is expressly decided by the authorities, and which render it impossible for me to hold that the children take anything by implication. I cannot give to the same words a different construction when used in relation to a residue from that which I should when applied to a simple legacy. Here the testatrix knew how to express a gift to the children, for she has done it in the case of the real estate. It is possible that some words have been left out, but it is not the province of the court to supply them, and thus make a will for a testator." And this decision was affirmed on appeal, sub nom. *Lee v. Busk*, 2 De G. M. & G. 810, 22 L. J. Ch. N. S. 97, 16 Jur. 1057.

In *Cooper v. Pitcher*, 4 Hare, 485, affirmed in 16 L. J. Ch. N. S. 24, testator, who had given a share of a fund to his wife's nephew, afterward made a codicil in which he declared that "in the case of the death of any one or more of my said wife's nephews and nieces in my lifetime without issue the share or shares of and in the said sum of £4,200 of such one or more of them as shall so die in my lifetime without issue shall go and be paid to the survivors or survivor of them in equal proportions." It was held that there was no gift by implication to the issue of the nephew.

In *Heron v. Walsh*, 3 Grant, Ch. (U. C.) 606, it was held that under a devise to sons and daughters, their heirs and assigns lawfully begotten, "and in case of failure of issue then the said property, either real or personal, moneys, goods and chattels, to descend to (another son) his heirs and assigns; and in case of failure of issue of him then unto" testator's brother, those next entitled under the will took the share of a child who died in the lifetime of the testator, to the exclusion of his issue.

⁵⁰ In *Burch v. Burch*, 20 Ga. 834, testator gave the whole of his estate to his wife during life or widowhood, and directed that at her death or marriage the whole of the estate should be sold and one-third part thereof divided between his brothers and sisters, to be "to them my said brothers and sisters, share and share alike, forever," adding: "But if either of my said brothers and

sisters should decease leaving no child or children then and in that case my will is that their part of said legacy be equally divided betwixt the whole of my brothers and sisters above named and is to each of them forever." One of the brothers had died before the will was made leaving children. It was held that, as a different construction would result in an intestacy, the limitation over not taking effect under such circumstances, the children were by necessary implication substituted for their father.

In *Denise v. Denise*, 37 N. J. Eq. 163, in which the testator gave to each of his seven children an equal share of his residuary estate, further providing: "In case any of my said seven children last named should die without leaving lawful issue, then, in that case, I order that the share of such as may die without issue, to be divided amongst the survivors of the above-named seven of my children, share and share alike," the court, after holding that under such a bequest the legatees take absolutely if they survive to the time of distribution, and that the gift over will take effect only in the event of the death of the legatee before distribution, said: "No bequest, it will be observed, is made to the survivors unless the first legatee dies without leaving lawful issue. It is clear, then, the survivors do not take. The contingency on which they were to take has not happened. Where, then, did the testator intend the shares of such of his children as should die before distribution, leaving issue, should go? It is plain that he did not intend to die intestate as to any part of his estate. He made careful provision for the disposition of the whole of it, and even attempted to provide for contingencies which seemed possible to his mind. A devise or bequest may arise from implication. Any words in a will which manifest an intention to create or give a legacy are sufficient for that purpose. In deciding whether a legacy is given by implication or not, conjecture must not be taken for implication. To create a bequest in that way, the implication on which it is founded must be a necessary one; not natural necessity, but so strong a probability of an intention to give must appear that an intention contrary to that which is imputed to the testator cannot be supposed to have existed in his mind. A construction in favor of a bequest by implication should never be adopted except in cases where, after a careful and full consideration of the whole will, the mind of the judge is convinced that the testator intended to make the bequest. . . . Applying this test to the case in hand, I think it is quite apparent the testator intended that the issue of any of his children who should die before distribution should take that share of his residuary estate which his will gave to their parent. Indeed, the implication in that

subjoined case⁵¹ other support for the implication was found.

Instances where the parent, by reason of his death in testator's lifetime, cannot be considered as a member of a class to whom the gift is made⁵² (as in the case of a gift to "surviving children"), appear to turn on that special circumstance, and so to be without bearing on the general question.

regard is not only highly probable, but cases very near absolute certainty."

But in *Howell v. Gifford*, 64 N. J. Eq. 180, 53 Atl. 1074, it is said of the foregoing case that it appears to go to the verge of the law, and to rest upon no other foundation than the assumption that testator did not intend to die intestate.

In *King v. Barker*, 3 Bradf. 126, the testator devised the residue of his estate to the children of his deceased brothers, adding: "And should either of the said seven children die before me without leaving any child or other descendant, I hereby give, devise and bequeath the residuary share or portion of the one so dying to her or his surviving brothers or sisters." One of the residuary legatees having died before the testator, leaving children, it was held that there was a substitutional gift by implication to such children.

In *Re Disney*, 118 App. Div. 378, 103 N. Y. Supp. 391, reversed on another ground in 190 N. Y. 128, 82 N. E. 1093, testator gave his residuary estate to his mother and sister "in equal shares or portions to have and to hold the same absolutely and forever; and in the event of either dying without issue surviving I give, devise and bequeath the share or portion of the one so dying to the survivor." The mother having died in the lifetime of the testator, the question arose whether a moiety of the residue became intestate property. The court expressed the opinion that there was a substitutional gift by implication to the issue of the mother, but found it unnecessary to decide the question.

⁵¹In *McClean v. Simpson*, Ir. L. R. 19 Eq. 528, testator gave his estate to be divided among nephews and nieces, naming them, adding: "Now if any of the persons named should die before this will takes effect without leaving any children legally to inherit, then his or her share must lapse to the general fund." One of the legatees died in testator's lifetime, leaving children. It was held, although no implication in favor of the children could arise merely from a gift over if one should die without children, that the introduction of the words "legally to inherit," was sufficient to show that the testator contemplated not only that if a legatee should leave children who should also survive the testator, his share was not to go over to the other legatees, but also that such children would "legally inherit," which they could do only by being 51 L.R.A.(N.S.)

V. Summary.

Taking the cases as a whole, it may be said of them that wherever it is possible to construe the gift so as to give the parent an absolute interest, the courts will do so, rather than imply a gift to descendants; but that where the interest taken by the parent is expressly, or by necessary construction, limited to an estate for life, they will be astute to imply a gift of the remainder to his descendants. E. S. O.

substituted for their father so as to prevent the contemplated lapse.

⁵²In *Roundtree v. Roundtree*, 26 S. C. 450, 2 S. E. 474, testator gave to his wife certain land, slaves, live stock, and tools, "for her own use during her natural life; and at her death it is my will and desire that it all shall be equally divided share, and share alike between my surviving children." It was held that, as a son who died in the lifetime of the testator was not embraced in the term, "surviving children," an intention that his children should take his share by substitution was not shown by a provision that "it is my will and desire that if any of my children should die leaving no issue the property shall revert back and be equally divided between my surviving children."

In *Re Coleman*, L. R. 4 Ch. Div. 165, the testator devised five houses "unto and to the use of all and every the children of my late brother Joseph Coleman who shall be living at my decease or who shall have died in my lifetime leaving issue living at my death in equal shares as tenants in common in fee simple." He subsequently executed a codicil by which, after reciting that some of the children of Joseph Coleman had lately died without issue, he altered the disposition of one of the houses in question, giving the four remaining houses in the same language employed in the will. Jessel, M. R., said that while it would seem that testator intended to provide somehow for a child who died leaving issue, without knowing how to do it, no gift to the issue of a child dying in the testator's lifetime might be presumed, because the law does not allow that child to be a member of the class comprised in a gift to children.

In *Ritter v. Fox*, 6 Whart. 99, testator provided: "I also give to every nephew and niece of mine an equal share of my estate. And that if any nephew or niece of mine die, leaving no heir before the division of my estate, then his or her portion shall not be divided among his or her friends, but shall be divided equally among my surviving nephews and nieces. And whereas, there is a suit against Peter Weimer's estate, I pledge the portion of Elizabeth Stichter, formerly Elizabeth Kast, to make good any loss Peter Weimer's estate may sustain by the said lawsuit so far as her portion goes, because I think it unjust that such a suit should have been commenced." Elizabeth Stichter was dead at the time of

the making of the will, leaving children. It was held that such children were not entitled to the portion of the estate which would have been coming to their mother had she been living at the death of the testator, the court saying: "It is argued, as he knew the fact of Elizabeth Stichter's death at the time of making his will, he must have supposed that her children would take the share that she would have been entitled to if living, under the following devise and bequest; I also give to every nephew and niece of mine an equal share of my estate; and that if any nephew or niece of mine die, leaving no heir, (no child or issue doubtless was meant) 'before the division of my estate, then his or her portion shall not be divided among his or her friends, but shall be divided equally among my surviving nephews and nieces;' because, unless such was his notion, it is impossible almost to account for the pledge contained in the immediately following sentence, in which, after mentioning that 'there is a suit against Peter Weimer's estate,' he pledges 'the portion of Elizabeth Stichter, formerly Kast, so far as it will go, to make good any loss Peter Weimer's estate may sustain by the said lawsuit, because he thought it unjust that such suit should have been commenced.' If, however, it were possible to imagine that the testator really entertained such an idea, and proof could be made of the fact, it would go to overturn the established rules of law, as also the meaning of the language employed by the testator, which cannot be done. When the testator pledged by his will 'the portion of Elizabeth Stichter,' knowing that she was dead, he pledged what he had and could not give her; though it was competent for him to pledge, as he did, that portion of his estate which she would have taken had she been living; but still that would not show, with any certainty, that he intended her children should take it. There is, therefore no gift either to the mother or the children; and without this, the pledging of the mother's portion, in the manner he has, cannot operate as a gift to the children of so much of the testator's estate. . . . Besides, to allow the plaintiff's claim in the case before us would militate against the intention of the testator, as disclosed by the next clause immediately following that giving to every nephew and niece an equal portion of his estate, whereby he has, in language the meaning of which is free from all ambiguity, and cannot be mistaken, excluded the children of such of his nephews or nieces as were dead at the time of the making his will, from participating as legatees in his estate, unless, as it would seem, expressly designated for that purpose in some part of the sequel. For by that clause he explicitly declares, 'that if any nephew or niece die, leaving no heir (meaning no child or issue) before the division of my estate, then his or her portion shall not be divided among his or her friends, but shall be divided equally among my surviving nephews and nieces,' thus excluding most clearly the

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children of Elizabeth Stichter, as also those of his nephews or other nieces who were dead at the time of making his will."

PENNSYLVANIA SUPREME COURT.

ISAAC MONTGOMERY et al., Admrs., etc.,
of Isaac Montgomery, Deceased, et al.,
Appts.,

v.

SOUTHERN MUTUAL INSURANCE COMPANY.

(242 Pa. 86, 88 Atl. 924.)

Insurance — exemption — locomotive engine.

A clause in a fire insurance policy exempting the insurer from loss by fire from or occasioned by locomotive engines does not exempt from loss from fire communicated by buildings burning on the railroad right of way which were ignited by the sparks from a locomotive engine.

(June 27, 1913.)

A PPEAL by plaintiffs from a judgment of the Court of Common Pleas for Lancaster County in favor of defendant *non obstante veredicto* in an action on a fire insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. William H. Keller and John A. Coyle, for appellants:

A policy of insurance is a contract to indemnify the assured against loss by fire;

Note. — Scope and effect of clause in fire insurance policy exempting insurer from liability for loss by fire from or occasioned by locomotive engines.

Probably the reason for the insertion in policies of fire insurance of provisions similar to that involved in *MONTGOMERY v. SOUTHERN MUT. INS. CO.*, exempting the insurer from liability for loss sustained by reason of fires started by locomotive engines, is attributable to the enactment of statutes in a number of states taking away the insurer's right of subrogation to the insured's action against railroad companies responsible for fires set by locomotives, causing him loss, and giving to railroads which have paid damages resulting from such fires a right to recover on policies covering the property destroyed. As to the constitutionality of such statutes, see the note accompanying *British America Assur. Co. v. Colorado & S. R. Co.* 41 L.R.A. (N.S.) 1202, and the later case of *Boston Ice Co. v. Boston & M. R. Co.* 45 L.R.A. (N.S.) 835.

Whatever may have been the cause of the insertion of these provisions, they appear to be of recent origin, and to have resulted in little litigation.

Their effect being to create an exception in favor of the insurer, the burden, accord-

and, as the policy is prepared by the insurance company, it is the rule of law that it shall be most strongly construed against the insurer and in favor of the assured, so as not to defeat without a plain necessity his claim to indemnity, which, it was his object to secure.

Yost v. Anchor F. Ins. Co. 38 Pa. Super. Ct. 594; *Humphreys v. National Ben. Asso.* 139 Pa. 264, 11 L.R.A. 564, 20 Atl. 1047; *Helme v. Philadelphia L. Ins. Co.* 61 Pa. 107, 100 Am. Dec. 621; *Louck v. Orient Ins. Co.* 176 Pa. 638, 33 L.R.A. 712, 35 Atl. 247; *Lebanon County v. Franklin F. Ins. Co.* 237 Pa. 360, 44 L.R.A. (N.S.) 148, 85 Atl. 419; *Showalter v. Mutual F. Ins. Co.* 3 Pa. Super. Ct. 448; *City F. Ins. Co. v. Corlies*, 21 Wend. 367, 34 Am. Dec. 258.

It is incumbent on the assured only to prove a loss by fire, and the burden is on the insurance company to prove that it is exempted by the special terms or provisions of the policy.

City F. Ins. Co. v. Corlies, supra; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 653; *Ryan v. New York C. R. Co.* 35 N. Y. 210, 91 Am. Dec. 49; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Northwest Transp. Co. v. Boston Marine Ins. Co.* 41 Fed. 793; *Crandal v. Accident Ins. Co.* 27 Fed. 40; *Jarnagin v. Travelers' Protective Asso.* 68 L.R.A. 499, 66 C. C. A. 622, 133 Fed. 892; *Richmond Coal Co. v.*

Commercial Union Assur. Co. 95 C. C. A. 178, 169 Fed. 746, 17 Ann. Cas. 1092; *Baker v. Williamsburgh City F. Ins. Co.* 157 Fed. 280; *Williamsburgh City F. Ins. Co. v. Willard*, 21 L.R.A. (N.S.) 103, 90 C. C. A. 392, 164 Fed. 404; *Atchison, T. & S. F. R. Co. v. Calhoun*, 213 U. S. 1, 53 L. ed. 671, 29 Sup. Ct. Rep. 321.

Messrs. John A. Nauman and John E. Malone, for appellee:

"The chain of events" is "so linked together as a natural whole" as to exclude any other proximate cause of the burning than the sparks from the dinkey engine,—especially in view of plaintiffs' own testimony that there was "no other cause intervening," and that the shed "burned right along with the barn."

33 Cyc. 1348; *Haverly v. State Line & S. R. Co.* 135 Pa. 50, 20 Am. St. Rep. 848, 19 Atl. 1013; *Gudfelder v. Pittsburg, C. C. & St. L. R. Co.* 207 Pa. 629, 57 Atl. 70, 15 Am. Neg. Rep. 672; *Pennsylvania R. Co. v. Hope*, 80 Pa. 373, 21 Am. Rep. 100; *Potter v. Natural Gas Co.* 183 Pa. 575, 39 Atl. 7. Defendant was not liable.

Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. 44, 19 L. ed. 65; *German Sav. & Loan Soc. v. Commercial Union Assur. Co.* 109 C. C. A. 506, 187 Fed. 759; *Insurance Co. v. Express Co.* (Imperial F. Ins. Co. v. Fargo) 95 U. S. 227, 24 L. ed. 428; *German F. Ins. Co. v. Roost*, 55 Ohio St. 581, 36 L.R.A. 236, 60 Am. St. Rep. 711, 45 N. E. 1097.

ing to the general rule applicable to exceptions, rests with the insurer to prove that a particular loss was within the exception (The question as to the burden of proof as to excepted causes is discussed in its relation to life and accident insurance in note to *Red Men's Fraternal Acci. Asso. v. Rippey*, 50 L.R.A. (N.S.) 1006.)

The elementary rule that where provisions of an insurance policy are ambiguous they are to be construed most strongly against the insurer is clearly applicable to such provisions as those under consideration, by which the insurer seeks, by language of its own choosing, to escape liability.

The decision in *MONTGOMERY v. SOUTHERN MUT. INS. CO.*, holding that a clause exempting the insurer from liability in case of "fire from, or occasioned by, locomotive engines," does not relieve the insurer from liability for a loss from fire communicated to the insured's property by buildings burning on the railroad's right of way, which were ignited by sparks from a locomotive, seems sound.

The insurer, in framing its exclusion, might easily have broadened it in such a manner as to exclude losses resulting directly as well as indirectly from fires started by locomotives; and, not having clearly excepted such risks, it should be held to its contract.

51 L.R.A. (N.S.)

A similar question to that presented in *MONTGOMERY v. SOUTHERN MUT. INS. CO.* has been involved in cases construing other clauses of fire insurance policies by which the insurer has attempted to reduce its liability, and where a loss has indirectly resulted from the excepted cause.

For such cases involving the liability of the insurer for fire caused by an earthquake, see note to *Williamsburgh City F. Ins. Co. v. Willard*, 21 L.R.A. (N.S.) 103, and the later case of *McEvoy v. Security F. Ins. Co.* 22 L.R.A. (N.S.) 984.

And as to liability of the insurer for loss caused by explosion, see notes to *Heuer v. Northwestern Nat. Ins. Co.* 19 L.R.A. 594, and *Wheeler v. Phenix Ins. Co.* 38 L.R.A. (N.S.) 474.

Concerning the scope and effect of provisions exempting the insurer from loss caused by military or usurped power or order of civil authority, see note to *Hocking v. British America Assur. Co.* 36 L.R.A. (N.S.) 1155.

And as to fall-of-building clause in fire insurance policies, see note to *Davis v. Connecticut F. Ins. Co.* 32 L.R.A. (N.S.) 604.

As to liability of insurer for property destroyed by mob or during riot, see note to *Spring Garden Ins. Co. v. Imperial Tobacco Co.* 20 L.R.A. (N.S.) 277.

J. T. W.

Brown, J., delivered the opinion of the court:

Isaac Montgomery was the owner of a farm in Eden township, Lancaster county. He died February 27, 1904. On July 1, 1903, the Pennsylvania Railroad Company, under its right of eminent domain, appropriated for a roadbed for its low-grade road a strip of land extending through the said farm for a distance of about 1,500 feet and of a width of about 180 feet. The south line of the right of way passed through a tobacco shed, leaving a portion of it on the company's right of way and the balance on Montgomery's land. In 1905 the railroad company was engaged in constructing its new roadbed; the contractor doing the work being the John Shields Construction Company. Dinkey engines were operated on temporary tracks which ran past the tobacco shed. On August 1, 1905, a fire broke out on the north peak of this building, on the right of way of the railroad company, caused by a spark from one of the dinkey engines. Sparks from the shed set fire to a frame barn and wagon shed located on the land of the plaintiffs, and they were entirely destroyed. In 1865 the Southern Mutual Insurance Company of Lancaster county issued a policy of insurance to Isaac Montgomery, insuring the said buildings. The plaintiffs brought suit against the John Shields Construction Company, alleging that its negligence had caused the fire, and instituted this action against the appellee upon the policy of insurance. The case against the construction company was tried first and a verdict rendered in favor of the plaintiffs. That company was insolvent and a dividend of only \$168 was received on the judgment recovered against it, which sum has been credited on the present claim of the appellants. The defense set up in this action was the following section of the by-laws attached to the policy of insurance: "This policy shall cover any direct loss or damage caused by lightning, . . . but will not cover loss or damage by fire happening by means of insurrection of any military or usurped power, or fire from, or occasioned by, locomotive engine or engines." A verdict was returned for the plaintiffs under undisputed facts, but the court subsequently entered judgment for the defendant *non obstante veredicto*, on the ground that the fire was within the exempting clause.

In the opinion of the court below, directing judgment to be entered for the defendant, the learned president judge said that the question of the plaintiffs' right to judgment on the verdict was not "without difficulty." We were at first of the same impression; but, after due consideration, have

concluded that the policy covers the loss sustained, and that judgment should therefore be entered on the verdict.

The exemption of the appellee from liability is not, in express words, for loss by fire directly or indirectly from or occasioned by a locomotive engine or engines, and in determining whether the appellants are entitled to recover it is first important to ascertain what was the intention of the parties to the contract of insurance, as gathered from a reasonable construction of the words used in the exempting clause in the by-laws. These words are to be construed most strongly against the insurer and in favor of the insured, and, in so construing them, reasonable effect is to be given to them so as not to defeat—unless there be an imperative necessity to do so—the indemnity which the insured sought and thought he had secured through the policy of insurance. *Franklin F. Ins. Co. v. Updegraff*, 43 Pa. 350; *Mears v. Humboldt F. Ins. Co.* 92 Pa. 15, 37 Am. Rep. 647; *Lancaster Silver Plate Co. v. National F. Ins. Co.* 170 Pa. 151, 50 Am. St. Rep. 753, 32 Atl. 613; *McClure v. Mutual F. Ins. Co.* 242 Pa. 59, 48 L.R.A.(N.S.) 1221, 88 Atl. 921. In so construing the words of the exempting clause the conclusion to be reached from them is that the fire contemplated by them was one directly from or directly occasioned or caused by a locomotive engine or engines.

Instead of a fire caused directly by a locomotive engine, the fire in the present case was caused directly by sparks from a burning building 100 feet distant and entirely disconnected from those that were burned. The proximate and direct cause of the burning of the first building was a spark from an engine, and, if that building had been insured by the appellee under a policy of insurance similar in terms to the one in suit, the owner of the building could, of course, have recovered nothing in an action against the insurance company; but, if buildings hundreds of yards away, located on another farm, had been burned by a spark carried by the winds from the burning building, the owner of such burned buildings could not be denied a recovery in an action against an insurance company, if it had insured the buildings under a policy similar in terms to the one issued by the appellee to Montgomery, for the clause exempting the insurer from liability could not be reasonably so read or understood by anyone as being expressive of any such intention by either party to the contract of insurance. Under the view entertained by the learned court below, the owner of the burned buildings could not recover; nor could there be a recovery by an owner of a house in a town entirely wiped out by fire

caused by sparks from a building outside the municipal limits, if such building was set on fire by a spark from a locomotive. If the principle announced by the learned court below—not, however, without some misgiving—be correct, there can be no distinction made between the supposed cases and the one at bar. That the exempting clause in the Montgomery policy should have such an effect as has been given to it by the judgment in the court below could never have been contemplated by insurer or insured, and there is nothing in the clause that requires it to be so construed. On the contrary, as just stated, it contemplates a fire directly from or occasioned directly by an engine.

The case upon which the learned court below seems to have mainly relied in directing judgment for the defendant is *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, 19 L. ed. 65. It must be admitted that what was there held sustained the learned president judge in his view as to what ought to be regarded as the proximate cause of the fire. Tweed brought suit against the insurance company on a policy of insurance against fire which covered certain bales of cotton in a building in Mobile known as the Alabama warehouse. The policy contained a proviso that the insurer should not be liable to make good any loss or damage by fire which might happen or take place "by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, explosion, earthquake, or hurricane." During the period covered by the policy an explosion took place in a building known as the Marshall warehouse, situated directly across the street. This explosion threw down the walls of the Alabama warehouse, scattered combustible materials in the street, resulting in an extensive conflagration, embracing several squares of buildings, among which the Alabama warehouse and the cotton stored in it were wholly destroyed. The fire was not communicated directly to the Alabama warehouse from the Marshall warehouse, in which the explosion occurred, but came more immediately from a third building—the Eagle mill—which was itself fired by the explosion. The wind was blowing in a direction from the Eagle mill to the Alabama warehouse, and the whole fire was a continuous one from the explosion. Upon this state of facts the court below held that the principle *causa proxima, non remota, spectatur*, applied, and that the fire which consumed the cotton did not "happen or take place by means of an explosion." Judgment for the plaintiff was reversed, the Supreme Court of the United States holding that the explosion was the cause of the fire, 51 L.R.A. (N.S.)

within the meaning of the policy. Some years afterwards Mr. Justice Miller, who wrote the opinion, in commenting upon it in *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070, said: "This case went to the verge of the sound doctrine in holding the explosion to be the proximate cause of the loss of the Alabama warehouse; but it rested on the ground that no other proximate cause was found."

In *Pennsylvania R. Co. v. Kerr*, 62 Pa. 353, 1 Am. Rep. 431, reference is made to the *Tweed Case*, not, however, by way of approval, but rather in disapproval of it. In the *Kerr Case* a warehouse belonging to one Simpson, situated very near the track of the company's road, was set on fire by sparks emitted from a locomotive belonging to the defendant. The burning of the warehouse communicated fire to a hotel situated 39 feet distant, which, at the time, was occupied by the plaintiff. It, with its furniture, stock of liquors and provisions, was consumed, and for this the plaintiff sued and recovered in the court below; the trial judge charging that the defendant was liable by reason of the burning of the hotel, although by fire communicated from the warehouse, if the latter was set on fire by the negligence of the defendant's servants. In holding that this was error and reversing the judgment, we said: "It cannot be denied but that the plaintiff's property was destroyed, but by a secondary cause, namely, the burning of the warehouse. The sparks from the locomotive did not ignite the hotel. They fired the warehouse and the warehouse fired the hotel. They were the remote cause—the cause of the cause of the hotel being burned. As there was an intermediate agent or cause of destruction between the sparks and the destruction of the hotel, it is obvious that that was the proximate cause of its destruction, and the negligent emission of sparks the remote cause. To hold that the act of negligence which destroyed the warehouse destroyed the hotel is to disregard the order of sequences entirely, and would hold good if a row of buildings, a mile long had been destroyed. The cause of destruction of the last, in that case, would be no more remote, within the meaning of the maxim, than that of the first, and yet how many concurring elements of destruction there might be in all of these houses, and no doubt would be, no one can tell. . . . According to the principle asserted, a spark from a steamboat on the Delaware might occasion the destruction of a whole square, although it touched but a single separate structure. . . . A railroad terminating in a city might, by the slightest omission on the part of one of its numerous servants, be made to

account for squares burned, the consequence of a spark communicating to a single building." In support of the foregoing Mr. Chief Justice Thompson, who wrote the opinion, cited with approval *Ryan v. New York C. R. Co.* 35 N. Y. 210, 91 Am. Dec. 49. In that case the defendant, through the carelessness of its servants or through the insufficient conditions of one of its locomotive engines, set fire to its own woodshed, with a large quantity of wood therein. The plaintiff's house, situated some 130 feet from the shed, took fire from the heat and sparks of the burning shed and wood and was entirely consumed. The plaintiff brought suit against the company for his loss. Judgment of nonsuit was affirmed by the court of appeals in an elaborate and exhaustive opinion by Mr. Justice Hunt. After referring to that case, Mr. Chief Justice Thompson, proceeded to say: "But it seems to have been thought that *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, 19 L. ed. 65, conflicts with the above case. I do not think it does, when understood. It was an action on a policy of insurance against fire, in which there was an exception of several matters, *viz.*, invasion, insurrection, military and usurped power, explosion, earthquakes, etc. An explosion took place in a warehouse on the opposite side of the street from the insured property, and scattered fire and burning fragments upon the insured property and destroyed it. The decision of the supreme court was that the loss was within the exception of loss by fire occasioned by explosion. To me it seems that it would have been rather more rational to have held that the destruction was by fire *per se*. But the court interpreted the terms of the contract of the parties in this way. We must remember that there may be a difference between interpreting the obligation of a contract, and defining liability under the law of social duty. Certain it is the laws are not the same. One does not necessarily rule the other. I may say further that there is no evidence, in the opinion of Mr. Justice Miller, that he had specially in view the same question, so ably discussed by Mr. Justice Hunt, or, if he had, that his investigations extended so far as did those of the last-named judge. He does not even refer to the New York case at all."

Under *Pennsylvania R. Co. v. Kerr* the appellants are entitled to judgment. But it is said the authority of that case has been somewhat impaired. There is an intimation to that effect in what was said by Mr. Justice Mitchell in *Haverly v. State Line & S. R. Co.* 135 Pa. 50, 20 Am. St. Rep. 848, 19 Atl. 1013, but it is to be remembered, on the other hand, that the case was cited with approval in *Hoag v. Lake Shore & M.* 51 L.R.A. (N.S.)

S. R. Co. 85 Pa. 293, 27 Am. Rep. 653. It has never been overruled, and we are not inclined to overrule it now, but rather to still regard it as having applied the correct rule to the facts in the case.

The fire which caused the destruction of the property of the plaintiffs was not occasioned or caused by fire from a locomotive engine. It was caused by a spark or sparks from a building which had first been set on fire by a spark from an engine, and, as we are clear that it was not the intention of either insurer or insured, as gathered from the words of the exempting clause of the policy, that such a fire was to be within that clause, it must be without the clause, and the loss occasioned by it is therefore within the general indemnity clause of the policy.

The assignment of error is sustained, the judgment is reversed, and the record remitted, with direction that judgment be entered for the plaintiffs on payment of the jury fee.

WASHINGTON SUPREME COURT. (In Banc.)

FISHER FLOURING MILLS COMPANY,
Appt.,
v.

C. A. SWANSON, Respnt.

(— Wash. —, 137 Pac. 144.)

Monopoly — contract to fix price of commodity — validity.

A contract by the manufacturer of a particular brand of flour sold in a certain market, with retailers, as ancillary to his wholesaling the product to them, that they will maintain a minimum price, is valid if it is necessary to the continued production of his product, involves less than a controlling part of that commodity in the market, and the price fixed is fairly necessary to his protection, and affords only a fair profit to the contracting parties.

(December 13, 1913.)

Note. — Validity of contract provision seeking to control price at which an article shall be resold.

The question above stated is discussed in the note to *Grogan v. Chaffee*, 27 L.R.A. (N.S.) 395, to which the present note is supplementary.

The decision of the circuit court of appeals in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 90 C. C. A. 579, 164 Fed. 803, which was set forth in the earlier note above referred to, has since been affirmed by the United States Supreme Court in 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376, where it was held that the complainant was not entitled to maintain its

A PPEAL by plaintiff from a judgment of the Superior Court for King County in defendant's favor in an action brought to enjoin him from selling flour manufactured by plaintiff at less than the retail price fixed in a contract of sale made with the defendant. Reversed.

The facts are stated in the opinion.

Mr. Hyman Zettler, with Messrs. Hastings & Stedman and Higgins, Hall, & Halverstadt, for appellant:

The presumption is that the contract is enforceable unless it is made clearly to appear that it is in violation of public policy.

Knapp v. S. Jarvis Adams Co. 77 C. C. A. 536, 135 Fed. 1008; Reed v. Saslaff, 78 N. J. L. 158, 73 Atl. 1044; Herriman v. Menzies, 115 Cal. 16, 35 L.R.A. 318, 56 Am. St.

Rep. 81, 44 Pac. 660, 46 Pac. 730; Superior Coal Co. v. E. R. Darlington Lumber Co. 236 Ill. 83, 127 Am. St. Rep. 275, 86 N. E. 180; Harbison-Walker Refractories Co. v. Stanton, 227 Pa. 55, 75 Atl. 988; Hulse v. Bonsack Mach. Co. 13 C. C. A. 180, 25 U. S. App. 239, 65 Fed. 864; Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 30 L.R.A. 193, 17 C. C. A. 62, 36 U. S. App. 152, 70 Fed. 201; Couch v. Hutchinson, 2 Ala. App. 444, 57 So. 75; 9 Cyc. 672, note 30.

The contract is one in restriction of competition.

Phillips v. Iola Portland Cement Co. 61 C. C. A. 19, 125 Fed. 593; Brown v. Rounsavell, 78 Ill. 589; Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co.

system of restrictive contracts, either on the ground that they related to an article manufactured under a secret process, or by virtue of the fact that they related to products of its own manufacture; but that whatever right a manufacturer may have to project his control beyond his own sales must depend not upon an inherent power incident to production and original ownership, but upon agreement. And the court further held that the system of contracts which it was sought to enjoin the defendant from inducing parties thereto to violate operated as a restraint of trade, unlawful both at common law, as imposing an unreasonable restriction, and, as to interstate commerce, under the Sherman anti-trust act. The court, speaking through Mr. Justice Hughes, said: "The present case is not analogous to that of a sale of good will, or of an interest in a business, or of the grant of a right to use a process of manufacture. The complainant has not parted with any interest in its business or instrumentalities of production. It has conferred no right by virtue of which purchasers of its products may compete with it. It retains complete control over the business in which it is engaged, manufacturing what it pleases and fixing such prices for its own sales as it may desire. Nor are we dealing with a single transaction, conceivably unrelated to the public interest. The agreements are designed to maintain prices after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them.

"The bill asserts the importance of a standard retail price, and alleges generally that confusion and damage have resulted from sales at less than the prices fixed. But the advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them, and not to the complainant. It is through the inability of the favored dealers to realize these profits, on account of the described competition, that the complainant works out its alleged injury. If 51 L.R.A.(N.S.)

there be an advantage to a manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system.

"But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer. People v. Sheldon, 139 N. Y. 251, 23 L.R.A. 221, 36 Am. St. Rep. 690, 34 N. E. 785; Judd v. Harrington, 139 N. Y. 105, 34 N. E. 790; People v. Milk Exchange, 145 N. Y. 267, 27 L.R.A. 437, 45 Am. St. Rep. 609, 39 N. E. 1062; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, affirmed on appeal in 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Chapin v. Brown Bros. 83 Iowa, 156, 12 L.R.A. 428, 32 Am. St. Rep. 297, 48 N. W. 1074; Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; W. H. Hill Co. v. Gray, 163 Mich. 12, 30 L.R.A.(N.S.) 327, 127 N. W. 803.

"The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes. No distinction can properly be made by reason of the particular character of the commodity in question. It is not entitled to special privilege or immunity. It is an article of

75 S. C. 378, 9 L.R.A.(N.S.) 501, 55 S. E. 973, 9 Ann. Cas. 902; *Ferris v. American Brewing Co.* 155 Ind. 539, 52 L.R.A. 305, 58 N. E. 701; *Butterick Pub. Co. v. Fisher*, 203 Mass. 122, 133 Am. St. Rep. 283, 89 N. E. 189; *Elliman Sons & Co. v. Carrington & Son* [1901] 2 Ch. 275, 70 L. J. Ch. N. S. 577, 49 Week. Rep. 532, 84 L. T. N. S. 858; *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. Supp. 91; *Grogan v. Chaffee*, 156 Cal. 611, 27 L.R.A.(N.S.) 395, 105 Pac. 745; *Com. v. Grinstead*, 111 Ky. 203, 56 L.R.A. 709, 63 S. W. 427; *Fowle v. Park*, 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep. 658.

A contract or combination which restricts competition in any particular way is not *per se* void.

Reed v. Saslaff, 78 N. J. L. 158, 73 Atl. 1044; *Herriman v. Menzies*, 115 Cal. 16, 35 L.R.A. 318, 56 Am. St. Rep. 81, 44 Pac. 660, 46 Pac. 730; *Grogan v. Chaffee*, 156 Cal.

611, 27 L.R.A.(N.S.) 395, 105 Pac. 745; *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. Supp. 91; *Elliman Sons & Co. v. Carrington & Son* [1901] 2 Ch. 275, 70 L. J. Ch. N. S. 577, 49 Week. Rep. 532, 84 L. T. N. S. 858; *State v. Eastern Coal Co.* 29 R. I. 254, 132 Am. St. Rep. 817, 70 Atl. 1, 17 Ann. Cas. 96; *Com. v. Grinstead*, 111 Ky. 203, 56 L.R.A. 709, 63 S. W. 427; *State v. Duluth Bd. of Trade*, 107 Minn. 506, 23 L.R.A.(N.S.) 1260, 121 N. W. 395; *Fowle v. Park*, 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep. 658; *Cooke, Combinations*, 2d ed. § 125; *Eddy, Combinations*, § 195; *Ray, Contractual Limitations*, p. 223.

An agreement between a number of persons to act concertedly in fixing prices at which they will sell a particular product in a particular city is not illegal as being in restraint of trade, unless it appears that they have a monopoly of that product.

commerce, and the rules concerning the freedom of trade must be held to apply to it. Nor does the fact that the margin of freedom is reduced by the control of production make the protection of what remains in such a case a negligible matter. And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

Mr. Justice Holmes dissented upon the ground that the interests of the public, at least, where the necessities of life are not involved, are not unduly prejudiced by agreements seeking to maintain a fixed retail price, saying: "The only question is whether the law forbids a purchaser to contract with his vendor that he will not sell below a certain price. This is the important question in this case. I suppose that in the case of a single object, such as a painting or a statute, the right of the artist to make such a stipulation hardly would be denied. In other words, I suppose that the reason why the contract is held bad is that it is part of a scheme embracing other similar contracts, each of which applies to a number of similar things, with the object of fixing a general market price. This reason seems to me inadequate, in the case before the court. In the first place, by a slight change in the form of the contract the plaintiff can accomplish the result in a way that would be beyond successful attack; if it should make the retail dealers also agents in law as well as in name, and retain the title until the goods left their hands, I cannot conceive that even the present enthusiasm for regulating the prices to 51 L.R.A.(N.S.)

be charged by other people would deny that the owner was acting within his rights. It seems to me that this consideration by itself ought to give us pause.

"But I go farther. There is no statute covering the case; there is no body of precedent that, by ineluctable logic, requires the conclusion to which the court has come. The conclusion is reached by extending a certain conception of public policy to a new sphere. On such matters we are in perilous country. I think that at least it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear. What, then, is the ground upon which we interfere in the present case? Of course, it is not the interest of the producer. No one, I judge, cares for that. It hardly can be the interest of subordinate vendors, as there seems to be no particular reason for preferring them to the originator and first vendor of the product. Perhaps it may be assumed to be the interest of the consumers and the public. On that point I confess that I am in a minority as to larger issues than are concerned here. I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution) as fixing a fair price. What really fixes that is the competition of conflicting desires. We, none of us, can have as much as we want of all the things that we want. Therefore, we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it, and buy something else. Of course, I am speaking of things that we can get along without. There may be necessities that sooner or later must be dealt with like short rations in a shipwreck, but they are not Dr. Miles's medicines. With regard to things like the latter, it seems to me that the point of most profitable returns marks the equilibrium of

Ray, Contractual Limitations, p. 223; Cooke, Combinations, pp. 267, 268; Herri-man v. Menzies, 115 Cal. 16, 35 L.R.A. 318, 56 Am. St. Rep. 81, 44 Pac. 660, 46 Pac. 730; Walsh v. Dwight, 40 App. Div. 513, 58 N. Y. Supp. 91; Marsh v. Russell, 66 N. Y. 288; United States v. Nelson, 52 Fed. 646; Export Lumber Co. v. South Brooklyn Sawmill Co. 54 App. Div. 518, 67 N. Y. Supp. 626; Phillips v. Iola Portland Cement Co. 61 C. C. A. 19, 125 Fed. 593; Over v. Byram Foundry Co. 37 Ind. App. 452, 117 Am. St. Rep. 327, 77 N. E. 302; State v. Duluth Bd. of Trade, 107 Minn. 506, 23 L.R.A. (N.S.) 1260, 121 N. W. 395; Meredith v. New Jersey Zinc & I. Co. 55 N. J. Eq. 211, 37 Atl. 539; Oakdale Mfg. Co. v. Garst, 18 R. I. 484, 23 L.R.A. 639, 49 Am. St. Rep. 784, 28 Atl. 973; State v. Eastern Coal Co. 29 R. I. 254, 132 Am. St. Rep. 817, 70 Atl. 1, 17 Ann. Cas. 96.

social desires, and determines the fair price in the only sense in which I can find meaning in those words. The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable, for it is so alleged and the case is here on demurrer; so I see nothing to warrant my assuming that the public will not be served best by the company being allowed to carry out its plan. I cannot believe that, in the long run, the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own, and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get."

The decision of the Supreme Court in the foregoing case is followed without discussion in Kellogg Toasted Corn Flake Co. v. Buck, 208 Fed. 383.

In *W. H. Hill Co. v. Gray*, 163 Mich. 12, 30 L.R.A. (N.S.) 327, 127 N. W. 803, the court, adopting the reasoning in *John D. Park & Sons Co. v. Hartman*, 12 L.R.A. (N.S.) 135, 82 C. C. A. 158, 153 Fed. 24, held that a system of contracts by which a manufacturer of medicine under a secret formula undertakes to control the retail price by fixing the price at which it shall be sold, and the dealers who may secure it, is void as in restraint of trade.

That the fact that a contract is part of a system of similar or interlocking contracts may show a restraint imposed by it to be an unreasonable one, see discussion in note to *Grogan v. Chaffee*, 27 L.R.A. (N.S.) 395.

In *D. Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, 128 Pac. 1041, an action to enjoin defendants from selling or offering for sale chocolate manufactured by plaintiffs except at prices fixed by the manufacturer, it was held that the fact that the product was manufactured, prepared, and packed in accordance with secret processes and formulae was in no way material. So far as the validity of the contract was concerned, the 51 L.R.A. (N.S.)

Messrs. John E. Humphries, Charles E. Remsburg, and William A. Johnson, for respondent:

The owner of a trademark has no right to control the product or to fix the prices.

Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373-377, 55 L. ed. 502-504, 31 Sup. Ct. Rep. 376; *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722; *John D. Park & Sons Co. v. Hartman*, 12 L.R.A. (N.S.) 135, 82 C. C. A. 158, 153 Fed. 26.

Ellis, J., delivered the opinion of the court:

In this action, the plaintiff seeks to enjoin the defendant from selling flour manufactured by the plaintiff at less than the retail price fixed by the plaintiff in a contract of sale made with the defendant, and to recover damages in the sum of \$1,000.

court declared its adherence to its views expressed in *Grogan v. Chaffee*, supra, distinguishing *John D. Park & Sons Co. v. Hartman*, supra, and the decision of the United States Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376, on the ground that the contracts held invalid in those cases involved the whole supply of the product in question, which was not the situation in the case then before them. It was accordingly held that the stipulation in question was valid, both at common law as being no more than necessary to afford a fair protection to the business of the complainant, and not so large as to interfere with the interests of the public, and under the Cartwright act (Stat. 1907, p. 984), as amended in 1909 (Stat. 1909, p. 593), —especially in view of the proviso in the amendatory act of 1909 that "no agreement, combination, or association shall be deemed to be unlawful, or within the provisions of that act, the object and business of which are to conduct its operations at a reasonable profit."

In *Waltham Watch Co. v. Keene*, 202 Fed. 225 (affirmed without opinion in 209 Fed. 1007), the court, in discussing the question whether the violation of a so-called license agreement or restriction fixing the price at which plaintiff's product might be resold by dealers constituted infringement of the patent, said that the alleged right under the contract to retake the property on paying to the purchaser the price paid by him in case it is less than that fixed by the patentee or his assignee does not operate to make the sale in the first instance a conditional one which the law will recognize.

That a contract by which a manufacturer constitutes another an exclusive sales agent and fixes the list price of the product does not violate the prohibition of the Sherman act against combinations in restraint of commerce, see *Virtue v. Creamery Package Mfg. Co.* 227 U. S. 8, 57 L. ed. 393, 33 Sup. Ct. Rep. 202.

E. S. O.

The complaint alleges, in substance: That the plaintiff is a Washington corporation with its principal place of business at Seattle, where it has erected a large manufacturing plant and installed special machinery for manufacturing a special brand of flour known as "Fisher's Blend of Patent Flour." That the cost of manufacturing this flour is greater than that of ordinary flour. That the plaintiff has widely, and at great expense, advertised this flour as a blended flour, pure, wholesome, and of unusual excellence, and has used certain copyrighted designs and the above tradename to acquaint the public with the flour, so that it has become widely known as of unusual excellence and as of higher price than the ordinary patent flour, and large quantities of it are sold in Seattle and King county. That it is necessary to operate the mill to its full capacity in order to continue the business at a profit. That the flour is sold in all of its markets in constant and keen competition with many other brands of patent flour of all qualities, and the quantity of plaintiff's flour so sold is only a very small part of the pure blended flour and of the quantity of ordinary patent flour sold in each of such markets. That it is necessary to sell the flour through all retail dealers in each community rather than through one or two, as may be profitably done, with ordinary patent flours, so that the good will of the retail dealers is necessary to the success of the company. That in order to keep this good will it is necessary to maintain a minimum retail price offering a reasonable profit to the retailer. That, if the uniform minimum price is not maintained, the reputation of the flour will be injured, the good will of the dealers lost, and the plaintiff will be prevented from operating its mill at a profit. That the defendant conducts a retail grocery store in Seattle, and on or about October 3, 1911, entered into an oral contract with the plaintiff, agreeing to purchase from the plaintiff a carload of this flour at the uniform wholesale price, and further agreeing not to sell the flour at less than a certain minimum retail price. That these prices were the same as the wholesale and retail prices maintained by the plaintiff and its other customers, and permit no more than a reasonable profit. That, according to the contract, the plaintiff delivered an instalment of the flour on this purchase, the defendant accepting therewith a written invoice containing the following stipulation: "Retail prices. Our flour is sold on condition, which is made a part of the consideration of the sale of said goods, that the purchaser, if he retails the same, will maintain our fixed minimum retail selling prices, and if he

wholesales them, they are sold subject to the same conditions. Nothing in the above conditions shall prevent the purchaser from fixing the selling price in excess of the above lists when cost of transportation or other local conditions necessitate the same." That, since the delivery of the flour to the defendant, he has violated the agreement by selling the flour at less than the agreed price, and has widely advertised such sales, which price is less than the general retail price of all the other patent flours so sold in Seattle and the state of Washington. That his purpose in so doing is to attract customers to his store, and that he has threatened to continue this practice. That the defendant's action in this respect is causing damage to the plaintiff by injuring the reputation of the flour with the public and destroying its sale to retailers in Seattle and throughout the state. That, by reason of defendant's action, other retailers are threatening to follow his example, which will curtail the sales of the flour and cause irreparable damage to the plaintiff. That it has already decreased the sales of the flour, by rendering it unpopular with the retailers, to the plaintiffs damage in the sum of \$1,000. That the plaintiff has no adequate remedy at law. The defendant demurred to the complaint upon the ground that it does not state a cause of action, and that the court has no jurisdiction of the subject-matter. The demurrer was sustained, and the plaintiff electing to stand upon its complaint, the action was dismissed. The plaintiff appeals.

A single question is presented: Has a manufacturer who has given a reputation to particular goods which he creates, the right to fix in his contract of sale to retailers a reasonable minimum price at which those goods shall be sold to consumers?

It may be premised as a postulate that a manufacturer who has imparted a reputation to his goods may lawfully employ any means to secure the legitimate benefits of that reputation not inhibited by statutory enactment or inimical to a sound public policy.

It is not claimed, on the one hand, that the contract in question is inhibited by any statute of this state. No question of interstate commerce is involved. We are therefore not here concerned with the Sherman anti-trust act (act July 2, 1890, chap. 647, 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200). Nor is it claimed, on the other hand, that the fact that the article sold was under a tradename or in a trade dress, or the fact that it was manufactured by a patented process, affords the contract any immunity from invalidity which it would not otherwise possess. These things must be re-

garded as immaterial to this discussion. No question of public service corporations is involved. What we shall say has no application to contracts of corporations charged with public functions or duties as such.

The question is thus reduced to the inquiry whether at common law the contract here involved is violative of any canon of public policy. In considering this question, much confusion may be avoided by marking the distinction not always observed in the adjudicated cases between those contracts which, since the earliest history of the law on the subject, have been designated as "contracts in restraint of trade," and those more correctly designated as "contracts in restraint of competition." The term "contracts in restraint of trade" has so long been applied to undertakings not to pursue a particular profession, trade, or business, and has so thoroughly acquired that conventional significance, as to render its use in any other connection confusing. The rules relating to such contracts are of long standing and thoroughly established. Such contracts are valid only when restricted as to time and to place, and when reasonably necessary to the protection of the party in whose interest they are made. Conversely, stated, such contracts, when without limit as to time or place, are invalid. *Long v. Towl*, 42 Mo. 540, 97 Am. Dec. 355. The broader doctrine inhibiting, as contrary to public policy, all contracts which, by any other means, tend unreasonably to restrict competition, is of much more recent development, and is much less thoroughly settled. This doctrine has to do with the rules of public policy relating to control of markets. See note to *Harding v. American Glucose Co.* 64 L.R.A. 738, 74 Am. St. Rep. 238, 239; *Noyes, Intercorporate Relations*, § 336; 2 *Eddy Combinations*, §§ 719, 722; *Cooke, Combinations, Monopolies, & Labor Unions*, 2d ed. § 160.

This broader doctrine is primarily directed against monopoly in any form, and seeks to protect the public interest by holding invalid all contracts by which monopoly of a given market may be either created or sustained, or, as such, made profitable to its beneficiaries, where the right to make them is not incidental to a legal monopoly such as is accorded by the patent laws. With these last we are not here concerned. It is manifest that in case of such contracts the public interest is not conserved by mere limitations either as to time or space. The public interest can only be secured by a prohibition of all contracts having a tendency to create or foster monopoly by a control of any given market. *Noyes, Intercorporate Relations* 2d ed. § 357. Since limitations

of time and space do not serve as the test of the validity of contracts in restraint of competition, the test must be sought in the reason which underlies the rule of public policy. It must be found in the tendency of the given contract to control the given market. If the contract has that tendency, it is against public policy. If it does not have that tendency, it is not. In applying this test, the public interest is always the first and controlling consideration. A contract or combination creating a general—that is to say, complete—restraint or restriction, however slight, within a given market, is essentially invalid because it must either result from, or tend to produce, a monopoly. Its inevitable tendency is to destroy competition. Under an economic system founded upon competition, every general restriction—that is, every restriction covering all or a controlling fraction of a given commodity—is essentially unreasonable. It is not fairly necessary to the protection of the manufacturer. Having a monopoly, he needs no protection. It is not in any sense beneficial to the public, because it does not tend to create an incentive to increased excellence of product in order to maintain the better price, but, because of the monopoly, has a contrary effect.

And again, when the contract fixing the price is not ancillary to some main lawful contract, the sole object of the contract is to restrain competition and enhance prices, and its only tendency is to control the market. It is therefore invalid because of this tendency, without reference to its reasonableness in other particulars. In such a case, there is no main lawful purpose to subserve which partial restraint is permissible; hence, nothing by which to measure the reasonableness of the restraint. Its only measurable tendency would be to create a monopoly. Such a contract is therefore invalid. *United States v. Addyston Pipe & Steel Co.* 46 L.R.A. 122, 29 C. C. A. 141, 85 Fed. 271; *State v. Duluth Bd. of Trade*, 107 Minn. 506, 23 L.R.A. (N.S.) 1260, 121 N. W. 395.

But it does not follow that every contract restraining competition as to an insignificant part of the total of a given commodity in a given market in any degree is obnoxious to public policy. At common law, contracts containing limited restrictions on competition as incidental to some main contract, and not entered into for the sole purpose of suppressing competition or controlling the market, are not always and necessarily invalid. 2 *Eddy, Combinations*, § 723. "A monopoly created by the Crown seems to have been necessarily illegal, and, subject to the limitations hereafter considered, the same seems true of what is

strictly a monopoly; that is, a complete restriction upon competition, resulting from the acts of individuals. But, however it may have been as to restrictions upon competition created by the Crown, it seems clear enough that not all restrictions upon competition resulting from the acts of individuals are illegal. This results from the view that seems to be generally accepted, that the economic effects of a restriction upon competition are not necessarily evil; in other words, that unrestricted competition results in economic evils, capable of prevention or removal by some degree, at least, of restriction upon such competition. A different view of such economic effects has, however, led to judicial declaration in sweeping condemnation of any restriction upon competition, though, as may readily be inferred, there is no decision to that effect." *Cooke, Combinations, Monopolies & Labor Unions*, § 118. *State v. Duluth Bd. of Trade*, 107 Minn. 506, 23 L.R.A. (N.S.) 1260, 121 N. W. 395, 410. See also *Noyes, Intercorporate Relations* 2d ed. § 336; 1 *Eddy, Combinations*, §§ 307-324, incl.; *Herriman v. Menzies*, 115 Cal. 16, 35 L.R.A. 318, 56 Am. St. Rep. 81, 44 Pac. 660, 46 Pac. 730; *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 23 L.R.A. 639, 49 Am. St. Rep. 784, 28 Atl. 973; *State v. Eastern Coal Co.* 29 R. I. 254, 132 Am. St. Rep. 817, 70 Atl. 1, 17 Ann. Cas. 96; *Lanyon v. Garden City Sand Co.* 223 Ill. 616, 9 L.R.A. (N.S.) 446, 79 N. E. 313, 7 Ann. Cas. 50.

Partial restrictions have been held valid where the restraint was in different particulars. For example: The contract may limit the vendee's right of sale to a certain territory,—a restriction as to place. *Phillips v. Iola Portland Cement Co.* 61 C. C. A. 19, 125 Fed. 593. It may provide that the vendee deal exclusively with the vendor, and only in articles of the vendor's manufacture,—a restriction as to person. *Brown v. Rounsavell*, 78 Ill. 589; *Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co.* 75 S. C. 378, 9 L.R.A. (N.S.) 501, 55 S. E. 973, 9 Ann. Cas. 902; *Ferris v. American Brewing Co.* 155 Ind. 539, 52 L.R.A. 305, 58 N. E. 701; *Butterick Pub. Co. v. Fisher*, 203 Mass. 122, 133 Am. St. Rep. 283, 89 N. E. 189. Again, the restriction may be as to the price which the retailer must charge for goods purchased from the manufacturer,—the case here involved. *Elliman, Sons, & Co. v. Carrington & Son*, [1901] 2 Ch. 275, 70 L. J. Ch. N. S. 577, 49 Week. Rep. 532, 84 L. T. N. S. 858; *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. Supp. 91; *Grogan v. Caafee*, 156 Cal. 611, 27 L.R.A. (N.S.) 395, 105 Pac. 745; *Com. v. Grinstead*, 111 Ky. 203, 56 L.R.A. 709, 63 S. W. 427. 51 L.R.A. (N.S.)

The foregoing authorities make it clear that the courts now generally recognize as the basis of the rule of public policy against restraints on competition the tendency to create a monopoly. It is manifest that a restriction of competition between the owners of an insignificant part of the entire supply of a given commodity in a given community could not create a monopoly nor injuriously affect the public. It is equally clear that the restriction need not be a complete restriction covering the entire supply of a given commodity in order to injuriously affect the public; but, unless it be held that every restriction is *per se* illegal, where are we to draw the line? Obviously, the answer must be found in the facts of each particular case. If, considering all of the circumstances, including the character of the business, the necessities of the parties, the existence of other contracts, if any, of the same character, the restriction results or tends to result in a substantial control of the supply or price of a given commodity within a given area by a single dealer or a few dealers, or by what amounts to a combination of all of the dealers, the contract is invalid. Substantial control of a market by one or a few is, of course, as injurious to the public as an absolute control. Wherever, therefore, there exists a monopoly or combination, or the contract creates or tends to create a monopoly or such approximation to monopoly as to practically bar others from entering the field by the chance of failure, a contract fixing retail prices is void as essentially injurious to the public. "It is not essential, however, to the control of the market, within the rule, that it should be complete. Practical control is sufficient; and this does not imply an absolute elimination of competition. On the other hand, a mere restriction of competition does not give control of the market and is not unlawful. The commercial maxim 'competition is the life of trade,' while not adopted as a maxim of jurisprudence, finds a place in many decisions, and the language of the courts is often broad enough to include, as opposed to public policy, every combination in restraint of competition, regardless of degree. But the weight of authority—as well as sound principle—supports the view that every combination restricting competition is not invalid,—that restriction, to be unlawful, while not necessarily amounting to total suppression, must give substantially the control of the market. Just where the line is to be drawn between a lawful and unlawful restriction of competition—just what restriction is practical suppression—must depend largely upon the facts and circumstances of each case. As said in *Hoff-*

man v. Brooks, 11 Ohio L. J. 259, a case not officially reported: "Those engaged in any trade or business may, to such limited extent as may be fairly necessary to protect their interests, enter into agreements which will result in diminishing competition and increasing prices. Just the extent to which this may be done the courts have been careful not to define, just as they have refused to set monuments along the line between fairness and fraud." Noyes, *Intercompany Relations*, § 356. Cooke, *Combinations, Monopolies, & Labor Unions*, § 120. As exemplifying that the facts in each case must determine the effect of the contract, and that practical control of the market or any approximation to monopoly marks the line between valid and invalid restrictions, see the following decisions: *Herriman v. Menzies*, 115 Cal. 16, 35 L.R.A. 318, 56 Am. St. Rep. 81, 44 Pac. 660, 46 Pac. 730; *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. Supp. 91; *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 23 L.R.A. 639, 49 Am. St. Rep. 784, 28 Atl. 973; *Phillips v. Iola Portland Cement Co.* 61 C. C. A. 19, 125 Fed. 593; *Marsh v. Russell*, 66 N. Y. 288; *Export Lumber Co. v. South Brooklyn Sawmill Co.* 54 App. Div. 518, 67 N. Y. Supp. 626; *United States v. Nelson* (D. C.) 52 Fed. 646; *State v. Duluth Bd. of Trade*, 107 Minn. 506, 23 L.R.A. (N.S.) 1260, 121 N. W. 395; *Meredith v. New Jersey Zink & I. Co.* 55 N. J. Eq. 211, 37 Atl. 539.

The fact that the circumstances of each particular case and the situation of the parties, in addition to the effect on the public welfare, must be considered, and that, of all circumstances, the dominant consideration is the welfare of the public, makes it difficult to state by definition, except in the broadest way, any rule for determining the validity of any such contract as that here involved. Perhaps the following is as near a complete definition as we can formulate from the adjudicated cases: Contracts fixing prices as incidental to some main contract, and involving less than a controlling part of a given commodity in a given market, not proceeding from, nor tending to create, or to maintain, a monopoly, will be sustained when the restriction is, under the circumstances of the particular case, reasonable in reference to the interests of the parties, and reasonable in reference to the interests of the public; that is to say, when the price fixed is fairly necessary to the protection of the covenant, and fair to the public in that it furnishes only a reasonable profit to the contracting parties. Lacking these elements, such contracts are invalid as contrary to public policy. As said by Lord Macnaghten in *Nordenfelt v. Maxim-Nordenfelt Guns & Ammunition Co.* [1894] 51 L.R.A. (N.S.)

A. C. 565: "The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: Restraint of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable;—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public." And again, as said by Mr. Justice Hughes in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U. S. 373, 406, 55 L. ed. 502, 518, 31 Sup. Ct. Rep. 376, 384: "To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenant. Otherwise restraints of trade are void as against public policy."

Measured by our definition, which, as it seems to us, is as stringent as any fair construction of the authorities will sustain, the facts and circumstances as alleged in the complaint disclose no sinister purpose in the contract pleaded, nor any tendency inimical to the public interest. It may be objected that, since protection against general restriction is the basis of the rule of public policy, then if a general restriction is brought about by all, or nearly all, of the dealers in a given commodity in a given area making contracts of the same character with all retailers, the public interest is injuriously affected just as if there were an actual combination or contract creating or approximating a monopoly. The possibility of such a result as a mere coincidence, however, is too remote to furnish a reason for declaring the contracts of a single manufacturer who has no monopoly or approximation thereto void. If a controlling number of manufacturers or wholesale dealers in a given commodity should make identical contracts with the retailers of that locality, it would doubtless be the result of an agreement, secret or otherwise, between them, and all such contracts would be invalid as in aid of a combination in restraint of competition. The coincidence would be almost

conclusive evidence of the illegal combination, and sufficient basis for declaring all of the contracts void. No such condition, however, is presented by the record before us.

Such a contract as that here in question is of interest to the public only where the whole of a given commodity, or a measurable approximation to the whole of that commodity, is in the control of one of the contracting parties, or of some combination of which he is a member or which dictates his policy. It is monopoly, either actual or approximate, hence potential, against which the public interest is arrayed, not a fair reward to individual effort and initiative, which is as essential to competition as a competitive price. In the absence of a monopoly, either actual or potential, as above defined, a contract fixing retail prices to the consumer cannot have an effect appreciably inimical to the public interest because it cannot fix prices at an unreasonably high figure without defeating its own purpose by either signally failing to maintain the fixed price, or putting the individual manufacturer out of business. In either case, it fails to restrict competition. Either the consumers will not buy the product at the price fixed or, if they do, the high price will stimulate competition in production and the price will inevitably fall. The given manufacturer will thus be compelled to accept one or the other alternative. He must either fix the price to cover only a reasonable profit, or he must retire from business, and this for the simple reason that, in the absence of a monopoly either actual or potential, of the entire supply, the natural conditions of trade will defeat any attempted restriction of competition. Under our present competitive system, the public is as vitally interested in the maintenance of competition in the excellence of the product as it is in competition in prices. The one is as essential to value received at any price as the other is to a reasonable price for any value. Lacking either, the public will eventually be the loser, either in quality of product or in enhancement of price, which comes to the same thing. No sound public policy will insist upon the complete sacrifice of competition in one of these elements to competition in the other. A monopoly, however, either complete or approximate, tends to the destruction of both; hence is on all scores against public in the hands of one man or a combination policy. But where a given product is not of men, there is no monopoly, either actual or proximate, and the public has no interest hostile to a contract by a single manufacturer among many, intended and reasonably calculated to enable him to maintain

an unusual standard of excellence in that part of the aggregate of the given product which he puts out. On the contrary, the public interest, so far as it is touched by the contract, is in sympathy with it, because served by it.

Applying the principles which we have developed from the cases, it seems clear that this contract is valid. The facts alleged negative the idea of any existing monopoly in the appellant, and the contract has no tendency to create one. The retail selling price was fixed merely as ancillary to the contract of sale to the respondent. The fixing of the price was reasonably necessary to protect the appellant, and reasonable as applied to the public, in that it provides only for a fair profit. Fairly considered, the contract, while slightly restricting competition, is primarily intended to promote competition by enabling the appellant to compete with other high grade flours while maintaining the excellence of its product. As said by the supreme court of California in a case closely parallel to that before us (*Grogan v. Chaffee*, 156 Cal. 611, 27 L.R.A.(N.S.) 395, 105 Pac. 745): "Under these circumstances, we see no reason why the contract alleged by the plaintiff should not, as between the parties to it, be held to be valid. It violates no canon of public policy. By its terms the buyer is not precluded from engaging in any lawful trade. He may sell other olive oil at any price and on any conditions satisfactory to him. The producer was, in the first instance, under no obligation to sell his oil, and when he did sell it had the right to exact, as part of the consideration for the sale, a promise by the purchaser that he would not sell it at less than a stipulated price. There is nothing either unreasonable or unlawful in the effort by a manufacturer to maintain a standard price for his goods. It is simply a means of securing the legitimate benefits of the reputation which his product may have attained. Contracts similar to the one under discussion have been considered in a number of cases, and have generally been upheld where, as here, they had no tendency to create a monopoly." After citing and reviewing many authorities, the opinion continues: "The necessary result of what we have said is that the complaint must be held sufficient. It is alleged that the defendant bought oil under an express agreement that he would not sell it at less than given prices, and that he had sold and threatened to sell it at less than such prices. This is a violation of plaintiff's rights under his contract. Whether this contract could be enforced against persons who might come into possession of plaintiff's oil, with notice of the restriction

imposed by him on its sale, but without having made any direct agreement to respect such restriction, is a question not here presented. See *Garat v. Hall & L. Co.* 179 Mass. 588, 55 L.R.A. 631, 61 N. E. 219."

In *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. Supp. 91, the New York supreme court, touching a contract closely analogous to that here involved, said: "It is difficult to see upon what ground it can be claimed that such a contract is illegal. That the defendants would have the right to establish agencies for the sale of their goods, or to employ others to sell them, at such prices as the defendants should designate, cannot be disputed. Nor can it be that a manufacturer of merchandise cannot agree to sell to others upon condition that the vendees, in selling at retail, should charge a specified price for the goods sold, or should sell only the manufactured product of the manufacturer. If a dealer in articles of this kind, for his own advantage, agrees to confine his business to a particular line of goods, or agrees with the manufacturers to charge a particular price for the articles which he sells in his business, such an agreement is not illegal, as in restraint of trade, or as tending to create a monopoly, as there is nothing in the agreement to prevent others from engaging in the business, or the manufacturers of other articles from selling their products to anyone who is willing to buy."

In *Com. v. Grinstead*, 111 Ky. 203, 56 L.R.A. 709, 63 S. W. 427, notwithstanding the existence of a statute expressly prohibiting any person, firm, or corporation doing business in Kentucky from entering into any pool, trust, combine, agreement, confederation, or understanding with any other person, firm, or corporation for the purpose of regulating, controlling, or fixing prices, the court upheld the plan of fixing minimum retail prices of certain brands of goods of established reputation by contracts between the manufacturer and retailer, on the ground that there was no concerted action among the manufacturers, since the price was fixed by each manufacturer on his own product only.

The English courts maintain the same doctrine. *Elliman Sons & Co. v. Carrington & Son* [1901] 2 Ch. 275, 70 L. J. Ch. N. S. 577, 49 Week. Rep. 532, 84 L. T. N. S. 858; *National Phonograph Co. v. Edison-Bell Consol. Phonograph Co.* [1908] 1 Ch. 335, 77 L. J. Ch. N. S. 218, 98 L. T. N. S. 291, 24 Times L. R. 201.

That the tendency to monopoly, complete or substantial, is the real test in all cases involving the restraint of competition, is demonstrated by cases involving labor unions. Independent of statute, the test of

legality as to contracts or combinations in restraint of competition is the same for sellers of merchandise as for sellers of labor. This, so far as we are advised, has never been judicially challenged. "On principle, it is not apparent why the legality of combinations among employees as such should be subjected to any different test from that applied to combinations among employers as such, or among tradesmen as such." *Cooke, Combinations, Monopolies & Labor Unions*, § 52; 27 Cyc. 904; *Herriman v. Menzies*, 115 Cal. 16, 35 L.R.A. 318, 56 Am. St. Rep. 81, 44 Pac. 660, 46 Pac. 730; *Milwaukee Masons' & Builders' Assn. v. Niezzerowski*, 95 Wis. 129, 37 L.R.A. 127, 60 Am. St. Rep. 97, 70 N. W. 166; *Gatzow v. Buening*, 106 Wis. 1, 49 L.R.A. 475, 80 Am. St. Rep. 1, 81 N. W. 1003; *Froelich v. Musicians' Mut. Ben. Assn.* 93 Mo. App. 383; *O'Brien v. Musical Mut. Protective & Benev. Union*, 64 N. J. Eq. 525, 54 Atl. 150; *Folsom v. Lewis*, 208 Mass. 336, 35 L.R.A. (N.S.) 787, 94 N. E. 316; *More v. Bennett*, 140 Ill. 69, 15 L.R.A. 361, 33 Am. St. Rep. 216, 29 N. E. 891.

It would seem that the doctrine which would hold the contract here involved a contract or combination in illegal restraint of competition, carried to its logical extent, would render illegal practically every trades union or labor union in the country. The courts should be slow to adopt a rule of such far-reaching results. Such unions or associations for the purpose of maintaining wages are now universally recognized as legal. 24 Cyc. 819 C.

The respondent relies solely upon the following decisions: *John D. Park & Sons Co. v. Hartman*, 12 L.R.A. (N.S.) 135, 82 C. C. A. 158, 153 Fed. 24; *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722, and *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376, affirming the decision of the circuit court of appeals in 90 C. C. A. 579, 164 Fed. 803. The decision in *John D. Park & Sons Co. v. Hartman* is not necessarily in antagonism to the views here expressed. That case involved a monopoly. It holds that there is no such analogy between the statutory monopoly accorded by the patent laws and the monopoly resulting from the sole possession of a trade secret as to make it lawful to protect the latter by contracts or notices fixing the retail price, as is permitted in the case of patented articles. The opinion is devoted largely to a demonstration of the proposition, which we deem unquestionably sound, that the owner of a secret formula for the manufacture of a proprietary medicine, though he may protect the secret by contract against its disclosure, cannot protect

the profits resulting from his monopoly in the manufactured article (in that case, *Peruna*) by contracts or notices fixing a minimum price at which the jobbers and retailers shall sell it. That the effect of the contracts there involved was an absolute prevention of any competition in prices, a complete or general restriction as to *Peruna*, because of their application to the whole supply of that article on the market, is shown by the opinion, where it is said: "Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers, and the retailers to maintain prices and stifle competition has been brought about. It is true that the complainant is not in a combination with other makers of *Peruna*.' There are no others. If there were, there would not be a complete or general restraint; for it might then happen that these others, not being bound by any covenants, could supply the public. If the supply to come from them was adequate for the public demand, the public might be in no wise affected." That the learned judge who wrote the opinion recognized the validity of such contracts as between the actual contracting parties, where no monopoly is involved, and when merely ancillary to some main contract, and reasonably necessary to the protection of the retained business of the covenantee, is also evident from the following language which further distinguishes that case from the one before us: "Looking to the averments of the bill as a whole, and to the scheme of business as disclosed by the contracts themselves, we cannot escape the conclusion that the covenants restricting sales and resales have as their prime object the suppression of competition between those who buy to sell again. Any benefit to the retained business to result from them is manifestly but an incident of the main purpose, which is to benefit his vendees and subvendees by breaking down their competition with each other. Restraints which might be upheld if ancillary to some principal contract cannot be enforced if, when unmasked, they appear to be the main purpose of the contract, and not subordinate. The covenants in the contracts signed by the retailers are not even collateral to any sales by the complainant, but to sales made by the wholesalers. Although they run to the complaint, their prime purpose is neither the protection of the retained business of the complainant nor of the wholesaler, but only to prevent competition between retail-

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ers. Covenants protecting the seller of property against the competition of the buyer, by its use against the business retained by the seller, which are upheld if not wider than necessary for that purpose, have been covenants where the main purpose has been to protect the seller himself against competition directed against his retained business." The opinion, when fully considered, fairly recognizes every principle hereinbefore developed from the authorities as sustaining the contract here involved.

In *Bobbs-Merrill Co. v. Straus*, it was held that the sole right to vend a copyrighted book secured by the United States statute to the owner of the copyright does not include the right to impose, by a mere notice printed on the same page with the notice of copyright, a limitation as to the price at which the book shall be sold at retail by future purchasers with whom there is no privity of contract. The distinction from the case in hand is too plain to require further comment.

Nor do we deem the decision of the United States Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* controlling on the facts here presented. In that case, the bill alleged the manufacture of certain proprietary medicines under secret formulæ and processes, and the sale thereof under trade marks and trade dress; that, to prevent injury to its business by the sale of its medicines at cut prices, complainant had adopted a dual system of contracts controlling the sale and resale of its product; that the system contemplated consignments to wholesale dealers, permitting them to sell only to other contracting wholesale dealers and retail dealers who had also contracted with the complainant to sell its goods at fixed prices; that the defendant, refusing to enter into a consignment contract, had induced complainant's wholesale and retail agents, by means of fraudulent representations, to violate their contracts and sell goods of complainant's manufacture to the defendant, with the intention of selling such goods at cut rates to attract customers for other merchandise. An injunction against this practice was sought. It appeared that consignment contracts had been made with over 400 jobbers and wholesalers, and retail agency contracts with 25,000 retail dealers in the United States. The court refused relief on the ground that, by its system of interlocking restrictions, complainant sought to control not only the prices at which its agents might sell its product, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or subpurchasers, and thus fix the amount which the consumer shall pay, eliminating all competition. The court held

that such a system amounts to a restraint of trade, and is invalid both at common law and under the Sherman anti-trust act. It will be noted that the system there involved had no purpose save to create and perpetuate a monopoly which, under any view of the authorities, is invalid. While certain expressions in the opinion might appear contrary to the views we have expressed, the opinion expressly states that the mere fact that some restraint results does not necessarily render the contract invalid, and clearly recognizes the principles upon which the contract here involved must be held valid. Mr. Justice Hughes, speaking for the court, uses the following language: "With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in the adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenant. Otherwise restraints of trade are void as against public policy. As was said by this court in *Gibbs v. Consolidated Gas Co.* 130 U. S. 409, 32 L. ed. 984, 9 Sup. Ct. Rep. 553: 'The decision in *Mitchel v. Reynolds*, 1 P. Wms. 181, s. c., *Smith*, Lead. Cas. 7th Eng. ed. 407, 8th Am. ed. 756, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things, and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is or is not unreasonable. *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351, 49 L. J. Ch. N. S. 338, 42 L. T. N. S. 679, 28 Week. Rep. 623, 44 J. P. 663; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345, 39 L. J. Ch. N. S. 86, 21 L. T. N. S. 661, 18 Week. Rep. 572.'"

The cases upon which the respondent relies are all reviewed and distinguished from a case such as that here presented, in *D. Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, 128 Pac. 1041.

We do not hold that a mere notice printed on the packages or bill of lading, in the absence of express contract to be bound by such notice, would be sufficient to create a

valid restriction of the sale price, however unobjectionable. We do not hold that a manufacturer would have the right by any such notice to pursue his product into the hands of third parties and fix their selling price. The right, where it can be exercised at all, rests in contract, and it would seem that the contract should only be held binding upon the parties to it, except where the breaking of the contract is induced by the fraud of the third party. As observed in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376: "Whatever right the manufacturer may have to project his control beyond his own sales must depend not upon an inherent power incident to production and original ownership, but upon agreement." See also *Garst v. Hall & L. Co.* 179 Mass. 588, 55 L.R.A. 631, 61 N. E. 219, and *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722.

Finally, it seems to us an economic fallacy to assume that the competition which, in the absence of monopoly, benefits the public, is competition between rival retailers. The true competition is between rival articles, a competition in excellence, which can never be maintained if, through the perfidy of the retailer who cuts prices for his own ulterior purposes, the manufacturer is forced to compete in prices with goods of his own production, while the retailer recoups his losses on the cut price by the sale of other articles at, or above, their reasonable price. It is a fallacy to assume that the price cutter pockets the loss. The public makes it up on other purchases. The manufacturer alone is injured, except as the public is also injured through the manufacturer's inability, in the face of cut prices, to maintain the excellence of his product. Fixing the price on all brands of high grade flour is a very different thing from fixing the price on one brand of high grade flour. The one means destruction of all competition and of all incentive to increased excellence. The other means heightened competition and intensified incentive to increased excellence. It will not do to say that the manufacturer has no interest to protect by contract in the goods after he has sold them. They are personally identified and morally guaranteed by his mark and his advertisement. *Mazetti v. Armour & Co.* 75 Wash. 622, 48 L.R.A.(N.S.) 213, 135 Pac. 633. His reputation as a manufacturer, one of his chief assets, is bound up in them. The attitude of the respondent, who has wilfully violated his contract, presents no equities in his favor. The allegations of the complaint show that the public interest will in no wise suffer from an

enforcement of the contract. As between the parties, the appellant is entitled to the relief for which he prays.

The judgment is reversed.

Crow, Ch. J., and Gose, Chadwick, Main, Mount, Morris and Parker, JJ., concur.

WASHINGTON SUPREME COURT.
(Department No. 1.)

ALICE V. ROBINSON, Appt.,
v.

EDWARD ROBINSON, Respnt.

(— Wash. —, 138 Pac. 288.)

Divorce — collusion — vacating.

1. A decree of divorce secured by collusion will not be vacated at the instance of petitioner, in the absence of duress.

Duress — divorce — representation of embarrassment.

2. Representations by a man that his

wife's refusal to secure a divorce from him greatly embarrasses him in his business, and that her continued refusal will compel him to leave the state, are not such duress as to entitle her to a vacation of a collusive decree secured in consequence thereof.

Divorce — perjury — vacation.

3. The fact that a divorce decree is founded on perjury affords no ground for vacating it.

Same — insufficient evidence.

4. Insufficiency of evidence is no ground for vacating a divorce decree.

(February 4, 1914:)

A PPEAL by petitioner from a judgment of the Superior Court for Spokane County sustaining a demurrer to a petition filed to vacate a decree of divorce. Affirmed.

The facts are stated in the opinion.

Messrs. F. W. Girard and Robertson & Miller for appellant.

Messrs. Post, Avery, & Higgins for respondent.

Note. — Right of party obtaining or consenting to divorce to contest its validity.

This note is supplementary to the note to Karren v. Karren, 60 L.R.A. 294, and is the same in its scope as that note, and contains the cases decided since the preparation thereof.

As to the right of third persons to have a decree of divorce set aside, see subdivision "I. Decree of divorce," of note to Tyler v. Aspinwall, 54 L.R.A. 758, upon the general question as to who may sue or take other proceedings to set aside judgments against other parties.

Direct attack by party obtaining divorce.

Supplementing note in 60 L.R.A. 294.

The few recent cases, as ROBINSON v. ROBINSON, are in accord with the clear weight of authority among the earlier cases, as appears from the earlier note, to the effect that no relief will be granted upon a direct application by one who has voluntarily obtained a divorce, to have it set aside for any cause.

Thus, a wife who has obtained a decree of divorce in an action brought by her against her husband cannot contest the validity of the decree; and a decree made seven years later by the same court which granted the divorce, purporting to set aside the divorce decree upon the wife's application and upon the husband's default, without having ever obtained jurisdiction of his person, is of no effect, as against him, to change her status as fixed by the decree of divorce, or to restore her former status as his wife. Buxbaum v. Mason, 48 Misc. 396, 95 N. Y. Supp. 539.

But, as in cases where a husband has

obtained a decree of divorce in his wife's name without her knowledge or consent (see note in 60 L.R.A. 296), it has been held that a wife in whose favor a decree of divorce has been granted against her husband is entitled to have the decree set aside upon motion, where her bringing of the action for a divorce was coerced by her husband, and the decree obtained through fraud and duress on his part. Lake v. Lake, 124 App. Div. 89, 108 N. Y. Supp. 964.

Direct attack by party who has consented to or colluded in procurement of divorce — consent.

Supplementing note in 60 L.R.A. 296.

A husband who, pursuant to an agreement, has consented to a decree of divorce in favor of his wife, and has received a large sum of money in consideration thereof, and in full payment of all his right, title, and interest in and to her estate, cannot, after her death, prosecute a writ of error to a reversal of the decree for the sole purpose of permitting him, as her husband, to procure a further share of her estate. Mallory v. Mallory, 160 Ill. App. 417. (Generally, as to the right to contest the validity of a divorce decree after the death of one or both of the parties, see notes in 57 L.R.A. 583, and 44 L.R.A. (N.S.) 505.)

And a wife who, in consideration of a certain sum of money to her paid and certain promises made by her husband, has consented to his taking a decree of divorce against her upon his cross petition in a suit brought by her for a divorce, cannot, upon his failure to perform his promises, maintain an action to set aside the decree of divorce on the ground of fraud. New-

Gose, J., delivered the opinion of the court:

This is a petition to vacate a decree of divorce entered at the suit of the petitioner. The decree was entered on the 16th day of April, 1912. Nearly ten months later, and on February 4, 1913, the petitioner, the plaintiff in the divorce suit, filed her petition to vacate the decree. A general demurrer to the petition was sustained. The petitioner has appealed.

The petition is too lengthy to be reproduced in full. It alleges, in substance, that the appellant was married to the respondent in October, 1900; that they lived together as husband and wife until the date of the entry of the decree, except during brief intervals when the respondent was away from his home through the inducement and solicitation of one Ethel Irving, with whom he became infatuated in the spring of 1910; that in the month of May, 1911, the respondent, because of his infatuation for Ethel Irving, and at her instigation, brought an action against the appellant for a divorce on the ground of desertion, which he there-

after dismissed because there was no ground for his complaint; that a short time thereafter the respondent, who is a lawyer, commenced to urge and persuade the appellant to apply for and obtain a divorce from him on the ground of desertion, "in order that he might marry the said Ethel Irving;" that he told her that her refusal to comply with his request and secure a divorce "was occasioning him great inconvenience and annoyance in a business way, and he would be ruined financially as well as lose his standing with his friends, employers, and business associates;" that he repeatedly told her that the application would be only a formal matter; that, as soon as the six months' limitation expired after she had secured the decree, "he would remarry her," and in the meantime would straighten up his business affairs; that they could then resume the marital relations; that she frequently inquired of him in what manner his marriage embarrassed him; that he always answered that he could not tell her, "and asked her if she could not believe him and trust him;" that the respondent often told

man v. Newman, 27 Okla. 381, 112 Pac. 1007.

Nor can a wife who, in consideration of a sum of money to be paid to her, consented to her husband's obtaining a divorce without any defense by her, maintain an action to set aside the decree, where the former husband has failed to pay the amounts he promised,—especially where she has delayed action for five years, and the husband has in the meantime remarried and had issue by that marriage. *Whitley v. Whitley*, 60 Misc. 201, 111 N. Y. Supp. 1078.

—collusion.

Supplementing note in 60 L.R.A. 297.

In *McDonald v. McDonald*, 175 Mo. App. 513, 161 S. W. 850, a suit by a wife to have a divorce decree obtained against her by her husband annulled by reason of fraud on his part in its procurement, although she does not seem to have consented to, or even to have colluded in the obtaining of, the decree, the court said that, conceding that it was shown that she was willing to or did collude in allowing the divorce to be granted, this fact furnished no reason why the court, representing the state, should not set aside the decree because of fraud and collusion in a suit of the character of the one under consideration, where no innocent third parties would be affected by the decision.

Collateral attack—by party obtaining divorce.

Supplementing note in 60 L.R.A. 301.

The later cases are in accord with the cases cited in the earlier note, holding that the party who obtains a decree of divorce cannot assail it collaterally. 51 L.R.A. (N.S.)

Thus, a wife who permitted her husband and his attorney to institute in her name proceedings against the husband for a divorce, whereupon a decree in her favor was collusively obtained, is not entitled, after the death of the husband, to attack the decree in a collateral proceeding for the purpose of acquiring the property of the decedent, as his widow. *Johnson v. Johnson*, — Ala. —, 62 So. 706.

So, a wife who obtained a divorce from her husband upon a cross petition filed in a suit brought by him against her in another state in which neither of the parties resided, but to which he had gone for the purpose of obtaining a divorce, cannot contest the validity of the decree, for lack of jurisdiction, in an action subsequently brought by her in the state of their residence for the alienation of her husband's affections. *Bledsoe v. Scaman*, 77 Kan. 679, 95 Pac. 576.

In *Fitz Allan v. Rieutord*, 6 Quebec Pr. Rep. 111, it was held that a woman who has obtained a divorce from her husband and has remarried cannot question the validity of the divorce, after the death of her first husband, by claiming to be his widow, unless the second marriage has been declared void.

And in *Goodwin v. Goodwin*, 158 App. Div. 171, 142 N. Y. Supp. 1102, it was held that a husband who had obtained a judgment for separation against his wife, based upon his affirmation and the court's finding of the validity of their marriage, could not contest the validity of that finding, in a subsequent action to annul the marriage on the ground that it was invalid.

A decree of divorce obtained by a wife in an action brought by her against her husband fixes her status, and she cannot assert

her that, if she did not commence an action for and secure a divorce from him, he would be compelled to leave the state; that she would never hear from him again; that he would give no financial aid to her and to the children; but that, if she would get a divorce, his financial difficulties would soon be satisfactorily adjusted; that he told her that he would employ an attorney to represent her; that he would make default; and that he would make provision for the support of herself and their children until their remarriage. It is further alleged that, after the respondent had pleaded with the appellant for a number of months, "and after talking with one of his lawyers," who assured her that the respondent was greatly embarrassed in a financial way by reason of her refusal to apply for a divorce, and being overpersuaded, she finally consented to go before the court "and tell the situation to the court just as it was, at the same time protesting that she did not want a divorce; that she had no grounds therefore; that she did not believe that a decree would be granted;" that she was advised by the respondent that, in order to get a divorce, "it would be necessary for her to go to the attorney whom he had selected and would pay, and have him present the matter for her;" that pursuant to the "arrangement" she instituted an action for divorce; that the respondent defaulted, and that on the 16th day of April, 1912, a decree of divorce was entered. She further alleges that the facts stated in her complaint and testified to at the trial did not

justify a divorce on the ground of desertion; that, although she and the respondent sustained the marital relation subsequent to the bringing of the action, she did not testify to that fact; that the findings of the court in the divorce action, which are made a part of the petition, are not in accordance with the evidence adduced at the trial and are not supported by the evidence; that at the trial she did not state that she wanted a divorce, but only stated "that she wanted to do what was best for the children;" that the trial court did not believe there was any ground for divorce, and continued the hearing until the afternoon; that the court was then not satisfied of the sufficiency of the evidence to warrant a decree; that he called counsel for the appellant; and the prosecuting attorney to the bench, and the attorney for the appellant stated to the court that he and the attorney for the respondent had been endeavoring for a number of months to bring about a reconciliation, but that they were unable to do so, and expressed the opinion that the appellant and the respondent could no longer live together as husband and wife; that after this statement the court granted the decree; that the statement made by counsel for the appellant "was not the fact;" that the appellant did not desire a divorce, but that she applied for it because of the solicitation of the respondent and because of the representations made by him and one of his attorneys; that she did not know or have reason to believe at such time "that a fraud was being practised upon her or the court;"

the contrary, for the purpose of rendering the husband liable for necessities thereafter furnished to her, notwithstanding he may be in a position to assail the decree for lack of jurisdiction as to him. *Buxbaum v. Mason*, 48 Misc. 396, 95 N. Y. Supp. 539.

A husband who has left his wife and obtained in another state a decree of divorce against her, and has then returned and married another woman, cannot contest the validity of the divorce on the ground that the court which rendered it had no jurisdiction of the parties, in a subsequent proceeding to compel him to support the second wife. *People ex rel. Shradly v. Shradly*, 47 Misc. 333, 95 N. Y. Supp. 991.

So, a wife who has obtained in another jurisdiction a decree of divorce against her husband upon constructive service of process cannot contest the validity of that decree, in a subsequent proceeding in the state of their matrimonial domicile, based upon the continued existence of the marital relation. *Gibson v. Gibson*, 81 Misc. 508, 143 N. Y. Supp. 37 (suit by wife in New York for separation); *Simmonds v. Simmonds*, 78 Misc. 571, 138 N. Y. Supp. 639 (suit by wife in New York for divorce on ground of former husband's adultery with a woman 51 L.R.A. (N.S.)

whom he married in reliance on the former decree).

—by party who has consented to, or colluded in, procurement of divorce.

Supplementing note in 60 L.R.A. 305.

A husband who counseled with and employed the attorney who brought a divorce suit for his wife against him, and colluded in the obtaining of a decree in her favor, adjudging him to be the guilty party, cannot contest the validity of the decree when it is pleaded in defense to an action brought by him for the alienation of his wife's affections. *Hamilton v. McNeill*, 150 Iowa, 470, 129 N. W. 480, Ann Cas. 1912D, 604.

In *Friebe v. Elder*, — Ind. —, 105 N. E. 151, an action for partition brought by a divorced wife, after the death of her former husband, on the theory that the divorce decree was absolutely void, and that she was the widow of the decedent, the court said: "The complaint might possibly warrant an inference that there was collusion between the husband and wife in the procurement of the decree; but, if such inference were permissible, it would not result in rendering the decree void, on a collateral attack by either party." A. C. W.

that she was informed and believes that the decree "was obtained by collusion;" that the respondent had a good defense to the action; that he had not in fact deserted her, but had during the pendency of the suit sustained the marriage relation with her, and was supporting her and the children.

In the divorce suit, the court expressly found that the respondent deserted the petitioner in the month of July, 1909; that he had since that time refused to live with her, and that during all of said time he had lived separate and apart from her, against her will, and without her consent. The divorce decree recites that the prosecuting attorney of Spokane county appeared on behalf of the state and resisted the action. The decree awarded to the appellant the custody of the four minor children, and directed the respondent to pay her the sum of \$200 per month, payable monthly, for the support and maintenance of herself and the minor children, until the further order of the court.

We think the demurrer was properly sustained. There is no allegation that the appellant was feeble in mind or body, or that she stated the real facts to her attorneys or to the court. In short, the petition shows nothing but a collusive arrangement for a divorce. She alleges that she finally consented to go before the court "and tell the situation to the court just as it was." There is no allegation that she did this. Indeed, the inference is either that the facts alleged in her petition are false, or that she testified falsely, or suppressed material facts in the trial of the divorce suit. The gist of her petition is that her husband, who had theretofore commenced a divorce suit against her on the ground of desertion, which he had dismissed, represented to her that the marriage embarrassed him in his business relations; that, while both of the parties knew there was no ground for divorce, he represented that, if she would obtain a divorce, he would get his business affairs adjusted within six months and remarry her.

The appellant relies upon *Graham v. Graham*, 54 Wash. 70, 102 Pac. 891, 18 Ann. Cas. 999; *Pringle v. Pringle*, 55 Wash. 93, 104 Pac. 135, and *McDonald v. McDonald*, 34 Wash. 293, 75 Pac. 865, from this jurisdiction, and *Danforth v. Danforth*, 105 Ill. 603, and *Winder v. Winder*, 86 Neb. 495, 125 N. W. 1095, from other jurisdictions. The case at bar has little in common with any of these cases.

In the *Graham* Case a decree of divorce was entered at the suit of the husband on the 1st day of September, 1908. On the 1st day of October following, the wife filed her petition, praying for an order vacating the

decree, and for permission to withdraw her answer and defend the suit. She alleged in her petition that prior to November, 1907, the marriage relation had been most amicable; that from that time the husband began to grow cold and distant; that in June, 1908, he requested her to procure a divorce, which she refused to do; that his inattention and neglect then became more marked, until finally, with intent to deceive her as to his real motive, he more than once threatened to commit suicide unless she consented to allow him to procure a divorce; that he procured a revolver and made a pretended attempt to take his life; that his conduct so terrorized her and her children that she was reduced in health and so shocked in her nervous system that she was induced to believe that he would commit suicide, and yielded to his demand; that she signed an answer which her husband had caused to be prepared; that her husband thereafter telephoned her that he would take his life if she resisted the divorce or appeared in the courtroom at the hearing; all of which she believed, and for that reason did not appear. She further alleged that all the facts set forth in the complaint were false and untrue; that his threats of suicide were made with intent to cover his real purpose, which was to marry another,—a purpose which he thereafter admitted to her. In holding that the petition was sufficient, the court said that the complaint in the divorce suit was subject to demurrer; that the suit was, in effect, notwithstanding the record, a decree by default; that, while ordinarily "the plea of coercion or duress would not be heard, upon the facts alleged, when we consider the years of intimate relationship existing between these parties, the trust and confidence inspired by mutual interest in the rearing of children, it is not for us to say in this proceeding that appellant was not the victim of a well-founded dread that respondent, the father of her children, would take his life unless she submitted to his demand."

In the *Pringle* Case the wife commenced an action in Mason county against the petitioner and obtained a decree of divorce upon constructive service. Returns were properly made that the husband could not be found in either Mason or Chehalis county. A trial was had, and a decree entered, in which it was adjudged that the wife was entitled to a divorce. The husband alleged in his petition, that he had at all times during the pendency of the action resided in Chehalis county; that his place of residence and postoffice address were well known to his wife. This was held to state a ground for relief. It will be observed, however, that the petition was filed by the innocent party.

In the McDonald Case the court said: "It would seem to be violative of fundamental principles to hold that a divorce decree, fraudulently procured, may not be timely assailed by the *innocent* party to the proceedings." (The italics are ours.)

In the Danforth Case a motion was made to vacate a decree of divorce on the ground that it had been collusively entered. It was made at the term during which the decree was rendered. The court said that the decree had not then become "an unalterable record;" that the decree "with the records of other proceedings of the term, was still *in fieri* and under the control of the court to amend, change, or vacate it, as justice might require." *Winder v. Winder* is to the same effect. There the motion to vacate the decree because of collusion was made at the term at which the decree was entered. It was said: "The court had power to set aside the decree during the term, if satisfied that it had been obtained by fraud or collusion, or if it believed that its former conclusion was erroneous."

In *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 133 Am. St. Rep. 1005, 104 Pac. 159, and *Ferry v. Ferry*, 9 Wash. 239, 37 Pac. 431, we held that a decree of divorce stands upon the same footing as a decree in other cases.

In the *Ferry Case* the wife was the defendant in the divorce action. The decree was granted to her upon her cross complaint. She sought to have the decree vacated upon the ground, among others, that neither party to the divorce suit was a resident of the state at the time the decree was entered. She also alleged that no evidence was taken as to the residence of either party. A demurrer to her complaint was sustained. In passing upon the case, the court said: "We know of no rule prevailing in cases where husband or wife alleges fraud of this kind different from that which controls cases between other classes of parties."

In *Karren v. Karren*, 25 Utah, 87, 60 L.R.A. 294, 95 Am. St. Rep. 815, 69 Pac. 465, the wife sought to vacate a decree of divorce obtained at the suit of the husband. She alleged *inter alia* that her husband represented to her that he was procuring the divorce because of the insistence of his parents, and in order to get the homestead conveyed to him by his father, and that he represented that, after the divorce was obtained, he would remarry her, and that to enable him to procure the deed to the homestead she refrained from appearing and defending the action. In denying the relief, the court said: "The plaintiff, when she gave her consent, must have known that the contemplated divorce could only be procured by a suppression of the facts and false testimony." *Nichols v. Nichols*, 25 N. J. Eq. 60; *Newman v. Newman*, 27 Okla. 51 L.R.A. (N.S.)

381, 112 Pac. 1007, and *Simons v. Simons*, 47 Mich. 253, 645, 10 N. W. 360, announce the same rule.

In *Starbuck v. Starbuck*, 173 N. Y. 503, 93 Am. St. Rep. 631, 66 N. E. 193, the court said: "A party cannot avail himself of a defense or of a right to recover by means of an invalid decree or judgment obtained by him; but, on the other hand, he may not be heard to impeach a decree or judgment which he himself has procured to be entered in his own favor." This is undoubtedly the general rule; there may be exceptions. If the petition when read as an entirety showed that the appellant was, in fact, acting under duress, she might be exempt from the rule stated, but no such fact appears.

The fact that perjured testimony may have been offered to secure the decree affords no ground for vacating it. *Whitley v. Whitley*, 60 Misc. 201, 111 N. Y. Supp. 1078; *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93.

In the *Throckmorton Case* it was said: "On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed."

We think the petition when fairly read shows nothing more than a collusive arrangement to obtain the divorce. The prosecuting attorney appeared and resisted on behalf of the state. The petition does not allege that he failed to discharge his duty to the state. The legal presumption is that he did. There is no allegation that the appellant in the divorce action told the "situation to the court just as it was," as she alleges she had agreed with the respondent to do. Nor is there any allegation, either that she did or that she did not make full disclosures to her counsel who represented her at the instance of the respondent. It is true she alleges that the evidence was not sufficient to justify the decree. That, however, was for the court. In what respect it was insufficient she fails to point out. The presumption is that her counsel did their duty and there is no allegation to the contrary. The presumption is that the court did its duty, and there is no allegation to the contrary except the alleged insufficiency of the evidence. The insufficiency of the evidence would in proper cases justify an appeal, but it will not justify a vacation of the decree. *Morgan v. Williams*, — Wash. —, 137 Pac. 476.

We think the petition is fatally defective. The judgment is affirmed.

Crow, Ch. J., and Ellis, Main, and Chadwick, JJ., concur.

IOWA SUPREME COURT.

WATERLOO LUMBER COMPANY et al.
v.
DES MOINES INSURANCE COMPANY,
Appt.

(— Iowa, —, 138 N. W. 504.)

Insurance — transfer of risk — authority.

1. An insurance agent with power to issue policies has no authority, upon direction by his company to cancel the policy paid for and delivered, to transfer the risk on behalf of the applicant to another company represented by him.

Same — exchange of policies — effect.

2. The exchanging by one who has suffered a fire loss, of a policy which had been

Note. — Power of insurance agent to bind insured by transferring risk from one company to another represented by the former.

Generally, as to insurance brokers as agent for the insured, see note to Morris McGraw Woodenware Co. v. German F. Ins. Co. 38 L.R.A. (N.S.) 614.

This note does not cover the general question whether an insurance agent is authorized to receive notice of the cancellation of a policy for the insured.

It is confined to the consideration of the question whether it is within the power of insurance agents representing several companies to substitute a policy in one company for a policy in another without the insured's consent.

Agents employed merely to obtain insurance.

It is generally held that insurance agents who are employed merely to obtain insurance on property have no authority to consent to the cancellation of a policy issued at their instance by a company represented by them, and substitute a policy of another company represented by them in its place, since it is held that the authority conferred upon them is exhausted by the procurement of the first policy.

Thus, agents who were merely authorized to obtain insurance were held to have no power to transfer the risk to a second company represented by them, and the company in which the risk was first placed was held to be the one liable,—

—where an agent wrote a policy providing that it might be terminated on notice, and upon the insurer's refusal to take the risk, he, without the knowledge of the insured, wrote a policy in another company, and a loss occurred the same day, *Massasoit Steam Mills Co. v. Western Assur. Co.* 125 Mass. 116;

—where an agent of several insurance companies gave no notice to the insured upon being ordered to cancel a policy written by him providing for cancellation on

duly issued and paid for, for one in another company, upon receiving notice that the former was to be canceled, is not a ratification of the attempted change of insurers, so as to release the one which issued the surrendered policy, since after the loss the agent could not bind the substituted company.

Appeal — prematurity of action — right to question.

3. The objection that an action to enforce payment of a fire insurance policy was brought prematurely cannot be raised for the first time in the appellate court.

(November 20, 1912.)

APPPEAL by defendant from a judgment of the District Court for Blackhawk County in plaintiff's favor in an action on a fire insurance policy. Affirmed.

five days' notice, but wrote a policy in another company represented by him, which was not delivered to the insured until the day after a loss, *Yoshimi v. Fidelity F. Ins. Co.* 99 App. Div. 69, 91 N. Y. Supp. 393;

—where an agent, upon receipt of a letter addressed to the insured ordering the cancellation of the policy, without the consent of the insured, who was temporarily absent, issued policies in other companies for which he was agent, and forwarded them to the insured with a request to accept them in lieu of the first one, but the letter did not come to the insured's notice until after a loss had been sustained, *Partridge v. Milwaukee Mechanics' Ins. Co.* 13 App. Div. 519, 43 N. Y. Supp. 632, affirmed in 162 N. Y. 597, 57 N. E. 1119;

—where an agent obtained a policy through other agents, which was delivered, and upon receiving notice to cancel it, he wrote a policy in another company, which he mailed to the insured, requesting a return of the first policy, but the property was destroyed before the notice of the attempted transfer of the risk was received by the insured, *Stebbins v. Lancashire Ins. Co.* 60 N. H. 65;

—where it appeared that an agent for several companies, upon application by a broker for insurance for a stated amount in some good company, wrote a policy in a certain company and delivered it through the broker to the insured, and charged the premium to the broker; that later, upon receiving orders from the insurer to cancel the policy, without giving the notice of the cancellation as provided for in the policy, he entered the risk on his books in another company, which he credited with the premium; that on the day on which a loss occurred, without knowledge thereof, he mailed a policy in the second company to the broker, together with notice that the original insurer had declined the risk, and requested an exchange of policies; that on the same day he received notice from the second company declining the risk, and that thereafter he obtained the first policy from

The material facts are stated in the opinion.

Messrs. Read & Read for appellant.

Messrs. Edwards & Longley, for appellees:

There may be no cancelation of a policy of insurance in the absence of the five days' notice required by statute, unless the consent of the insured, given by himself or by someone having authority to do so for him, is procured. And authority to procure insurance does not at all imply or confer au-

thority upon the insurance agent to receive notice of cancelation. The agency is terminated when the insurance is procured.

Wilson v. New Hampshire F. Ins. Co. 140 Mass. 210, 5 N. E. 818; Clark v. Insurance Co. of N. A. 89 Me. 26, 35 L.R.A. 276, 35 Atl. 1010; Wisconsin C. R. Co. v. Phoenix Ins. Co. 123 Wis. 313, 101 N. W. 703; Kerr v. Milwaukee Mechanics' Ins. Co. 54 C. C. A. 616, 117 Fed. 442; Commercial Union Assur. Co. v. Urbansky, 113 Ky. 624, 68 S. W. 653; Snedecor v. Citizens'

the insured and delivered the second, Wilson v. New Hampshire F. Ins. Co. 140 Mass. 210, 5 N. E. 818;

—where an agent, upon notice to cancel a policy which had been delivered, directed a clerk to issue a policy in another company, and made an entry of a new policy covering the risk on his daily report, but no policy was written or notice of the attempted cancelation given to the insured until after a loss had occurred, Clark v. Insurance Co. of N. A. 89 Me. 26, 35 L.R.A. 276, 35 Atl. 1008;

—where agents, upon notice from an insurer to cancel a policy, without notice to or the consent of the insured, issued new policies, which were not delivered until after a fire occurred, London & L. F. Ins. Co. v. Turnbull, 86 Ky. 230, 5 S. W. 542. And to the same effect is Joyner v. Scottish F. Ins. Co. 155 N. C. 255, 71 S. E. 434;

—where an agent attempted to substitute another policy without the knowledge of the insured, upon receiving notice from the insurer to cancel a prior policy, although there had been no delivery of that policy, Commercial Union Assur. Co. v. Urbansky, 113 Ky. 624, 68 S. W. 653.

And in Merchants' Ins. Co. v. Shults, 8 Kan. App. 798, 57 Pac. 306, where both parties had acquiesced in the substitution of an insurer, the court said that an agent who was authorized to obtain insurance was not the agent of the insured at the time he issued a policy to take the place of one which he had been ordered to cancel.

And there is a *dictum* to the same effect in Larsen v. Thuringia American Ins. Co. 208 Ill. 166, 70 N. E. 31.

In Martin v. Palatine Ins. Co. 106 Tenn. 523, 61 S. W. 1024, where an applicant for insurance expressed a preference for certain companies, and the agent stated he could not place the risk in those companies, but that he would procure a policy in another company through other agents, which he did, delivering the policy to the insured, it was held that the agent had no power to assent to the cancelation of this policy, and to substitute another in one of the companies represented by him for which the insured had expressed a preference, and the first company was held liable, although the second policy had been delivered to the personal representative of the insured, the former never having consented to the cancelation of the first policy.

And where policies procured by an agent 51 L.R.A. (N.S.)

had to be to the satisfaction of the insured, no recovery can be had on a policy which the agent, upon being informed of a previous insurer's intention of raising its rate, filled out, countersigned, and placed in his safe, but did not deliver, no attempt being made to take up the first policy until the day after the insured property was destroyed, although he noted on his books a transfer of the premium and the cancelation of the previous policy. Kerr v. Milwaukee Mechanics' Ins. Co. 54 C. C. A. 616, 117 Fed. 442.

Agents authorized to keep property insured.

Where insurance agents representing several companies are authorized not merely to obtain insurance, but, under a general agreement between a property owner and an agent, to keep the property insured, it is generally held that the agent has authority to transfer the risk to another company represented by him on notice from a former insurer to cancel an existing policy.

Thus, it has been held that where an agreement is made by a property owner with an insurance agent, that the latter will keep property insured, and no insurance companies are mentioned, the agent may, upon notice from an insurer to cancel a policy, terminate it without notice to the insured and substitute a policy in another company, and where the substituted policy is mailed to the insured before a loss occurs, it is binding although it does not reach the insured until after the property has burned. Phoenix Ins. Co. v. State, 76 Ark. 180, 88 S. W. 917, 6 Ann. Cas. 440.

And in Jackson v. Fire Asso. of Philadelphia, 13 N. Y. S. R. 257, where an insurance agent agreed to insure property in a specified company if it would carry it, and if not to insure in some other company, and he issued a policy which provided that it might be canceled on notice to the agent, in the company mentioned, and delivered it to the insured, and after notice to cancel, without the insured's knowledge, he placed the risk in another company, which refused it, and he subsequently placed it in another company, whose policy was delivered to the insured, and the first policy handed back after a fire had occurred, it was held that the first two policies were properly terminated, and that the last company was liable for the loss, since, under the agreement with the property owner, it was the

Ins. Co. 106 Mich. 83, 64 N. W. 35; Johnson v. North British & M. Ins. Co. 66 Ohio St. 6, 63 N. E. 610; Mutual Assur. Soc. v. Scottish Union & Nat. Ins. Co. 84 Va. 116, 10 Am. St. Rep. 819, 4 S. E. 178; John R. Davis Lumber Co. v. Hartford F. Ins. Co. 95 Wis. 226, 37 L.R.A. 131, 70 N. W. 84; Buick v. Mechanics' Ins. Co. 103 Mich. 75, 61 N. W. 337; Grace v. American Cent. Ins. Co. 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207; Insurance Cos. v. Raden, 87 Ala. 311, 13 Am. St. Rep. 36, 5 So. 876;

Hermann v. Niagara F. Ins. Co. 100 N. Y. 411, 53 Am. Rep. 197, 3 N. E. 341; 1 Wood, Fire Ins. 2d ed. § 142; 1 May, Ins. 4th ed. §§ 67G and 67H.

Upon loss of insured property, the rights of the parties to the contract of insurance are fixed. A valid claim then exists or does not exist, and no right of election is open to insured at that time by any act of his to change the rights of either himself or the insurer.

Cassville Roller Mill Co. v. Aetna Ins. Co.

agent's duty, upon notice of cancellation by one insurer, to place the risk in another of the companies represented by him.

And in Dibble v. Northern Assur. Co. 70 Mich. 1, 14 Am. St. Rep. 470, 37 N. W. 704, it was held that the policy first issued was properly canceled, and that there was a sufficient delivery of the one substituted for it, where it appeared that an insurance agent who had authority to keep one's property insured in such companies as the agent might select placed a risk in a company and sent the policy, which authorized the insurer to cancel upon notice, to the insured; that, upon being ordered by the insurer to cancel it, he did so, and notified the insured the same day, and at the same time notified him that he had rewritten the risk in a specified company; that the notice was received by the insured's clerk the next day, and new policies were written and placed in the agent's safe, and the insurer notified and the premium remitted; that a loss occurred the day after the last policy was issued and the notice of the change was received by the insured.

And in Todd v. German American Ins. Co. 2 Ga. App. 789, 59 S. E. 94, it was held that it was no strained inference to say that a property owner's expression to an insurance agent of a desire that his agency should carry a certain amount of his insurance gave authority to the agent, in the event that any insurance originally written by the agent in companies of his choosing should become canceled, to replace it with a policy in some other company represented by the agency, and in this case, where a company in which the agent had written a policy became bankrupt, and he rewrote the risk in other companies represented by him, that, from the insured's instructions to the agent, and from the other attending evidence and circumstances, the jury might find an assent by the insured to the new policy in lieu of the old.

And it was held that, in determining whether the insured's assent was to be inferred, the jury would be authorized to take into consideration not only the insured's exact words, but also the surrounding circumstances, and to apply their common knowledge as intelligent men as to what a customer meant when he asked an insurance office to carry so much insurance for him. Ibid.

So, in Wilson v. German-American Ins. Co. 90 Kan. 355, 133 Pac. 715, where an 61 L.R.A. (N.S.)

insurance agent representing several companies was employed to procure insurance on property without designating the company, and the premium was paid and the agent agreed to place the policy in his safe and keep the property insured, and policies were written in two companies, one after the other, which the insurers ordered canceled, after which the agent resolved to place it in another company, and began to write a policy, but was unable to finish it on account of darkness, and the property was burned that night, it was held that there was a binding contract of insurance with the last company.

And in Finley v. Western Empire Ins. Co. 69 Wash. 673, 125 Pac. 1012, where agents who had obtained a policy, upon notice from the insurer to cancel it, secured a policy in another company, which was not delivered to the insured until the property covered was destroyed, it was held that, considering the whole record, the agents had authority to substitute the policy in order to keep up the amount of insurance.

In Hartford F. Ins. Co. v. McKenzie, 70 Ill. App. 615, where an agent, upon notice to cancel a policy covering a hazardous risk which had been refused by several insurers, made notations purporting to transfer the risk to another company, and signed a policy in blank, and charged the insured with the premium on his books, it was held that he acted without authority from the insured, although there was some evidence that the insured had instructed the agent to write him up in another company in case of cancellation of a policy.

Authority inferred from usage.

In Hamm Realty Co. v. New Hampshire F. Ins. Co. 80 Minn. 139, 83 N. W. 41, where for fifteen years an insurance agency representing several companies, and authorized to issue policies, had carried the risk on a property owner's buildings, designating the companies, and receiving notice of cancellations, and issuing new policies as substitutes without objection by the insured, it was held that an insurer represented by such agency was liable on a policy issued by the agency to replace one which it had been ordered to cancel, although a loss occurred before the policy was delivered to the insured, it appearing that it was not the custom of the agency to immediately deliver policies substituted by it for those canceled. J. T. W.

105 Mo. App. 146, 79 S. W. 720; Clark v. Insurance Co. of N. A. 89 Me. 26, 35 L.R.A. 276, 35 Atl. 1010; Wilson v. New Hampshire F. Ins. Co. 140 Mass. 210, 5 N. E. 818; Insurance Cos. v. Raden, 87 Ala. 311, 13 Am. St. Rep. 36, 5 So. 876.

Testimony of insured that no authority was given to the insurance agents to accept notice of cancelation of policy, and also that no such notice was in fact received, is competent and, if uncontroverted, conclusive of the question.

Wisconsin C. R. Co. v. Phoenix Ins. Co. 123 Wis. 313, 101 N. W. 703.

The agent procuring the insurance policy is not, in the absence of express authority given, or such course of business as of itself is evidence of such authority, the agent of insured for receiving notice of cancelation.

Clark v. Insurance Co. of N. A. 89 Me. 26, 35 L.R.A. 276, 35 Atl. 1010; Kerr v. Milwaukee Mechanics' Ins. Co. 54 C. C. A. 616, 117 Fed. 447.

An agent of an insurance company has no authority to insure property already destroyed; and a policy written and intended as a substitute for a subsisting policy in another company, but not delivered, and of which the assured has no knowledge until after the property is destroyed by fire, is not a valid contract of insurance.

Stebbins v. Lancashire Ins. Co. 60 N. H. 65; Hermann v. Niagara F. Ins. Co. 100 N. Y. 411, 53 Am. Rep. 197, 3 N. E. 341; Hartford F. Ins. Co. v. McKenzie, 70 Ill. App. 615; London & L. F. Ins. Co. v. Turnbull, 86 Ky. 230, 5 S. W. 542.

The objection that an action was not brought until the statute of limitations had run must be pleaded as a defense, and cannot be raised for the first time on appeal.

Harlin v. Stevenson, 30 Iowa, 371; Tredway v. McDonald, 51 Iowa, 663, 2 N. W. 567; Welch v. McGrath, 59 Iowa, 519, 10 N. W. 810; Goring v. Fitzgerald, 105 Iowa, 507, 75 N. W. 358; Belken v. Iowa Falls, 122 Iowa, 430, 98 N. W. 296; Re McMurray, 107 Iowa, 648, 78 N. W. 691; Borghart v. Cedar Rapids, 126 Iowa, 313, 68 L.R.A. 306, 101 N. W. 1120.

The objection that an action was begun sooner than provided by a statute of limitation cannot be raised on appeal where not interposed at the trial.

Clason v. Kehoe, 87 Hun, 368, 34 N. Y. Supp. 431; Farmers' Benev. F. Ins. Assoc. v. Kinsey, 101 Va. 236, 43 S. E. 338; Petty v. Mutual F. Ins. Co. 111 Iowa, 358, 82 N. W. 767; Van Camp v. Keokuk, 130 Iowa, 716, 107 N. W. 933.
51 L.R.A.(N.S.)

Weaver, J., delivered the opinion of the court:

The plaintiff is a lumber dealer at Waterloo, Iowa. The defendant insurance company maintains a recording agency in that city conducted by Jameson & French. Through this agency the policy in suit was issued, and during the period named in such policy the property insured was destroyed by fire. These facts are conceded, but defendant denies liability on the grounds (1) that, when the issuance of the policy was reported by its agents, defendant rejected the risk and canceled the policy, and that same was never in fact delivered or paid for; and (2) that, in violation of a provision of said policy, the plaintiff procured other insurance upon the property without the knowledge or consent of the defendant, whereby the contract of insurance with defendant became void and of no effect.

The facts conceded or well established are as follows: Upon plaintiff's application Jameson & French, defendant's recording agents, acting within the scope of their authority, issued the policy in suit, and received payment of the stipulated premium. This policy was issued on January 27, 1908, and duly reported by said agents to the defendant at Des Moines. Eight days later defendant addressed a letter to Jameson & French, saying that the rate was inadequate, and, unless a higher rate could be procured, they were directed to take up the policy and return it for cancelation. This demand or direction was received by Jameson & French on February 5, 1908, but was not then reported by them to the plaintiff lumber company. On the same day they entered upon their records a note of the cancelation of the policy, and directed an employee to rewrite the same risk in the Iowa Manufacturers' Insurance Company, which they also represented. Such policy was prepared not earlier than February 5, 1908, but it was antedated as of February 1, 1908, and it is not entirely clear from the record whether the instrument was executed before the property was destroyed by fire, on February 7, 1908. As a matter of bookkeeping the plaintiff's payment of premium which had been credited to the defendant company was transferred to the credit of the manufacturers' company. On the morning of February 8, 1908, having learned of the fire, a representative of Jameson & French went to the manager of the plaintiff company, told him that the defendant had asked a cancelation of its policy, and that the agents had on the day before written up another in the manufacturers' company to take its place, and upon the strength of such alleged facts demanded an exchange

of said policies. The manager replied that he only wanted what was right and to get the insurance for which he had paid; took the policy offered to him, and returned the one previously issued. Thereafter the plaintiff demanded of said agents a return of the policy sued upon, and offered to surrender the policy of the manufacturers' company.

1. There is no evidence whatever to support the plea that the policy was never delivered or paid for. The delivery and the payment are both shown, and neither was disputed upon the trial. We have, then, to consider whether the policy was canceled and defendant released from liability thereon. Jameson & French being recording agents authorized to countersign and deliver policies, it requires neither argument nor citation of authorities to support the proposition that this policy upon delivery to plaintiff became a valid contract of insurance. It is equally clear that such policy could not be effectively canceled by notice or instruction from the company to its own agents that the premium was inadequate, and that, unless a higher rate could be obtained, the policy must be taken up. The insured could, of course, authorize the agents to act for him in receiving notice of cancellation and in procuring other insurance in case his policy was thereafter canceled, but the giving of such authority in this case was nowhere shown, nor is it to be fairly implied from the record. It should also be here remembered as having material bearing upon this controversy that the defendant did not attempt nor order an unconditional cancellation of the policy. Addressing its agents under date of February 4, 1908, it called their attention to the character of the risk, disapproving the rate charged as being insufficient, and adding: "We consider it well worth $1\frac{1}{2}$ per cent for three years, fire and lightning, and unless you can obtain this rate, we will ask you to very kindly take up our policy and return it to us for cancellation." This direction quite clearly contemplated an effort on the part of the agents to obtain the increased premium, and that cancellation should only follow the failure of such effort. So far as shown, the agents did not consult the plaintiff on the subject, or attempt to induce it to meet the company's demand. This, even without respect to the lack of due notice to the insured, would seem to be not so much an act of cancellation as it was a proposition or threat of cancellation to be made upon the failure of the insured to comply with the demand for a greater premium. The case thus presented is similar in principle to the one decided in *Van Tassel v. Greenwich* 51 L.R.A.(N.S.)

Ins. Co. 151 N. Y. 130, 45 N. E. 365. There the plaintiff held a policy for \$10,000, which was renewed or extended for a year. A week later the company addressed a letter to the agent, saying the risk was declined for \$10,000, but that the company would renew for \$5,000 if wanted, and that the risk would not be held binding for more than \$5,000. No reply was made to this communication, and a loss was incurred within six days thereafter. Suit being brought, defendant sought to escape liability on the ground that the policy as issued had been canceled, and that the proposition or offer to renew for the smaller amount had not been accepted. The defense was overruled, it being held that the letter constituted no more than a proposed cancellation, and not a cancellation in fact. See also *Chrisman & S. Bkg. Co. v. Hartford F. Ins. Co.* 75 Mo. App. 310.

The point is made in argument that, plaintiff having applied to Jameson & French for insurance without designating any particular company in which the policy was desired, the agents were authorized to place it in any responsible company represented by them, and that, upon notice to them of the cancellation of such policy, it was within the scope of their implied authority to place the risk with some other insurer. With this contention we are unable to agree. Plaintiff did not deal with Jameson & French as mere soliciting agents to present its application to different companies in succession until one was found willing to accept the risk. They were, as we have seen, recording agents authorized to issue policies for the company. Plaintiff applied to them for insurance in a stated sum. They furnished it, and plaintiff paid for it. The contract was complete, and thenceforward these agents ceased in any manner to represent the insured. If the defendant thereafter undertook to cancel the policy, it was a new and independent transaction, in which its agents could not represent nor bind the plaintiff without special authority so to do, or a previous course of dealing between such parties from which the authority may be implied. *John R. Davis Lumber Co. v. Hartford F. Ins. Co.* 95 Wis. 226, 37 L.R.A. 131, 70 N. W. 84; *Hartford F. Ins. Co. v. McKenzie*, 70 Ill. App. 615; *Commercial Union Assur. Co. v. Urbansky*, 113 Ky. 624, 68 S. W. 653; *Clark v. Insurance Co. of N. A.* 89 Me. 26, 35 L.R.A. 276, 35 Atl. 1008; *Partridge v. Milwaukee Mechanics' Ins. Co.* 13 App. Div. 519, 43 N. Y. Supp. 632; *Merchants' Ins. Co. v. Shults*, 8 Kan. App. 798, 57 Pac. 306; *Snedicor v. Citizens' Ins. Co.* 106 Mich. 83, 64 N. W. 35; *Edwards v. Sun Ins. Co.* 101 Mo. App. 45, 73 S. W. 886; *Mutual*

Assur. Soc. v. Scottish Union & Nat. Ins. Co. 84 Va. 116, 10 Am. St. Rep. 819, 4 S. E. 178; *Martin v. Palatine Ins. Co.* 106 Tenn. 523, 61 S. W. 1024; *Grace v. American Cent. Ins. Co.* 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207; *Newark F. Ins. Co. v. Sammons*, 110 Ill. 166; *Stilwell v. Mutual L. Ins. Co.* 72 N. Y. 385; *Hermann v. Niagara F. Ins. Co.* 100 N. Y. 411, 53 Am. Rep. 197, 3 N. E. 341; *Broadwater v. Lion F. Ins. Co.* 34 Minn. 466, 26 N. W. 455. The precedents cited to the contrary effect,—*Arnfeld v. Guardian Assur. Co.* 172 Pa. 605, 34 Atl. 580; *Kooistra v. Rockford Ins. Co.* 122 Mich. 620, 81 N. W. 568; *Standard Oil Co. v. Triumph Ins. Co.* 64 N. Y. 85,—and others of that class, are not in point. In each of these cases the person receiving the notice was the admitted agent or broker of the insured, or the course of business between the insured and the company's agent for a considerable period had been such as to justify an implication of authority to act in the premises.

Here there is no claim of express authority, nor is there any proof of prior transactions or course of business from which a finding of implied authority could be sustained. The notice of Jameson & French, not having been communicated to plaintiff till after the loss had occurred, was necessarily unavailing to relieve the defendant from its liability, unless we are required to hold as a matter of law that plaintiff's act in receiving the policy in the manufacturers' company and giving up the one in suit is an act which bars or estops it from denying the effectiveness of the alleged cancellation. Counsel argued that if plaintiff had been informed of the change in the policies before the loss occurred, and had accepted the one last written in exchange for the first, he would be held to have ratified the act, and could not recover from the defendant. This is, of course, true, but it does not follow that such an exchange or attempted substitution made after the loss would have the same effect. In the case supposed by counsel, the plaintiff's ratification having been made while the insured property was still in existence, the manufacturers' company would clearly be bound by the contract made by its agents, and the defendant discharged from further liability. In the case before us, the alleged ratification cannot upon any theory be said to have taken place until after the loss occurred, when the insured property had ceased to exist, and the agents could no longer bind the manufacturers' company by any attempt to insure it at that time. Defendant cannot relieve itself from liability for loss already occurred by inducing the insured to receive the alleged policy of

another company, issued without authority and affording no indemnity whatever. Decisions touching upon transactions of this kind are quite numerous.

It has frequently been held that an agent has no authority to insure property already destroyed, and a policy written and intended as a substitute for a subsisting policy in another company, but not delivered or brought to the notice of the property owner until after loss, is not a valid contract of insurance. *Stebbins v. Lancashire Ins. Co.* 60 N. H. 65; *Clark v. Insurance Co. of N. A.* 89 Me. 26, 35 L.R.A. 276, 35 Atl. 1008; *Kerr v. Milwaukee Mechanics' Ins. Co.* 54 C. C. A. 616, 117 Fed. 442. In the last-cited case, as in the case at bar, the insurer in the first policy, the Phoenix company, notified its agent to cancel it. The agent Rohrer made the entry in his books, transferred the premium credit to the Milwaukee company, and wrote up a policy in the last-named company ready for delivery to the insured, who was given no notice of the transaction until after a fire had destroyed the property, when an actual delivery of the policy was made. In holding that such acts did not work a cancellation of the first policy, the court reviews the precedents to which we have already called attention, and says: "These cases hold that the written but undelivered policy never matured into a contract for insurance, and that liability upon the subsisting policy, which was intended to be replaced, was fixed by the burning of the property while it was still in force. The acts of bookkeeping of Rohrer in marking cancellation on his office record of the Phoenix company's policy, and transferring in his accounts the credit for premium from that company to the defendant company, all done in anticipation of his purposed delivery of defendant company's policy in replacement for the expected surrender of the policy of the Phoenix company, were futile, and affected no existing rights or liabilities. *London & L. F. Ins. Co. v. Turnbull*, 86 Ky. 230, 237, 5 S. W. 542; *Hartford F. Ins. Co. v. McKenzie*, 70 Ill. App. 615, 623. In the present case it clearly appeared that at the time of the burning of the elevator, the policy of the Phoenix Insurance Company was a valid contract of insurance, which had never been surrendered nor canceled; and that plaintiff, the insured, then held it as such. The policy of the defendant company was then an undelivered writing, not yet a contract, and because of the destruction of the property while it was in that condition, it never became a contract." The Clark Case cited from the Maine court arose upon a state of facts very similar to those we have here

to deal with. The plaintiff applied to the agents for insurance, which they wrote in the Commercial Union Company. A few days later that company wrote the agents to cancel the policy. Without notifying the insured, they directed their clerk to write another policy in the Insurance Company of North America. That policy was antedated, as was done in this case, and credit for the premium paid was transferred to the last-named company. Before the change was reported to the insured, the property burned. Thereafter the agent induced the insured to receive the last policy and give up the one first written, assuring him that it would be all right. As a matter of safety separate actions were brought on these policies setting up the facts of the attempted cancelation and change. Speaking with reference to the action upon the policy last issued, the court says: "The agent had no authority, express or implied, to effect any insurance for the plaintiff beyond what had already been completed. His authority was to procure for the plaintiff \$1,200 insurance in one of the companies which he represented, and, having done that to the acceptance of the plaintiff, his agency, so far as the plaintiff was concerned, was accomplished, and he had no authority to make further insurance on the behalf of the plaintiff. Nor was it the intention even, on the part of the agent, to effect additional insurance. It was, at most, an attempt to transfer a risk from one company to another at the instance of the company then carrying the risk, and without the consent of the assured. The attempted cancelation and the effort to place the risk in the defendant company were parts of the same transaction with no consent of the assured. Unless the cancelation was valid, the second risk did not attach. It is not pretended that the plaintiff was aware of any intention or attempt at cancelation till the morning after the loss occurred. Until the five days' notice provided in the policy should be given him, or he should consent to such cancelation, the first policy would remain in force, and the second would not become operative as a legal subsisting contract." Quite in point and to the same effect are *Massasoit Steam Mills Co. v. Western Assur. Co.* 125 Mass. 110; *Wilson v. New Hampshire F. Ins. Co.* 140 Mass. 210, 5 N. E. 818; *Stebbins v. Lancashire Ins. Co.* 60 N. H. 65.

If it be said that, Jameson & French being agents of the manufacturers' company, its assent to the issuance of the second policy must be assumed, it is none the less true that the assent of the plaintiff was essential to the existence of a com-

pleted contract, and, if such assent was not given or procured until after the subject of insurance had been destroyed, the company would not be bound thereby. *Mutual L. Ins. Co. v. Young*, 23 Wall. 85, 23 L. ed. 152; *Michigan Pipe Co. v. Michigan F. & M. Ins. Co.* 92 Mich. 493, 20 L.R.A. 277, 52 N. W. 1070, and cases already cited. Counsel's illustration of a case in which the insurance companies deal directly together, the second company agreeing to take the risk which is being carried by the first company, and loss ensues before the policy is delivered, does not cover the case at bar. In such instance there is a complete contract of reinsurance for the benefit of the first insurer, which may be enforced. But the first company is in no manner relieved from its obligation to the property owner, although it is in position to protect itself against ultimate loss by calling upon the second company for the promised indemnity. *Massasoit Steam Mills Co. v. Western Assur. Co.* 125 Mass. 110.

Neither company is empowered to speak or act for the holder of the first policy, or to bind him to an acceptance of the second policy, and he is equally powerless to bind the second insurer by a consent given after a loss has occurred. But two cases are brought to our attention from which any apparent support for defendant's position can be extracted,—*Larsen v. Thuringia American Ins. Co.* 208 Ill. 166, 70 N. E. 31; *Arnfeld v. Guardian Assur. Co.* 172 Pa. 605, 34 Atl. 580,—and a careful reading of these demonstrates that neither goes to the extent claimed for it. In the *Arnfeld Case* plaintiff employed a broker to procure insurance, and the broker obtained a policy from the guardian company. This company thereafter notified the broker of its purpose to cancel the policy within five days. Acting upon the notice, the broker at once procured a policy in the Queen Company, and notified the guardian company thereof, and assured it that it was relieved from further liability. The insured accepted the policy from the Queen Company, and that company conceded its liability, and paid its proportion of the loss. Action was also brought on the first policy, and the essence of the decision upon appeal in that case is that the court should have instructed the jury that if the second policy was taken as a substitute for the first, and not merely as additional insurance, and if the second company accepted responsibility and paid its share of the loss, then the first policy should be treated as canceled, and no recovery could be had thereon. Of the soundness of this proposition there can be no dispute, and it is in no manner inconsistent with the conclu-

sions we have above announced. The Larsen Case, decided by the Illinois court, is substantially similar in its facts to the Arnfeld Case, in that, after being notified of the exchange of policies, the insured not only assented thereto, but presented its claim to the substituted company, which acknowledged its liability and paid its proportion of the loss. The insured having thus received the indemnity promised in the policy last issued, the court very properly says: "It cannot lie in him now to say that there was no consideration for the surrender of the policy issued by appellee, and that appellee is not relieved from liability by that transaction." Without further consideration of the authorities, we have to say that we are quite clear that there was never any efficient cancellation of the policy issued by the defendant, nor was there a valid substitution therefor of the policy of the manufacturers' company. For the reasons already stated, it must be held that the defense based upon an alleged avoidance of the policy by the act of the plaintiff in procuring additional insurance is without any support in the record.

2. The defendant further insists that the judgment below must be reversed because the action was prematurely begun. This fact is said to affirmatively appear from the printed record, a statement which the appellee questions. We have not undertaken to satisfy ourselves in that respect because it appears to be unnecessary. The objection to the timeliness of the action was not raised in pleading or by motion in arrest, nor does it appear to have been in any manner called to the attention of the trial court. Under such circumstances, it cannot be raised for the first time in this court. *Petty v. Mutual F. Ins. Co.* 111 Iowa, 358, 82 N. W. 767; *Van Camp v. Keokuk*, 130 Iowa, 716, 107 N. W. 933; *Borghart v. Cedar Rapids*, 126 Iowa, 313, 68 L.R.A. 306, 101 N. W. 1120. The objection is quite certainly not one which goes to the jurisdiction of the court, and the general rule that other objections not in any manner raised in the trial court will not be considered on appeal is so general and universal that citation of authorities in support thereof is not required. The action is at law. The burden was upon defendant to make good its several defenses, or some of them, and the findings of the trial court upon all disputed matters of fact are in favor of the plaintiff.

We find no reversible error in the record, and the judgment below is therefore affirmed.

Sherwin, J.:

By mistake an opinion written upon the 51 L.R.A.(N.S.)

original submission of this case, reversing the judgment below, was released and published pending a petition for rehearing. See *Waterloo Lumber Co. v. Des Moines Ins. Co.* 150 Iowa, 607, 130 N. W. 147.

Said opinion is hereby ordered withdrawn.

Petition for rehearing denied.

IOWA SUPREME COURT.

JOHN P. LOONEY, Appt.,

v.

CITY OF SIOUX CITY, Iowa.

(— Iowa, —, 145 N. W. 287.)

Municipal corporation — Liability for tort of police officer.

Failure of a superintendent of police to take the bond from a police officer authorized by ordinance, before permitting him to exercise the duties of his office, does not render the municipality liable for a tort committed by such officer in the performance of his duty, since it is in the exercise of a governmental function.

(February 11, 1914.)

APPEAL by plaintiff from a judgment of the District Court for Woodbury County sustaining a demurrer to a petition filed to recover damages for negligent failure of the defendant city to have a policeman of the city under bond when plaintiff was shot and injured by him. Affirmed.

Statement by Preston, J.:

This is an action wherein the plaintiff seeks to recover damages from the defendant city for negligence in failing to have one Matt Carr, a policeman of said city, under bond on the 1st day of May, 1912, when plaintiff was shot and injured by the said police officer. The demurrer to the petition was sustained. Plaintiff appeals.

Mr. Andrew G. Lehr, for appellant:

The board of civil service commissioners and the city council act for and on behalf of the city, and their negligence and breach

Note. — A search has disclosed no other cases involving the liability of a municipality for failure to require a bond of an officer.

The general subject of municipal liability for torts of police officers is treated in the notes to *Gillmor v. Salt Lake City*, 12 L.R.A.(N.S.) 537, and *Sehy v. Salt Lake City*, 42 L.R.A.(N.S.) 915. For other phases of municipal liability for acts of officers, see Index to L.R.A. Notes, "Municipal corporations," §§ 81-84.

of duty are the negligence and breach of duty of the city, and there is no discretion in the matter, as it is the neglect of a ministerial duty for which the city is liable.

Gray v. Griffin, 111 Ga. 361, 51 L.R.A. 131, 36 S. E. 792; *Gibson v. Huntington*, 38 W. Va. 177, 22 L.R.A. 561, 45 Am. St. Rep. 853, 18 S. E. 447.

The appointment and putting under bond of a police officer are a ministerial act and duty, and not a governmental act, in which the city has no discretion, and the negligence of its officers is the negligence of the city, for which the city is liable.

Ibid.

Messrs. Schmidt & Pike, for appellee:

The police power in all its branches, as exercised by a municipality, is a governmental function, and in the performance of this function, the municipality represents the state. The officers exercising these powers are state officers.

Calwell v. Boone, 51 Iowa, 687, 33 Am. Rep. 154, 2 N. W. 614; *Easterly v. Irwin*, 99 Iowa, 694, 68 N. W. 919; *Lahner v. Williams*, 112 Iowa, 428, 84 N. W. 507; *Ball v. Woodbine*, 61 Iowa, 83, 47 Am. Rep. 805, 15 N. W. 846; *Curran v. Boston*, 151 Mass. 505, 8 L.R.A. 243, 21 Am. St. Rep. 465, 24 N. E. 781; *Bartlett v. Columbus*, 101 Ga. 300, 44 L.R.A. 795, 28 S. E. 599; *Elliott, Mun. Corp.* 2d ed. 1910, § 318, p. 323.

The mere fact that the city takes a bond in these cases cannot in any respect increase the liability of the city to the individual. It cannot be liable indirectly for what it is not directly liable.

28 Cyc. 267; *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Vanhorn v. Des Moines*, 63 Iowa, 447, 50 Am. Rep. 750, 19 N. W. 293; *Goddard v. Harpawell*, 30 Am. St. Rep. 376, case note.

Preston, J., delivered the opinion of the court:

The plaintiff states in his petition that while under arrest of one Matt Carr, a policeman of the defendant city, he was shot and severely injured by the said Carr, and that he recovered in the district court of Woodbury county a judgment against the said Carr of \$4,000 for his injuries so sustained, and that he tried to enforce said judgment against said Carr, but that Carr had no property subject to execution, either at the time of the injury or any time thereafter, and that the city, by practice and custom, has fixed the amount of the bond required of its policemen at \$2,000, and that the plaintiff is therefore damaged in the amount of \$2,000 owing to the negligence of the defendant city in not having

said Carr under bond at the time of said injury.

Carr was appointed policeman on the 22d day of April, 1912, and up to May 1, 1912, when he shot plaintiff, had not given bond. A copy of a part of the ordinance on this subject is attached to the petition, under the title, "Bonds of City Officers," and is as follows: "Sec. 2. The superintendents of the different departments are hereby authorized to require bonds from employees in their respective departments, not mentioned in § 1 hereof, and to fix the amount of said bonds, whenever they shall deem such action necessary. Such bonds shall comply as to sureties with other bonds herein required, and shall be approved by the city council."

The grounds of the demurrer are: "First. That the said city was acting in a governmental capacity, as the agent of the state, in enforcing the police regulations in said city, and for any wrongs committed by the agents or officers of said city in relation thereto, it is not liable, either directly or indirectly. Second. That the requirements that a bond be furnished by police officers was a requirement imposed upon the officers of the city acting in a governmental capacity, and that the failure of any municipal officer to require such bond is the failure to exercise or perform a governmental duty, and not the breach of a municipal obligation for which a city may be liable."

The only authorities cited by appellant are *Gray v. Griffin*, 111 Ga. 361, 51 L.R.A. 131, 36 S. E. 792; *Gibson v. Huntington*, 38 W. Va. 177, 22 L.R.A. 561, 45 Am. St. Rep. 853, 18 S. E. 447; *Laws of Iowa*, 34 G. A. chap. 54, § 2; *Code*, §§ 1182, 1183. *Gray's Case* was an action in which plaintiff attempted to hold the defendant city liable for wrongful imprisonment, and it was held that the city was exercising a governmental function and could not be held liable. That is appellee's contention in the case at bar. The *Gibson Case* was an action brought for the alleged wrongful death of a child, caused by the falling of an embankment which had been undermined by a person without the knowledge of the city. The city was held not liable, but on the ground that it did not have notice of the defect. In the opinion the court makes some general observations as to the rules by which a city is liable for injuries sustained by the negligent management of its corporate property, and for injuries caused by its negligence in the discharge of, or failure to discharge, such duties as are purely ministerial, and not governmental or discretionary. These rules are conceded by the defendant to be correct statements of the law.

Chapter 54, Acts of 34 G. A., has reference to civil service examinations of fire and police officers before a commission, in cities under the commission form of government. It is not alleged in the petition in this case that the defendant city is under such form; but this is, perhaps, not material. The application of this act to this case is not stated by appellant further than that he concedes the appointment of a policeman to be a governmental act; but, he asserts, that the requiring of a bond of such officer, but some other officer of the city (in this case, under § 2 of the ordinance, the superintendent of the department), is a ministerial act for which the city is liable. Sections 1182 and 1183 of the Code are the requirements as to the officers giving bond. It may be observed here—though it has not been suggested in argument—that § 1185 of the Code provides that the amount of the bond shall be in such a sum as the council, by ordinance, prescribes; while, under the ordinance, this is to be done by the superintendents of the departments. Again, § 1197 provides that it shall be a misdemeanor for an officer of whom a bond is required to act without giving the bond; and that he shall be liable to a fine for an amount not exceeding the amount of the bond required of him.

In this case neither the statute nor the ordinance of the city fixes the penalty of the bond; but, as stated, the petition alleges that "by practice and custom it has been fixed at \$2,000." Plaintiff seems to rely on the ordinance rather than the state law. It may be further noticed that the ordinance seems not to be mandatory, but authorizes the superintendents of the different departments to require bonds "whenever they shall deem such action necessary." It is doubtful whether, under the allegations of the petition, there is any fact pleaded or showing that any bond was required of the policeman; but conceding, for the purpose of the argument, that it was, it is clear that it was not an administrative, but a governmental, act, and the failure to perform it does not make the defendant liable.

The defendant cites the following authorities: *Calwell v. Boone*, 51 Iowa, 687, 33 Am. Rep. 154, 2 N. W. 614; *Easterly v. Irwin*, 99 Iowa, 694, 68 N. W. 919; *Lahner v. Williams*, 112 Iowa, 428, 84 N. W. 507; *Ball v. Woodbine*, 61 Iowa, 83, 47 Am. Rep. 805, 15 N. W. 846; *Curran v. Boston*, 151 Mass. 505, 8 L.R.A. 243, 21 Am. St. Rep. 465, 24 N. E. 781; *Bartlett v. Columbus*, 101 Ga. 300, 44 L.R.A. 795, 28 S. E. 599; *Elliot v. Mun. Corp.* 2d ed. 1910, § 318, p. 323; 28 Cyc. 267b, 268; *Ogg v. Lansing*, 35 Iowa, 495, 499, 14 Am. Rep. 499; *Vanhorn v. Des*

Moines, 63 Iowa, 447, 50 Am. Rep. 750, 19 N. W. 293, 294; case note in 30 Am. St. Rep. 376, 401. The last four cases are cited to sustain the proposition that the mere fact that the city takes a bond in these cases cannot in any respect increase the liability of the city to the individual; it cannot be liable indirectly for what it is not directly liable.

It is well settled, and it is not contended otherwise by appellant, that an act, whether of omission or commission, of an officer or employee of a municipal corporation, done in the line of the performance of an official duty public in character, does not make the municipality liable for the tort or wrongdoing of such officer or employee, while engaged as such, unless expressly authorized by statute or otherwise. The grounds of exemption from liability as stated in some of the cases are, substantially, that the corporation is engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the public. In this case the policeman, Carr, was a public officer, and it is admitted by appellant that because of this the city would not be responsible directly for his act in shooting plaintiff. The requirement that such officer must give bond, if under the record in this case it is required, and the failure to do so, is but the act of another officer of the defendant corporation, and is but one of the steps to be taken in the appointment and qualification of such policeman. This duty of the superintendent of the police department is a public service, or governmental function, in which he acts as a servant of the state, and the city is not liable for a failure to perform it.

As bearing on this question and as sustaining our conclusion, we cite, without discussion, the following additional cases: *McFadden v. Jewell*, 119 Iowa, 321, 60 L.R.A. 401, 97 Am. St. Rep. 321, 93 N. W. 302; *Hall v. Concord*, 71 N. H. 367, 58 L.R.A. 455, 52 Atl. 864; *Hull v. Roxboro*, 142 N. C. 453, 12 L.R.A.(N.S.) 638, 55 S. E. 351; *Nicholson v. Detroit*, 129 Mich. 246, 56 L.R.A. 601, 88 N. W. 695; *Carty v. Winowski*, 78 Vt. 104, 2 L.R.A.(N.S.) 95, 62 Atl. 45, 6 Ann. Cas. 436, 19 Am. Neg. Rep. 565; *Dudley v. Flemingsburg*, 115 Ky. 5, 60 L.R.A. 575, 103 Am. St. Rep. 253, 72 S. W. 327, 1 Ann. Cas. 958; *Evans v. Kankakee*, 231 Ill. 223, 13 L.R.A.(N.S.) 1190, 83 N. E. 223; *Kelley v. Boston*, 186 Mass. 165, 66 L.R.A. 429, 71 N. E. 299.

The court below ruled correctly upon the

point presented, and the judgment is affirmed.

Ladd, Ch., J., and Evans and Weaver, JJ., concur.

GEORGIA SUPREME COURT.

EXCHANGE NATIONAL BANK OF FITZ-
GERALD, Plff. in Err.,
v.

J. A. J. HENDERSON.

(139 Ga. 260, 77 S. E. 36.)

Bills and notes — illegal consideration — bona fide holder — buying notes.

1. A promissory note given for an illegal and immoral consideration is void, and cannot be enforced, even in the hands of an innocent purchaser for value, before due, and without any notice of defense. And this is so even if the consideration of the note is in part legal.

Headnotes by HILL, J.

Note. — Validity of agreements tending to influence elections or appointments to office.

I. Agreements tending to influence elections, 549.

II. Agreements tending to influence appointments to office, 554.

I. Agreements tending to influence elections.

Agreements to accept less than legal amount of compensation are excluded. See the note to Lukens v. Nye, 36 L.R.A. (N.S.) 244.

For agreements in consideration of withdrawal of candidacy for office, see the note to Com. ex rel. Layman v. Sheeran, 37 L.R.A. (N.S.) 289.

For validity of agreement to divide fees or salary of public officers, see the note to Anderson v. Branstrom, 43 L.R.A. (N.S.) 422.

For contract as to the location of public buildings [not connected with any voting or election], see the note to Edwards v. Goldsboro, 4 L.R.A. (N.S.) 589.

As to injunction in favor of party in *pari delicto* against enforcing or otherwise proceeding with illegal contract, see the note to Basket v. Moss, 48 L.R.A. 842.

"It is the interest of the state that all places of public trust should be filled by men of capacity and integrity, and that the appointing power should be shielded from influences which may prevent the best selection; hence the law annuls every contract for procuring the appointment or election of any person to an office." Grier, J., in Marshall v. Baltimore & O. R. Co. 16 How. 314, 14 L. ed. 933.
51 L.R.A. (N.S.)

(a) Buying or selling, or offering to buy or sell, a vote at any election in this state, or in any county thereof, is both illegal and immoral.

(b) Buying or selling votes and political influence is both illegal and immoral; and a note having as a basis such consideration, in whole or in part, is void, and cannot be enforced in the hands of an innocent purchaser.

Evidence — admissibility.

2. The court did not err in admitting in evidence the testimony objected to, of the several witnesses for the defendant, under the facts of this case; nor in refusing to charge the jury as requested in writing by the plaintiff's counsel.

Appeal — motion for new trial.

3. There was no error in overruling the motion for a new trial.

(January 18, 1913.)

ERROR to the Superior Court for Irwin County to review a judgment in defendant's favor in an action on a promissory note. Affirmed.

The facts are stated in the opinion.

Contracts involving advance of money or credit to aid an election.

Most cases are decided expressly upon statutes. In Martin v. Wade, 37 Cal. 168, however, the decision was placed upon public policy; and it was there held that a recovery could not be had upon a note given for the amount of advances made upon a contract, which was rescinded at the time of the giving of the note, the original contract being that a candidate, if elected, would give certain of the emoluments of his office to one who was to use his political and personal influence to secure such candidate's election, and was to advance him money to be used for that purpose. The court said: "That the agreement . . . was in violation of the general law of public policy, immoral, and *malum in se*, and therefore, wholly void, there can be no reasonable doubt," stating also that such contracts "corrupt and poison the very source of political power in republican governments."

But unless the statutes prohibit the use of any money by a candidate, it would seem that a loan of money to him for use in his election generally might be recovered, as it would not be presumed to be for an illegal purpose. Thus it was held in Deskins v. Phillips, 11 Ky. L. Rep. 485 (reported on memorandum), that the fact that a note was executed for money lent by the payee to the payor a few days before the election, to enable the defendant "to make the race" for county judge, was not sufficient to enable the appellate court to say, against the opinion of the trial court, that the purpose was the bribery of voters, although the court might suspect that the plaintiff must have known that

Messrs. L. Kennedy, Elkins & Wall, and Haygood & Cutts for plaintiff in error.

Mr. H. J. Quincey, for defendant in error:

The note was void even in the hands of a bona fide holder for value.

Johnston Bros. v. McConnell, 65 Ga. 129; Cunningham v. National Bank, 71 Ga. 400, 51 Am. Rep. 266, 75 Ga. 366; Moss v. Exchange Bank, 102 Ga. 808, 30 S. E. 267; Jones v. Dannenberg Co. 112 Ga. 426, 52 L.R.A. 271, 37 S. E. 729; Rhodes v. Beall, 73 Ga. 641; Joyce, Defenses to Commercial Paper, § 291; 2 Am. & Eng. Enc. Law, 366.

Mr. W. H. Horne also for defendant in error.

\$500, the amount of the note, could not be legitimately expended within three days before the election.

As just stated, the matter has usually arisen under express statute, or in case of agreements contemplating an act prohibited by statute.

Thus, a promissory note given to raise money for election of a third party will not support a recovery by a holder with notice under the Canadian statute, which provides that "every executory contract, or promise, or undertaking, in any way referring to, arising out of, or depending upon, any election under this act, even for the payment of lawful expenses, or the doing of some lawful act, shall be void in law." *St. Pierre v. L'Ecuver*, Rap. Jud. Quebec, 23 C. S. 495 (approving *Danser v. St. Louis*, 18 Can. S. C. 587).

See also as to checks, *Dion v. Boulanger*, Rap. Jud. Quebec, 4 C. S. 358.

In *Foley v. Speir*, 100 N. Y. 552, 3 N. E. 477 (affirming 11 Daly, 254), it was held that an agreement by a candidate (for a judgeship) with a political committee was void which provided that he should pay a certain definite sum of money in consideration of certain expenditures to be made by such committee, which included rent and some other matters not included in the statute, which limited contributions to defraying expenses of printing, the circulation of votes, handbills, and other papers, and for conveying sick, poor, and infirm electors to the polls; and the committee could not recover from the candidate upon such contract. The court distinguished *Hurley v. Van Wagner*, 28 Barb. 109, *infra*, and *Sizer v. Daniels*, 66 Barb. 432, *infra*.

So, a promise to pay to the owner of a building a certain sum if he would permit the building to remain standing and allow it to be used for meetings of a certain political party, etc., during the election, was held void under a statute making it a misdemeanor to contribute money intended to promote an election of any particular person or ticket (except for printing, and for circulation of votes, papers, etc.), and 51 L.R.A. (N.S.)

Hill, J., delivered the opinion of the court:

The Exchange National Bank of Fitzgerald brought suit against J. A. J. Henderson, as maker, and Mitchell & Paulk, as indorsers, upon a promissory note for \$400. The note was payable to Mitchell & Paulk, who indorsed it to the plaintiff for value before due. The note itself does not disclose the consideration, and only recites that it is given "for value received." At the appearance term of the court, J. A. J. Henderson, the maker of the note, filed his plea averring that the note was without consideration, and was obtained by fraud; that the note was given for a certain patent right; that the consideration had failed, because the payees of the note failed and

there can be no recovery upon such promise. *Jackson v. Walker*, 5 Hill, 27; this judgment was affirmed by an equal vote in the court of errors in 7 Hill, 387.

But it has been held that the chairman of a county committee of a political party may lawfully employ another to perform the duties of that position. Thus, in *Smith v. Babcock*, 3 App. Div. 6, 37 N. Y. Supp. 965, it was held that a contract was not necessarily void which provided that the defendant, being desirous of accepting the position of chairman of a political committee, and not being able to give time to it, employed the plaintiff personally to perform these duties for him for a compensation which was agreed upon between them, where the statute was designed to prevent "furnishing money or entertainment to induce attendance at polls," and provided that "any person who, with the intent to promote the election of a person to an elective office, . . . contributes money for any other purposes than the printing and circulating of handbills, books, and other papers previous to an election or town meeting, or conveying electors to the polls, or music or rent of halls, is guilty of a misdemeanor;" the court stating that if such a contract was entered into for the purpose of evading the statute, it would be void.

—where lender ignorant of purpose.

A contract for the loan of money which, in the lender's ignorance, is procured to further the election of a certain person, is valid and enforceable.

Thus, the fact that a note and mortgage were given to raise money to use in promoting the candidacy for office and the election of one of the makers, the payee not knowing the use to which the money is to be put, affords no defense to an action by the payee and mortgagee on the note and mortgage. *Hale v. Harris*, 28 Ky. L. Rep. 1172, 5 L.R.A. (N.S.) 295, 91 S. W. 660 (where it was stated that the court might not, without evidence, assume that the money was corruptly used).

refused to make over or to transfer to the defendant the interest in and to the patent right for which the note was given; and that they were unable to do so, for the reason that they did not own or have at the time of the execution of the note any such patent right as they claimed to have. By an amendment to the original plea, J. A. J. Henderson set up the defense "that the note sued upon . . . is void, and that the plaintiff cannot recover thereon, for the reason that said note was given for an immoral and illegal consideration, to wit, to purchase political influence and votes in an election held in said county for the purpose of removing the courthouse from Irwinton to Ocilla," and that the payees fully understood that the considera-

tion moving the maker of the note to enter into the contract for the purchase of an interest in the patent right was the agreement that he was to obtain the political influence of the payees to secure the removal of the courthouse, and that the purchase of such interest was a mere blind to cover up such illegal and immoral contract, which was the sole consideration for the giving of the note sued on. The amendment to the plea further averred that the transaction was part of a general scheme whereby certain citizens of Ocilla, including the defendant, in consideration of the agreement on the part of Mitchell & Paulk to exert their political influence in favor of the removal of the courthouse, gave notes in the aggregate sum of \$2,500 for

Promises by candidate to appoint to office.

A promise by a candidate for electoral office to appoint another his deputy is void and cannot be enforced. *Robertson v. Robinson*, 65 Ala. 610, 39 Am. Rep. 17.

And an agreement between two candidates for the office of sheriff is void which provides that whichever one is elected shall appoint the other his deputy, and pay him one half of the emoluments. *Glover v. Taylor*, 38 La. Ann. 634.

Hiring influence or services.

Contracts purchasing or hiring the influence of another to further a particular election are wholly void. *Wilcox v. Puryear*, 12 Ky. L. Rep. 556; *Gaston v. Drake*, 14 Nev. 175, 33 Am. Rep. 548; *Swayze v. Hull*, 8 N. J. L. 54, 14 Am. Dec. 399; *King v. Raleigh & P. S. R. Co.* 147 N. C. 263, 125 Am. St. Rep. 546, 60 S. E. 1133, 15 Ann. Cas. 40; *Nichols v. Mudgett*, 32 Vt. 546; *Livingston v. Page*, 74 Vt. 356, 59 L.R.A. 336, 93 Am. St. Rep. 901, 52 Atl. 965 (furthering a nomination); *Whitman v. Ewin*, — Tenn. —, 39 S. W. 742; *EXCHANGE NAT. BANK v. HENDERSON*.

In *Whitman v. Ewin*, — Tenn. —, 39 S. W. 742 (infra) the court said: "The greater his influence, the more powerful his eloquence, the more persuasive and effective his arts and skill, the more important it is that such powers and capabilities should be preserved and protected, unbought and unpurchasable, for the benefit of the state and the public weal, and only allowed to be brought into pernicious activity from purely patriotic and unselfish motives. . . . All such contracts as the one alleged are corrupt, contrary to public policy, illegal, void, and unenforceable in the courts."

"A contract by which one agrees, for money or other personal profit, to use his efforts, influence, etc., to induce a majority of the voters at an election to vote for a particular candidate or for any proposition, as for a subscription by a city or county in aid of a railroad, is against public policy, 51 L.R.A. (N.S.)

and therefore void." *Wilcox v. Puryear*, supra.

A promissory note is void which was made in consideration that the promisee should give the promisor his interest in pursuing his election to the office of sheriff, the note being payable after the election if the promisor was elected, and no recovery can be had upon it by the promisee against the promisor. *Swayze v. Hull*, 8 N. J. L. 54, 14 Am. Dec. 399.

So, a contract between partners that one of them should become a candidate for the office of district attorney, the other to use his best efforts to secure his partner's election, and the fees of the office to be divided, is void and will not support an action by the unofficial partner, alleging the agreement to divide the fees, and that he had rendered services to the other partner in his official capacity. *Gaston v. Drake*, 14 Nev. 175, 33 Am. Rep. 548.

The same is true of contracts securing the support of newspapers. Thus, a contract by a railroad to pay a newspaper editor for endeavoring in his paper to carry an election authorizing the issue of bonds for the building of a railroad, and to gain for the railroad the good will of the citizens, etc., is void and will not sustain a recovery. *King v. Raleigh & P. S. R. Co.* 147 N. C. 263, 125 Am. St. Rep. 546, 60 S. E. 1133, 15 Ann. Cas. 40, where the court said: "Contracts for money or personal profit, to use efforts and influence to 'carry an election,' especially an election of this character, are *contra bonos mores*."

In *Livingston v. Page*, 74 Vt. 356, 59 L.R.A. 336, 93 Am. St. Rep. 901, 52 Atl. 965, it was held that a contract between a Republican candidate for nomination to the office of Congressman and the publisher of a Democratic newspaper, whereby the latter was to use his influence to secure such nomination, was void as against public policy, and the publisher of the newspaper could not recover upon it. (The plaintiff asked a reasonable compensation, but a verdict was directed against him.)

So, an agreement is void by which a creditor agrees to reduce the debt if the debtor

the purchase of a half interest in the patent rights. There was much testimony both for the defendant and plaintiff. Most of the witnesses for the defendant testified that they would not have signed the notes except that they thought that they were signing them in order to get the influence and notes of Mitchell & Paulk for the removal of the county site from Irwinville to Ocilla. William Henderson who represented those interested in having the county site removed to Ocilla, and who procured the notes, stated to each one signing that Mitchell & Paulk would use their influence for Ocilla, and it was on this representation that the notes were signed. It appears from the evidence that Mitchell did use his influence in behalf of Ocilla; in fact,

he favored the removal to Ocilla before there was put in motion the scheme to sell the stock in the corporation which was organized to manufacture and sell the patented implement. But Paulk did not vote for, or use his influence for, Ocilla. Some of the signers of the notes received certificates of stock in the corporation. Some of them, including the defendant, gave written recommendations of the merits of the patented implement. The defendant testified that "part of the consideration of that note was subscription to stock in that corporation," that "the stock was sent to me inclosed in an envelop," but that he did not return it; as he did not know who sent it, and did not consider the stock worth anything. A patent was duly issued, and a

will "work" for the creditor's election to office, and it will not effect a reduction of the debt. *Whitman v. Ewin*, — Tenn. —, 39 S. W. 742.

See also under the Missouri statute, *Keating v. Hyde*, *infra*.

The same is true of an agreement to cancel a debt if the debtor would do what he could for the creditor's election to office. *Nichols v. Mudgett*, 32 Vt. 546, where it was argued that the agreement did not necessarily mean that the debtor, who was politically opposed to the creditor, should vote for him, but it was clear that he had used his influence for him. The court said: "Such bargains cannot be enforced in law. And the reason why they cannot be enforced is not merely because they are made criminal acts by statute, or are opposed to the provisions of the Constitution, but because of their own inherent turpitude, because they are corrupt and corrupting because they are destructive to public virtue and the welfare of the community. In republican governments especially, whatever tends to destroy the purity of elections should be guarded against with the strictest watchfulness, and pursued with the most prompt condemnation by court and legislators."

The default of the person whose influence is purchased will not alter the case. Thus, it was held that the court would not give its assistance to the recovery of money sent by the plaintiff to the defendant, with the request that the defendant use his influence to get the plaintiff nominated to the electoral office of clerk of a police court, although the defendant used his influence not for the plaintiff, but against him. *Liness v. Hesing*, 44 Ill. 114, 92 Am. Dec. 153.

It has been held that contracts to secure a nomination are equally bad with those to secure an election. *Livingston v. Page*, *supra*, where the court said: "When the voters are unevenly divided into two parties, the nomination of the stronger organization is usually equivalent to an election. And when party action is less decisive, the subsequent efforts of the voters are ordinarily confined to a selection from the can-

didates regularly presented. The individual voter of a large electorate can seldom give an effective expression to a choice that is not in line with the action of some party convention. To secure a free and exact expression of the sovereign will, there must be a proper selection of candidates, as well as an honest election. If the choice of delegates and the action of the nominating convention is improperly determined, the election ballots will fail to express the real judgment of the voters."

See also *Keating v. Hyde*, 23 Mo. App. 555, *infra*; *Liness v. Hesing*, 44 Ill. 114, 92 Am. Dec. 153, *supra*; and *Strasburger v. Burk* (Md.) 13 Am. L. Reg. N. S. 607, *infra*.

But in *Sizer v. Daniels*, 66 Barb. 426, it was held that services rendered to a political committee by their agent under a contract with him before the nomination of any candidate were not against the statutes making it a misdemeanor to contribute money to further the election of a particular person or a particular ticket.

—hiring services.

Between the hiring of influence and the hiring of services there is sometimes no material distinction.

In *Whitman v. Ewin*, *supra*, a contract to "work" for a candidate's election was held to be void.

And in *Keating v. Hyde*, 23 Mo. App. 555, it was held that an agreement not to enforce an obligation if the obligor would "work" for the nomination of the obligee as candidate for an electoral office was void, where the statute made it a misdemeanor to give or contract to give anything to another who should endeavor to procure the election of a person to office. (The court stated that it would not be illegal to compensate a person for merely advertising a candidate by means of papers, etc., where one acted as an advertiser, and not as an advocate.)

But, on the other hand, it has been held that it is not necessarily illegal to hire a

charter procured for the corporation. The original payees of the note, Mitchell & Paulk, denied in their testimony that the consideration of the note was their vote and influence in behalf of Ocilla, but insisted that it was given for an interest in a patented fertilizer distributor, and for stock in a corporation to manufacture and sell the distributor. The jury returned a verdict for the defendant. A motion for a new trial was overruled, and the plaintiff excepted.

1. The main question to be determined in this case is whether the promissory note sued on is void in the hands of an innocent purchaser for value, who took it before due and without notice of any defense. The Civil Code, § 4286, declares: "The

bona fide holder for value of a bill, draft, or promissory note, or other negotiable instrument, who receives the same before it is due, and without notice of any defect or defense, shall be protected from any defenses set up by the maker, acceptor, or indorser, except the following: (1) *Non est factum*. (2) Gambling, or immoral and illegal consideration. (3) Fraud in its procurement." It is insisted by the defendant that the real consideration of the note sued on was the votes and political influence of the payees of the note, Mitchell & Paulk, in agreeing to thus assist the defendant and others in having the county site of Irwin county removed from Irwinville to Ocilla, where the defendant lived; that, although the plaintiff claims that the

person to present the views of the candidate when he cannot personally do it.

Thus, it was held that a contract by which a candidate for Vice President of the United States employed a person to speak in advocacy of his candidacy in his native state of Indiana, when sued upon in the New York courts, will be presumed to have been made in Indiana, and unless it appears that such contract is void in Indiana, it will be presumed to be a good contract, in the absence of averment to the contrary. *Murphy v. English*, 64 How. Pr. 362, where the court said: "No authority has been cited to show that it is an offense at common law for a candidate for a national office, who could not personally present his individual views of national policy over a wide area of constituency, to employ and compensate a person for that purpose."

In *Howard v. Jacoby*, 3 Pa. Co. Ct. 436, it was said *obiter* that the statute was not intended to prevent the hiring of a person to canvass for the hirer as candidate.

And a contract with a laborer was enforced against one who hired him to travel through the country to assist in putting up and taking down a tent which his employer used for his meetings in which he agitated the election of a certain presidential candidate. *Hurley v. Van Wagner*, 28 Barb. 109. The court considered that *Jackson v. Walker*, 5 Hill, 27, *supra*, was not to be extended beyond the circumstances of the case, and that the legislature did not intend to prohibit matters of the nature concerned in the action. This case, together with *Sizer v. Daniels*, 66 Barb. 439, was distinguished in *Foley v. Speir*, 100 N. Y. 558, 3 N. E. 477, as not being contrary to the decision in that case.

Contracts involving furnishing food or drink to voters.

The statutes prohibiting the furnishing of meat, etc., or intoxicating liquors, to voters, are frequent, and contracts involving a breach of these statutes are void, and will not support a recovery by the person furnishing such supplies, against the

candidate directing that they be furnished. *Ribban v. Crickett*, 1 Bos. & P. 264; *Lofhouse v. Wharton*, 1 Campb. 550, note.

And personally voting against a candidate will not save contracts of this character. Thus, in *Duke v. Asbee*, 33 N. C. (11 Ired. L.) 112, it was held under the state statutes where a liquor seller sued a candidate upon a contract in which he furnished the defendant, at his request, such liquor as the defendant and his political friends might desire, that it was immaterial that the plaintiff alleged that he did not further the candidacy of the defendant, that he was opposed to him politically, and voted against him, the court holding that the jurors should have been instructed that, if, from the testimony, they believed it was the intention of the defendant to influence the election by the meat and drink furnished by the plaintiff, and that intention was known to the plaintiff, the latter could not recover.

A contract with the defendant by which the plaintiff was to supply intoxicating liquors to electors, together with his influence upon them for the nomination of the defendant's father, was held void in *Strasburger v. Burk* (Md.) 13 Am. L. Reg. N. S. 607, although the election was a primary election for the nomination, as this election was recognized by the law, and the supplying of liquor to electors was a criminal offense, and any contract made to violate its provisions was necessarily void.

But it was held in *Ward v. Nanney*, 3 Car. & P. 399, that an innkeeper supplying beer to voters on the request of a person who was not a candidate, but who was canvassing for one, could recover from such person so canvassing, under the English statute 7 & 8 Wm. III.

And it was held in *Thomas v. Harries*, 6 Car. & P. 616, that if a person who is not himself a candidate, and who is not known to the party who supplies refreshments to be an agent of a candidate, opens a public house at an election, and orders supplies for the voters, he is personally liable to pay, and the treating act, 7 & 8 Wm. III., chap. 24, will afford him no defense

note was given solely for an interest in a patent right and stock in a corporation which was to manufacture a fertilizer distributor, the real consideration was the votes and political influence of the payees in behalf of Ocilla; that this consideration alone induced the defendant to sign the note; and that such consideration was both immoral and illegal, and the note unenforceable for that reason. Undoubtedly, if the note sued on was not given for the stock in the corporation, or for an interest in the patent right, but was really given for an immoral and illegal consideration, it would be void and unenforceable, even in the hands of an innocent purchaser. Civil Code, § 4286. See *Rhodes v. Beall*, 73 Ga. 641; Civil Code, § 4253. If the real con-

sideration of the note was the buying of votes and political influence, for the purpose of removing a county site at an election to be held to determine that question, such a consideration will be against public policy, and void. 1 Page on Contracts, § 410, and cases cited. Is the buying of political influence to secure the removal of a county site immoral and illegal?

In the case of *Jones v. Dannenberg Co.* 112 Ga. 426, 428, 52 L.R.A. 271, 37 S. E. 729, 730, Mr. Justice Little said: "But the issue is still further narrowed to the question whether the averments of the plea set up a contract, the consideration of which was both immoral and illegal. It will be noted that the statute requires these two conditions to exist conjointly to let in the

if the goods were supplied entirely on his credit.

Similarly it was held in *Thomas v. Edwards*, 2 Mees. & W. 215, 1 Tyrw. & G. 872, that a contract by an innkeeper with a person not authorized by a candidate, to furnish supplies, was valid in the absence of evidence that the innkeeper supplied the meat or drinks with a view to induce the electors to vote for a particular candidate.

A candidate's agent cannot recover from him for money spent for whisky and in other ways prohibited by the statute. *Howard v. Jacoby*, 3 Pa. Co. Ct. 436, *infra*.

But in *Bayntun v. Cattle*, 1 Moody & R. 265, it was held that where a candidate for Parliament had ratified the expenditures made in assistance of his candidacy which were illegal, he could not recover from his agent for such expenditures. (Here it seems they were either ordered or ratified.)

Miscellaneous.

A contract assigning the fees of an office depending upon an election yet to be held is wholly void. *Willis v. Weatherford Compress Co.* — Tex. Civ. App. —, 66 S. W. 172.

A check given to a town treasurer to influence the town in voting for bonds for a railroad is void, and the drawee having certified the check as good upon a certain condition, and having paid it, cannot recover from the drawer. *Burden Bank v. Phelps*, 5 Kan. App. 685, 48 Pac. 938.

A bond given to guarantee or indemnify a taxpayer against any taxes that he might have to pay by reason of the bonding of his town for the benefit of a railroad, by reason of which he joined others in requesting the commissioners to bond the town, is void. *Dean v. Clark*, 80 Hun, 80, 30 N. Y. Supp. 45.

So, an authorization to an agent to induce votes for the selection of a townsite by the gift of lots is void, and the agent may not require his principal to carry out such gifts of lots, made by the agent. *Roby v. Carter*, 6 Tex. Civ. App. 295, 25 S. W. 725.

In *Ward v. Hartley*, 178 Mo. 135, 77 S. 51 L.R.A.(N.S.)

W. 302, where it was agreed between the members of a firm that the election expenses of one of the members should be paid out of the firm moneys, it being considered that his political position would be of an advantage to the firm, the court considered that the contract was, at the most, of doubtful validity; but, the money having been paid out under the agreement, it would not compel the partner to bring it back into the firm assets, it not appearing that it was paid out for any illegal, corrupt, or criminal purpose.

A note given after the election, by a defeated candidate, to persons who printed matter used during the campaign, not at his request, but at the request of the chairman of the committee of the party, is a note without consideration, and cannot be collected by the payee from the maker. *Dearborn v. Bowman*, 3 Met. 155.

In *Harris v. Firth*, — N. J. L. —, 68 Atl. 1064, it was held that "a promise in writing to pay the sum of \$500 'on the day after my nomination for county clerk in the year 1900, for value received, is not *ipso facto contra bonos mores*, nor against public policy. While not valid as a negotiable promissory note, it is valid as a promise to pay money, unless evidence *aliunde* be adduced from which illegality in the inception of the contract may reasonably be inferred." There was no evidence admitted to show that the contract depended upon services for the maker's election, or that it was a gambling contract.

It is not intended to include cases where notes payable after the maker was elected were held to be wagering contracts.

II. Agreements tending to influence appointments to office.

Cases of agreement between the holder of an office and his deputy are not included, nor other cases of agreements to divide official fees or salary. For validity of agreement to divide fees or salary of public officers, see the note to *Anderson v. Branstrom*, 43 L.R.A.(N.S.) 422. Agreements as to the appointment of a person to a pri-

defense. As was said in the opinion in the case of *Rhodes v. Beall*, supra, 'the statute which makes such a contract illegal and void must also make the same a crime, or the act itself must be immoral and *contra bonos mores*.' An examination of the plea discloses the fact that its averments do not designate the offense for which the husband of the plaintiff in error was arrested, nor can we gather from it the nature of the crime with which he was charged. It may have been a felony, and, equally as well, it may have been a misdemeanor." And again, at page 430 of 112 Ga.: "So that we think that if we confine the averments made in the plea to their narrowest limits, and assume, because it was not otherwise pleaded, that the criminal offense for the set-

tlement of which it is averred that the note and mortgage were given was a misdemeanor, then the consideration was an illegal one. Was it an immoral one in the sense of the statute? One of the definitions of 'immoral' given in the Standard Dictionary is 'hostile to the welfare of the general public.' And Mr. Bouvier defines immorality to be 'that which is *contra bonos mores*;' and, in defining what contracts are *contra bonos mores*, the same author says, among other things which he names, that those which have a tendency to mischievous or pernicious consequences are void as being contrary to good morals." Is the buying of votes and political influence a crime under our law? Under the definition cited above, selling or buying votes or political influence

vate official duty such as administrator or receiver, etc., are not considered.

It is the present American common law that all agreements tending to influence appointments to public office are absolutely void. Probably the same is substantially true to-day in England, though the courts were a good while in reaching the conclusion.

By the statute of 12 Rich. II. chap. 2, certain officers were required to be sworn that they would not make certain appointments "for any gift or brokerage, favor or affection." There were later statutes restricting certain farmings or sellings of offices, and by 5 & 6 Edw. VI. chap. 16, it was provided that sales in deputation, etc., of offices relating to the administration of justice or the collection of the King's revenue (with certain exceptions) should cause the forfeiture or loss of the office, and that contracts relating to such sales, etc., should be void. The provisions of this act were extended to other offices, etc., by the statute of 49 Geo. III. chap. 126. By the statute of 6 & 7 Wm. III., army officers were required to take an oath that they had not paid or promised any money or gratuity for the commission.

In *Filson v. Himes*, 5 Pa. 452, 47 Am. Dec. 422, the court said: "Is not the procurement of an appointment to office by private influence illegal on the ground of public policy? In England, a public office is yet so much a subject of private property that the sale of it was not prohibited before the 5 & 6 Edw. VI. chap. 16, which interdicted it in respect to offices which concern the administration of justice, or the public revenue, and the 49 Geo. III. chap. 126, which interdicted it in respect to offices in the gift of the Crown, and in certain specific cases. Had all traffic of the sort been deemed, from the first, illegal at the common law, these statutes would have been unnecessary; and hence it is, perhaps, that the English judges handle transactions like the present with the utmost tenderness. But, notwithstanding what was said by Mr. Justice Burrough, in *Richardson v. Mellish*, 2 Bing. 252, 9 J. B. Moore, 435, 1 Car. & P. 241, Ryan & M. 51 L.R.A. (N.S.)

66, 3 L. J. C. P. 265, 27 Revised Rep. 603, that public policy is an unruly horse that carries you, when you bestride it, you know not whither, the settled law of this day is, that this same public policy may render the sale of an office illegal even in England; and the Chief Justice Best, arguing in restraint of its influence, conceded in the same case, that wherever the proof clearly puts the contract on the contravention of public policy, the principle must prevail. And there are many English cases in which the plaintiff broke down precisely on that ground. But were the English common law otherwise, such contracts could not be tolerated by the courts of a country whose government is founded theoretically on the most pure and exalted public virtue."

"We have no doubt that all contracts based upon the sale of, or traffic in, offices of any description, at this day, and in this country, are void at common law, as against public policy." *Eddy v. Capron*, 4 R. I. 394, 67 Am. Dec. 541.

Early cases.

(Cases between principal and deputy, or for a division of fees of an office, are excluded.)

In *Vernon's Case*, 2 Co. Litt. 234a, the appointment was held void under the statute of Edw. VI., where the cofferer of the King's house, for a consideration from A, surrendered his office to the King, that A might be appointed, which was done.

Similarly, a bond given for like action in regard to the office of warden of the Fleet prison was held void under such statute, the office being one touching the administration or execution of justice.

So it was held in Virginia that a bond was void under the statute of Edw. VI., which was given by one deputy sheriff to another deputy sheriff for a certain definite sum of money, the consideration being the procuring of the influence of the obligee with the sheriff to secure the appointment of the obligor. *Noel v. Fisher*, 3 Call. (Va.) 215.

is undoubtedly *contra bonos mores*, but, for it to be both immoral and illegal, it must appear that the act is also a crime under our law, or that it is of itself immoral and opposed to public policy; for, as observed by Mr. Justice Little in the Jones Case, *supra*, these two conditions must exist conjointly to let in the defense. We hold that the act of buying political influence is against public policy. Is it also illegal under our statute to buy votes and political influence? The Penal Code, § 665, declares: "If any person shall (1) buy or sell, or offer to buy or sell, a vote, or shall be in any way concerned in buying or selling, or contribute money or any other thing of value for the purpose of buying a vote at any election in this state, or in any county

thereof; . . . he shall be guilty of a misdemeanor. . . . The hiring of workers qualified to vote in said election or primary before or on the day of election, for the purpose of canvassing for or influencing votes in behalf of any candidate, or the being hired for said purpose, is a misdemeanor." Under the averments of the defendant's plea, the note sued upon "is void," and "the plaintiff cannot recover thereon, for the reason that said note was given for an immoral and illegal consideration; to wit, to purchase political influence and votes in an election held in said county for the purpose of removing the courthouse from Irwinville to Ocilla." There was evidence tending to show that such was the consideration of the note sued on, and the

(But in *Godbolt's Case*, Leon, pt. 4, p. 33, it was held that the sale of a bailiwick of a hundred was not within the statute of Edw. VI., as it was not an office concerning the administration of justice, nor an office of trust; but the facts of the case are not reported.)

The sale of the good will of a business as law stationer, etc., together with an agreement that the seller would use his best efforts to have the buyer appointed in his stead as collector of taxes and distributor of stamps, is an illegal contract under the statutes of Edw. VI. and Geo. III., and will not support an action by the buyer against the seller to carry it out. *Hopkins v. Prescott*, 4 C. B. 578, 16 L. J. C. P. N. S. 259, 11 Jur. 562.

But there are early cases which were decided upon grounds of public policy.

In *Kingston v. Pierepont*, 1 Vern. 5, it was held that a gift in a will of a certain sum to procure by all lawful means a dukedom within a year after testator's decease was void (but the year had already elapsed when the suit was brought).

This was followed in the case of *Edgerton v. Brownlow*, 4 H. L. Cas. 1, 23 L. J. Ch. N. S. 348, 18 Jur. 71, 24 Eng. Rul. Cas. 118, where it was held that a proviso in a will defeating limitations in case the life holder of an estate should not become a duke or marquis was void as against public policy.

And it was held in *Rex v. Pollman*, 2 Campb. 229, 11 Revised Rep. 689, that it is a misdemeanor at common law to conspire, for money, to procure the appointment of a person by the authorities to an office in the customs.

One of the most influential of the cases on the public-policy aspect of the subject is *Garforth v. Fearson*, 1 H. Bl. 328, note, 2 Revised Rep. 778 (not strictly within our scope), where, in holding that an agreement that one who receives a customs office by the recommendation of another shall hold the profits of such office at the disposal of the other will not support an action in assumption, the court considered not only that the arrangement was prohibited by the statute 51 L.R.A. (N.S.)

utes of 12 Rich. II. and 5 & 6 Edw. VI., but that it was illegal in itself.

So, contracts for the sale of the appointment to the command of a ship in the East India Company's service were held illegal, as this was a position virtually in a branch of the public service. *Blachford v. Preston*, 8 T. R. 89; *Thomson v. Thomson*, 7 Ves. Jr. 470, 6 Revised Rep. 151.

Thus, in *Blachford v. Preston*, *supra*, where a payment was made to the person securing the appointment, with an agreement that he would repay it on the appointment of the payor's successor, it was held that such repayment could not be enforced on the appointment of such successor.

Where one resigned command of a ship in the East India Company's service in favor of another, in consideration of the latter's agreement for an annuity, and thereafter the company, in seeking to break up the custom of such contracts, paid the promisor a compensation or allowance for any loss of the sale of his position, it was held that equity would not decree payment, out of such compensation, of the annuity or its equivalent, as the contract was illegal. *Thomson v. Thomson*, *supra*.

—early applications in equity for relief.

Generally as to injunction in favor of party *in pari delicto*, against enforcing or otherwise proceeding with illegal contract, see the note to *Basket v. Moss*, 48 L.R.A. 842.

The early equity cases seem to have refused effectual relief against contracts for office, but later the court granted relief in some cases, in which the essential illegality of such contracts was recognized.

In *Berrisford v. Done*, 1 Vern. 98, relief in equity was refused against a bond (except as to interest thereon) given for the consideration that the obligee should surrender his commission as captain in the army in Ireland, the obligor, his lieutenant, expecting to get the place; though the appointing authority, on accepting the resignation, declined to appoint the obligor.

So, in *Symonds v. Gibson*, 2 Vern. 308,

jury under the evidence was authorized to find such to be the case. The evidence showed that W. A. Mitchell and J. B. D. Paulk were partners, owing a certain patent right to a fertilizer distributor, and were without funds with which to promote it. They endeavored to interest certain citizens of Ocilla in the patent, including the maker of the note, and to sell them a half interest in it, and also stock in the corporation created to promote the enterprise. The defendant and other Ocilla citizens were also interested in the campaign then pending to have the county site of Irwin county removed from Irwinville to Ocilla. Various conversations were had between the citizens of Ocilla, including the defendant, and one or both members of the

firm of Mitchell & Paulk, which tended to show an agreement that, if Mitchell & Paulk would vote for and use their political influence in favor of Ocilla, the defendant and the other citizens of Ocilla associated with him in endeavoring to have the county site removed would take stock in the corporation to promote the patent right. The evidence for the defendant tended to show that Mitchell promised to vote and use his influence for Ocilla, and that his partner, Paulk, would do the same. Paulk did not vote for or use his influence for Ocilla, and Mitchell & Paulk both denied selling or offering to sell their vote or influence for Ocilla. J. A. J. Henderson testified in part as follows: "There was a conversation between Mr. Mitchell and myself, in which he

relief was refused except as to the interest on bonds given to one who had the promise of appointment of himself as purser on one of the King's ships, in consideration that he procure the appointment of the obligor to the position.

So, in *Ivye v. Ashe*, Colles, P. C. 267, the court of chancery refused to give relief against a bond given in consideration that the obligee would procure for the obligor a commission in the marines, as officers of marine regiments were not within the statute of 6 & 7 Wm. III., requiring commission army officers to make oaths that they had not paid any money or gratuity for their commissions.

But, on the other hand, in *Law v. Law*, 3 P. Wms. 391, it was held that equity would require that a bond be delivered up which was given in consideration of the procurement by the obligee of a place with the excise commissioners for the obligor. The court stated that though the excise was no part of the revenue at the time of the statute of Edw. VI., yet it might be "within the reason and mischief" of that law, which was rather remedial than penal.

And in *Morris v. McCulloch*, 1 Amb. 432, the chancery court, per Henley, Ld. Ch., in giving judgment for the refund of money paid for the procurement by "interest" of a commission for the plaintiff in the marines (he being later discharged on account of his having been a livery servant), said: "I lay down this rule, that if a man sells his interest, to procure a person an office of trust or service under the government, it is a contract of turpitude; it is acting against the Constitution, by which the government ought to be served by fit and able persons, recommended by the proper officers of the Crown for their abilities, and with purity. This case is within the reason of the determinations upon marriage brokerage and *post obit* bonds. It is one of the most useful jurisdictions of the court, and ought to be exercised upon all occasions."

In *Whittingham v. Burgoyne*, 3 Anstr. 900, equity enjoined the payment of money levied in execution on a judgment upon a draft given to the colonel of a regiment in

consideration that he procure the promotion of a cornet, as the contract was void. The court stated in effect that the principle of *particeps criminis* did not apply when the granting of relief by the court would tend to suppress vicious practices.

In *Osborne v. Williams*, 18 Ves. Jr. 382, 11 Revised Rep. 218, affirmative relief was granted to a son's estate against his father's estate from a contract between father and son by which the father should gain for the son the father's position as captain of a packet hired by the postoffice. The court considered the contract void as a fraud both upon the postoffice authorities (it being done without their knowledge), and also under the ship registry acts; and that the parties were not really *in pari delicto*, the fault being considered as mostly that of the father.

It may be noted that in *Hartwell v. Hartwell*, 4 Ves. Jr. 815, which arose on a bill in equity on a bond, for an annuity, against the executrix of the obligor, to have the bond established against his assets, the court retained the bill pending an action which the plaintiff might bring at law. The defense was that the obligor, in succession to his deceased father, was appointed captain of a government mail packet, his appointment being secured by the influence of friends, who insisted as a condition that he should pay an annuity to his mother for his life, and for this the bond was given to her.

Sales of local offices by local public authorities.

There is some difference of opinion as to the power of local public authorities to sell a local office.

In *Meredith v. Ladd*, 2 N. H. 517, it was held that, in the absence of statute on the subject, the sale by a town of the office of constable is void, and the town may not recover upon a promissory note given by the intended constable to the town for the price of sale.

So, in *Johnson County v. Mullikin*, 7 Blackf. 301, it was held that county com-

told me, if we would get up this subscription for the stock for this patent right, we would have the following of him and Mr. Paulk; and he connected Mr. Young with it. He said that we would secure that district over there that they lived in, secure their influence and get that district. I thought that was a fair and square understanding as I ever had [with] anybody in my life. I was anxious about the court-house removal question, and they were rather against us in a political way, and, when you all got it up, we did it for the purpose of securing that influence. That was my understanding. . . . The only thing that moved me to give the note was to get that political influence. That was the agreement with Mr. Mitchell. I remem-

ber one conversation with Mr. Paulk in Ocilla before the election; and I think the words he used were: 'Well, if you take this stock here in Ocilla, the interest in our patent right, it is going to change my feelings towards you. I see you are all interested in me, and I will be more so towards Ocilla.' Our political feelings had always been bad; that is the conversation in substance that we had. . . . Before the notes were signed, I had an agreement with Mr. Mitchell, whereby he was to use his influence in the election. As near as I can give it to you, it was that if we would get up this subscription, take half interest in this patent right, Paulk and his influence would be with us in this court-house fight; and, after it was over, Mr.

missioners could not recover upon a promissory note given to them in consideration that they would appoint a certain person a collector of revenue, the amount of the note when collected to go to the county and be part of its funds, as the note was void, as given upon a sale of a public office. The court said: "It does not matter whether the office be sold in violation of an express statute or not. If the bestowment of it be for a money consideration, it is in contravention of public policy, and equally void."

In *Groton v. Waldborough*, 11 Me. 306, 26 Am. Dec. 530, it was held that a constable could not recover from a town the price he had paid for his office, which was put up for auction and sold by the town, for although the contract was illegal, the court would leave the parties where they had placed themselves.

In *Alvord v. Collin*, 20 Pick. 418 (where it seems that the matter was not necessary to the decision), the court considered that the office of collector of taxes was not a public office, and that while it would probably be illegal for the town to sell the office to the lowest bidder, at all events, that it was not illegal to sell the office for a certain figure, the theory being that the town would not be compelled to comply with the bid unless the bidder was a suitable person.

These suggestions bore fruit in subsequent Massachusetts cases. Thus, in *Spencer v. Jones*, 6 Gray, 502, it was held that a vote of a town that the taxes be collected by the lowest bidder, without qualification, is void, and the town may not recover of him the amount of his bid, although he had, before the suit, collected the taxes of the year.

But in *Howard v. Proctor*, 7 Gray, 128, it was held that a vote of a town to let out the collection of taxes to the lowest bidder the town will accept is valid, and the person so chosen is a good collector.

In *Wilkes-Barre v. Rockafellow*, 171 Pa. 177, 30 L.R.A. 393, 50 Am. St. Rep. 795, 33 Atl. 269, where a city, as the price of the office of treasurer, exacted from a candidate an agreement to pay interest on funds in his hands as treasurer, it was held that

this contract was not capable of enforcement against the treasurer's sureties.

It may be noted that in *Thetford v. Hubbard*, 22 Vt. 440, it was held that a town had a right to sell the office of first constable to the highest bidder, and to collect from him upon his promissory note given for the purchase, under the statute which provided that "the inhabitants of any town shall have liberty to agree with some suitable person to fill the office of first constable, in such method as they shall judge most advantageous, and such person shall afterwards be chosen by the town."

Use of influence.

All contracts for the purchase of one's influence in the appointment to public office are wholly void.

A promise to pay a certain sum per annum to a person who was, in consideration therefor, to use influence with the governor to appoint the promisor to a certain office, is void as against public policy, and no action will lie upon the promise. *Faurie v. Morin*, 4 Mart. (La.) 39, 6 Am. Dec. 701.

Most of the cases arise where the holder of an office for a consideration resigns in favor of the payor, and is to advocate his appointment.

A contract by a postmaster for the sale of his goods, etc., with an agreement to secure (or to endeavor to secure) the office for the purchaser, is void. *Eilson v. Himes*, 5 Pa. 452, 47 Am. Dec. 422; *Edwards v. Randle*, 63 Ark. 319, 36 L.R.A. 174, 58 Am. St. Rep. 108, 38 S. W. 343; *Harris v. Chamberlain*, 126 Mich. 280, 85 N. W. 728.

The title to the goods will not pass under such a contract. *Harris v. Chamberlain*, supra.

An agreement is void that one party shall transfer to the other a lease and certain goods in a store, and secure within six months the transfer of the postoffice to the location of the store, and the appointment of the transferee to the position of postmaster, and the seller cannot recover a balance upon the contract, all of which he has performed except the removal of the post-

Mitchell told me he was never so surprised in his life as he was when John Paulk didn't do it. I think Mr. Mitchell did use his influence for us. The substance was that if we went into this company and carried out that plan and got these notes, Paulk's influence would be for us." R. L. Henderson, a witness for the defendant, and who was defendant in another suit on a similar note given by him to Mitchell & Paulk, testified: "What I gave the note for was for the influence of Mr. Mitchell and Mr. Paulk to help us remove the courthouse to Ocilla. That was what I would consider the consideration. The negotiations were carried on by my brother, William Henderson. He represented to me that that would secure the influence of Mr.

Mitchell and Mr. Paulk." William Henderson, a witness for the defendant, and also a defendant in his own case, testified in part as follows: "I know W. A. Mitchell and J. B. D. Paulk. Along in May, 1907, at the time these distributor notes were given, there was a political campaign going on here in Irwin county about removing the court house from Irwinnville to Ocilla. I was considerably interested in that campaign, and thought of nothing else about that time. I was in favor of bringing the courthouse here. J. B. D. Paulk had political influence, and had always been strong, politically, here. I know what his attitude was about the courthouse removal question. I didn't hear him express himself, but it seemed to me like he ought to have been in

office and the appointment of the defendant, as the contract is indivisible. *Filson v. Himes*, supra (where it was said that if a price had been put upon the illegal part of the consideration, it might have been deducted).

Similarly, a person who had paid for a sutler's stock on being appointed, through the seller's influence, his successor by the local military authority, cannot recover the price paid, though the Washington authorities fail to confirm the appointment; nor can he offer evidence that the seller had falsely represented to him that the approval of the local officer was all that was required. *Haas v. Fenlon*, 8 Kan. 601.

So, an action by the purchaser to recover the price paid upon the contract failed, as the contract was void, and the court would not lend its aid to either party, in *Edwards v. Randle*, 63 Ark. 319, 36 L.R.A. 174, 58 Am. St. Rep. 108, 38 S. W. 343, where the defendant, for a certain sum, agreed to sell to the plaintiff his postoffice fixtures and furniture, further agreeing to resign his office and recommend the plaintiff as his successor, and permit him to recover the fees of the office from the time of his actual appointment as successor until the time that he was installed, etc., and the defendant had done all that was possible, but could not remove the fixtures, etc., without the permission of his superior.

But where no execution had been had of the contract except the payment of certain money by the purchaser, it was held that although the contract was illegal, he might recover the money he had paid. *McCall v. Whaley*, 52 Tex. Civ. App. 646, 115 S. W. 658 (affirmed on rehearing, 115 S. W. 659), where, under the agreement, one party was to sell to the other certain personal property and a store and storehouse and lot, and was to resign as postmaster, and use his influence for the appointment of such successor.

A note given in consideration that the payee, who was the United States mail agent, should resign his office and use his influence for the appointment of the maker of the note as his successor, cannot be recovered upon (where it is found by the jury that

the plaintiff was a nominal plaintiff, and that the payee was the real holder of the note). *Meachan v. Dow*, 32 Vt. 721.

A note is void which is given in consideration of an agreement by the person to be benefited by it that he will resign the office of deputy sheriff, and endeavor to secure said office for the person for whose accommodation the note was made, and the person endeavoring to sell his office cannot recover upon the note, as the consideration was in fact the sale of the office of deputy sheriff, an office of trust, which concerns the administration of justice. *Carleton v. Whitcher*, 5 N. H. 196.

A mortgage is void at common law which is given to secure a sum of money to be paid to the holder of an office of the United States for resigning it, and for the expenses and compensation of persons to go to Washington to procure the authorities there to accept his resignation, and to appoint a certain person as his successor. And the court will enjoin its foreclosure under the power of sale therein. *Basket v. Moss*, 115 N. C. 448, 48 L.R.A. 842, 44 Am. St. Rep. 463, 20 S. E. 733 (where the court quoted the local statute making void bargains, etc., given for the purchase or sale of offices the sale of which is contrary to law.)

An obligation is against public policy and void which is given in consideration of an agreement that the obligee would resign his office as port physician under the United States "in favor of the obligor," although it was not intended that the obligee should recommend the appointment of the obligor, or use any influence to have him appointed, notwithstanding that there was no statute in the state on the subject. *Eddy v. Capron*, 4 R. I. 394, 67 Am. Dec. 541. (The court does not point out how there can be a resignation "in favor of" a person without the resignor recommending such person, but as the other party had himself formerly held the office, it is possible that the resignation was not in favor of anyone, the other party taking his chances.)

Miscellaneous.

In *Stroud v. Smith*, 4 Houst. (Del.) 448,

Ocilla. I discussed this matter with W. A. Mitchell a number of times and with Paulk one time. I told Mitchell that there was a little politics in this thing if nothing else, and more politics than anything else; and if he could carry J. B. D. Paulk and Joe Young, and he told me that Joe's wife was already for Ocilla, that Joe would do anything in the world for him, and they would help us in this election. I asked him over again about Paulk, if he would help us; and he said, yes, he would if we the people of Ocilla got up this, and I told him I could get it right away if they would promise to do that. He didn't say just that if the people of Ocilla would get up this money for this interest, but that was what we were talking about, and what we were leading to. Mr. Mitchell was wanting to get stock for this patent right, and I was wanting him to promise to help us in the courthouse election, and told him, if he would do it, I could get it up right off, and he was perfectly willing himself. I asked him if Mr. Paulk would favor Ocilla if these notes were signed up, and he said he would; and I told him, 'I can go and get it up in two hours.' Other witnesses for the defendant testified substantially to the same effect as those above quoted.

One cannot read the testimony in this case, and not be impressed with the idea

that it was understood between one of the partners (Mitchell) and the defendant, J. A. J. Henderson, and the other witnesses who testified that "the consideration causing me to sign this note and indorse the others was the agreement I had with Mitchell for his and Paulk's influence in the election," that the citizens of Ocilla were to get the votes and influence of the firm of Mitchell & Paulk for Ocilla, in consideration for the notes. If Mitchell, a member of the firm of Mitchell & Paulk, agreed to sell, in connection with a firm transaction, the votes and influence of the firm, such agreement would taint the whole transaction, and his copartner would be affected. A contract based upon such a consideration would not only be immoral and against public policy, but would be illegal as well. It would be both illegal and immoral. Such a contract cannot be enforced under our law. The legislature of the state, by the statute quoted from above, has wisely endeavored to throw around our elections every safeguard to prevent corrupt practices at and preceding elections held in this state, and makes the buying or selling or offering to buy or sell votes at any election a misdemeanor.

Under § 665 of the Penal Code, *supra*, it is illegal to sell or offer to sell votes "at any election in this state." If, therefore,

it was held that an agreement for a money consideration by which two employees of a postoffice exchanged their positions was void and would not be enforced.

Where an arrangement was made between a city treasurer and one who became his successor, that the city treasurer would run for mayor, that his successor would run for city treasurer, and on being elected would enable the former treasurer to handle the funds, he being in default to the city, it was held that the bond given by the former treasurer to the treasurer for the handling of the funds was void. *Cobbs v. Hixson*, 75 Mich. 260, 4 L.R.A. 682, 42 N. W. 818.

The mandate of a labor union commanding public officers who are members of it to appoint a certain person to office is void, and punishment for disobedience of such mandate will be set aside with damages, notwithstanding the pledge of such members of such labor union to yield obedience to all its laws and legal summons, etc., and not to do anything prejudicial to the best interest of the association, as such pledge is binding on the makers only in so far as those purposes are lawful and are to be attained by lawful means. *Schneider v. Local Union No. 60*, 116 La. 270, 5 L.R.A. (N.S.) 891, 114 Am. St. Rep. 549, 40 So. 700, 7 Ann. Cas. 868.

For obligation of members of labor union as to political matters, see the note to *Schneider v. Local Union No. 60*, 5 L.R.A. (N.S.) 891.

51 L.R.A. (N.S.)

Where a promissory note is founded on a sufficient consideration, one who signs as a surety upon a promise that the maker will be appointed to public office cannot avoid the note, as the element of illegality did not enter into the real consideration. *Graham v. Marks*, 98 Ga. 67, 25 S. E. 931.

In *Outon v. Rodes*, 3 A. K. Marsh. 432, 13 Am. Dec. 193, it was held that a contract to resign an office and obtain the appointment of the successor for a consideration was against the statute of Edw. VI., and, if not, was against public policy; but a judgment on a note growing out of a transaction of this kind would not be enjoined on the failure of the person to whom the office had been farmed fully to perform his duty, where the bill to enjoin did not disclose the turpitude of the transaction, but it only appeared on the allegations of the person who had procured the judgment. (It does not appear just how the turpitude was not shown by the enjoining party, and how it was shown by the party who was sought to be enjoined.) The decision in this case is misstated in *Eversole v. Holliday*, 131 Ky. 202, 114 S. W. 1195, where it was held that a sheriff was not precluded from an action requiring his deputy to account because the sheriff might have procured his office by an illegal bargain with the former sheriff and the defendant, which included the agreement to appoint the defendant his deputy.

B. B. B.

the consideration of the note sued on was in payment or part payment for the political influence and votes of Mitchell and Paulk, even though a part of the consideration was an interest in a patent right, or stock in a corporation to promote the patent right, still the plaintiff would not be entitled to recover on the notes as against the defendant, if the real consideration was based upon the purchasing of the votes and political influence of the payees in favor of Ocilla. The jury has found, in effect, that such was the consideration of the notes sued on, and we think there was sufficient evidence to support their verdict.

2. The first, second, third, and fourth grounds of the motion for a new trial raised substantially the same question. Evidence was admitted by the court, over objection, which tended to show that the inducement to the defendant to sign the note sued on, and to others who were parties to the scheme and who signed similar notes, was the votes and political influence of the payees, Mitchell & Paulk, in helping to remove the county site from Irwinville to Ocilla, where the defendant and the others who signed similar notes resided. It is insisted that the evidence objected to was irrelevant, and that that which referred to the inducement offered to others to sign similar notes was as to a matter between other parties. Under the ruling made in the first division of this opinion, it follows that evidence which tended to show that the consideration of the note sued on was the votes and political influence of the payees of the note in favor of Ocilla was admissible for that purpose. It is difficult to prove an express consideration of the kind alleged. No one would readily admit that he was buying or selling a vote. As one witness expressed it, "it was a pretty ticklish thing coming out that way with a man like him, to what looked like buying him, and I wanted to go as far as I could." Slight circumstances, therefore, might shed great light on such a transaction; and, where there was a general scheme to promote a patent right, on one side, and a general scheme to have a county site removed, on the other side, conversations between the parties to the two general schemes which tended to show what the real consideration of the notes sued on was were admissible for that purpose. Nor can it be said, under the facts of this case, that the evidence of some of the witnesses is admissible as being *res inter alios acta*, because they were not parties to the present suit.

3. The fifth ground of the motion assigns error because the court admitted in evidence, over objection, the testimony of

the defendant's witness, R. L. Henderson, as follows: "In a conversation after the courthouse election I stated to Mr. Mitchell that was the consideration of my note, and the reason I went into the thing was to help out in the removal of the courthouse by Mr. Paulk's influence, and he, Mr. Mitchell, stated that he regretted very much that J. B. D. Paulk did not help us to remove the courthouse." The objection was that this conversation occurred after the transaction, and was merely hearsay, and not binding on the parties. This evidence was admissible as being in the nature of an admission.

4. The court allowed H. B. Sutton, one of the defendant's witnesses, to testify, over objections of the plaintiff, as follows: "I had a conversation with W. A. Mitchell during the courthouse campaign in 1907 about the subscription to certain stock or buying half interest in a patent right for a guano distributor, and he was trying to get me to subscribe, and we were talking about the political situation about removing the courthouse; and I told him I was very sorry that J. B. D. Paulk wasn't with us, and he told me that all Ocilla would have to do would be to buy this stock, and Paulk would come in all right. I don't remember whether I ever told this conversation to William Henderson or any other parties here in Ocilla or not." It is insisted that this conversation was not had with any of the parties to this suit, and did not appear to have been communicated to either of them, so that no one could have contracted on the faith of it. We think the evidence was properly admitted, for the reason given in the second division of this opinion.

5. Error is assigned on the refusal of the court to charge the jury, as requested in writing by plaintiff's counsel before the beginning of the charge of the court, as follows: "If you find from the evidence that any member of the firm of Mitchell & Paulk agreed that if the defendant and other persons named in the defendant's answer would become interested, either by going into a corporation or otherwise, in a patent right of a manure distributor, and giving their notes for their respective shares or interest therein, then Mitchell and Paulk, or either of them, would use their influence in favor of Ocilla in the county-site removal contest, but if you further believe that there was no agreement whereby Mitchell and Paulk, or either of them, was to sell his vote, and no agreement whereby either of said parties was to buy any other person's vote, or to corruptly influence any voter, then I charge you that such agreement would not render the consideration of the note illegal and immoral,

and, under such circumstances, you should find a verdict in favor of the plaintiffs." Under the facts of this case, this refusal to charge was not error.

6. The plaintiff requested the court in writing to charge the jury as follows: "A mere agreement to use one's influence in favor of one side in a public issue, without agreeing to sell one's vote or corrupt any other voter, is neither illegal nor immoral; and, in order to defeat a recovery by an innocent holder of a negotiable note, it would have to appear that the consideration of the note was both immoral and illegal." Error is assigned on the refusal to so charge. This request to charge was not an accurate statement of the law applicable to the real issues of this case, and the court did not err in declining to so instruct the jury.

7. A request to charge that which had already been "charged in substance" was properly denied, and the refusal to "charge the same just as requested" by counsel for the plaintiff will not require a new trial.

8. The court did not err in overruling the motion for a new trial.

Judgment affirmed.

All the Justices concur.

ILLINOIS SUPREME COURT.

CITY OF ZION

v.

RICHARD BEHRENS, Plff. in Err.

(262 Ill. 510, 104 N. E. 836.)

Municipal corporation — power to prohibit use of tobacco.

The police power of a city does not extend to the prohibition of smoking or carrying lighted tobacco in its streets and parks, which are spacious enough so that

the use of tobacco in such places cannot be harmful to others, or tend to cause danger to property from fire.

(February 21, 1914.)

ERROR to the Circuit Court for Lake County to review a judgment convicting defendant of violating an ordinance prohibiting the use of tobacco. Reversed.

The facts are stated in the opinion.

Messrs. A. F. Beaubien and W. H. Fabry, for plaintiff in error:

Under police power, laws cannot be passed prohibiting that which is harmless in itself.

Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Ex parte Hayden, 147 Cal. 649, 1 L.R.A.(N.S.) 184, 109 Am. St. Rep. 183, 82 Pac. 315.

Regulations under the police power must have some adaptability to the end sought for.

Ruhrstrat v. People, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; State v. Redmon, 134 Wis. 89, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408.

The right of municipal corporations to regulate private conduct under the police power is more limited than that of the state.

Wice v. Chicago & N. W. R. Co. 193 Ill. 351, 56 L.R.A. 268, 61 N. E. 1084.

Tobacco is not one of the outlawed products, like opium or whisky, unless possibly in the form of cigarettes.

Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132.

Citizens have the right to use public streets without undue restrictions.

Note. — Power to prohibit or restrict use of tobacco.

The power to prohibit or restrict the use of tobacco is, in the absence of constitutional provision, a matter depending upon the extent of the police power of the state or municipality. "Generally speaking, it may be said that the proper authorities may control practices in the operation of all business which endanger the public welfare and safety; but only such regulations will be sustained as in fact are necessary for the safety and comfort of the public, and the courts will declare arbitrary provisions invalid." 8 Cyc. 866.

In State v. Heidenhain, 42 La. Ann. 483, 21 Am. St. Rep. 388, 7 So. 621, holding that a charter provision granting a city power to provide for public health is sufficient 51 L.R.A.(N.S.)

authority for an ordinance prohibiting smoking in street cars, the court says: "Smoking in itself is not to be condemned for any reason of public policy. It is agreeable and pleasant, almost indispensable to those who have acquired the habit, but it is distasteful and offensive, and sometimes hurtful, to those who are compelled to breathe the atmosphere impregnated with tobacco in close and confined places."

The distinction between open and confined places, suggested in the foregoing case, renders that case clearly harmonious with ZION v. BEHRENS.

In holding unreasonable an ordinance prohibiting the smoking of cigarettes within the corporate limits of a city, the court in Hershberg v. Barbourville, 142 Ky. 60, 34 L.R.A.(N.S.) 141, 133 S. W. 985, Ann. Cas. 1912D, 189, said: "The ordinance is so

Swift v. Topeka, 43 Kan. 671, 8 L.R.A. 772, 23 Pac. 1075; People v. Armstrong, 73 Mich. 288, 2 L.R.A. 721, 16 Am. St. Rep. 578, 41 N. W. 275.

The police power does not justify interference with private rights for esthetic purposes.

Haller Signs Works v. Physical Culture Training School, 249 Ill. 436, 34 L.R.A. (N.S.) 908, 94 N. E. 920.

The ordinance is against the spirit of our laws.

Ibid.

The ordinance is unreasonable as applied to all the streets and parks in the city, and as making no proper directions for a real health ordinance.

Chicago v. Gunning System, 214 Ill. 628, 79 L.R.A. 230, 73 N. E. 1035, 2 Ann. Cas. 892; Dixon v. Messer, 136 Ill. App. 488; People v. Schenck, 257 Ill. 384, 44 L.R.A. (N.S.) 46, 100 N. E. 994, Ann. Cas. 1914A, 1129; Bailey v. People, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98.

Messrs. Theodore Forby and O. P. Barnes, for defendant in error:

The ordinance in question is presumed to be valid, and the burden of proof is on the plaintiff in error to clearly show its invalidity.

Belleville v. Pfingsten, 225 Ill. 293, 80 N. E. 266; People ex rel. Lockwood & S. Co. v. Grand Trunk Western R. Co. 232 Ill. 292, 83 N. E. 839; Springfield v. Postal Teleg. Cable Co. 253 Ill. 346, 97 N. E. 672, 164 Ill. App. 276; Plymouth v. McWherter, 152 Ill. App. 114; Harmon v. Chicago, 140 Ill. 374, 29 N. E. 732; Berry v. Chicago, 192 Ill. 154, 61 N. E. 498.

The use of tobacco comes under the police power of the city.

People ex rel. Berlzheimer v. Busse, 231 Ill. 251, 83 N. E. 175; Gundling v. Chicago, 176 Ill. 340, 48 L.R.A. 230, 52 N. E. 44, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Chicago v. Drogaawacz, 256 Ill. 34, 99 N. E. 869; 8 Cyc. 868; Austin v. State, 101 Tenn. 563, 50 L.R.A. 478, 70 Am. St. Rep. 703, 48 S. W. 305, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; State v. Sbragia, 138 Wis. 579, 23 L.R.A. (N.S.) 697, 119 N. W. 290.

Statutes and ordinances against smoking on streets and in public places are valid.

State v. Heidenhain, 42 La. Ann. 483, 21 Am. St. Rep. 388, 7 So. 621; Hershberg v. Barbourville, 142 Ky. 60, 34 L.R.A. (N.S.) 141, 133 S. W. 985, Ann. Cas. 1912D, 189; Com. v. Thompson, 12 Met. 231.

broad as to prohibit one from smoking a cigarette in his own home or on any private premises in the city. To prohibit the smoking of cigarettes in the citizen's own home or on other private premises is an invasion of his right to control his own personal indulgences. The city council is authorized by statute to enact and enforce all such local, police, sanitary, and other regulations as do not conflict with general laws. . . . But under this power it may not unreasonably interfere with the right of the citizen to determine for himself such personal matters. If the council may prohibit cigarette smoking in the city, it may prohibit pipe smoking or cigar smoking, or any other use of tobacco. The legislature did not contemplate conferring such power upon the council. If the ordinance had provided a penalty for smoking cigarettes on the streets of the city, a different question would be presented; but whether such an ordinance would be valid is a question not now presented or decided."

However, in Com. v. Thompson, 12 Met. 231, without discussing the validity of a statute prohibiting smoking "in any street, lane, or passageway," it is held that such statute applies to all open ways, whether legally established public ways or not.

In holding that the making of a cigarette for one's own personal use is not within the meaning of a statute forbidding the manufacture of cigarettes, the court in Dempsey v. Stout, 76 Neb. 152, 107 N. W. 236, said: "It was contended upon the 51 L.R.A. (N.S.)

hearing that the legislature has no power to regulate the personal habits of an individual by forbidding him to use cigarettes; that it is the right of the sovereign citizen to eat, drink, and smoke what he may choose to, although it may be the judgment of the legislature that he is injuring himself by so doing. From a comparison of this suggestion with the act itself, and the title thereof, it will readily be seen that the legislature in this act has avoided any attempt to regulate the personal habits of the citizen. . . . The purpose of the law is to suppress the traffic in, and not to forbid the use of, these articles. It is true that the law assumes that the use of the articles is injurious to the health and morals of the public, and that therefore traffic in the articles themselves should be made illegitimate. The law thus discourages the use of the articles, but it intentionally avoids forbidding the individual to use them."

And in State v. Lowry, 166 Ind. 372, 4 L.R.A. (N.S.) 528, 77 N. E. 728, 9 Ann. Cas. 350, a statute prohibiting the manufacture, sale, keeping for sale, or owning of cigarettes was construed as not applying to the act of smoking cigarettes, or of having them in possession for the sole purpose of smoking.

On the right of state to confiscate cigarettes imported for personal use, see note to State v. Lowry, 4 L.R.A. (N.S.) 528.

E. L. D.

Vickers, J., delivered the opinion of the court:

On an appeal from a justice of the peace to the circuit court of Lake county, plaintiff in error was adjudged guilty of violating an ordinance of the city of Zion, and a fine was imposed upon him. The trial judge certified that the validity of a municipal ordinance was involved, and that the public interest required that an appeal be granted direct to this court, in pursuance of which this writ of error has been sued out.

The ordinance violated by the plaintiff in error is as follows:

"Section 1. That it shall be and hereby is declared to be unlawful for any person to smoke tobacco in any form, whether in a pipe or by the use of a cigarette, cigar, or otherwise, in or upon any street, alley, avenue, boulevard, park, parkway, public passageway, depot, depot platform, depot grounds, hospice, hotel, store, postoffice, or other public building or public place within the said city of Zion.

"Section 2. That it shall be and hereby is declared to be unlawful for any person to have in his or her possession at any time, in or upon any street, alley, avenue, boulevard, park, parkway, public passageway, depot, depot platform, depot grounds, hospice, hotel, store, postoffice, or other public building or public place within the city of Zion, any lighted pipe, lighted cigar, or lighted cigarette."

The remainder of the ordinance imposes a fine of not less than \$3 nor more than \$100 for a violation of §§ 1 and 2.

The errors assigned question the validity of §§ 1 and 2 of the ordinance above set out, and the sole question involved is the validity of the ordinance.

The case was heard upon a stipulation which shows that the city of Zion has a population of about 5,000; that it covers 6½ square miles and has 1,000 acres of park lands within its limits; that no street in said city is less than 66 feet wide, and there are four streets which are 300 feet in width, running the full length of the city, and that all alleys are 25 feet wide; that Shiloh boulevard, where the smoking in question occurred, is 300 feet wide.

An extended brief and argument have been filed by defendant in error, in which it is sought to sustain the validity of the ordinance under the police power granted to cities and villages. Many cases decided by this court sustaining various ordinances and statutes under the police power are cited and relied upon. None of the cases heretofore decided by this court go to the extent of sustaining the power of a city to pass an ordinance forbidding an act under all circumstances which can only be offen-

sive or harmful to others under certain conditions. Recognizing that tobacco smoke is offensive to many persons, and in exceptional cases harmful to some, we have no doubt that power exists to prohibit smoking in certain public places, such as street cars, theaters, and like places, where large numbers of persons are crowded together in a small space. But this is quite a different matter from prohibiting smoking on the open streets and in parks of a city, where the conditions would counteract any harmful results. The personal liberty of the citizen cannot be interfered with unless the restraint is reasonably necessary to promote the public welfare.

The only case that has been called to our attention that lends any support to the defendant in error's contention is *Com. v. Thompson*, 12 Met. 231. In that case the supreme court of Massachusetts sustained a statute which made it an offense to smoke or have in one's possession a lighted pipe or cigar on any of the streets of the city of Boston. In that case the law was upheld on the ground that it tended to protect the city against damage from fire. This seems to be the only case in the United States where an ordinance or statute forbidding smoking of tobacco in any form, on streets or public grounds, has been sustained. While we have a very high regard for the decisions of the supreme court of Massachusetts, still we are constrained in this instance to decline to follow the doctrine of the *Thompson Case*.

In *State v. Heidenhain*, 42 La. Ann. 483, 21 Am. St. Rep. 388, 7 So. 621, the supreme court of Louisiana sustained an ordinance which forbade smoking in street cars as a nuisance, but that court carefully limited its decision to the conditions named in the ordinance. In the course of its opinion the court said: "Smoking in itself is not to be condemned for any reason of public policy. It is agreeable and pleasant, almost indispensable to those who have acquired the habit, but it is distasteful and offensive, and sometimes hurtful, to those who are compelled to breathe the atmosphere impregnated with tobacco in close and confined places." See 3 McQuillin, Mun. Corp. § 902.

It has been held that cities and villages may pass ordinances regulating, and providing for licensing, the sale of cigarettes under a general delegation of power authorizing the passage of all adequate police regulations which may be necessary or expedient for the preservation of the health or the suppression of disease. *Gundling v. Chicago*, 176 Ill. 340, 48 L.R.A. 230, 52 N. E. 44. The holding in the *Gundling Case* was affirmed by the United States Supreme Court. 177 U. S. 183, 44 L. ed. 725, 20 Sup.

Ct. Rep. 633. The supreme court of Tennessee held that cigarettes are not legitimate articles of commerce, within the protection of the Constitution of the United States, because they possess no virtue and are bad inherently. *Austin v. State*, 101 Tenn 563, 50 L.R.A. 478, 70 Am. St. Rep. 703, 48 S. W. 305. That decision was affirmed by the United States Supreme Court. 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132. Notwithstanding the smoking of cigarettes, especially by young persons, is regarded as more offensive and harmful than the use of tobacco in any other form, still the supreme court of Kentucky held an ordinance void which forbade the "smoking of cigarettes within the corporate limits" of a city. *Hershberg v. Barbourville*, 142 Ky. 60, 34 L.R.A.(N.S.) 141, 133 S. W. 985, Ann. Cas. 1912D, 189. See also 3 McQuillin, Mun. Corp. § 921, and cases there cited.

It will be seen that the ordinance in question cannot be sustained on the ground that it tends to protect the property of the city from damage by fire. If the ordinance were limited to places where quantities of highly combustible materials were collected, it would be less objectionable. In the broad language in which the ordinance is enacted, it is apparently an attempt on the part of the municipality to regulate and control the habits and practices of the citizens without any reasonable basis for so doing. The ordinance is an unreasonable interference with the private rights of the citizen, and must be held void.

The judgment of the Circuit Court of Lake County is reversed, and, since there can be no judgment sustained under the ordinance, the cause will not be remanded. Judgment reversed.

Petition for rehearing denied April 9, 1914.

KANSAS SUPREME COURT.

M. A. DUNCAN

v.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Appt.

(86 Kan. 112, 119 Pac. 356.)

Evidence — opinion — condition of bridge.

1. A bridge where a brakeman lost his life was so described and photographed that the jury could thoroughly understand its character and condition. Railway employees were permitted, over objection, to

give their opinions as to such bridge being a safe place to work. Held error, as the jury could not from such opinions have received any assistance in arriving at a proper conclusion.

Same — conduct — safety.

2. Opinions of railway employees as to which side of a freight train it was proper for a brakeman to alight in order to give signals were properly received; this being a question calling for special knowledge or experience.

Master and servant — violation of rule — waiver.

3. A printed rule of the railway company, requiring brakemen to be on top of the train when approaching and passing stations, was shown to have been habitually violated with knowledge of those whose duty it was to report such violations. Held, that the jury were justified in finding that such rule was waived by the company.

Same — engine step — safety.

4. The mere use on the cab of an engine, of a stirrup of the kind used on box cars, instead of the standard step generally used on such engines, does not of itself show negligence as a matter of law. To render its use negligent, such stirrup must in some way be shown to be unsafe.

Evidence — circumstances — negligence.

5. When circumstances are relied on to show negligence, they must be of such significance and relation one to another that a reasonable conclusion of negligence can be founded thereon; and, while reasonable inferences may be drawn from the facts and conditions shown, they cannot be drawn from facts or conditions merely imagined or assumed.

(December 9, 1911.)

APPEAL by defendant from a judgment of the District Court for Sumner County in plaintiff's favor in an action brought to recover damages for the death of plain-

Note. — Admissibility of opinion evidence as to safety of place or appliance.

In general.

This note is limited to cases sounding in tort, which involve the question of the admissibility of opinion evidence, both expert and nonexpert, as to the safety of a place or appliance itself.

The cardinal rule is that a witness must state facts, and not opinions, and consequently, in order that a witness may express an opinion, an exception to the general rule must be made. Such an exception has been made in a great number of cases; the majority of those which fall within the scope of the present note being of comparatively recent date. Broadly speaking, the rule is that a witness possessing special skill in drawing inferences from data furnished by others, or from personal observa-

tiff's intestate, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. William R. Smith, Owen J. Wood, and Alfred A. Scott, for appellant:

Plaintiff failed to prove that the negligence of the defendant was the cause of the decedent's death, which, if it was not purely accidental, is directly traceable to his own negligence.

Atchison, T. & S. F. R. Co. v. Roth, 80 Kan. 752, 104 Pac. 849; Brown v. Union P. R. Co. 81 Kan. 701, 29 L.R.A.(N.S.) 808, 106 Pac. 1001; Duncan v. Chicago, R. I. & P. R. Co. 82 Kan. 230, 108 Pac. 101; Chicago, R. I. & P. R. Co. v. Rhoades, 64 Kan. 553, 68 Pac. 58, 11 Am. Neg. Rep. 383; Hart v. St. Louis & S. F. R. Co. 80

Kan. 699, 102 Pac. 1101; 2 Labatt, Mast. & S. § 836; 1 Labatt, Mast. & S. § 38; Pittsburgh & L. E. R. Co. v. Henly, 48 Ohio St. 608, 15 L.R.A. 384, 29 N. E. 575; Peirce v. Bane, 27 C. C. A. 361, 53 U. S. App. 297, 80 Fed. 988.

Mr. E. T. Hackney for appellee.

West, J., delivered the opinion of the court:

F. E. Duncan was an employee on defendant's road, was twenty-eight years of age, and earning \$4 a day. On the night of March 9, 1908, he was head brakeman on a freight train coming east through the station of Noel, Oklahoma, where, on the south side of the track, are an elevator and switch, and on the north side a switch

tion and investigation, may express his opinion whenever the facts are such that inexperienced persons are likely to prove incapable of forming a correct judgment without such assistance, and that a non-expert or lay witness may express his opinion where, from familiarity with or personal observation of the subject-matter, he has gained a personal knowledge existing in reason rather than facts, which cannot otherwise be fully presented to the jury. Stating the rule conversely, neither expert nor non-expert opinions are admissible where the matters are within the experience or knowledge of persons of ordinary understanding and experience, and where the witness, in order to form his opinion, must draw his deductions from facts which are in the possession of, or which can be fully and adequately presented to, the jury. Thus, it will be seen that the true theory upon which the opinion rule is based is necessity. In other words, opinion evidence is admissible where it is essential in order that the jury may reach an intelligent decision, and is excluded where superfluous because unnecessary.

In the main the cases are decided each upon its particular facts rather than upon principle, and are often in seeming conflict, which is probably due to the varying impressions created by the particular manner in which the question arises, the difficulty of determining whether the particular subject is one with which the ordinary person can cope, or as to which the facts can be fully and adequately presented, and the reluctance of the appellate courts to reverse the rulings in such cases.

Expert opinions.

The exception to the general rule that a witness must state facts, and not opinions, which arises from necessity, is, as before intimated, that the opinion of witnesses possessing peculiar skill or knowledge as to the safety of a particular place or appliance may be received whenever the facts are such that inexperienced persons are likely to prove incapable of forming a correct judgment without such assistance, but that when the necessity of the case ceases, the operation of the exception ceases.

—cases where opinions are held admissible.

Under this rule it has been held in cases involving the safety of places, that the opinion of an expert was admissible—

—to show the safe or dangerous condition of a railroad track at a particular place. Chicago G. W. R. Co. v. Price, 38 C. C. A. 239, 97 Fed. 423; San Antonio & A. P. R. Co. v. Waller, 27 Tex. Civ. App. 44, 65 S. W. 210; San Antonio & A. P. R. Co. v. Booking, — Tex. Civ. App. —, 51 S. W. 537; Ft. Worth & D. City R. Co. v. Wilson, 3 Tex. Civ. App. 583, 24 S. W. 68, affirmed on this point in 85 Tex. 516, 22 S. W. 578;

—as to whether a railroad was safe or unsafe at a particular place for the purpose for which it was used. Colorado Midland R. Co. v. O'Brien, 16 Colo. 219, 27 Pac. 701, 13 Am. Neg. Cas. 537;

—to show the improper condition of the roadbed at the place where a railroad employee was injured. Missouri P. R. Co. v. Fox, 60 Neb. 531, 83 N. W. 744, 8 Am. Neg. Rep. 463;

—as to whether a railroad at the point where it crossed a highway was properly constructed so as to render it safe for employees operating trains. St. Louis, A. & T. R. Co. v. Johnston, 78 Tex. 536, 15 S. W. 104;

—as to the necessity for a guard rail on a certain sharp curve in a street railway track. Louisville & S. I. Traction Co. v. Snead, 49 Ind. App. 16, 93 N. E. 177;

—as to whether or not the track at a certain place in a coal mine was so dangerous as to render it an unsafe place when cars were being operated over it. Great Western Coal & Coke Co. v. Malone, 39 Okla. 693, 136 Pac. 403;

—to show the elements of weakness in a railroad trestle arising from the nature and the manner of the use of certain materials. Bowen v. Sierra Lumber Co. 3 Cal. App. 312, 84 Pac. 1010;

stand, and about 78 feet east of the latter a bridge about 56 feet in length, over a ravine. On the north side, this bridge was provided with a runway and hand rail so that brakemen could cross in safety. On the south side, there was neither hand rail nor runway; the end of the ties being but 18 inches from the south rail of the track. The train was drawn by two engines, the second of which (No. 134) had on the north side the ordinary steps leading up to the gangway, but on the south side, instead of such steps, was one stirrup of metal, about 1½ inches wide, such as ordinarily used on freight cars. It was not shown how long the engine had been in this condition, nor whether Duncan had knowledge thereof at the time. On the night in question at

about 11 o'clock, it being moonlight, with some clouds, as the train approached Noel, Duncan was standing in the gangway of the second engine with a lantern in his hand, receiving signals from the rear of the train, and passing them to the engineer on the front engine, who controlled the air and the movement of the train. It was necessary to cut off the caboose and switch certain cars to the side track, and Duncan was receiving and passing signals given for this purpose. As the second engine was crossing the bridge in question, Duncan was seen by the engineer to be falling from the gangway, and was found under the bridge on the roadway beneath, unconscious and injured, from which injuries he died the next day. His widow sued to recover dam-

—as to whether a railroad bridge was an unsafe working place because there was no platform or run provided for the workmen. *Griffin v. Boston & M. R. Co.* — Vt. —, 89 Atl. 220;

—as to the necessity of a railing and as to the safe condition of the approach to a bridge on a public highway. *Taylor v. Monroe*, 43 Conn. 36 (the court said that the case was one where the opinion of experts would be of aid to the court and jury, and that "the true test of the admissibility of such testimony is not whether the subject-matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue");

—to show that a guard rail to a bridge was constructed in an improper manner, and that it was not substantial and safe, the court saying that the question was one requiring knowledge beyond that of persons of common intelligence. *Dardanelle Pontoon Bridge & Turnp. Co. v. Croom*, 95 Ark. 284, 30 L.R.A. (N.S.) 360, 129 S. W. 280;

—as to the safety of a highway bridge as affected by the manner of construction and maintenance. *Bonebrake v. Huntington County*, 141 Ind. 62, 40 N. E. 141; *Harford County v. Wise*, 71 Md. 43, 18 Atl. 31;

—as to whether a highway or street at a certain point was reasonably safe for public travel. *Dean v. Sharon*, 72 Conn. 667, 45 Atl. 963 (highway); *Baker v. Madison*, 62 Wis. 137, 22 N. W. 141, 583 (street gutter);

—as to the safety of a street railway turntable in a public street. *Fitts v. Cream City R. Co.* 59 Wis. 323, 18 N. W. 186;

—as to whether certain conditions of a roadway in a mine rendered it safe or otherwise. *Henrietta Coal Co. v. Campbell*, 211 Ill. 216, 71 N. E. 863;

—to show whether the roof of a mine entrance was reasonably safe. *Central Coal* 51 L.R.A. (N.S.)

& Coke Co. v. Williams, 97 C. C. A. 597, 173 Fed. 337;

—to show that a mine was unsafe because props were not provided to support the roof of a stope or chamber. *Bird v. Utica Gold Min. Co.* 2 Cal. App. 674, 84 Pac. 256;

—as to the dangerous conditions and surroundings existing at a trapdoor in a coal mine. *Hamilton v. Spring Valley Coal Co.* 149 Ill. App. 10;

—to show the dangerous character of an overhead track upon which a traveling crane moved. *Hammer v. Janowitz*, 131 Iowa, 20, 108 N. W. 109, 20 Am. Neg. Rep. 324;

—as to the safety of the floor of a grand stand when used for the purpose intended. *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788, affirmed without opinion in 163 N. Y. 559, 57 N. E. 1109;

—as to the comparative safety of a good piece of ship-lap lumber and the piece which was alleged to have given way. *Corrigan v. Heubler*, — Tex. Civ. App. —, 167 S. W. 159;

—as to the safety of joists used in the construction of a grand stand as affected by the fact that they were notched. *Fox v. Buffalo Park*, supra;

—as to whether a described scaffold was a safe and suitable place in which to work in a manner described. *Jenks v. Thompson*, 179 N. Y. 20, 71 N. E. 266, 16 Am. Neg. Rep. 528, affirming 83 App. Div. 343, 82 N. Y. Supp. 274;

—as to the safety of the place where plaintiff was employed as a servant in the removal of temporary shorings which had been constructed during the erection of a building. *Stone v. Sylliaasen*, 70 Wash. 89, 126 Pac. 84;

—as to whether a railroad car was safe for the transporting of horses and mules. *Betts v. Chicago, R. I. & P. R. Co.* 92 Iowa, 343, 26 L.R.A. 248, 54 Am. St. Rep. 558, 60 N. W. 623;

—to show the safety of an electric insulator used on defendant's telephone wires. *North Amherst Home Teleph. Co. v. Jack-*

ages, alleging as negligence on the part of the company the defective condition of the engine with respect to the step on the south side, failure to have the south side of the bridge in question provided with a runway, and failure to keep a switch light burning; no evidence being introduced on the latter point. The answer was a general denial and allegation of contributory negligence and assumption of risk. At the close of the plaintiff's testimony, a demurrer thereto was overruled, and after the close of evidence the jury returned a verdict for the plaintiff, and answered a large number of special questions, on which a judgment was moved for by the defendant and denied; a motion for a new trial being also refused.

The jury found, among other things, that just prior to the injury Duncan was standing in the gangway of engine No. 134; that he fell out of the gangway; that he was found just after the injury on the south side of the bridge, which was 15 feet from the ground; that on the north side of the bridge was a plank walk 5 feet from the outside of the rail, and a railing 3 feet high; that the step on the right side of the engine was similar to those used on box cars, with hand-holds on each side in good condition; that Duncan had a lighted lantern in his hand, and had just given a signal to one of the trainmen; that the negligence of the defendant which caused his death was a defective step on engine No. 134 and lack of runway and hand rail on

son, 26 Ohio C. C. 89 (action by a pedestrian injured by fallen wire);

—as to the dangerous character of certain revolving shafting by which an employee was injured. *Pullman's Palace Car Co. v. Harkins*, 5 C. C. A. 326, 17 U. S. App. 722, 55 Fed. 932;

—as to the proper and safe way of loading car wheels upon a flat car. *Meily v. St. Louis & S. F. R. Co.* 215 Mo. 567, 114 S. W. 1013;

—as to the dangerous construction of an elevator shaft. *Obermeyer v. Logeman Chair Mfg. Co.* 120 Mo. App. 59, 96 S. W. 653, affirmed in 229 Mo. 97, 129 S. W. 209.

And under this rule in cases involving the safety of appliances, expert opinions have been held admissible—

—to show that a derrick was not properly and safely constructed. *Dyas v. Southern P. Co.* 140 Cal. 296, 73 Pac. 972; *Scandell v. Columbia Constr. Co.* 50 App. Div. 512, 64 N. Y. Supp. 232; *Parlett v. Dunn*, 102 Va. 459, 46 S. E. 487;

—to show the safety of a derrick boom for the purposes for which it was used. *Roberts v. Vroom*, 212 Mass. 168, 98 N. E. 687;

—to show whether a hoisting apparatus was reasonably safe for the purpose intended. *Warren v. Jeunesse*, — Ky. —, 122 S. W. 862;

—to show whether a certain kind of block and hook constituting a part of a painter's apparatus was a reasonably safe appliance for the doing of the particular work assigned to the injured employee. *Anderson v. Fielding*, 92 Minn. 42, 104 Am. St. Rep. 665, 99 N. W. 357, 16 Am. Neg. Rep. 92;

—to show that a rope used in lowering a derrick did not have sufficient strength for the use to which it was put. *Consolidated Stone Co. v. Williams*, 26 Ind. App. 131, 84 Am. St. Rep. 278, 57 N. E. 558;

—to show that a certain pulley was not a suitable and proper appliance with which to do certain specified work. *Indiana Bituminous Coal Co. v. Buffey*, 28 Ind. App. 108, 62 N. E. 279;

—to show the safe or unsafe condition of an elevator with reference to the kind of

knot necessary to properly tie the ropes by which it was raised, etc. *McLain v. Dahlstrom Metallic Door Co.* 19 Cal. App. 475, 126 Pac. 391;

—to show that an elevator was dangerous because of a defective brake. *Union Show Case Co. v. Blindauer*, 175 Ill. 325, 51 N. E. 709, affirming 75 Ill. App. 358;

—to show whether or not a pile driving machine and appliances were safe. *Koon v. Southern R. Co.* 69 S. C. 101, 48 S. E. 86;

—to show that street cars were unsafe for use on a certain line because not equipped with sanding appliances. *Mayer v. Detroit, Y. A. A. & J. R. Co.* 152 Mich. 276, 116 N. W. 429;

—to show whether or not it was safe to operate a "bolting saw" without a carriage attachment. *Olmscheid v. Nelson-Tenney Lumber Co.* 66 Minn. 61, 68 N. W. 605;

—to show the dangerous character of the "bull wheel" and clutches on a coal chute. *Greer v. Great Northern R. Co.* 115 Minn. 213, 132 N. W. 6;

—to show the safety of a machine used for cutting bed spring slats, with respect to the "die" being improperly set. *Hocking v. Windsor Spring Co.* 131 Wis. 532, 111 N. W. 685;

—to show the safety of an iron elbow on a high pressure steam pipe. *Innes v. Milwaukee*, 103 Wis. 582, 79 N. W. 783; *Daly v. Milwaukee*, 103 Wis. 588, 79 N. W. 752;

—to show the safety of a locomotive boiler. *Houston & T. C. R. Co. v. Haberman*, 104 Tex. 50, 133 S. W. 873;

—to show the dangerous character of a "carding machine" in a woolen mill. *Whitaker v. Campbell*, 187 Pa. 113, 41 Atl. 38;

—to show the safe or unsafe condition of a hoisting apparatus with reference to whether the "dogs" would take effect in holding the rods up. *McGonigle v. Kane*, 20 Colo. 292, 38 Pac. 367, 13 Am. Neg. Cas. 578;

—to show that a safety valve on a boiler was unsafe. *Beunk v. Valley City Desk Co.* 128 Mich. 562, 87 N. W. 793;

—to show the safety of a car-puller drum as affected by the location of the clutch.

the south side of the bridge; that if the defendant had used reasonable care and precaution to prevent the fatal injuries to Duncan, his death would not have occurred; that he had been over the bridge in question, while acting as fireman, twenty-eight times in the six or eight months prior to the accident, and had been over it within the forty-eight hours next prior thereto; that a printed rule of the company provided that freight brakemen must be on top of their trains in approaching and on passing stations, and that if Duncan had been on top of his train, he would not have been injured; that at the time the engineer was receiving signals from the conductor through Duncan, that the train was moving about 6 miles an hour; that Duncan would not

have been injured if he had waited till the train stopped before getting off; that no one directed him to get off near the switch while the train was moving; that, aside from hurrying the work a little, the only advantage in getting off before the train stopped was to give signals; that Duncan intended to step down on the south side of the bridge at the time in question; that the movement of the train crossing the bridge would make a distinct and noticeable rumble or sound to one paying heed thereto; that the evidence did not show that Duncan forgot where he was, or took time and precaution to learn or to observe or examine as to location before getting off.

Testimony of various men who had worked for defendant showed that the

Spencer v. Uptide Grain Co. — Iowa, —, 138 N. W. 820;

—to show the safety of fly wheels which have been broken and repaired as affected by general custom as to the use of such wheels in sawmills. Boop v. Laurelton Lumber Co. 212 Pa. 523, 61 Atl. 1021;

—to show whether machinery operated with a twisted belt is reasonably safe. Gundlach v. Schott, 192 Ill. 509, 85 Am. St. Rep. 348, 61 N. E. 332;

—to show that a certain nut and bolt used to connect the parts of a harvester were not proper and sufficient for the purpose. Snyder v. Holt Mfg. Co. 134 Cal. 324, 66 Pac. 311;

—to show the suitability and safety of a saw used in a "cutter" in a pulp mill. Lau v. Fletcher, 104 Mich. 295, 62 N. W. 357;

—to show the reasonable safety of an appliance or arrangement for operating a circular saw. King v. King, 79 Kan. 584, 100 Pac. 503; Lovell & B. Tobacco Co. v. Justice, 147 Ky. 642, 144 S. W. 1079;

—to show the safety of a valve on a rotary boring machine run by compressed air. Wells v. Swift & Co. 90 Kan. 168, 133 Pac. 732;

—to show that a "smasher," a machine used in binding books, was a dangerous machine. Gammel-Statesman Pub. Co. v. Monfort, — Tex. Civ. App. —, 81 S. W. 1029;

—to show the safety of an "ironing mangle" used in a laundry. Carlin v. Kennedy, 97 Minn. 141, 106 N. W. 340; Coleman v. Perry, 28 Mont. 2, 72 Pac. 42;

—to show the increased danger of a "shaping machine" arising from the fact that it was set up with the knives revolving inwardly instead of outwardly. Swarts v. R. M. Wilson Mfg. Co. 115 App. Div. 739, 100 N. Y. Supp. 1054, affirmed without opinion in 193 N. Y. 623, 86 N. E. 1133;

—to show the safety of an electric coal mining machine as affected by an unguarded cutting chain. Ford v. Providence Coal Co. 124 Ky. 517, 99 S. W. 609;

—to show the safety or unsafety of a grease tank which exploded. Fischer v. Ed- 51 L.R.A. (N.S.)

ward Heitzeberg Packing & Provision Co. 77 Mo. App. 108;

—to show the safety of the material of which a steam main was made. Erickson v. American Steel & Wire Co. 193 Mass. 119, 78 N. E. 761;

—to show that a hook was not made of proper material. Manchester v. Landry, 118 C. C. A. 330, 199 Fed. 882;

—to show the sufficiency of hooks to sustain a given weight. Little v. Head & D. Co. 69 N. H. 494, 43 Atl. 619;

—to show the suitability of a "pin maul" for the work in question as affected by the question of proper temper. Crader v. St. Louis & S. F. R. Co. — Mo. App. —, 164 S. W. 678;

—to show the unsafe support for a lamp, the imperfections in the rope, pulley, and wires by which it was suspended being described. Excelsior Electric Co. v. Sweet, 57 N. J. L. 224, 30 Atl. 553, reversed on other grounds in 59 N. J. L. 441, 31 Atl. 721;

—to show that a machine used for "butting and ripping bolts," the facts regarding which could not be fully communicated to the jury, was impracticable and dangerous. Hutchinson Cooperage Co. v. Snider, 46 C. C. A. 517, 107 Fed. 633;

—to show the safety or danger of coupling cars equipped with double deadwoods. Louisville, N. A. & C. R. Co. v. Frawley, 110 Ind. 18, 9 N. E. 594; Baldwin v. Chicago, R. I. & P. R. Co. 50 Iowa, 680;

—to show whether or not cars could be safely coupled where the pin could not be removed from one of the cars. Goins v. Chicago, R. I. & P. R. Co. 47 Mo. App. 173;

—to show the improper construction of a truss rod or bolt, a part of the coupling appliance on a railroad car. Missouri P. R. Co. v. Fox, 60 Neb. 531, 83 N. W. 744, 8 Am. Neg. Rep. 463;

—to show whether a loose strap used for mounting and climbing onto a box car would be dangerous or safe to climb upon while the car was in motion. St. Louis Southwestern R. Co. v. Neef, — Tex. Civ. App. —, 138 S. W. 1168.

In a considerable number of cases expert opinion evidence as to the safety of a place

printed rule requiring brakemen to be on the top of a train when approaching a station was commonly unheeded and violated. Testimony of former employees was given to the effect that, in their opinion, the bridge in its condition was not a safe place to work. Testimony was also introduced, showing that for the purpose of giving signals the south side of the engine was the proper one from which to alight. Defendant appeals, and assigns as error the refusal of the trial court to sustain a demurrer to the evidence, its refusal to enter judgment on the findings, its denial of a motion for a new trial, and error in instructions and in ruling upon the introduction of evidence.

It is argued that there was a failure to

show what actually caused the death of Duncan, and that the conclusion that it was caused in the way found by the jury arises from mere speculation. Also that Duncan was bound by the rule requiring him to be on top of the train, and that, instead of being there, he had voluntarily assumed a place of danger, and thereby relieved the defendant of responsibility; that the opinion of the railroad men as to the safety of the bridge was improperly received, not being within the rule permitting expert evidence; and that the testimony showing the violation of the rule regarding the location of brakemen was improperly received, and erroneously found by the jury to show a waiver by the company. Also that there was no evidence that the

has been admitted either without discussion as to its admissibility, or without a reason assigned for its admission. Thus, an expert has been allowed to express his opinion—

—as to the safety of a railroad track. *Galveston, H. & S. A. R. Co. v. Pitts*, — Tex. Civ. App. —, 42 S. W. 255;

—as to whether a spur track over which, about 100 feet from the end, was a structure so built as to prevent the use of the hand brakes on the cars at that point, and at the end of which was a buffer sufficient only to stop the trucks of a car, was a reasonably safe place. *Gila Valley, G. & N. R. Co. v. Lyon*, 203 U. S. 405, 51 L. ed. 276, 27 Sup. Ct. Rep. 145, affirming 9 Ariz. 218, 80 Pac. 337;

—as to whether the buffer at the end of a spur track was a reasonably safe and proper one, so as to render the track safe. *Ibid*;

—as to a safe method of constructing a railroad station platform with reference to the track, for the purpose of showing that the platform in question, upon which plaintiff, a passenger, was injured, was dangerous because too narrow. *Illinois C. R. Co. v. Davidson*, 22 C. C. A. 306, 46 U. S. App. 300, 76 Fed. 517, 7 Am. Neg. Cas. 449, certiorari denied in 166 U. S. 719, 41 L. ed. 1186, 17 Sup. Ct. Rep. 94;

—as to the merits or demerits of "whipping straps" as cautionary signals to brakemen of the fact that the train is approaching a low overhead bridge. *Louisville & N. R. Co. v. Hall*, 87 Ala. 708, 4 L.R.A. 710, 13 Am. St. Rep. 84, 6 So. 277;

—to show inferentially that a railroad was a dangerous place as regards the trainmen unless "telltails" were erected on each side of low overhead bridges. *Pittsburgh, S. & N. R. Co. v. Lamphere*, 69 C. C. A. 547, 137 Fed. 20;

—as to whether certain "latches" in a switch were safe on a slope. *Southern Coal & Coke Co. v. Swinney*, 149 Ala. 405, 42 So. 808;

—to show that a switch was not safe unless it was locked down, no lock having been provided for the one in question. *Birmingham R. & Electric Co. v. Baylor*, 101 Ala. 488, 13 So. 793;

Ala. 488, 13 So. 793;

—as to the relative safety of blocked and unblocked switches. *Galveston, H. & S. A. R. Co. v. Hughes*, 22 Tex. Civ. App. 134, 54 S. W. 264;

—as to whether a particular pattern of "tipple" was reasonably adapted for the purpose of emptying cars at a certain place, and its condition at the time an accident occurred. *Alabama Connellsville Coal & Coke Co. v. Pitts*, 98 Ala. 285, 13 So. 135;

—as to whether the ceiling of a mine entry or tunnel was in a safe or unsafe condition. *Jacobs v. Madison Coal Corp.* 165 Ill. App. 444; *Tanner v. Wickliffe Coal Co.* 32 Ky. L. Rep. 1304, 108 S. W. 351;

—to show that the roof of a mine was or was not properly supported. *Brazil Block Coal Co. v. Hotel*, 112 C. C. A. 448, 192 Fed. 108; *Acme Coal Co. v. Kusanir*, 71 Ill. App. 446;

—as to the safety of inclines used in mining operations. *Claxton v. Lexington & B. S. R. Co.* 13 Bush, 636;

—as to whether it was safe to have the space between the track and wall of a cross entry in a mine as narrow as a foot or a foot and a half. *McNamara v. Logan*, 100 Ala. 187, 14 So. 175;

—as to whether staging erected in a specified way was safe when carrying a particular load. *Prendible v. Connecticut River Mfg. Co.* 160 Mass. 131, 35 N. E. 675;

—as to whether it was safe to locate a staging with one corner post resting upon a brick ledge. *Bourbonnais v. West Boylston Mfg. Co.* 184 Mass. 254, 68 N. E. 232;

—as to the proper construction of a telephone line with regard to the space which safety required between it and a live wire which it intersected. *Southwestern Teleg. & Teleph. Co. v. Luckie*, — Tex. Civ. App. —, 153 S. W. 1158.

And in a number of cases in which the courts did not state the grounds upon which the evidence was admitted, experts have been allowed to express their opinions as to the safety of an appliance. In cases of this

step or stirrup was defective, or that Duncan was in the line of his duty when the accident occurred.

It is argued that the court erred in charging that disobedience of a reasonable rule, requiring Duncan to be on top of the train, would preclude his recovery, if such disobedience caused or contributed to the injury, unless the jury also found that such rule was habitually disregarded, with the knowledge of those superior in authority, whose duty it was to report such violations, to such an extent as to show a tacit or express consent by the defendant to such disregard of such rule. Presumptively a rule of this kind is made for the purpose of being heeded; but when it is so continuously or habitually disregarded as to convince

fair-minded jurors that it has been waived, it is not only sense and justice that they may so conclude, but it is the law. *Kansas City, Ft. S. & G. R. Co. v. Kier*, 41 Kan. 661, 671, 13 Am. St. Rep. 311, 21 Pac. 770; *Union P. R. Co. v. Springsteen*, 41 Kan. 724, 21 Pac. 774. In *Atchison, T. & S. F. R. Co. v. Slattery*, 57 Kan. 499, 505, 46 Pac. 941, 943, 15 Am. Neg. Cas. 104, it was said by Justice Johnston: "Ordinarily, the wilful disobedience of a rule should be held to constitute negligence; but where the rule is habitually disregarded, and a different course has long been pursued by employees with the knowledge and approval of the managing officers of the company, the rule must be regarded as inoperative." p. 505.

It was held by the court of appeals of

character expert opinions have been admitted in evidence—

—as to the safety of a particular elevator. *Bier v. Standard Mfg. Co.* 130 Pa. 446, 18 Atl. 637;

—as to the safety of a worn cable on an elevator. *Stomne v. Hanford Produce Co.* 108 Iowa, 137, 78 N. W. 841;

—as to the danger, because of improper adjustment, of the valve chains on an air hoist. *Louisville & N. R. Co. v. Goodwin*, 151 Ky. 149, 151 S. W. 376;

—to show whether belts used to run a spinning frame in a woolen mill were unsafe by reason of the manner in which they were laced. *McGar v. National & P. Worsted Mills*, 22 R. I. 347, 47 Atl. 1092;

—to show the improper construction, etc., of a certain wooden pulley. *Wabash Screen Door Co. v. Black*, 61 C. C. A. 639, 126 Fed. 721;

—as to the safety of an appliance for, and the method of, raising telephone poles. *Kansas City Southern R. Co. v. Rogers*, 121 C. C. A. 586, 203 Fed. 462;

—as to the proper construction and rigging of a derrick, by the uncontrolled swing of which an employee was injured. *Kreigh v. Westinghouse, C. K. & Co.* 214 U. S. 249, 53 L. ed. 984, 29 Sup. Ct. Rep. 619; *Lang v. Terry*, 163 Mass. 138, 39 N. E. 802;

—as to the safety of a valve on an oil burning rivet heater. *Carr v. American Locomotive Co.* 26 R. I. 180, 58 Atl. 678;

—to show the dangerous character of a "still" made of iron of insufficient strength, and used in an oil mill. *Ardesco Oil Co. v. Gilson*, 63 Pa. 146, 10 Mor. Min. Rep. 669;

—as to whether the material used in a furnace which broke, injuring an employee, was of sufficient thickness. *Williamson Iron Co. v. McQueen*, 144 Ala. 265, 40 So. 306;

—as to whether a part of a machine was made of the proper kind of iron. *McFaul v. Madera Flume & Trading Co.* 134 Cal. 313, 66 Pac. 308;

—as to the safety of a certain kind of blasting powder. *Sowden v. Idaho Quartz Min. Co.* 5 Cal. 443, 2 Mor. Min. Rep. 199;

—as to whether a certain hydraulic press

was safe. *Caldwell-Watson Foundry & Mach. Co. v. Watson*, — Ala. —, 62 So. 859;

—as to the safety of a camphene lamp. *Bierce v. Stocking*, 11 Gray, 174;

—to show the sufficiency of an "idler" (a pulley on a frame which could be thrown against a belt to increase effectiveness of power) as a safety appliance. *McCreery v. Union Roofing & Mfg. Co.* 143 Iowa, 303, 119 N. W. 738;

—to show the dangerous character of a machine known as a "dough breaker," consisting of rollers between which dough was pressed by hand. *New York Biscuit Co. v. Rouss*, 20 C. C. A. 555, 45 U. S. App. 45, 74 Fed. 608;

—to show that a gravel-washing machine should, according to the custom of well appointed and managed concerns, have guards for its cogwheels. *Stone & W. Engineering Corp. v. Melovich*, 120 C. C. A. 544, 202 Fed. 438;

—as to the dangerous construction and character of a "joiner" from which the safety board had been removed. *Vollman Buggy Body Co. v. Spry*, 26 Ky. L. Rep. 228, 80 S. W. 1092;

—to show the necessity for a guard to render a candy-cutting machine safe. *Glass v. Hazen Confectionery Co.* 211 Mass. 99, 97 N. E. 627;

—as to whether the uncovered gearing that turned the slab rollers in a sawmill was dangerous. *Huizega v. Cutler & S. Lumber Co.* 51 Mich. 272, 16 N. W. 643;

—as to the safety of a ladder which had no spikes in the bottom, and which was furnished to a railroad employee for use at a certain place. *Missouri, K. & T. R. Co. v. Hedrie*, — Tex. Civ. App. —, 154 S. W. 633;

—to show that a grinding stone which burst was being run at an unsafe speed. *Helfenstein v. Medart*, in division 2, 136 Mo. 595, 36 S. W. 863, in banc 136 Mo. 619, 37 S. W. 829, on rehearing in 136 Mo. 619, 38 S. W. 294;

—as to whether a hand car upon which a passenger was being carried from a wreck to a station, and from which she was

the seventh circuit, in *Cleveland, C. C. & St. L. R. Co. v. Baker*, 33 C. C. A. 468, 63 U. S. App. 553, 91 Fed. 224, that the habitual disregard of such rule, with the knowledge of those whose duty it is to report violations thereof, presents a question for the jury whether the rule has been waived by the company. This is substantially the same as the rule announced in the *Springsteen Case*, *supra*, where an instruction quite similar to the one given in the case now under consideration was approved. Plaintiff asserts that, as the defendant did not plead this rule, it had no right to introduce evidence thereof. But, as the answer appeared to be a general allegation of contributory negligence and assumption of risk, the plaintiff could have required the specific

facts to be set forth by motion (*Price v. Atchison Water Co.* 58 Kan. 551, 558, 62 Am. St. Rep. 625, 50 Pac. 450, 3 Am. Neg. Rep. 392), and, not having made such motion, it was not error to permit the introduction of the testimony.

The defendant complains that evidence was received of the opinion of witnesses that the bridge was a dangerous place to work. These questions, propounded to employees of the defendant who were familiar with the bridge in question, called for their opinions as to whether it was a safe structure to couple and uncouple cars and to switch trains on the side track, or a safe structure for the brakeman and conductor to use in coupling and uncoupling and switching trains from that station from the

thrown and injured, was too narrow for the track. *Healy v. Visalia & T. R. Co.* 101 Cal. 585, 36 Pac. 125.

See also *Western Coal & Min. Co. v. Berberich*, 36 C. C. A. 364, 94 Fed. 329; *Hutchinson Cooperage Co. v. Snider*, 46 C. C. A. 517, 107 Fed. 633; *Alabama Consol. Coal & I. Co. v. Heald*, 168 Ala. 626, 53 So. 162; and *James v. Johnson*, 12 Ill. App. 286, all of which are set out in the next following subdivision of this note, for other cases wherein expert testimony was held admissible.

—cases where opinions are held not admissible.

On the other hand, it has been held in cases which involve the safety of an appliance, and which apply the above-stated general rule as to the admissibility of opinion evidence, that expert opinions were not admissible—

—to show whether or not two sticks rather than a frame were a suitable or reasonably safe appliance to keep marble slabs from falling in upon the persons holding the sticks while the slabs were being hauled, one or more slabs being on edge on each side of the wagon and the holder of the sticks standing between the slabs. *Motey v. Pickle Marble & Granite Co.* 20 C. C. A. 366, 36 U. S. App. 682, 74 Fed. 155;

—to show whether appliances furnished workmen constructing a bank vault were sufficient to allow the work to be done safely. *Dolan v. Herring-Hall-Marvin Safe Co.* 105 App. Div. 366, 94 N. Y. Supp. 241;

—to show whether a rope used in loading tilting upon a car "was an ordinary, safe, and proper apparatus" for the work for which it was used. *Hunt v. Kile*, 38 C. C. A. 641, 98 Fed. 49, rehearing denied in 44 C. C. A. 168, 104 Fed. 717;

—to show that an elevator cable which had been used for a certain length of time was unsafe. *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. 445 (this was upon the ground that the question of negligence in the use of the cable was the very issue involved, and therefore was for the jury, the court saying 51 L.R.A. (N.S.)

that the witness could properly express "his opinion as to the effect of the breaking of strands of wire upon the ultimate strength of the cable, or of the process of crystallization, the result of time and friction, upon the ultimate strength of the cable, and also as to the probable life of a cable under given circumstances," yet he should not have been permitted to state that the continued use of the cable under the conditions as existing was dangerous);

—to show the safety of a bolt used to operate machinery. *Dittman v. Edison Electric Illuminating Co.* 87 App. Div. 68, 83 N. Y. Supp. 1078, on subsequent appeal in 144 App. Div. 632, 129 N. Y. Supp. 221;

—to show whether a hoisting apparatus used in a mine shaft was a safe and suitable one. *Luman v. Golden Ancient Channel Min. Co.* 140 Cal. 700, 74 Pac. 307; *Coe v. VanWhy*, 33 Colo. 315, 80 Pac. 894, 3 Ann. Cas. 552 (in *Coe v. VanWhy*, *supra*, the court said: "The principle upon which expert or opinion evidence is allowed is well known, but the difficulty arises in applying it to the facts of a given case. No general rule applicable to all cases can be enunciated, but each one must be determined largely upon its own peculiar facts. It does not appear that this hoisting plant was a complicated piece of machinery, but, as we read the record, it was exceedingly simple in construction and operation, and all the facts relating thereto, as well as its condition of repair, could be fully explained to the jury. It is not altogether clear just what particular acts of negligence plaintiff charged, but the chief reliance seems to be that the machinery was not properly supplied with a band brake, and that the key which secured the drum appliance to the shaft was out of repair. Just how this brake operated, and the use and character of the key, and its condition as to repair, were fully explained to the jury by the witnesses. There was no necessity for them to give to the jury their opinion as to the safety of the hoist, for the jury were as capable of determining that fact from the evidence in the case as were the witnesses themselves");

east end of the switch. This was objected to as calling for an opinion of a witness who had not shown himself competent, and that it was a matter on which opinion evidence was not competent, the safety of the bridge being a question for the jury.

The alleged negligence of the company respecting the bridge was the failure to equip it with a runway on the south side, no mention being made of a hand rail on that side; and the testimony very clearly showed that the cab of engine No. 134 must have projected over the south end of the bridge, and that there was neither runway nor hand rail on that side, and a photograph was introduced giving a very clear picture of the structure. In view of this condition of things, the jury were as well able to say

as anyone else whether the bridge was a safe place for train operatives to work; it being remembered that there was no complaint concerning such bridge except as to its south side. In *Murray v. Woodson County*, 58 Kan. 1, 3, 48 Pac. 554, 555, 2 Am. Neg. Rep. 537, it was held proper to refuse to permit witnesses experienced in the building of bridges like the one there in question, to describe its method of construction and claimed defects, and to give their opinion as to its safety. It was there said: "Where all the facts from which an opinion can be formed as to the safety of travel on a public highway are stated by those who have knowledge of them, and the matter is one within the comprehension of the jury upon explanation of such facts, it is the

—to show the sufficiency of an eyebolt used to support two derricks which fell, injuring plaintiff. *Dougherty v. Milliken*, 163 N. Y. 527, 79 Am. St. Rep. 608, 57 N. E. 757;

—to show the safety of a derrick as affected by the nature of the pin used to fasten the wheels in the tackle block at the upper end of the mast. *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380;

—to show the safety of a hook on a hoisting apparatus. *Benson v. Superior Mfg. Co.* 147 Wis. 20, 132 N. W. 633;

—to show the safety of a string as compared with a "becket," to keep a hook on a derrick in place. *Chicago, R. I. & G. R. Co. v. Denton*, — Tex. Civ. App. —, 101 S. W. 462;

—to show the safety of a "snatch block," a part of a hoisting apparatus. *Virginia-Carolina Chemical Co. v. Knight*, 106 Va. 674, 56 S. E. 725;

—to show the safety of a tackle for, and of the method of, lowering and hoisting building materials. *Kelpy v. Triest*, 73 App. Div. 597, 76 N. Y. Supp. 742;

—to show whether a particular belt fastener was suitable and safe to use for fastening a certain belt in defendant's machine shop. *Harley v. Buffalo Car Mfg. Co.* 142 N. Y. 31, 36 N. E. 813;

—to show the inherent insufficiency of a friction-hoist elevator. *Root v. Cudahy Packing Co.* 88 Kan. 413, 129 Pac. 147, rehearing denied in 89 Kan. 8, 129 Pac. 1199;

—to show the dangerous character of a machine called the "straightening rolls," used to straighten and smooth sheets of brass in a rolling mill. *Anderson v. Chicago Brass Co.* 127 Wis. 273, 106 N. W. 1077;

—to show whether a "speeder" in a cotton mill was, because of ungarded cogwheels, unsafe. *Marks v. Harriet Cotton Mills*, 135 N. C. 287, 47 S. E. 432;

—to show whether a "conveyer," a machine used to convey baked stuffs in a bakery, should have been guarded, where the conditions were so fully susceptible of proof that men of average intelligence could have

formed a correct opinion. *National Biscuit Co. v. Nolan*, 70 C. C. A. 436, 138 Fed. 6;

—to show the safety of certain ice harvesting machinery. *Meyer v. Meyer*, 86 Ill. App. 417;

—to show whether an unfastened block used in preserving the shape of hats was a safe appliance. *Walker v. Williamson*, 205 Mass. 514, 91 N. E. 885;

—to show that a hammer and hatchet were not proper and safe tools with which to open wooden packing cases. *Whalen v. Rosnosky*, 195 Mass. 545, 122 Am. St. Rep. 271, 81 N. E. 282;

—to show that a particular hammer was not dangerous or improper for the purpose for which it was used, but was a safe and proper tool or appliance. *Vant Hul v. Great Northern R. Co.* 90 Minn. 329, 96 N. W. 789;

—to show the safety of placing doors in a certain position on an elevator well. *Siegel, C. & Co. v. Trecka*, 218 Ill. 559, 2 L.R.A.(N.S.) 647, 109 Am. St. Rep. 302, 75 N. E. 1053, 19 Am. Neg. Rep. 166;

—to show whether a railroad signal system was such as to insure reasonable safeguards to railroad employees. *Bergen County Traction Co. v. Bliss*, 62 N. J. L. 410, 41 Atl. 837, subsequent appeal in 64 N. J. L. 601, 46 Atl. 624;

—to show whether openings on the end of cars were safe and proper appliances within the meaning of the Federal safety appliance act requiring hand-holds and grab irons. *Spokane & I. E. R. Co. v. United States*, — L.R.A.(N.S.) —, — C. C. A. —, 210 Fed. 243;

—to show whether a freight car was dangerous because it had no handles or grab irons to lay hold of when a coupling pin had been drawn. *Dooner v. Delaware & H. Canal Co.* 164 Pa. 17, 30 Atl. 269;

—to show whether cars with particular kinds of couplings are safe. *Way v. Illinois C. R. Co.* 40 Iowa, 341, 14 Am. Neg. Cas. 621 (the court said that the subject was not one regarding which unskilled persons would be likely to prove incapable of forming a correct judgment, they having

province of the jury to form such opinion, and not of witnesses, although experts, to express theirs." p. 3. In *Erb v. Popritz*, 59 Kan. 264, 68 Am. St. Rep. 362, 52 Pac. 871, certain witnesses, without railroad experience, had been permitted to give their opinion as to the cause of a certain derailment, and this was held error on the ground, not only that the witnesses had no expert knowledge, but that the appearance of the wreck could have been easily and adequately described to the jurors, so that they could have formed an opinion as readily as the witnesses. Had the structure and situation been such that the witnesses by their railroad experience were able to afford the jury any assistance in addition to that furnished by an explanation of the

facts and the photograph of the bridge, it would have been proper to receive their opinions. *Missouri, K. & T. R. Co. v. Merrill*, 61 Kan. 671, 60 Pac. 819, 7 Am. Neg. Rep. 620; *Kansas City, Ft. S. & M. R. Co. v. Blaker*, 68 Kan. 244, 64 L.R.A. 81, 75 Pac. 71, 1 Ann. Cas. 883; *United States Smelting Co. v. Parry*, 92 C. C. A. 159, 166 Fed. 407; *Central Coal & Coke Co. v. Williams*, 97 C. C. A. 597, 173 Fed. 337; *Gila Valley, G. & N. R. Co. v. Lyon*, 203 U. S. 465, 51 L. ed. 276, 27 Sup. Ct. Rep. 145.

It is impossible to see, however, why the jury were not entirely competent to judge as to the safety of the bridge, or how they could in anywise have been assisted by the opinions of others. In addition to this, the questions were too broad, and, if proper

models of the couplings, and the relations of the various parts having been explained);

—to show the comparative safety of a railroad switch with and without a light. *Galveston, H. & S. A. R. Co. v. English*, — Tex. Civ. App. —, 59 S. W. 626, on petition for rehearing in 59 S. W. 912;

—to show whether or not a certain kind of pin by which the singletree was fastened to the drawhead of a horse car was safe. *Sappenfield v. Main Street & Agri. Park R. Co.* 91 Cal. 48, 27 Pac. 590, 13 Am. Neg. Cas. 387 (the court said: "The general rule . . . is that witnesses must testify to facts, and not to opinions, and that whenever the question to be determined is the result of the common experience of all men of ordinary education, or is to be inferred from particular facts, the inference is to be drawn by the jury, and not by the witness. When the inquiry relates to a subject whose nature is not such as to require any peculiar habits or study in order to qualify one to understand it, or when all the facts upon which the opinion is founded can be ascertained and made intelligible to the court or jury, the opinion of the witness is not to be received in evidence. If the relation between the facts and their probable results can be determined without any special skill or training, the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury. If the circumstances out of which the negligence is said to arise have been established by proof, or can be shown, the ultimate fact of negligence is an inference to be drawn therefrom by the jury, and is not to be established by the opinions of others");

—to show the safety of a method of fastening a drum cylinder by which cables were wound up, to the support. *Cramer v. Slade*, 66 App. Div. 59, 73 N. Y. Supp. 125;

—to show the safety of an appliance used to fasten a wagon bed to the wagon frame. *Van Edwards v. Barber Asphalt Paving Co.* 92 Mo. App. 221;

—to show the safety of a "push stick" used to push cars on a track other than that on which the locomotive was, as affected by

its length. *Bookman v. Masterson*, 83 App. Div. 4, 81 N. Y. Supp. 962;

—to show the safety of an unguarded circular saw. *Schmahl v. Albany Brush Co.* 61 Misc. 316, 113 N. Y. Supp. 768;

—to show that the particular gauge used on a steam saw was safe, the jury having a model and the methods of using it having been fully explained. *Sprague v. Atlee*, 81 Iowa, 1, 46 N. W. 756;

—to show the safety of a lock or fastener attached to the feed lever with which a steam sawmill was equipped. *Trickey v. Clark*, 50 Or. 516, 93 Pac. 457;

—to show whether an unguarded shaft near which plaintiff worked was a dangerous appliance. *Civetti v. American Hatters' & Furriers' Corp.* 124 App. Div. 345, 108 N. Y. Supp. 663;

—to show that a revolving shaft in the end of which a keyway with sharp edges had been sunk was more dangerous than a plain shaft. *Connelly v. Hamilton Woolen Co.* 163 Mass. 156, 39 N. E. 787;

—to show whether a shaft having a rough surface or end which projected 18 inches into a room where workmen were liable to come into contact with it was unsafe in that it was more dangerous than it would have been if it had been smooth. *Kauffman v. Maier*, 94 Cal. 269, 18 L.R.A. 124, 29 Pac. 481 (the court said that, as such question could be determined by men of common experience, to permit the jury to be influenced by the opinion of experts would deprive the litigants of their right to have the jury render its verdict upon the facts in the case, and to this extent would substitute the judgment of the experts for that of the jury);

—to show whether certain couplings, pulleys, and belts in a plow works, because of their position, afforded a reasonably safe combination and appliance. *Freeberg v. St. Paul Plow-Works*, 48 Minn. 99, 50 N. W. 1026 (the court said that the case clearly was one where the facts were such that, when placed before a jury and explained to them, they were as competent as the witnesses to form an opinion as to the safety of the appliance);

at all, should have been restricted to the duties of the brakeman in giving signals, and should not have included the duties of others in switching and uncoupling. It is suggested that the error, if any, was harmless, as the jury would have reached the same conclusion regardless of the opinions of others. But the matter presented by these opinions was not that the absence of a runway on the south side of the bridge made it dangerous for Duncan to assist in switching by giving signals, but was the broad proposition that the bridge as a whole, for use by the train crew generally, was an unsafe place to work, and this might well have induced the jury to find the specific negligence claimed as one item

embraced within the general negligence thus sought to be shown.

Complaint is also made that railroad men were permitted to testify as to which side the brakeman should get off in order to operate the train and give and receive proper signals. We see no reason why this was not competent, however, for jurors are not supposed to understand the proper method of operating railroad trains. *Missouri, K. & T. R. Co. v. Merrill*, 61 Kan. 671, 60 Pac. 819, 7 Am. Neg. Rep. 620.

Instruction No. 15 charged that the law did not require that Duncan should know of defects, if any existed, in the tracks, switches, or engines, nor require him to make an inspection to ascertain if any such existed. In the same instruction, the jury

—to show the dangerous character of a molding machine. *Gleason v. Smith*, 172 Mass. 50, 51 N. E. 460;

—to show the comparative safety of sawing lumber in the manner directed. *Carroll v. Standard Refrigerator Co.* 122 App. Div. 296, 106 N. Y. Supp. 723;

—to show that an appliance (a wagon and team) furnished plaintiff for the drawing of lumber was not safe because there was no wagon seat and the lines were too short. *Limberg v. Glenwood Lumber Co.* 127 Cal. 598, 49 L.R.A. 33, 60 Pac. 176.

And in the following cases, which involved the safety of a place applying the same rule, it was held that an expert should not be allowed to express his opinion—

—as to the safety of a corral, one side of which was bounded by an unfenced bluff, such question being one with which men of common education could cope. *Shafter v. Evans*, 53 Cal. 32;

—that a freight elevator was a place of danger to life and limb. *Braasch v. Michigan Stove Co.* 153 Mich. 657, 20 L.R.A. (N.S.) 500, 118 N. W. 366 (admission held harmless in this case, however);

—whether the roof of a mine was properly secured. *Colorado Coal & I. Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251 (decided upon the ground that the jury, having the facts before it, could decide the question as well as an expert, and that to allow the expert to express his opinion would be to invade the province of the jury); *Wullner v. Smith-Lohr Coal Co.* 145 Ill. App. 486;

—that a stope carried up in a certain manner in a mine was not an ordinarily safe place for a man to work in. *Smuggler Union Min. Co. v. Broderick*, 25 Colo. 16, 71 Am. St. Rep. 106, 53 Pac. 169 (this decision was put upon the ground that, as evidence of both the right and the wrong way to run a stope, and as to how the stope in question had been run, was before the jury, they were just as well qualified to determine the safety thereof as were the experts);

—whether a mine entry was safe, the question being whether it was so obstructed by debris as to be unsafe, and the actual 51 L.R.A. (N.S.)

conditions having been testified to. *Crooks v. Tazewell Coal Co.* 263 Ill. 343, 105 N. E. 132;

—whether a room in a mine was a dangerous place by reason of the opening of a crosscut from another room toward the former and in advance of the face of that room. *Hart v. Penwell Coal Min. Co.* 146 Ill. App. 155;

—as to the safety of a certain untimbered mine shaft. *Monahan v. Kansas City Clay & Coal Co.* 58 Mo. App. 68;

—as to the safety of a certain railroad trestle. *Bowen v. Sierra Lumber Co.* 3 Cal. App. 312, 84 Pac. 1010 (held, however, that improper allowance of direct opinion that trestle was unsafe was harmless where such conclusion was a necessary one from the facts shown);

—as to the dangerous character of a railroad crossing, the facts and conditions being fully before the jury in detail. *Tiffin v. St. Louis, I. M. & S. R. Co.* 78 Ark. 55, 93 S. W. 564;

—whether certain railroad crossing gates could be operated in a safe manner, and with safety to the operator. *Flanagan v. New York, L. E. & W. R. Co.* 83 Hun, 522, 32 N. Y. Supp. 84 (the court in this case stated the rule to be that, to render opinion evidence admissible, "the subject must be one of science or skill, or one of which observation and experience have given the opportunity and means of knowledge which exists in reason rather than in descriptive facts, and therefore cannot be intelligently communicated to others not familiar with the subject, so as to possess them with a full understanding of it");

—whether a public highway was safe and convenient for travel. *Edwards v. Worcester*, 172 Mass. 104, 51 N. E. 447, followed in *Spillane v. Fitchburg*, 177 Mass. 87, 83 Am. St. Rep. 262, 58 N. E. 176, 8 Am. Neg. Rep. 639; *Brown v. Cape Girardeau Macadamized & Pl. Road Co.* 89 Mo. 152, 1 S. W. 129; *Shelley v. Austin*, 74 Tex. 608, 12 S. W. 753;

—as to the safety of a highway bridge. *Escher v. Carroll County*, — Iowa, —, 141

were told that if any such defects existed and were known to him, it was his duty to exercise ordinary care to avoid injury and danger caused thereby, and this is criticized. It was improper to include within this instruction tracks and switches, as the engine and bridge were the only alleged negligent matters about which evidence had been introduced; however, it is not seen that this expression could have in any wise prejudiced the jury or harmed the defendant.

The railway company insists that it devolved upon the plaintiff to show that the absence of a standard step on the south side of the engine, or the absence of a platform on the south side of the bridge, was the proximate cause of Duncan's death; that

there was an utter failure of proof in this respect, because the evidence did not show whether he attempted to use either steps or platform, and, even if it had so shown, there was nothing to indicate that he looked before he leaped; and therefore the company could not be held responsible. Also that the evidence failed to show that Duncan had any duty to perform upon the ground or upon the bridge, or in giving signals from the front of the train, and that if he was performing the unnecessary act of repeating signals, he could not have done that as well in the gangway as on the bridge. It is also argued that no statute or rule of law required any particular kind of step on the engine, and that the stirrup on the south side of No. 134 was not shown to be

N. W. 38; *Murray v. Woodson County*, 58 Kan. 1, 48 Pac. 554, 2 Am. Neg. Rep. 537; —as to the safety of a bridge railing. *McDonald v. Duluth*, 93 Minn. 206, 100 N. W. 1102, 17 Am. Neg. Rep. 91;

—whether it is safe and proper to have draws with drop gates across the footpath of a bridge, to use when the draw is open. *Hart v. Hudson River Bridge Co.* 84 N. Y. 56;

—as to safety, with respect to pedestrians, of a scuttle hole and cover in a sidewalk. *Benjamin v. Metropolitan Street R. Co.* 50 Mo. App. 602, affirmed in 133 Mo. 274, 34 S. W. 490;

—as to the proper construction and safety of a trapdoor in a sidewalk. *Holton v. Hicks*, 9 Kan. App. 179, 58 Pac. 998;

—as to the safety of a sidewalk as affected by the fact that a part thereof consisted of a smooth piece of glass. *Chicago v. McGiven*, 78 Ill. 347;

—whether a sidewalk was out of repair. *Gordon v. Sullivan*, 116 Wis. 543, 93 N. W. 457;

—whether a certain sidewalk, into a hole in which plaintiff had stepped or slipped, "in the condition it was at the time of the accident, with or without snow or ice, was in a dangerous condition or not." *District of Columbia v. Haller*, 4 App. D. C. 405 (wherein the court, in holding that the question of the safety of the sidewalk was not the subject of expert testimony, because one with which people of common understanding could cope, said: "The rule upon this subject is, perhaps, nowhere better stated than by Mr. Smith in his note to the leading case of *Carter v. Boehm*, 1 Smith, Lead. Cas. 760. In his note the learned editor says: 'On the one hand, it appears to be admitted that the opinions of witnesses possessing peculiar skill are admissible, whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance. In other words, when it so far partakes of the nature of a science as to require a course of previous habit or study in order to the attainment of a knowledge 51 L.R.A. (N.S.)

of it. While, on the other hand, it does not seem to be contended that the opinion of witnesses can be received when the inquiry is into a subject-matter, the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it.' Here no peculiar habit or study was required to enable any intelligent person to understand when a sidewalk of a street was dangerous. The common observation of people in the habit of traveling the pavements is full and ample means of knowledge as to the safe condition of the pavements; and it does not require a skilled expert to inform the jury as to when the streets or sidewalks are in a safe or dangerous condition");

—whether a trench was a reasonably safe place to work as affected by the propriety of the construction of the sheathing and bracing of the sides. *Winters v. Naughton*, 91 App. Div. 80, 86 N. Y. Supp. 439;

—as to the safety of a cesspool cover as affected by whether or not it could tip while in its regular position. *Ward v. Troy*, 55 App. Div. 192, 66 N. Y. Supp. 925;

—as to the sufficiency of lights used to guard an excavation in a street. *Carty v. Boeseke-Dawe Co.* 2 Cal. App. 646, 84 Pac. 267;

—whether a pile of lumber, by reason of the manner in which it was piled, was safe as regards one working near it. *Baldwin v. St. Louis, K. & N. R. Co.* 68 Iowa, 37, 25 N. W. 918;

—as to the safety of a coal bin, as affected by the appropriateness of material and the sufficiency of manner of construction. *Gerbig v. New York, L. E. & W. R. Co.* 87 Hun, 649, 61 N. Y. S. R. 534, 22 N. Y. Supp. 21; *Davis v. New York, L. E. & W. R. Co.* 69 Hun, 174, 23 N. Y. Supp. 358 (in the latter case one justice dissented upon the ground that the structure of the bin, the amount of strain, the size, strength, and durability of the material, and the manner of construction, were subjects that could not well be placed before the jury by a mere description);

—whether a certain part of the ground in a switch yard was in a safe condition to

defective in any particular; the only complaint being that it differed in design from the standard steps in general use on engine cabs of defendant, such as were on the north side of the engine in question. In her petition, plaintiff alleged, among other things, that the bridge had been constructed some twenty years; that the defendant well knew the dangers attendant upon switching in a yard with an open trestle; that Duncan either attempted to step to the ground, or take a position on the steps of the engine, and fell through the trestle or bridge; that the engine in question had been injured prior to the accident by having its steps torn off on the south side, which had been two in number, with a curtain behind to keep employees from slipping through, and

that the superintendent of repairs and the repairing force had caused to be placed thereon the single iron step, about 1½ inches wide, about like the steps on freight cars, without any protection at the back to keep employees from slipping through; that the defendant well knew such step was not safe, but that it was liable to cripple or kill employees while in discharge of their duties.

The only testimony regarding the step showed that it was not the kind generally used on such engines; that they usually have two steps; that it was not protected behind and on each side; that there were the usual handholds on both sides of engine No. 134; that they were in their usual position and firmly set; that the steps on both

work upon. *Hurst v. Kansas City, P. & G. R. Co.* 163 Mo. 309, 85 Am. St. Rep. 539, 63 S. W. 695;

—whether the method employed by a railroad foreman in raising the end of a box car was reasonably safe, where all the facts could be made intelligible to a jury composed of men of ordinary intelligence and experience. *Yarber v. Chicago & A. R. Co.* 235 Ill. 589, 85 N. E. 928;

—whether a pole carrying both telephone and electric wires was a dangerous place to work. *Kolp v. Decatur R. & Light Co.* 145 Ill. App. 645 (the decision was expressly upon the ground that the question calling for an opinion as to the dangerous character of the pole infringed the province of the jury, the court saying: "The [expert] witnesses, . . . after describing in detail the office and position of the wires and apparatus upon the pole, and the precise manner in which danger was to be apprehended by a person working on said pole, were permitted to state that in their opinion the pole as thus equipped was a dangerous pole. This was error. These witnesses, called as experts, having properly expressed their opinions relative to questions involving expert knowledge of electricity, the instrumentalities by which it is communicated, conveyed, and controlled, the manner in which these instrumentalities perform their several functions, the effect produced upon one coming in contact simultaneously with a wire charged with electricity and a grounded telephone wire, the jury were as well qualified as were the witnesses, to determine whether or not the pole as equipped was a dangerous place to work, and the opinions of the witnesses upon that question infringed the province of the jury");

—whether the proximity of telephone wires to electric wires rendered the construction dangerous. *Swan v. Salt Lake & O. R. Co.* 41 Utah, 518, 127 Pac. 267.

—whether certain electric wires were placed too low over a metallic roof, the ground being that the question and answer invaded the province of the jury. *Giraudi v. Electric Improv. Co.* 107 Cal. 120, 28 L.R.A. 596, 48 Am. St. Rep. 114, 40 Pac. 51 L.R.A. (N.S.)

108 (it was further held, however, that the expression of opinion upon the point by the expert did not constitute prejudicial error, as the answer gave the facts in full, and explained what methods would have been safe and what matters should be taken into consideration in locating wires such as those in question, it also being fully proved by other evidence that the defendant was negligent).

But it has been held that the mere fact that the question whether or not a place or appliance is safe is ultimately to be decided by a jury does not, standing alone, prevent an expert from giving his opinion involving the point. See *Western Coal & Min. Co. v. Berberich*, 36 C. C. A. 364, 94 Fed. 329, wherein a mining expert was allowed to give his opinion as to the safety of a mine at a particular time and under stated conditions; *Hutchinson Cooperage Co. v. Snider*, 46 C. C. A. 517, 107 Fed. 633, set out supra; *Alabama Consol. Coal & I. Co. v. Heald*, 168 Ala. 626, 53 So. 162, holding that an expert could give his opinion as to whether a mine containing poisonous gases was a safe place to send an employee into, although the question of the safety *vel non* of going into the mine was to be determined by the jury, the jury not being bound by the opinion; and *James v. Johnson*, 12 Ill. App. 286, holding that it was not a valid objection to the admission of the opinion of an expert as to whether the platform of a horse car was a safe or unsafe place, that the question involved the question at issue to be decided by the jury.

Nonexpert opinions—cases where opinions are held not admissible.

The general rule is that the opinion of a nonexpert witness as to the safety of a place or appliance is not admissible in evidence where all the facts can easily be laid before the jury, the ground being that it is the province of the jury to draw conclusions from the facts, and that where possible, facts, and not opinions, should be given. Applying this rule, the courts have refused

sides were solid; the one on the south side being firm and solid and similar to the ones on box cars. There was no evidence to show whether Duncan attempted to alight by the use of the stirrup, or whether he simply fell from the gangway; the only direct evidence being by his own engineer, who said, "I seen him falling." Assuming for the moment that the jury rightfully inferred from the circumstances shown that the deceased attempted to alight by using what he supposed were standard steps, and met his death because instead there was this stirrup, can it be said, as a matter of law, that the stirrup itself must be considered negligent equipment, or that the engine thus equipped must be considered, as a matter of law, an unsafe place for an em-

ployee to work, regardless of whether he knew that such stirrup was there or not? It would seem that a brakeman used to similar stirrups on freight cars would not be endangered by one on an engine, if he knew it was there. There is nothing to show, and we cannot assume, that such a stirrup would be more dangerous on an engine cab than on a freight car, or that it would be dangerous on either. In the absence of any testimony beyond the fact that such engines generally had steps, instead of stirrups, it would not be said that the defendant was shown to be guilty of negligence in this respect. In *Jackson v. Kansas City, L. & S. K. R. Co.* 31 Kan. 761, 763, 3 Pac. 501, 503, it was alleged that the step of an engine was defective, caus-

to allow nonexpert witnesses to express an opinion—

—as to whether the timbers used to support the roof of a mine were sufficiently close together to render the mine safe. *Stewart v. Sloss-Sheffield Steel & I. Co.* 170 Ala. 544, 54 So. 48, Ann. Cas. 1912D, 815;

—as to the safety of a mine as affected by the sufficiency of the light furnished. *Meyers v. Highland Boy Gold Min. Co.* 28 Utah, 96, 77 Pac. 347;

—as to the danger of leaving a trapdoor of a certain kind in the floor of a manufacturing plant. *Kolb v. Sandwich Enterprise Co.* 36 Ill. App. 419;

—as to the safety of a trapdoor in a sidewalk. *Holton v. Hicks*, 9 Kan. App. 179, 58 Pac. 998;

—as to the sufficiency of a grating in a sidewalk. *Lentz v. Dallas*, 96 Tex. 258, 72 S. W. 59;

—as to the danger to pedestrians of a defective window above a sidewalk. *Detzur v. B. Stroh Brewing Co.* 119 Mich. 282, 44 L.R.A. 500, 77 N. W. 948, 5 Am. Neg. Rep. 371;

—as to the danger of leaving a long heavy ladder standing over a walk. *Moore v. Townsend*, 76 Minn. 64, 78 N. W. 880, 6 Am. Neg. Rep. 95;

—as to the safety of an obstructed passageway. *Brunker v. Cummins*, 133 Ind. 443, 32 N. E. 732;

—as to the safe or the dangerous and unsafe condition of a sidewalk or street or road. *Barnes v. Newton*, 46 Iowa, 567 (sidewalk); *Brooks v. Sioux City*, 114 Iowa, 641, 87 N. W. 682 (sidewalk) (but in connection with these Iowa cases, see *Kelleher v. Keokuk*, 60 Iowa, 473, 15 N. W. 280, and *Spears v. Mt. Ayr*, 66 Iowa, 721, 24 N. W. 504); *Parsons v. Lindsay*, 26 Kan. 426 (street crossing); *Topeka v. Sherwood*, 39 Kan. 690, 18 Pac. 933 (admission of opinion as to defective condition of sidewalk held inadmissible, but nonprejudicial under the facts of the case); *Junction City v. Blades*, 1 Kan. App. 85, 41 Pac. 677 (street crossing); *Ryerson v. Abington*, 102 Mass. 526 (road); *Harris v. Clinton Twp.* 64 Mich. 447, 8 Am. St. Rep. 842, 31 N. W. 425 51 L.R.A. (N.S.)

(road); *Girard v. Kalamazoo*, 92 Mich. 610, 52 N. W. 1021 (sidewalk); *Atherton v. Bancroft*, 114 Mich. 241, 72 N. W. 208 (sidewalk); *People ex rel. Esper v. Detroit & S. Pl. Road Co.* 125 Mich. 366, 84 N. W. 290 (quo warranto for the forfeiture of the charter of a plank road company); *Brown v. Owosso*, 130 Mich. 107, 89 N. W. 568 (holding that the opinion of a witness as to the safety of a walk is not admissible, but that the opinion of a nonexpert is admissible so far as it tends to show the actual condition of the walk); *Lindley v. Detroit*, 131 Mich. 8, 90 N. W. 665 (sidewalk); *Eubank v. Edina*, 88 Mo. 650 (sidewalk); *Bradley v. Spickardsville*, 90 Mo. App. 416 (sidewalk—admissions of opinion were harmless in view of other evidence); *Miller v. Canton*, 112 Mo. App. 322, 87 S. W. 96 (sidewalk); *Spaulding v. Edina*, 122 Mo. App. 65, 97 S. W. 545 (sidewalk); *Thompson v. Poplar Bluff*, 124 Mo. App. 439, 101 S. W. 709 (sidewalk); *Metz v. Butte*, 27 Mont. 506, 71 Pac. 761 (sidewalk); *Betts v. Gloversville*, 56 Hun, 639, 29 N. Y. S. R. 331, 8 N. Y. Supp. 795 (sidewalk); *Stillwater Turnp. Co. v. Coover*, 26 Ohio St. 520 (highway); *Street R. Co. v. Nolthenius*, 40 Ohio St. 376 (street); *Siegler v. Mellinger*, 203 Pa. 256, 93 Am. St. Rep. 767, 52 Atl. 175 (highway); *Lester v. Pittsford*, 7 Vt. 158 (highway); *Kelley v. Fond du Lac*, 31 Wis. 179 (highway); *Montgomery v. Scott*, 34 Wis. 338 (highway); *Griffin v. Willow*, 43 Wis. 509 (highway); *Benedict v. Fond du Lac*, 44 Wis. 405 (highway); *Mellor v. Utica*, 48 Wis. 459, 4 N. W. 655 (highway); *Baker v. Madison*, 62 Wis. 137, 22 N. W. 141, 583 (street gutter);

—as to whether a road was too narrow to allow a wagon to turn around on it with safety. *International & G. N. R. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. 58;

—as to whether steps were dangerous because of snow and ice, etc. *Langhammer v. Manchester*, 99 Iowa, 295, 68 N. W. 688;

—as to whether a sidewalk was dangerous because of accumulated snow and ice. *Dempsey v. Dubuque*, 150 Iowa, 260, 132 N. W. 758;

—as to whether an alley was dangerous

ing an injury to the conductor. It was said: "The step, however, was not really defective, but was simply of a different pattern from those often used on railroad engines; and the plaintiff admits in his brief that the evidence does not show such a defective or unsafe condition of the step as to preclude its use. And he also admits that, except for the reversal of the engine, he would not have fallen or been injured. Besides, there was no necessity for the plaintiff to use the step at the time he did; and we certainly think that no negligence can be imputed to the railroad company on account of the use of said step by the plaintiff at the time he used it. Probably neither the plaintiff nor the railroad company was

guilty of negligence in using said step." p. 763.

While the jury were warranted in drawing fair and reasonable inference from the facts and conditions shown, it was only from those shown, and not from those imagined or inferred, that such inference could rightfully be drawn. They found that the negligence which caused the death was, "Defective step on engine No. 134, and lack of runway and hand rail on the south side of bridge," and also that the train was moving about 6 miles an hour, and that Duncan would not have been injured if he had waited until the train stopped before getting off. Had he thus waited, he would have been well beyond the bridge, which was 56 feet in length; and hence an injury at

because of an unprotected entrance to a cellar way. *Musick v. Latrobe*, 184 Pa. 375, 39 Atl. 226;

—as to the safety of a toll bridge. *Baldridge & C. Bridge Co. v. Cartrett*, 75 Tex. 628, 13 S. W. 8;

—as to the safety of a bridge on a public highway. *Bliss v. Wilbraham*, 8 Allen, 564; *Comstock v. Georgetown*, 137 Mich. 541, 100 N. W. 788; *Crane v. Northfield*, 33 Vt. 124; *Weeks v. Lyndon*, 54 Vt. 640; *Kelley v. Fond du Lac*, 31 Wis. 179;

—as to the safety of a railroad bridge as a place to work, as affected by the fact that it had no runway. *DUNCAN v. ATCHISON, T. & S. F. R. Co.*;

—as to the dangerous character of a railroad right of way, because of an open waterway across the track. *Couch v. Charlotte, C. & A. R. Co.* 22 S. C. 557;

—as to the safety of a railroad crossing. *Atchison, T. & S. F. R. Co. v. Henry*, 57 Kan. 154, 45 Pac. 576; *Louisville & N. R. Co. v. Molloy*, 122 Ky. 219, 91 S. W. 683; *King v. Missouri P. R. Co.* 98 Mo. 235, 11 S. W. 563; *Seifred v. Pennsylvania R. Co.* 206 Pa. 399, 55 Atl. 1061; *Childress v. Chesapeake & O. R. Co.* 94 Va. 186, 26 S. E. 424, 1 Am. Neg. Rep. 196;

—that a raised part of a depot platform or broad step, 4 feet wide and 9 inches in height, is a dangerous place. *Graham v. Pennsylvania Co.* 139 Pa. 149, 12 L.R.A. 293, 21 Atl. 151, 6 Am. Neg. Cas. 329;

—as to the safety of a gate for the purpose of keeping stock off a railroad track. *Collins v. Chicago, M. & St. P. R. Co.* 122 Iowa, 231, 97 N. W. 1103;

—as to whether an unlocked and uncovered turntable was a dangerous machine. *Koons v. St. Louis & I. M. R. Co.* 65 Mo. 592;

—as to the safety and suitability of a railroad car in which a horse was shipped. *Atchison, T. & S. F. R. Co. v. Sage*, 49 Kan. 524, 31 Pac. 140;

—as to the danger of leaving a movable stool in a passenger elevator. *Gibson v. International Trust Co.* 186 Mass. 454, 72 N. E. 70, 17 Am. Neg. Rep. 248;

—as to the safety of a place as affected 51 L.R.A. (N.S.)

by leaving a burning oil lamp therein. *Wood v. Chicago, M. & St. P. R. Co.* 51 Wis. 196, 8 N. W. 214;

—as to whether a trussing machine used for tightening hoops on barrels, as operated, was dangerous to one in the position in which plaintiff was at the time he was injured. *Minlea v. St. Louis Cooperage Co.* 176 Mo. App. 91, 157 S. W. 1006;

—as to the safety or danger of a "mangle," a machine used in a mill. *Evans v. Mills*, 124 Ga. 318, 52 S. E. 538;

—as to the dangerous condition of the handle in a sledge hammer. *Nash v. Dowling*, 93 Mo. App. 156;

—as to the rotten condition of a rope furnished plaintiff to bind loads upon a wagon. *Dugan v. American Transfer Co.* 100 App. Div. 11, 145 N. Y. Supp. 31;

—as to the dangerous condition of a hood or cap connected with a cup elevator in an oil mill. *Holland v. McRae Oil & Fertilizer Co.* 134 Ga. 678, 68 S. E. 555;

—as to the safety of electric machine used for moving cars, as affected by the fact that there was no guard to the "spool" over which the operator guided the rope, that there was no lever to guide the rope, and that the switch that was used to stop the machine was so far away that it could not be reached by the operator without leaving the machine. *San Antonio Brewing Asso. v. Wolfshohl*, — Tex. Civ. App. —, 155 S. W. 644.

And a nonexpert witness should not be allowed to give his opinion as to the safety of a place or appliance where expert knowledge is essential to the formation of a correct opinion. Under this rule it has been held that a nonexpert should not be permitted to express his opinion as to the safety of a railroad embankment (*Central R. & Bkg. Co. v. Kent*, 84 Ga. 351, 10 S. E. 965; *Cain v. Atlantic Coast Line R. Co.* 74 S. C. 89, 54 S. E. 244), or as to whether a car furnished to ship a horse in was a safe and proper one for the purpose (*Atchison, T. & S. F. R. Co. v. Sage*, 49 Kan. 524, 31 Pac. 140). And in *Fairoury v. Rogers*, 98 Ill. 554, witnesses were not allowed to state their opinions as to whether a sidewalk across a ditch

the point then reached could not have been caused by a defect in the bridge. A mere accidental falling from the engine, without fault of the company, would not render it liable; and therefore, in order to make the bridge a contributing cause of the injury, it must appear otherwise than by speculation that the fall itself was attributable to the negligence of the company. It is largely a case of circumstantial evidence, in which the circumstances shown must be of such significance and relation one to another that a reasonable conclusion of negligence can be founded thereon. In *Chicago, R. I. & P. R. Co. v. Rhoades*, 64 Kan. 553, 68 Pac. 58, 11 Am. Neg. Rep. 383, it was held that, to establish a theory by circumstantial evidence, the known facts relied on must be

of such nature and so related to one another that the only reasonable conclusion to be drawn therefrom is the theory sought to be established. In *Hart v. St. Louis & S. F. R. Co.* 80 Kan. 699, 102 Pac. 1101, it was shown that a passenger fell from a vestibule train. The door of one vestibule was open, but there was no testimony to show where or how it was opened; and it was argued that the presumption of negligence on the part of the company, or of suicide on the part of the deceased, were the only ones to be indulged, and, the latter being unreasonable, the former alone remained. But it was held that no facts were presented upon which it could be safely assumed that the deceased lost his life because of any negligence upon the part of the

was so narrow as to be dangerous, the ground seemingly being that they were not experts. But see *Missouri P. R. Co. v. Jarard*, 65 Tex. 560, wherein it was held that nonexpert witnesses could give their opinion as to the safety of a railroad track at a certain point, even though the subject was not one of common information, where they had actual knowledge of that particular part of the road, and testified as fully as they could to the facts upon which their judgments were founded.

See also *Chamberlain v. Platt*, 68 Conn. 126, 35 Atl. 780; and *Seidel v. Woodbury*, 81 Conn. 65, 70 Atl. 58, as set out at the end of the following subdivision of this note.

—cases where opinions are held admissible.

On the other hand, it has been held that a nonexpert witness may give his opinion as to the safety or danger of a particular place or appliance where, from familiarity with it, or by reason of having seen it, he has gained a personal knowledge of the matter existing in reason rather than facts, which cannot otherwise be fully presented to the jury; or, in other words, applying the rule of necessity, a nonexpert may express his opinion where the facts cannot be correctly or adequately presented to the jury, the facts upon which the opinion is founded having been presented as fully as possible. This rule has been applied, and the expression of a nonexpert opinion allowed,—

—as to the safety of an elevator, as affected by the use of worm gearing to prevent falling. *Sievers v. Peters Box & Lumber Co.* 151 Ind. 642, 50 N. E. 877, 52 N. E. 399;

—as to the safety of a ladder which had no spikes in the bottom to prevent it from slipping. *Missouri, K. & T. R. Co. v. Hedric*, — Tex. Civ. App. —, 154 S. W. 633;

—as to the comparative safety of a "T" joint fastened to a steam pipe with bolts, and one screwed into the main pipe. *Texas Power & Light Co. v. Bird*, — Tex. Civ. App. —, 165 S. W. 8;
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—as to whether a railroad car was defective. *Gulf, C. & S. F. R. Co. v. Colbert*, — Tex. Civ. App. —, 31 S. W. 332;

—as to whether a particular car coupling was ill constructed and unsafe. *Baltimore & P. R. Co. v. Elliott*, 9 App. D. C. 341, 13 Am. Neg. Cas. 795;

—as to the safety of a "push bar," an appliance used in moving railroad cars. *McDonald v. Michigan C. R. Co.* 108 Mich. 7, 65 N. W. 597;

—as to the defective appearance of stay bolts from an exploded locomotive boiler. *Findley v. Coal & Coke R. Co.* — W. Va. —, 78 S. E. 306;

—as to the sufficiency of a lantern furnished for lighting purposes in a certain place. *Missouri, K. & T. R. Co. v. Steele*, 50 Tex. Civ. App. 634, 110 S. W. 171;

—as to whether a team of horses was safe for the work for which they were used. *Noble v. St. Joseph & B. H. Street R. Co.* 98 Mich. 249, 57 N. W. 126, 4 Am. Neg. Cas. 159;

—as to the safety of a floor, holes in which were covered with plates and irons. *Newport Rolling Mill Co. v. Mason*, 152 Ky. 224, 153 S. W. 220, wherein the court said that the conditions under which the plates were used, and the exact manner of their use, were not within the common observation or knowledge of the jury;

—as to the safety of a board in the platform of a well drill derrick. *Britton v. South Penn Oil Co.* — W. Va. —, 81 S. E. 525;

—as to whether the channel of a creek near a bridge was not too narrow to safely carry off flood waters. *Standley v. Atchison, T. & S. F. R. Co.* 121 Mo. App. 537, 97 S. W. 244;

—as to the dangerous character of a bridge which was without a guard rail. *Auberle v. McKeesport*, 179 Pa. 321, 56 Atl. 212, 1 Am. Neg. Rep. 167;

—as to whether a sidewalk, by reason of a hole therein and a break in the railing, was a "bad and dangerous place." *Ryan v. Bristol*, 63 Conn. 26, 27 Atl. 309 (in this case it was contended that the wit-

defendant. In *Brown v. Union P. R. Co.* 81 Kan. 701, 705, 29 L.R.A.(N.S.) 808, 106 Pac. 1001, 1002, a passenger was found two or three hundred feet east of the depot, lying close to the track, his dis severed legs between the rails, and many bruises and wounds on his body. The ground indicated that the body had been dragged 25 or 30 feet. The train upon which he had been riding was a vestibule passenger train. It was held that the negligence of the company was not established, and it was said: "The circumstances do not, however, indicate how the person happened to fall under the train, or whose fault occasioned the fall, if it be the fault of anyone." p. 705.

In *Duncan v. Chicago, R. I. & P. R. Co.* 82 Kan. 230, 232, 108 Pac. 101, a brakeman

named Duncan was standing upon the stirrup of a freight car, raising the lever which would uncouple the next car. The uncoupling had been made, and the train had parted, and Duncan was seen to roll out from under a car in the rear from the opposite side of the train. Blood was found upon the ties outside of the rail from the opposite side of the track where he had last been seen, and also upon one of the cars. The engineer testified that he saw him upon the stirrup; that he was leaning over into the car and giving signals to go forward. The brake beam of the car was found to be defective, and in stepping upon it, for some reason not shown, it would sink down. The plaintiff claimed that the lever of the coupling device was disconnected and

nesses should be permitted only to state the facts and to describe the place without giving their opinions, but the court said that it was a legitimate inference from the record that the witnesses could not clearly and fully describe the situation to the jury);

—as to the dangerous character of an open area way in a sidewalk and street. *McNerney v. Reading City*, 150 Pa. 611, 25 Atl. 57;

—as to whether or not a sidewalk, because of snow and ice, was in a reasonably safe condition for public travel at a certain time. *Campbell v. New Haven*, 78 Conn. 394, 62 Atl. 665;

—as to the dangerous condition of a way leading to a railroad station. *Cross v. Lake Shore & M. S. R. Co.* 69 Mich. 363, 13 Am. St. Rep. 399, 37 N. W. 361, 9 Am. Neg. Cas. 464;

—as to the safety of a railroad track at a certain point. *Missouri P. R. Co. v. Jarrard*, 65 Tex. 560 (the court said: "The opinions were admissible, if the condition of the road could be judged of by men of ordinary information, for the reason that the witnesses, from actual observation, had acquired knowledge which could only be communicated to the jury as a result. A juror would be as competent as the witness to form an opinion, if he had seen what the witness saw, but what the witness observed 'cannot be reproduced and made palpable in the concrete to the jury,'—'language is not adequate to such realization.' The aggregate impression is what is reported to the consciousness and preserved in the memory, and that is susceptible of expression only in the form of an opinion. Wharton, Ev. § 511. The leading facts consciously conducting to the opinion can and must be stated, but the appearance of the road, made up of patched rails, worn or rusted in various degrees, some properly, some partially, and some not at all, fastened together at the ends; the ties in all the stages of decay, some with the iron spiked to them and some not, some in a socket of mud, and some firmly embedded in the earth, the 51 L.R.A.(N.S.)

roughness of the track, perceptible with precision at a glance, but insusceptible of accurate portrayal in words, each of which contributes to the general appearance an indefinable part, this whole appearance of the road cannot be adequately stated in language. Its best reproduction is in the shape of an opinion. What can be stated is sufficient to test the witness's knowledge and accuracy of observation, and upon these depends the value of the opinion"); *San Antonio & A. P. R. Co. v. Parr*, — Tex. Civ. App. —, 26 S. W. 861; *Thompson v. Galveston, H. & S. A. R. Co.* 48 Tex. Civ. App. 284, 106 S. W. 910;

—as to whether or not a railroad crossing was particularly dangerous. *Martin v. Baltimore & P. R. Co.* 2 Marv. (Del.) 123, 42 Atl. 442 (in this case the court said: "It is in many cases impossible for any one person to depict to the jury by his testimony, or by all the witnesses, the exact surroundings of that place, showing all the elements of danger that enter into a crossing of that kind, which is obtained by familiarity with the crossing itself and with the circumstances surrounding it. No one witness or number of witnesses will be able to present it fully. Therefore, it does not come within the general rule of a witness taking a physical fact, and stating that fact and surrounding facts, from which any man might ordinarily infer the conditions of things"); *Laughlin v. Street R. Co.* 62 Mich. 220, 28 N. W. 873;

—as to whether an unlocked, unfenced turntable was dangerous. *Bridger v. Asheville & S. R. Co.* 25 S. C. 24.

And see *Beatty v. Gilmore*, 16 Pa. 463, 55 Am. Dec. 514; and *Kitchen v. Union Twp.* 171 Pa. 145, 33 Atl. 76, as set out and discussed infra; and the *dictum* in *Brunker v. Cummins*, 133 Ind. 443, 32 N. E. 732.

And in some instances it has been held that a nonexpert should be allowed to express his opinion as to the safety of a place or appliance, even though the question calling therefor was one which any man of ordinary intelligence could answer. This was the rule adopted in *Alexander v. Mt. Ster-*

failed to work, and for that reason the deceased had to lean over between the cars to lift the coupling pin, and in so doing his foot slipped on the defective brake beam, which caused him to fall. The jury found that the ladder, handhold, and stirrup were in good order, but that the brake beam and coupling appliances were not in proper condition. The finding as to the coupling appliances was based entirely upon circumstances shown in evidence; direct testimony having been given that it was in good condition. In the opinion, Mr. Justice Benson said: "It is first presumed that the brakeman was doing his duties properly, which is a fair presumption; it is next presumed that he could not lift the pin by use of the lever; it is presumed from this that the appliance was out of order, and because of this defect it is presumed that he stepped

upon the defective brake beam, thereby losing his life. . . . The lamentable death of this man may have been caused by some mischance after the uncoupling was effected. It may have been caused in the manner claimed by the plaintiff. Possibly one conjecture is as reasonable as another, but the evidence does not reveal the cause of his fall. In the absence of such evidence, there can be no recovery." pp. 232, 233.

In view of the doctrine announced by these decisions, we find it impossible to hold that the evidence justified the jury in all of their conclusions.

The judgment is reversed, and the cause remanded, with directions to grant a new trial.

All the Justices concur.

ling, 71 Ill. 366, wherein it was held that a nonexpert should have been allowed to give his opinion as to whether or not a sidewalk, because of the mode of its construction, was unsafe and dangerous. And in *Baltimore & Y. Turnp. Road v. Crowther*, 63 Md. 558, 1 Atl. 279, a nonexpert witness was allowed to give his opinion as to whether a road at a certain point was unsafe because of a bank or declivity, the court saying that the matter was one about which men of ordinary intelligence could speak as well as experts in road making, and that the testimony of such witnesses may be resorted to in such case. So, in *Baltimore & L. Turnp. Co. v. Cassell*, 66 Md. 419, 59 Am. Rep. 175, 7 Atl. 805, a nonexpert was allowed to express his opinion as to the safety of a highway at a particular point. And see *Rowe v. Baltimore & O. R. Co.* 82 Md. 493, 33 Atl. 761, wherein opinion evidence as to the safety of a road, there being overhanging rocks, was admitted, seemingly without question.

And in the following cases nonexpert opinions as to the safety of a place or appliance were admitted, but the respective courts do not state the grounds upon which the admissions were allowed: *Merkle v. Bennington Twp.* 68 Mich. 133, 35 N. W. 436 (highway bridge); *Beatty v. Gilmore*, 16 Pa. 463 (excavation in highway; a subsequent case—*Graham v. Pennsylvania Co.* 139 Pa. 149, 12 L.R.A. 293, 21 Atl. 151, 6 Am. Neg. Cas. 329—intimates that this case belongs to that class where a mere description of the place would not convey to the jury an adequate idea of it without reference to the danger, and holds that if the case cannot be so regarded, it must be regarded as materially modified by subsequent decisions); *Kitchen v. Union Twp.* 171 Pa. 145, 33 Atl. 76 (defective road,—case probably one in which the court believed that an adequate description could not be given the jury); *Reese v. Morgan Silver Min. Co.* 17 Utah, 489, 54 Pac. 759 (ladder used for entering mine); *Drew v.* 51 L.R.A.(N.S.)

New River Co. 6 Car. & P. 754 (witness testified that pavement was so low as to make it unsafe for pedestrians).

But it has been held that a nonexpert, although familiar with a place or appliance, should not be allowed to express his opinion as to its dangerous or safe character. It was so held in *MacFeat v. Philadelphia, W. & B. R. Co.* 5 Penn. (Del.) 52, 62 Atl. 898, as regards a platform and passageway or crossing for the use of passengers awaiting trains (but in connection with this case, see *Martin v. Baltimore & P. R. Co.* as set out supra); in *Seininski v. Wilmington Leather Co.* — Del. —, 83 Atl. 20, as to the dangerous character of a "threshing machine;" and in *Milledgeville v. Wood*, 144 Ga. 370, 40 S. E. 239, as to whether a street was dangerous at a certain point.

But even in those jurisdictions which in some cases permit the introduction in evidence of the opinion of a nonexpert, it has been held that such an opinion is not admissible where the facts upon which it is based are not stated. See *Chamberlain v. Platt*, 68 Conn. 126, 35 Atl. 780, holding that a nonexpert who was familiar with a certain railroad station where plaintiff was injured because of alleged insufficient lighting could not give his opinion as to the conditions for safety as regards lights at the time of the accident, although he was there at the time, where he did not give the facts observed on such occasion and those upon which his opinion was based.

And such an opinion is sometimes held not to be admissible where the witness does not know or has not seen the conditions at the time of the accident. See *Seidel v. Woodbury*, 81 Conn. 65, 70 Atl. 58, holding that an opinion as to the safety of a highway, given in answer to a hypothetical question by a nonexpert who had no personal knowledge of the condition of the highway at the time of an accident alleged to have been caused by the defendant, was not admissible.

G. J. C.

MICHIGAN SUPREME COURT.

JAMES R. PATTERSON, Appt.,
v.STANDARD ACCIDENT INSURANCE
COMPANY.

(— Mich. —, 144 N. W. 491.)

Insurance — automobile — obligation to defend criminal prosecution.

A policy of automobile insurance obligating the insurer to indemnify the assured against loss from the liability imposed by law upon him for damages on account of bodily injuries, including death, accidentally sustained by any person by reason of the maintenance or use of his automobile, and to defend in the name and on behalf of the assured any suits which may at any time

be brought against him on account of such injuries, does not bind the insurer to defend a criminal prosecution for manslaughter instituted against the assured.

(December 20, 1913.)

APPEAL by plaintiff from a judgment of the Circuit Court for Branch County in defendant's favor in an action brought to recover damages for alleged breach of a contract to defend plaintiff in a suit brought against him on account of an automobile accident. Affirmed.

The facts are stated in the opinion.

Messrs. Joseph L. Hooper and Bernard J. Onen, for appellant:

The word "suit" includes criminal prosecutions as well as civil proceedings.

Note. — Insurance covering automobiles, or indemnifying against injury, or liability for injury, caused thereby.

The early cases upon the questions here considered were treated in the note accompanying *Harris v. American Casualty Co.* 44 L.R.A.(N.S.) 70.

Automobile insurance—accident insurance.

Supplementing note in 44 L.R.A.(N.S.) 71.

It is not necessary, in order to constitute a "collision" within the meaning of a policy insuring against damage resulting from a collision of an automobile with any other automobile, vehicle, or object, that both objects should be in motion. *Lepman v. Employers' Liability Assur. Corp.* 170 Ill. App. 379.

The words "collision with," as used in such a policy, mean striking against; and the policy covers a case where the automobile strikes a brick which causes an accident. *Ibid.*

It was held in *Hanvey v. Georgia L. Ins. Co. — Ga. —*, 81 S. E. 206, that a petition was not subject to a general demurrer where it alleged that the plaintiff, while operating the automobile covered by the policy, sustained damages to it, caused solely by a collision with another object, the same being a bank or side of a ditch on a certain road: and stating that the automobile left the roadbed and ran into the ditch on the side, and into the bank, and turned over, it appearing from the petition that the policy sued on insured against loss or damage to the automobile if caused solely by collision with another object, either moving or stationary, although it excluded all loss or damage caused by striking any portion of the roadbed or any impediment consequent upon the condition thereof. The court remarked that they could not say as a matter of law that the petition alleged facts which showed that the accident fell within the exception mentioned.

In *Stix v. Travelers' Indemnity Co.* 175 Mo. App. 171, 157 S. W. 870, where the 51 L.R.A.(N.S.)

insured automobile skidded across the granitoid guttering about 20 inches in width, adjacent to the highway, and across a grass plat 2 feet wide, and collided with a granitoid sidewalk 6 inches above the grass plat, it was held that the guttering constituted no part of the roadbed within the meaning of a provision of the policy excluding "all loss or damage caused by striking any portion of the roadbed." The court said: "Here the policy does not exclude loss or damage caused by striking any portion of the roadway or street, but rather confines the exemption of liability to the more restricted area of the 'roadbed.' In common roads the term 'roadbed' refers to the whole material laid in place and ready for travel. See Webster's Dict. Obviously the roadbed involved here consisted of that portion between the gutters on either side which was constructed for travel, and not to the gutters designed for the purpose of draining water from the adjacent roadbed. The court did not err in instructing the jury that the granitoid gutter constituted no part of the roadbed."

In an action on a policy insuring against damage to an automobile where there was no evidence that the chauffeur, at the time of the accident for which recovery was sought, gave a sudden turn to the steering gear, an instruction that if the jury were in doubt and unable to say whether the upset was due to the car striking a brick, or to a sudden turn given the steering gear by the chauffeur, or to some unknown causes, no recovery could be had, was held properly refused, since it suggested to the jury that they might indulge in conjecture as to the cause of the accident. *Lepman v. Employers' Liability Assur. Corp. supra.*

It has been held that a provision in a policy insuring an automobile against damage that "each claim hereunder shall be adjusted separately, and from the amount of each claim, when determined, the sum of twenty-five dollars (\$25) shall be deducted, and the company shall be liable for loss or damage in excess of that amount only," followed by provisions respecting the ascertainment of the amount of the claim for

Com. v. Moore, 143 Mass. 136, 58 Am. Rep. 128, 9 N. E. 25.

The contract is not void as against public policy.

Zeigler v. Illinois Trust & Sav. Bank, 245 Ill. 180, 28 L.R.A.(N.S.) 1112, 91 N. E. 1041, 19 Ann. Cas. 127; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 30 L.R.A. 193, 17 C. C. A. 62, 36 U. S. App. 152, 70 Fed. 201; 15 Am. & Eng. Enc. Law, 2d ed. 938.

Messrs. Keena, Lightner, Oxtoby, & Oxtoby, for appellee:

The word "suit" does not include criminal prosecutions.

loss, and providing that the insurer shall not be responsible beyond the value of the property, and that the parties shall agree on the amount of the loss, if possible, and, if not, shall select appraisers, is not available to reduce the amount of the loss only in case an adjustment is made by agreement or appraisal, but also entitles the insurer to such a reduction where a judgment is recovered against it in an action on the policy. *Stix v. Travelers' Indemnity Co.* supra.

In *Lepman v. Employers' Liability Assur. Corp.* supra, a provision in a policy covering loss from damage to an automobile that the insurer should not in any event be liable "for more than — the actual cost of the suitable repair of the property injured" was held to indicate that the contemplation was that the measure of damages should be the actual cost of repair, and it was held proper to show the amount of damages by proving the cost of repairs to the machine, and showing that the repairs were reasonably worth the amount of the charge.

—fire insurance.

Supplementing note in 44 L.R.A.(N.S.) 71, 72.

Where the insured company originally had a policy insuring its automobile against loss by fire, which was obtained by agents, and upon its being canceled by the insurer, the agents, not being able to place the risk with their companies, procured a policy through another agency which covered the machine only while in the garage, it was held that the insured was not entitled to have the latter policy reformed on the ground of mistake, upon its appearing that it knew that the agents employed by it were not authorized to act for the company issuing the policy in question, and that it knew that the policy was the only one the insurer would write upon its machine, and knew that no agent of that company was authorized to write a policy like the one which had been canceled. *Mississippi Electric Co. v. Hartford F. Ins. Co.* — Mich. —, 63 So. 231.

—theft insurance.

Supplementing note in 44 L.R.A.(N.S.) 75.
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Drake v. Gilmore, 52 N. Y. 389; *Philadelphia & R. Coal & I. Co. v. Chicago*, 158 Ill. 9, 41 N. E. 1102; *Callen v. Ellison*, 13 Ohio St. 446, 82 Am. Dec. 448; *Sanford v. Sanford*, 28 Conn. 6; *Kuhl v. Chicago & N. W. R. Co.* 101 Wis. 42, 77 N. W. 155; *Cohen v. Virginia*, 6 Wheat. 264, 405, 5 L. ed. 257, 291; *Pearson v. Nesbit*, 12 N. C. (1 Dev. L.) 315, 17 Am. Dec. 569; *Cannon v. Phillips*, 2 Sneed, 185; *Re Stutsman County*, 88 Fed. 337; *United States v. Mann*, 1 Gall. 3, Fed. Cas. No. 15,717; *Kurtz v. Moffitt*, 115 U. S. 487, 29 L. ed. 458, 6 Sup. Ct. Rep. 148; *Weston v. Charleston*, 2 Pet. 464, 7 L. ed. 486; *People v. Qui-*

It has been held that an employee of the garage keeper at which the insured kept his machine under an agreement by which he paid a specified sum per month is not in the employment or service of the insured within the meaning of a policy providing that "loss . . . by theft, robbery, or pilferage by persons not in the employment, service, or household, is covered." *Schmid v. Heath*, 173 Ill. App. 649. The court said: "A servant or employee is one who is employed to perform personal service; and a contractor, one who engages to do a particular thing; the idea of personal service not being a necessary element in the bargain. To be in the service or employment of the assured, within the meaning of the policy, Collier must have been subject to the control and direction of the assured, and bound to render personal service to him; but he was employed, not by the assured, but by LiBal, and was not subject to the control of the assured, nor bound to render to him any personal service."

In *Bigus v. Pacific Coast Casualty Co.* 145 Mo. App. 170, 129 S. W. 982, it was held that a policy insuring an automobile against "direct loss by burglary, theft, or larceny" covered only a felonious asportation, and did not include a case where the machine was taken openly in the daytime, by one who claimed to be the owner, since such taking at most amounted only to a trespass.

Generally as to burglary and theft insurance, see the note to *Rosenthal v. American Bonding Co.* 46 L.R.A.(N.S.) 561.

Liability insurance.

Supplementing note in 44 L.R.A.(N.S.) 73.

It has been held that an indemnity policy issued to a taxicab company, covering a loss sustained from an accident arising because of a violation of a speed ordinance, is not void as against public policy. *Taxicab Motor Co. v. Pacific Coast Casualty Co.* 73 Wash. 631, 132 Pac. 393.

In this case it was also held that where the policy contained no condition purporting to exempt the insurer from liability for an accident caused by a violation of a speed ordinance on the part of the insured, the

der, 172 Mich. 280, 137 N. W. 546; *People v. Swift*, 172 Mich. 473, 138 N. W. 662; *People v. Cain*, 171 Mich. 279, 137 N. W. 159; *People v. Case*, 171 Mich. 282, 137 N. W. 55; *People v. Davis*, 171 Mich. 241, 137 N. W. 61; *People v. Lalonde*, 171 Mich. 286, 137 N. W. 74; *People v. Mulvaney*, 171 Mich. 272, 137 N. W. 155; *People v. Neely*, 171 Mich. 249, 137 N. W. 150; *People v. Tessmer*, 171 Mich. 522, 41 L.R.A.(N.S.) 433, 137 N. W. 214; *Re Adler*, 171 Mich. 264, 136 N. W. 1120.

To permit an insurance company to agree in advance to defend a criminal proceeding would be against public policy.

insurer could not defeat an action by the insured for the amount paid in satisfaction of a judgment rendered against it, on the ground that it appeared on the trial of the original cause that the insured's liability arose from a violation on its part of the speed laws of the city where the accident occurred. *Ibid*.

And where the insurer in that case had charge of the defense of an action brought against the insured to recover for a death caused by one of its machines, it was held that it could not defeat an action by the insured to recover the amount paid in satisfaction of the judgment recovered, on the ground that the death resulted from the malpractice of the attending physician, and not from the insured's negligence. *Ibid*.

It was further held that a provision of the policy that the insured should render such co-operation and assistance in the defense of actions against it to recover for injuries covered by the policy as lay in its power was not violated because an officer of the insured company gave evidence at an inquest relative to the instructions given drivers which conflicted with his evidence on the trial of an action against the insured to recover for negligently killing a person, where it did not appear that the discrepancy in his testimony was anything more than a mistake. *Ibid*.

It has been held that the payment of a judgment by the insured within ninety days of its affirmance by the appellate court is within the requirements of an indemnity policy providing that the insurer shall not be liable unless a judgment recovered against the insured is paid within ninety days from the date of such judgment, although the payment in question was not made within ninety days from the date of the rendition of the judgment. *Ibid*.

The evidence is sufficient to show a loss actually sustained within the meaning of an indemnity policy issued to a company operating taxicabs, which provides that the insurer shall not be liable in an action "unless it shall be brought by the insured to reimburse him for loss actually sustained and paid by him in satisfaction of a final judgment," where it appears that the insured, in satisfaction of a judgment, with the consent and approval of the judge of 51 L.R.A.(N.S.)

9 Enc. Law & Proc. 481; *Crisup v. Grosslight*, 79 Mich. 380, 44 N. W. 621.

Steere, Ch. J., delivered the opinion of the court:

This action was brought on a certain so-called accident policy of insurance, issued to plaintiff by defendant, for his protection from specified losses which might result to him in connection with the use of two designated automobiles within a stated period of time.

Within the period covered by the policy, a young man named Reagan was killed in a collision with one of the automobiles men-

probate, executed and delivered an unsecured promissory note to the administratrix of a person killed by one of the insured's taxicabs, there being nothing to indicate that the note was not given in good faith. *Ibid*.

The general question whether the giving of a note is a loss or damage within an indemnity policy is covered in the notes to *Kennedy v. Fidelity & C. Co.* 9 L.R.A.(N.S.) 478, and *West Riverside Coal Co. v. Maryland Casualty Co.* 48 L.R.A.(N.S.) 195.

A policy indemnifying the owner of an automobile from loss from liability imposed by law on account of injuries or death accidentally suffered, and requiring immediate written notice upon the occurrence of an accident, does not require that notice should be given of all accidents resulting from the operation of the insured's automobile, but only those accidents which result in bodily injuries to others are within the meaning of the provision. *Chapin v. Ocean Acci. & Guarantee Corp.* — Neb. —, — L.R.A.(N.S.) —, 147 N. W. 465.

The provision in such policy requiring immediate written notice of the occurrence of an accident is not unreasonable. *Ibid*.

The word "immediate," as there used, does not mean instantly, but means within a reasonable time, having regard to all of the circumstances. *Ibid*.

The word "accident," as used in such policy, means an undersigned and unforeseen occurrence of an afflictive or unfortunate character, resulting in bodily injury to a person other than the insured. *Ibid*.

Where at the time a person was thrown from his bicycle through being struck by the insured's automobile no injury was apparent, and the person thrown stated that he had received none, and for about a year thereafter the insured honestly believed that none had resulted, it cannot be said as a matter of law that the conditions of the accident were such as to bring it within the class in which it was the insured's duty to give immediate notice, or that the notice given was not given within a reasonable time, where it appears that upon the insured's being notified that a suit was to be brought against him to recover for the injury, he immediately notified the insurer. *Ibid*.

J. T. W.

tioned, while plaintiff was driving it. An inquest held over the remains of the young man resulted in a finding of the coroner's jury that he came to his death through plaintiff's negligence in operating his automobile, and criminal prosecution was recommended. An agent of defendant, experienced in that class of work, made an investigation of the accident, viewing the premises and taking the statements of witnesses, and attended the inquest. He informed plaintiff that the company would defend him in any civil action brought against him for damages, but that the insurance did not cover criminal cases.

Plaintiff was subsequently arrested and prosecuted for manslaughter. He requested the insurance company to defend him, which it declined to do on the ground that its policy did not include criminal prosecutions. He then employed his own counsel, being ultimately tried for the offense and found not guilty by the verdict of a jury. An action, entitled *Reagan v. Patterson*, was also begun against him in the Branch county circuit court by the father of deceased, in which plaintiff claimed \$10,000 damages for the death of his son; the case involving the same facts as the criminal prosecution. At the time this case was argued here, the insurance company was defending that civil case for damages, under the requirements of its policy. Plaintiff expended \$2,258.46 in attorney fees and other expenses in his defense in the criminal prosecution against him for manslaughter. This action is to recover from defendant those expenditures.

Defendant's obligations as stated in the policy in question were as follows:

"(1) To indemnify the assured named and described in the declarations against loss from the liability imposed by law upon him for damages on account of bodily injuries, including death, at any time resulting therefrom, accidentally sustained by any person or persons, by reason of the maintenance or use of any of the automobiles enumerated and described in said declarations, provided such bodily injuries are suffered within the policy period therein defined. This policy shall also cover such bodily injuries if caused by means of loading or unloading goods carried on automobiles used for transportation and delivery of materials or merchandise, and so specified in said declarations.

"(2) To serve the assured upon notice of such injuries by such investigation thereof, or by such negotiation or settlement of any resulting claims, as may be deemed expedient by the company.

"(3) To defend in the name and on behalf of the assured any suits which may at any time be brought against him on account of

such injuries, including suits alleging such injuries and demanding damages therefor, although such suits, allegations, or demands are wholly groundless, false, or fraudulent.

"(4) To pay all costs taxed against the assured in any legal proceeding defended by the company according to agreement 3 above, and all interest accruing after entry of judgment upon such part of same as is not in excess of the company's limit of liability as hereinafter expressed; and

"(5) To reimburse the assured for the expense incurred in providing such immediate surgical relief as is imperative at the time of the accident."

It is claimed by plaintiff that the criminal prosecution instituted against him for manslaughter was a suit brought against him on account of bodily injuries alleged to have been sustained by reason of the use of one of the automobiles described in the policy; that under the agreement in said paragraph 3 the insurance company was obligated to defend such suit; that, having refused to do so, it is liable to him on breach of the contract for expenditures actually and necessarily made by him in employing counsel and assuming the defense of said criminal case.

The two general grounds of defense urged and argued are:

"(1) That the word 'suit' does not include criminal prosecutions brought on behalf of the people of the state of Michigan; and

"(2) That it would be against public policy to permit an insurance company to agree in advance to defend in criminal proceeding."

The word "suit," unqualified by adjective or context, has possible meanings foreign to this inquiry. When used with reference to courts, it necessarily implies a lawsuit, defined by the *Century Dictionary* as "a suit at law or in equity; an action or a proceeding in a civil court; a process in law instituted by one party to compel another to do him justice." It would be a forced and unnatural construction to hold that the word as used in this accident policy is intended to comprehend criminal prosecutions instituted and conducted by public officials in the name of the people, presumably for the punishment and suppression of crime.

It must be conceded that the word "suit," as applied to legal controversies, both by the legal profession and others, is now used and recognized as a generic term of broad significance, often understood and used, even by legislatures and courts, to designate almost any proceeding in a court, even, though rarely, being applied to a criminal prosecution in certain connections. *Com. v. Moore*, 143 Mass. 136, 58 Am. Rep.

128, 9 N. E. 25. In its strict, technical meaning, more particularly where the distinction between law and chancery is retained, as in this state, is "a proceeding in equity, the proper word for a litigation in chancery, a usual and technical designation of a proceeding in equity," as distinguished from an action at law. 37 Cyc. 524.

But, irrespective of lexicographers and precise technical definition, the expression "criminal suit" is unnatural and awkward to the professional ear and is seldom used, even in common parlance. "Suit," in its general, unqualified use in legal documents, such as the one before us, naturally means, and should be construed as intended to include, the mode or manner authorized and adopted by law to redress civil injuries. Such is the view expressed by able authorities when carefully considering and directly treating the question. Many of these authorities are cited in 27 Cyc. 522. In the lengthy and exhaustive case of *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257, Chief Justice Marshall says: "What is a suit? We understand it to be the prosecution or pursuit of some claim, demand, or request; in law language, it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is, says Judge Blackstone, 'the being put in possession of that right whereof the party injured is deprived.' The instruments whereby this remedy is obtained are a diversity of suits and actions, which are defined by the Mirror to be 'the lawful demand of one's right.' Or, as Bracton and Fleta express it, in the words of Justinian, '*jus prosequendi in iusticio quod alicui debetur*.' Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right."

Furthermore, the two essentials of a contract of insurance which are to be considered together in this inquiry are the subject-matter and the risk insured against. The two automobiles constitute the subject-matter in relation to which the risk was assumed. Construing the various provisions of the policy together, we think it clearly evident that the controlling thought as to indemnity, the thing contracted for, was protection against risk of liability for injury resulting from accidents in the operation of the automobiles, not risk of public prosecution for crimes or misdemeanors committed in the use of them; and we conclude from the context that in this policy the word "suits" must be taken to mean civil suits which would determine the pecuniary liability of defendant for injury to person or property; suits which, because 51 L.R.A.(N.S.)

of its promised indemnity, defendant was necessarily interested in defending.

The learned circuit judge rightly held "that the provisions of said policy, read together, exclude any construction making it the legal duty of defendant to defend plaintiff on the criminal charge of manslaughter, and that consequently the defendant is entitled to an instructed verdict."

As these views dispose of the case, it becomes unnecessary to consider the other interesting question raised by defendant.

The judgment is affirmed.

MICHIGAN SUPREME COURT.

MYRTLE E. BOWEN

v.

PRUDENTIAL INSURANCE COMPANY
OF AMERICA, Appt.

(— Mich. —, 144 N. W. 543.)

Insurance — approval of application — delivery of policy.

1. Where a applicant for life insurance agreed that the policy should not take effect until issued and delivered, the approval of the application and execution of the policy by the insurer creates no liability, in default of its actual delivery.

Same — constructive delivery.

2. The transmission of a policy of life insurance to a general agent of the insurer for delivery to the applicant, with instructions not to deliver it to the applicant unless in good health, is not such constructive delivery thereof as will put the policy in force, where the applicant has agreed that the policy shall not become operative until it shall be issued and delivered, and the first premium paid thereon in full, while the applicant's health is in the same condition as described in the application.

Same — delivery to special agent.

3. The receipt of a life insurance policy by a special agent, through whom the negotiations for insurance had been conducted, two days after the death of the insured, is not a constructive delivery to the insured which will satisfy a stipulation in the application that the policy shall not take effect until issued and delivered while the health of the insured is in the same condition as described in the application.

(December 20, 1913.)

Note. — The subject of the effect of stipulation in application or policy of life insurance, that it shall not become binding unless delivered to assured while in good health, is covered in the notes to *Roe v. National L. Ins. Co.* 17 L.R.A.(N.S.) 1144, and *Connecticut General L. Ins. Co. v. Mullen*, 43 L.R.A.(N.S.) 725.

APPEAL by defendant from a judgment of the Circuit Court for Montcalm County in plaintiff's favor in an action brought to recover the amount alleged to be due on a life insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. Kleinhans, Knappen, & Uhl, for appellant:

Applicant's agreement was binding, and the policy was of no effect unless delivered.

Russell v. Prudential Ins. Co. 176 N. Y. 178, 98 Am. St. Rep. 656, 68 N. E. 252; McCully v. Phoenix L. Ins. Co. 18 W. Va. 782; New York L. Ins. Co. v. Babcock, 104 Ga. 67, 42 L.R.A. 88, 69 Am. St. Rep. 134, 30 S. E. 273; Oliver v. Mutual L. Ins. Co. 97 Va. 134, 33 S. E. 536; Hills v. Penn Mut. L. Ins. Co. 28 Ky. L. Rep. 790, 90 S. W. 544; Ray v. Security Trust & L. Ins. Co. 126 N. C. 166, 35 S. E. 246; Bacon, Ben. Soc. § 272.

There was no delivery of the policy, as required by the contract.

Bacon Ben. Soc. § 273; Busher v. New York L. Ins. Co. 72 N. H. 551, 58 Atl. 41; Hawley v. Michigan Mut. L. Ins. Co. 92 Iowa, 594, 61 N. W. 201; McCully v. Phoenix Mut. L. Ins. Co. 18 W. Va. 782; May, Ins. § 60, p. 76.

Messrs. Walker & Fitzgerald, for appellee:

There was a sufficient delivery of the policy.

New York L. Ins. Co. v. Pike, 51 Colo. 238, 117 Pac. 899; Pledger v. Sovereign Camp, W. W. 17 Tex. Civ. App. 18, 42 S. W. 653; New York L. Ins. Co. v. Babcock, 104 Ga. 67, 42 L.R.A. 88, 69 Am. St. Rep. 134, 30 S. E. 273; 16 Am. & Eng. Enc. Law, 855; Yonge v. Equitable Life Assur. Soc. 30 Fed. 902; Porter v. Mutual L. Ins. Co. 70 Vt. 504, 41 Atl. 970; Kilborn v. Prudential Ins. Co. 99 Minn. 176, 108 N. W. 861; New York L. Ins. Co. v. Greenlee, 42 Ind. App. 85, 84 N. E. 1101; Gallagher v. Metropolitan L. Ins. Co. 67 Misc. 115, 121 N. Y. Supp. 638; Payne v. Mutual L. Ins. Co. 72 C. C. A. 487, 141 Fed. 339; Connecticut General L. Ins. Co. v. Mullen, 43 L.R.A.(N.S.) 725, 118 C. C. A. 345, 197 Fed. 299; Cooper v. Pacific Mut. L. Ins. Co. 7 Nev. 116, 8 Am. Rep. 705; Mulligan v. Metropolitan L. Ins. Co. 149 Ill. App. 516; Alabama Gold L. Ins. Co. v. Herron, 56 Miss. 646; Hallock v. Commercial Ins. Co. 26 N. J. L. 268; Mutual Reserve Fund Life Asso. v. Farmer, 65 Ark. 581, 47 S. W. 850; Dupriest v. American Cent. L. Ins. Co. 97 Ark. 229, 133 S. W. 826; Title Guaranty & S. Co. v. Fulton, 89 Ark. 471, 33 L.R.A.(N.S.) 676, 117 S. W. 537; Mutual L. Ins. Co. v. Thomson, 94 Ky. 253, 22 S. W. 87; Devine v. Federal L. Ins. Co. 250 Ill. 203, 95 N. E. 176; Wheeler v. Watertown F. Ins. 51 L.R.A.(N.S.)

Co. 131 Mass. 1; Dibble v. Northern Assur. Co. 70 Mich. 1; 14 Am. St. Rep. 470, 37 N. W. 704; Lorscheer v. Supreme Lodge, K. H. 72 Mich. 316, 2 L.R.A. 206, 40 N. W. 545; Dailey v. Preferred Masonic Mut. Acci. Asso. 102 Mich. 289, 26 L.R.A. 171, 57 N. W. 184, 60 N. W. 694; Wagner v. Supreme Lodge, K. & L. H. 128 Mich. 660; 87 N. W. 903; Supreme Court, O. P. v. Davis, 129 Mich. 318, 88 N. W. 874; Robinson v. United States Benev. Soc. 132 Mich. 696, 102 Am. St. Rep. 436, 94 N. W. 211.

The policy was valid and effective from its date, December 27, 1910.

Unterharnscheidt v. Missouri State L. Ins. Co. — Iowa, —, 45 L.R.A.(N.S.) 743, 138 N. W. 459.

Steere, J., delivered the opinion of the court:

Plaintiff brought this action in the circuit court of Montcalm county to recover the amount of an insurance policy for \$1,000, alleged to have been issued by defendant on the life of her husband, Eugene T. Bowen, who was accidentally killed on the 28th of January, 1911. Deceased resided in Montcalm county, near Howard City, which was his postoffice address. Said policy is dated the 24th day of January, 1911, and at the time of the death of deceased was in the hands of Charles McCready, state manager for defendant, located at Wichita, Kansas. Defendant was and is a foreign corporation organized under the laws of the state of New Jersey, with its home office at Newark in said state, being authorized to do business in the states of Kansas and Michigan, respectively.

The issue presented is whether or not said policy ever became operative. It is claimed by defendant that it had not yet become valid and binding because of non-delivery.

The facts in the case are practically undisputed. Eugene T. Bowen, deceased, made application on December 27, 1910, for insurance in defendant company, naming plaintiff as the beneficiary. At that time his age on his nearest birthday was thirty-four years; he having been born on June 29, 1876. He asked to have his policy dated on the day he made his application. The application was solicited and taken by an acquaintance of deceased, named Van Ostrand, who was a special agent of defendant, apparently with a roving commission, but working under said McCready, the Kansas state manager of Wichita. Van Ostrand's home was in Marion, Kansas, and his position with defendant was superintendent of agencies under McCready. At the time of making his application Bowen paid Van Ostrand \$21.43, which was an amount equal to the

first premium on the policy applied for, taking a receipt, which provided that such payment would in no manner be binding on the company, except that it would be returned in case the company declined to issue a policy on the life of the applicant. A statement of physical examination for insurance made by a local physician not authorized by defendant accompanied the application; but the defendant company required an examination made by its own medical examiner. This examination was had on January 16, 1911, and the medical examiner's report duly forwarded to the home office of defendant. After this was received and approved, the policy in question was prepared, dated January 24, 1911, and mailed on that date, with instructions attached, to said Manager McCready, at Wichita, Kansas. It was received by McCready on Saturday, January 28th, some time during the forenoon. He also received about the same time a letter of instructions, dated January 25th, relative to an apparent discrepancy between the statements of age found in the application and report of defendant's medical examiner. This we regard as unimportant, inasmuch as it appears clearly there was no discrepancy in fact; deceased's nearest birthday having changed between the time of his application and the time of his last medical examination. Attached to the policy was a red slip of instructions to agents such as the company was in the custom of sending with all its policies, and receipt for the insured to sign. The latter was to be countersigned by the agent delivering the policy. The slip also gave directions not to deliver the policy unless the applicant was at the time in a satisfactory state of health. On the same day this policy was received by McCready, Saturday, January 28th, Bowen was killed, some time between 2 and 3 o'clock in the afternoon, while working in the field near his home in Montcalm county, hauling stumps with a team, having apparently been struck by the root of a stump on which he was working. When last seen alive by his father shortly before the accident on the same afternoon, he was in good health, and had been so continuously from the time he made application for insurance. As far as shown his death was entirely accidental. On Monday, January 30th, McCready, having no knowledge of the applicant's death, mailed the policy, with the red slip of instructions, premium receipt, and letter of instructions relative to the discrepancy in the age to B. D. Van Ostrand, superintendent of agencies, Topeka, Kansas; that being his business address. Forwarding these papers to the agent who secured the application, for delivery to the applicant accord-

ing to inclosed instructions, was in pursuance of the usual custom of defendant. Bowen being dead when Van Ostrand received these papers, he returned the same to Manager McCready on February 3d, notifying him of the situation, at the same time remitting the amount paid him by Bowen to meet the first premium. This was sent to Bowen's family on February 24th, with a request for return of the receipt for same given by Van Ostrand to Bowen on December 27, 1910. This receipt contained the following clause: "It is understood that this payment is in no way binding upon the said company, except that said company agrees to return the amount mentioned hereon in case the company declines to grant a policy on the life of said applicant." This amount was again sent to McCready on April 11th by plaintiff's attorney, who insisted that defendant was liable upon the policy under a completed contract of insurance.

Plaintiff's declaration contains two counts; one alleging delivery of the policy on January 28th to plaintiff "or some person for and in his behalf," the second basing a claim of liability on acceptance of the application and execution of the policy.

Defendant pleaded the general issue, and gave special notice of defense, alleging agreement that there should be no contract of insurance until delivery of the policy, and that the same was never delivered to said Bowen or anyone in his behalf prior to his death or at any other time; also giving notice of payment into court of the money received by Van Ostrand from applicant, a tender of which had been kept alive in the meantime.

At the close of plaintiff's evidence, and again at the close of all the testimony in the case, defendant's counsel moved for a directed verdict in its behalf on the ground of nondelivery of the policy. This was denied by the court, and verdict directed in favor of the plaintiff on the ground that there had been full performance on the part of deceased, following which the company had executed the policy, transmitted it from the home office to its agent for delivery, and therefore, deceased being in a legal position at the time of his death to have demanded and compelled delivery of said policy, the same was valid and binding.

Plaintiff's claim that approval of the application and execution of the policy by defendant created a liability in the absence of delivery cannot be sustained. In his application, over his own signature, Bowen expressly agreed "that the policy herein applied for shall be accepted subject to the privileges and provisions therein contained, and said policy shall not take effect until

the same shall be issued and delivered by the said company, and the first premium paid thereon in full, while my health is in the same condition as described in this application."

This is plain language, easily understood. The application was initiative of the proposed contract, would become a part of it when consummated, was binding on the applicant, and fixed the time when his policy should become operative and his insurance begin. It is presumed to have been understandingly made. *Van Buren v. St. Joseph County Village F. Ins. Co.* 28 Mich. 398; *American Ins. Co. v. Stoy*, 41 Mich. 385, 1 N. W. 877.

While it is generally held, in the absence of an agreement to the contrary, that actual delivery is not a prerequisite of insurance, provided the contract is otherwise complete, and it is evident that the parties intended it should be effectual without manual delivery of the policy, although the ultimate issue of one was contemplated, it is also well settled that, "if there be a provision or an agreement that the policy shall not be in force until actual delivery to the insured, the contract is not consummated nor the company bound in the absence of such delivery." 1 Joyce, *Ins.* § 98. "A contract of insurance never becomes complete until the last act necessary to be done by either party has in fact been done, although one side or the other may conditionally bind itself by a proposition which, when unconditionally accepted, ripens the negotiation into a contract. In the case of fire insurance contracts there is often a contract before the policy is issued or before it is delivered to the insured; but this is seldom so with life insurance agreements, because there is usually, in the applications as well as the policies, a stipulation that the policy shall not be binding until delivery to the assured while in good health, and payment of the premium by him. Such conditions are valid and binding, and will be enforced." 1 Bacon, *Ben. Soc.* 3d ed. § 272.

A contract of insurance rests upon and is controlled by the same principles of law applicable to any other contract. What the contracting parties intended, mutually agreed to, and their minds met upon, is the measure of their obligations. They could agree that the policy, though approved and executed, should have no effect until delivered, or till a certain time had arrived, or until some other condition had been performed, and when this is established the courts have no authority to make the contract binding upon either party contrary to their intention and the terms of their express agreement.

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Here it was plainly agreed in writing that the policy in question should not take effect until issued and delivered to Bowen while he was in as good health as when he applied for the insurance.

It is contended in behalf of plaintiff that under the circumstances shown there was in contemplation of law such constructive delivery of the policy as complies with the terms of the contract. This is based on approval of the application, execution of the policy, and mailing it to the general agent in Kansas for delivery. Numerous cases are cited where it has been held that, if the premium is paid or acknowledged, and the policy, signed in accordance with the application, transmitted to the applicant or the company's agent for delivery, the contract is complete, although the insured failed to receive it; the agent, in case it was sent to him, being regarded as agent or trustee for the insured. Most of the cases so holding are readily distinguishable from the one before us in the particular that the contract of insurance is bare of any provisions that the policy shall not become operative until the same is delivered to the insured while in good health, and it was therefore forwarded for unconditional delivery; the contract being complete in all its essentials, and nothing remaining to be done but put it into the hands of the insured. The principle deducible from those authorities is thus stated, in May, on *Insurance*, 4th ed. vol. 1, § 60: "To constitute a delivery of a policy, it is not necessary that there should be an actual manual transfer from one party to the other. The agreement upon all the terms, and the issue and transmission to the agent of a policy in accordance therewith, for delivery without conditions, is tantamount to a delivery to the insured."

Can it be said here that the policy was transmitted to the agent for unconditional delivery? While the word "issued" is often loosely used in relation to the execution and transmission of a document, issuing and delivering are in this connection equivalent legal terms. A policy of insurance is the formal, written instrument in which a contract of insurance is embodied, and in its nature such as to be within the general rule of law that a contract in writing cannot be varied or altered by parol testimony. When the contract provides that it shall not be operative until the instrument is delivered to the assured, delivery means, as in case of delivery of muniments of title, a surrender of possession and control, the transfer of the instrument from the grantor to the grantee, or some person in his behalf, in such a manner as to deprive the grantor of the right to recall it at his option. *Bou-*

vier's Law Dict. There are two essentials to such a delivery,—an intention to deliver, and an act evincing a purpose to part with control of the instrument. It is difficult to gather such intention from the undisputed facts in this case. The contrary is the natural inference. The policy was not mailed to the insured, who lived in Michigan, nor to a local agent there, but to the general manager of defendant in Kansas, under whom the canvasser who secured the application worked, and who also resided in Kansas. It was sent from the head office to a subordinate office of defendant in due course of business and according to the general custom, addressed to the manager under whom the soliciting agent acted, accompanied by positive written instructions that it should not be delivered to the applicant except upon certain conditions, one of which was that he should be in as good health as when he applied for insurance. This condition the applicant knew of, and had consented to as a part of his contract. It is true that he would not be bound by any secret instructions to the agent, of which he had no knowledge, and in relation to which he had not contracted; but of this condition he did have knowledge and had so contracted. That he knew his application was tentative, at the option of defendant, and subject to certain conditions, and that in the regular course of business some time must elapse before his insurance would become effective if finally granted, is clearly indicated. Defendant had once refused to accept the application without a further medical examination, to which he had subsequently submitted, in Howard City, Michigan, but twelve days before his death, and the physician's report had thereafter been forwarded to defendant's office in Newark, New Jersey. The instructions sent with the policy are competent and persuasive evidence of an intent tending to negative the claimed inference, from its being mailed to the Kansas manager as a step towards ultimate delivery, that it was in effect sent to the local agent for "delivery without conditions." Usage and accompanying instructions are proper to be taken into account as aids in discovering intent when considering the question of delivery.

Bowen did not receive the policy, and had no notice that his application was accepted, during his lifetime. On the day of his death, and shortly before it occurred, the policy was received in Wichita, Kansas by McCready, who had nothing to do with taking the application and no previous dealings with Bowen. There were no personal relations between them in connection with placing the insurance which made McCready Bowen's agent to receive and hold 51 L.R.A. (N.S.)

the policy for him. *Busher v. New York L. Ins. Co.* 72 N. H. 551, 58 Atl. 41. Van Ostrand, who had conducted the negotiations, was the only representative of defendant Bowen knew or was known to. To him naturally, and according to the usual custom of defendant, would be intrusted the duty of closing the contract and delivering the policy. He did not receive it until over two days after the applicant's death, and certainly could not become the agent of one then deceased.

In the numerous cases which have been passed upon by various tribunals where it was shown insurance policies had been forwarded to local agents for delivery, the courts, in determining whether or not there was a constructive delivery and completed contract, have, as a rule, recognized and been guided by the distinction between those cases in which, pursuant to a completed contract, the policy had been forwarded for unconditional delivery, and those where, by the terms of the contract, something yet remained to be done by the agent as a condition precedent to delivery.

Authorities are to be found where the claim of constructive delivery has been sustained under the particular facts shown in special cases in which the local agent, through whom the application was made, having received a policy for conditional delivery, after ample time and opportunity in which to act, neglected or failed to make the delivery. The leading cases along that line, and which it is contended are controlling here, are *New York L. Ins. Co. v. Babcock*, 104 Ga. 67, 42 L.R.A. 88, 69 Am. St. Rep. 134, 30 S. E. 273, and *Unterharnscheidt v. Missouri State L. Ins. Co.* — Iowa, —, 45 L.R.A. (N.S.) 743, 138 N. W. 459.

In the latter case the application contained a provision that the insurance should not take effect unless the policy was delivered and accepted during the life time and good health of the applicant. The applicant resided in Sioux City, Iowa, and transacted the business with a resident agent of the defendant. A policy dated July 8, 1910, was mailed from the home office of the company to the local agent in Sioux City, with an accompanying letter of instructions not to deliver the same "unless settlement has been received and applicant in good health." The letter bore date July 19, 1910, and would reach him in due course of mail not later than July 20th; but the local agent left Sioux City, July 15th, and did not return until August 7th following. The letter, with policy inclosed, was delivered at his office and remained there unopened until his return. Some days after it was delivered at the agent's office the applicant sickened, and died August 2, 1910. With-

out attempting to review and reconcile, or fully accepting as applicable to this class of cases, all that is said in that opinion, we fully indorse the controlling, fundamental principle there declared that a party cannot take advantage of his own wrong nor profit by his own delinquencies, upon which ground the decision could well rest under the circumstances shown. It also finds support in an Iowa statute referred to. Among other things, the court said of delivery to an agent: "It is quite obvious that this may or may not be true according to the circumstances under which the policy is placed in the agent's hands. If the premium is paid when the application is presented, and such application is approved and policy executed as of that date, and nothing remains but to deliver the paper to the insured, it may well be held that the sending of it to the agent, to be by him given over to such insured person, constitutes a sufficient delivery in law. To say the least, the neglect or omission of the agent under such circumstances to perform the manual act of placing the policy in the hands of the insured will not serve to suspend or postpone the obligation of the company upon its contract. In other words, delivery in law is not necessarily manual delivery. . . . In other words, the applicant had complied with all the requirements of the contract on his part, and was entitled to receive the policy. He was not responsible for the voluntary absence of the agent, and his rights cannot be abridged or lost by the failure of the agent to perform his duty in the premises. . . . Our statute relating to life insurance provides that, where an applicant submits to medical examination by the company's physician, and is pronounced a fit subject of insurance, such company, in the absence of fraud, shall be estopped from pleading that the insured person 'was not in the condition of health required by the policy at the time of the issuance or delivery thereof.' Code, § 1812. No fraud is pleaded, and none is shown in testimony."

In *New York L. Ins. Co. v. Babcock*, supra, which is quoted from extensively and followed in the *Unterharnscheidt* Case, Babcock made application for insurance to the local agent at Dalton, Georgia, where both resided. He paid the first year's premium, and took from the agent a receipt therefor, which provided that the company assumed no responsibility except to return the money, unless, among other things, the policy was issued and delivered to him while in good health. The application which he signed contained no such condition. In its opinion the court intimates that the condition in the receipt as to delivery while in good health was no part of the contract,

but thereafter discusses certain aspects of the case as though it was. The application was approved, and a policy executed and mailed to the local agent at Dalton for delivery, without instructions and unconditionally, so far as shown. It was received by the local agent about 2 P. M. November 30, 1895. Babcock's office was near-by the agent's; but no effort was made to deliver the policy to him, and it remained in the agent's possession until after Babcock's death, he having been shot and killed in his office on the afternoon of December 1, 1895. The court, after declaring the rule that "the fundamental question to be determined in legal construction of all contracts is, What was the real intention of the parties?" discussing the condition in the receipt, said: "Assuming that this condition constitutes a part of the agreement between the parties, it then becomes a material question as to whether or not such delivery was affected before the death of the insured. This is also a question of intention, and must be determined from the facts and circumstances in the case. . . . On the other hand, where a person parts with dominion and control over a thing by transmitting it, for example, through the mails or otherwise, with the intention that it shall pass unconditionally into the hands of another, and in the course of transportation it has become lost, the delivery is nevertheless complete in law." The court then, after reviewing numerous authorities and discussing them at length, apparently concludes from the facts in the case before it that the company intended to and did forward the policy to its local agent for unconditional delivery, saying: "When his application was accepted at the home office in New York, and a policy issued thereon was placed in the mails for the sole purpose of ultimately reaching his hands, the company parted with its possession and control of the paper. The intention to deliver was complete." A statutory provision of that state is also referred to as having an important bearing; the court saying: "But the contract may be otherwise proved, and, when it is shown to be in writing, it is ordinarily binding upon the company, though there should be no delivery whatever, either actual or constructive, of the policy, and though it should remain in the hands of the company. This principle is settled by the provisions of our statute, which declares: 'Such contract [fire insurance], to be binding, must be in writing; but delivery is not necessary if, in other respects, the contract is consummated.' Civil Code, § 2089. By § 2117 of the Civil Code the same principle is made applicable to life insurance." In the concluding paragraph

of its opinion the court says: "In any view, then, that we take of this case, whether the receipt given by the local agent to the applicant constitutes a part of the contract of insurance or not, the defendant company was liable. The insured had complied with every condition and had done everything required of him in order to obtain insurance upon his life. The company had unconditionally accepted his application, and issued a policy to be unconditionally delivered to him. That policy was received by its local agent, who, through negligence or in disregard of his obligations both to his company and to the other contracting party, failed, without excuse and without authority, to hand the policy to its real owner. In consequence of this failure and negligence, the company contends it is not liable. It thus seeks to take advantage of the wrong of its own agent by virtually pleading his negligence as a defense to this action."

The strong, sound, underlying principle in both of the foregoing decisions, and which, standing alone, justifies the results reached, is that the defendants could not escape liability by relying on their own wrongs, and are estopped by their misconduct and negligence, or that of their local agents through whom the applications were made, from denying a delivery which they should have made, and therefore the court could and did say that there was a constructive delivery.

The facts here differ in material particulars from those shown in the two cases just referred to, and we have no such statutory provisions in this state as gave support to those decisions. We find nothing in this case to take it out of the general rules applicable to insurance contracts as digested, from prevailing authorities cited, in 25 Cyc. pp. 718, 719. It is there said: "Likewise the placing of the completed policy in the hands of the agent for delivery without condition to the insured completes the contract, although the actual delivery by the agent to the insured is not made before the death of the insured. But, if the delivery to the agent of the company is with the understanding that it is to be delivered by the agent to the insured only after the performance of some condition, then, until the condition is performed, and it becomes the duty of the agent to deliver the policy to the insured, the contract is not completed. . . . It is a usual condition of a life insurance policy that the delivery shall not be effectual to create a binding contract unless the insured is alive and in good health when the policy is delivered and the first premium paid, and under such conditions the death of the insured before the delivery of 51 L.R.A. (N.S.)

the policy will prevent its becoming effectual. And this is true, even in the absence of such a condition, if the policy is not to take effect until delivery, for the death of the insured makes a subsequent contract with him impossible."

A leading case supporting the rule that conditional delivery to the agent is not delivery to the applicant is *McCully v. Phoenix Mut. L. Ins. Co.* 18 W. Va. 782, in which deceased applied to the local agent of his home city, Wheeling, West Virginia, for a policy of \$1,000 life insurance. The application which he signed contained a provision that "this application shall be completed by delivery of the policy." A policy was sent to the local agent about September 1st. It contained a provision that it should take effect when countersigned by the local agent. It was not countersigned by the agent, nor ever delivered to the applicant, who was taken ill after the policy was received by the agent, and died on September 28th. Various questions were raised in the case; but it was disposed of on the ground that there was no completed contract of insurance because the policy was not countersigned by the agent nor delivered to the applicant. The court said in part: "All of these conditions, whether wise or not, reasonable or unreasonable, are within the power of the insurer to impose. The insurer is not bound to accept the proposal made, and may impose such additional requirements to create the contract as it sees fit. . . . The applicant in this case agreed that no contract should be consummated except upon delivery of the policy. This was a most important stipulation. Many troubles might arise between the application and the delivery which would induce the company not to contract. The party's health might fail; his habits might become such as to make him an undesirable person to insure; it might be ascertained that the answers made in the application to important questions were untrue. . . . It seems to me, therefore, that, if the policy in this case had not in fact been delivered to McCully, no contract had arisen between him and the company. . . . In no view of this case can I see that a contract was at any time consummated between the parties. The mere sending of the policy to the agent did not make the contract. Beyond the policy itself there was no evidence of a willingness to contract. It is unlike those cases where there was an antecedent complete contract, and the policy was but the mere formal expression of the previous contract. . . . McCully had no notice, actual or constructive, of the acceptance of his proposal, and, according to the authorities, at any time before such notice, if

there had been an acceptance, it could have been withdrawn. The conditions upon which, by the terms of the policy, it was to take effect, were never complied with, and the negotiations between the parties were never terminated by a mutual agreement between them."

That case was more favorable to plaintiff than this in the particular that the policy was in the hands of the local agent through whom the business had been transacted at a time when the applicant was alive and well; while here the special agent who took the application was not located in the same town or state, and did not receive the policy during the applicant's lifetime. There is nothing in this case to indicate that Bowen was in any way deceived or misled, or that he understood he would be insured until his policy was delivered to him while in good health, as agreed in his contract.

We are constrained to hold, under the documentary history and undisputed facts of this case, that the tentative contract of insurance was never consummated by delivery of the policy to the applicant during his lifetime.

The judgment is therefore reversed, and no new trial granted.

NEW MEXICO SUPREME COURT.

W. E. ROGERS

v.

KEMP LUMBER COMPANY.

(— N. M. —, 137 Pac. 586.)

Appeal — from justice of peace — reversal.

1. On appeal to the district court from a

Headnotes by ROBERTS, Ch. J.

Note. — Stipulation in contract for attorney's fees as measure of compensation to which attorney is entitled.

It is not intended in this note to discuss the recovery by the client from his debtor of stipulated attorney's fees, and the citation of a few cases of this character is only by way of illustration.

Where the contract between attorney and client does not fix the compensation, its measure is what the services are reasonably worth. If the matter were to be decided by strict logic, it would seem that the stipulation in the contract between the debtor and creditor had nothing to do with matters between the creditor and his attorney. And where the creditor has failed to realize an amount sufficient to pay the fees 51 L.R.A.(N.S.)

justice of the peace a cause is triable *de novo*.

Attorney and client — recovery on note.

2. In the absence of a contract, express or implied, between attorney and client, fixing the stipulated percentage which the payee is entitled to recover from the payor, in case of default and the placing of the note in the hands of an attorney for collection, as the compensation which the attorney is to receive, the attorney is only entitled to recover from his client the reasonable value of his services.

(December 2, 1913.)

CROSS APPEALS from a judgment of the District Court for Chaves County in plaintiff's favor in a suit to recover attorney's fees alleged to be due and unpaid; defendant appealing from the judgment, and plaintiff appealing from an order denying affirmance of the judgment of a Justice of the Peace before whom the cause originated. Reversed on defendant's appeal.

The facts are stated in the opinion.

Mr. W. E. Rogers for plaintiff.

Messrs. Reid & Hervey for defendant.

Roberts, Ch. J., delivered the opinion of the court:

Appellee instituted suit before a justice of the peace in Chaves county to recover the sum of \$85, alleged to be due him from the appellant as attorney's fees. In the justice court appellant interposed a plea to the jurisdiction of the justice of the peace, which was overruled, and thereupon it declined to plead further, and judgment was rendered in favor of appellee for the sum prayed for in his complaint. Appellant appealed to the district court, and there conceded the jurisdiction of the justice of the peace, whereupon appellee moved for judgment of the district court affirming the judgment of the justice of the peace, which

stipulated in the contract between debtor and creditor, owing solely to the deficiency in the proceeds of the property liable, or to the inability of the debtor to pay, the strict logic of the situation is properly applicable, as in *ROGERS v. KEMP LUMBER Co.*, where it would seem clear that the court correctly decided that the attorney was not entitled to recover the amount stipulated in the mortgage for attorney's fees.

Where creditor has collected attorneys' fees.

But where the creditor has collected from his debtor the amount stipulated for in the contract, and attorney and client have no agreement fixing the amount of the attorney's compensation, may the attorney then

motion was overruled, and which ruling of the court is assigned as error by appellee upon a cross appeal. The assignment is wholly without merit, as the case in the district court is triable *de novo* upon the merits under our statute.

The facts necessary to be stated to understand the question raised by appellant by his assignment of errors may be briefly stated as follows: Appellant held a power of sale mortgage, securing a note which provided, upon default, for 10 per cent additional upon the amount of principal and interest unpaid "for attorney's fees, if placed in the hands of an attorney for collection." The mortgagor being in default, appellant consulted appellee as an attorney, relative to the procedure to be taken

by it to foreclose the mortgage and its rights under the mortgage, and had him draw a pencil memorandum of a notice of sale, which appellant caused to be published, as required by law. Appellant sold the property under the notice of sale for \$850, which was sufficient to cover the principal, interest, and costs of sale, not including any charge, however, for attorney's fees. Appellee claims that he is entitled to 10 per cent of the amount due on the note at the time of sale as attorney's fees, by reason of the stipulation in the note above set out. Appellant, on the other hand, insists that he is only entitled to reasonable compensation, and as the evidence introduced upon the trial in the district court, without dispute, shows that

recover the amount of "attorney's fees" which was stipulated for between the debtor and the creditor, and which the creditor has collected? It would seem that in this case the answer to the question does not depend upon strictly logical rules, but is governed by the view obtaining in the particular jurisdiction with reference to the recovery upon stipulations for attorneys' fees in contracts; that is to say, is such recovery allowed as liquidated damages, or is it allowed only as an indemnity?

Where such fees are considered purely as liquidated damages, it would seem that the logical rule should apply, that the principal contract has no connection with the relations between attorney and client. This would seem to be indicated by cases sustaining the theory of liquidated damages where the question arose between debtor and creditor. Thus, for example, in *Barbee v. Aultman*, 102 Iowa, 278, 71 N. W. 235, the court described the situation which existed in Iowa before the statute regulating the matter as follows: "Whether the plaintiff had a contract with his attorney for more or less than was recovered on the note was entirely immaterial, and whether the attorney was paid for his services was also regarded as unimportant. . . . The judgment for fees was not held in trust for the attorney, for, in the absence of a contract between himself and his client, he had no interest in the amount recovered."

So, in *Scholey v. De Mattos*, 18 Wash. 504, 52 Pac. 242, it was held that the fact that the attorney was to receive less than the sum stipulated as fees in the contract was no defense to the debtor against paying such stipulated sum, under the old statute, providing that "in all judgments on promissory notes and similar instruments in writing, whether secured by mortgage or not, an attorney's (fee) may be allowed when specially contracted to be paid by the terms of the note or mortgage, in any amount so specially contracted."

But the situation is different where the theory of indemnity applies, for there the creditor is only allowed to recover these fees

upon the theory that he has to pay them over to his attorney. Thus, for example, we find it has been held that, to entitle a plaintiff in foreclosure to recover attorney's fees where the same are stipulated for in the mortgage, he must show an agreement to pay his attorney a fixed or reasonable sum for his services, and the reasonableness of the fee agreed upon, or what is a reasonable fee in such an action. *Porter v. Title Guaranty & S. Co.* 17 Idaho, 364, 27 L.R.A. (N.S.) 111, 106 Pac. 299; that an agreement by the plaintiff with his attorney for a sum smaller than is stipulated for attorney's fees in the principal contract will limit his recovery for attorney's fees to such smaller sum (*Kennedy v. Richardson*, 70 Ind. 524; *Dunovant v. Stafford*, 36 Tex. Civ. App. 33, 81 S. W. 101, *obiter*); that the holder could recover on the note only such amount for attorney's fees as his attorney could recover from him for his services, as in such case the attorney could recover only the reasonable value of his services, and that should be the measure of the recovery which the holder of the note could obtain against the maker (*Texas Land & Loan Co. v. Robertson*, 38 Tex. Civ. App. 521, 85 S. W. 1020); that the maker of a note stipulating for 10 per cent attorney's fees was estopped, in the absence of fraud or mistake, from claiming that the amount was not reasonable against his creditor, who had already contracted to pay his attorneys that amount (*Dunovant v. Stafford*, *supra*). So there are statutes requiring an affidavit of the attorney that there has been no agreement between the attorney and any other person to divide the fee before any allowance of attorney's fees shall be made by the court. *Wilkins v. Troutner*, 66 Iowa, 557, 24 N. W. 37.

Probably the decision in *ROGERS v. KEMP LUMBER Co.* would have been for the attorney if the client had collected the fees from his debtor, as the same court said in *Exchange Bank v. Tuttle*, 5 N. M. 427, 7 L.R.A. 445, 23 Pac. 241, in sustaining a judgment on a note, including 10 per cent attorney's fees, such being stipulated in

\$25 is the reasonable value of the services performed by appellee, his recovery should be limited to that amount. There was some claim made by appellant to the effect that there was an account stated between the parties for \$10 as compensation; but, as appellee testified that this sum was for only a part of the work done by him, *viz.*, drawing the notice of sale, and did not include advice and consultation, we will not consider the question, but will treat it as not being involved in the case.

It will thus be observed that the question in the case is as to whether or not the stipulation in a note of fixed percentage as attorney's fees is the measure of compensation between attorney and client, where a dispute arises between them as to the attorney's compensation, in the absence of a contract, express or implied, fixing such amount as compensation. Upon the question no authorities have been cited by either party, but on principle it would seem that the question must be answered in the nega-

tive. The stipulated amount in the note is the limit of the payee's right to recover from the payor, and is inserted solely for his benefit, and to compensate him for damages and expense entailed upon him by reason of the payor's default. As between payee and his attorney, in the absence of a contract, express or implied, the attorney is not limited to the percentage stated in the note, nor does it measure his compensation. He is entitled to recover only the reasonable value of his services.

As the undisputed facts in this case show that the reasonable value of appellee's services, based upon the *quantum meruit*, are \$25, this cause is reversed, and the District Court is directed to enter judgment in appellee's favor for said sum; and it is so ordered.

Hanna and Parker, JJ., concur.

Petition for rehearing denied December 22, 1913.

the note: "The amount has been fixed by the contract, and we must presume that the amount fixed was the reasonable value of the services rendered, until the contrary appears. The amount being fixed and value reasonable, the court below committed no error in giving judgment for the amount provided for in the note."

The question of attorney's fees arose directly between attorney and client in *Thayer v. Harbican*, 70 Wash. 278, 126 Pac. 625, where the terms of the notes and mortgage do not appear, but a foreclosure suit upon them was settled upon payment of principal, interest, costs, and "an attorney's fee of \$300," and it was held that the attorney was entitled to collect the entire \$300, from his client for his fees. The attorney, said the court, had no right to exact that sum from the debtor, nor the client to receive it, "except as a reasonable attorney's fee for the work done. They are both, under these circumstances, estopped to say that the amount so exacted and paid was not the reasonable value of the attorney's services. The rights of the parties being thus established by the admitted facts, the plaintiff was entitled to judgment as a matter of law. . . . While a valid contract might have been made between the parties here, as attorney and client, for more than the amount exacted from the mortgagor as an attorney's fee, no valid contract could have been made which contemplated less. Since the act of 1895 (Laws 1895, p. 81; Rem. & Bal. Code, § 475), the amount of the attorney's fee which may be collected from a mortgagee is no longer the subject of binding stipulation in the mortgage or note, though prior to that time it was. Since that act, a reasonable fee only can be exacted in any event; and manifestly no sum

larger than that received by the attorney would be a reasonable fee. Any other construction of that statute would allow the attorney's fee collected from the mortgagor to be made a cloak for usury. In any event, therefore, the respondent, having collected \$300 as an attorney's fee, was estopped to claim it, or any part of it, as his own. There could, hence, be no bona fide dispute that that sum, at least, was due to the appellant."

In *Thayer v. Harbican* the court, in saying that the client was "estopped" to deny that the services of the attorney were reasonably worth the sum which the client had collected as attorney's fees, probably does not mean that there was any technical estoppel. Probably the recovery of the fees by the client as an indemnity has generally occurred when the services have been practically finished, so that but little was intended to be left to conjecture, and it may be that in case of recovery which designedly resulted substantially to the client's own benefit, the debtor might have an action against him for money had and received. But while the decision in the *Thayer Case* seems fair and reasonable, and is within the practical common sense of the situation, it is not easy to state precisely on what legal grounds it rests. Apart from the question of technical estoppel or technical logic, it seems probable that the courts will decline to permit the client who has recovered attorney's fees upon the theory of indemnity against his counsel's charges, to retain them for his own benefit, and thus profit by his dishonesty to his debtor with the assistance of the court.

As stated above, where the theory of indemnity does not obtain, the situation is entirely different. B. B. B.

NORTH DAKOTA SUPREME COURT.

T. J. ATWOOD, Respt.,
v.

CHARLES ROAN

and

G. A. TUCKER et al., Garnishees, Appts.

(26 N. D. 622, 145 N. W. 587.)

Writ — substituted service — sufficiency of affidavit.

1. An affidavit for publication of summons filed under § 6840, Rev. Codes 1905, requiring the "stating the place of defendant's residence, if known to the affiant, and, if not known, stating that fact," as a basis for substituted service, is not complied with by filing an affidavit stating "that the last-known postoffice address of the defendant is unknown."

Same — validity.

2. Such an affidavit for publication is not a substantial compliance with such statutory requirement, and is void.

Headnotes by Goss, J.

Note. — Right of garnishee to attack judgment against principal defendant for lack of jurisdiction.

This note presupposes that the judgment, so far as the principal defendant is concerned, is void for failure of statutory service or notice upon or to him, and does not go into the questions whether the defect is an irregularity rendering the judgment voidable, or one that renders it void. The expressions "service" or "legal" or "statutory service" or "notice" as used in this note are intended to include constructive or substituted service or notice.

The question of the relation of the garnishment proceeding to the principal suit, and the consequent nature of the attack by the garnishee upon the principal judgment as direct or collateral, is beyond the scope of this note. See, for example, *Tabor v. Bank of Leadville*, 35 Colo. 1, 83 Pac. 1060; *Dennison v. Taylor*, 142 Ill. 45, 31 N. E. 148; *Simmons v. Missouri P. R. Co.* 19 Mo. App. 542; *Erwin v. Heath*, 50 Miss. 795; *Melloy v. Deal*, 124 Pa. 161, 16 Atl. 747; *Keystone Brewing Co. v. Canavan*, 221 Pa. 366, 70 Atl. 785.

It is not in general intended to include cases holding that void judgments in the principal case are no protection against the garnishee.

It would seem to be clear that a court has no power to compel a debtor to pay his debt to a third person unless he will be protected, at least within the court's jurisdiction, in so doing, and as payment under a void judgment is no protection to the debtor, the garnishee is entitled to a day in court to attack the judgment against the principal debtor as void. Consequently, if the garnishee claims that such judgment is void for lack of service or notice upon or

Garnishment — void publication of summons — effect.

3. Personal service of regular garnishment proceedings upon resident garnishee defendants was had, who defaulted, and thereby admitted liability. Subsequently, attempted substituted service of summons by publication was had upon a void affidavit for publication. Judgment was entered against both defendant and garnishee by default. Held:

(a) Such judgment as to both defendant and garnishees was void as entered without jurisdiction.

(b) Judgment against the garnishee defendants cannot be entered by default until after entry of a valid judgment against the principal defendant, the garnishment proceedings not being an independent action, but wholly ancillary to the main action against the principal defendant.

(c) Garnishee defendants by defaulting in answer are not concluded from raising the question of jurisdiction over the principal defendant by motion to vacate the judgment against the principal defendant and themselves for want of jurisdiction.

(d) Such a motion to vacate is a direct,

to the principal defendant, he may raise that question in the proceedings against himself. *Hinman v. Andrews Opera Co.* 49 Ill. App. 135; *Littlestone v. Goldenberg*, 66 Ill. App. 673; *Czyston v. St. Stanislaus Parish*, 131 Ill. App. 161; *McKey v. Cobb*, 33 Miss. 533; *Hinds v. Miller*, 52 Miss. 845; *Smith v. McCutchen*, 38 Mo. 415; *McCloom v. Beattie*, 46 Mo. 391; *Smith v. Montoya*, 3 N. M. 13, 1 Pac. 175; *Sun Mut. Ins. Co. v. Seeligson*, 59 Tex. 3 (*obiter*); *Beaupre v. Brigham*, 79 Wis. 436, 48 N. W. 596; see also other cases *infra*.

So, he may raise the question that there is no judgment at all against the principal defendant. *Hauptman v. Richards*, 85 Mo. App. 188.

In *Pierce v. Carleton*, 12 Ill. 358, 54 Am. Dec. 405, the court, while deciding that there had been jurisdiction by publication to enter judgment against the principal defendant, said: "The first question arising on this record is whether a garnishee who sues out a writ of error to reverse a judgment rendered against him may inquire into the legality and regularity of the previous proceedings against the defendant in attachment. In one respect, he unquestionably can. In a suit by attachment, the court must acquire jurisdiction, and proceed to enter a judgment against the defendant, before it can pronounce any judgment against a party summoned as garnishee. If the previous proceedings are unauthorized and void, there is no sufficient basis to support the judgment against the garnishee. He would not be protected in the payment of a judgment obtained under such circumstances. It would be regarded as a voluntary, and not a compulsory, payment, and the defendant might compel him to pay a second time. It is clear, therefore, that a garnishee should be permitted

and not a collateral, attack upon the purported judgment.

(e) Default of garnishee defendants cannot clothe the court with jurisdiction in the main action, or validate void proceedings taken against the principal defendant, and the proceedings against the garnishees fall with the failure of jurisdiction in the main action against the principal defendant.

(January 21, 1914.)

APPEAL by the garnishees from an order of the District Court for Stutsman County denying their application for the vacation of a judgment against them and the principal defendant for want of jurisdiction in an action of garnishment. Reversed.

The facts are stated in the opinion.

Mr. George H. Stillman, for appellants:

The court was without jurisdiction to entertain the plaintiff's action.

Brown, Jurisdiction, 2d ed. § 51, p. 221; Pomeroy v. Betts, 31 Mo. 419; Lonkey v.

to inquire into the validity of the previous proceedings in the case. If such proceedings are void, the judgment against the garnishee may for that cause be reversed on error."

The garnishee must see that there is jurisdiction over the principal defendant (Louisville, N. A. & C. R. Co. v. Parish, 6 Ind. App. 89, 33 N. E. 122); he may object to the record of the original judgment when offered in evidence, in that it does not show service on the principal defendant the statutory length of time before judgment could be entered upon it (France v. Evans, 90 Mo. 74, 2 S. W. 141); he may attack the principal judgment on the ground that the attachment on which it was based was issued by the clerk as such an attachment was void as to the defendants in attachment, who were nonresidents and had not appeared (Flash v. Paul, 29 Ala. 141); he may plead to the jurisdiction where the service against the principal defendant, a corporation, was made on a simple stockholder (Tabor v. Bank of Leadville, 35 Colo. 1, 83 Pac. 1060); and he may raise the question that the principal defendant, a corporation, had been dissolved before the judgment against it, although such judgment was by default (Farmers' & M. Bank v. Little, 8 Watts & S. 207, 42 Am. Dec. 293).

The proceeding against a trustee in trustee process should be dismissed on his motion where there is no service on the principal (Washburn v. New York & V. Min. Co. 41 Vt. 50); and the garnishee may move to quash the writ of garnishment for lack of service upon the principal defendant in the principal suit appearing upon the record (Hedrix v. Hedrix, 103 Mo. App. 40, 77 S. W. 495, where the principal judgment preceded the garnishment). See also Steel

Keyes Silver Min. Co. 21 Nev. 312, 17 L.R.A. 351, 31 Pac. 37; New York Baptist Union v. Atwell, 95 Mich. 239, 54 N. W. 760; Fetes v. Volmer, 28 N. Y. S. R. 317, 8 N. Y. Supp. 294; Bothell v. Hoelthwarth, 10 S. D. 491, 74 N. W. 231; Williams v. Fairmount School Dist, 21 N. D. 198, 129 N. W. 1027.

The garnishment proceeding authorized by our statute is not a proceeding *in rem*, but one strictly *in personam*, and the judgment against the garnishees must be preceded by a *personam* judgment against the defendant in the principal action.

20 Cyc. 978-981; 9 Enc. Pl. & Pr. 810; 3 Wade, Attachm. §§ 327 et seq.; 2 Sutherland, Code Pl. § 2791.

A judgment against garnishees without a valid judgment against the principal defendant is a nullity.

Hinds v. Miller, 52 Miss. 845; Frisk v. Reigelman, 75 Wis. 499, 17 Am. St. Rep. 198, 43 N. W. 1117, 44 N. W. 766; Shoemaker v. Pace, — Tex. Civ. App. —, 41 S. W. 498; St. Louis, I. M. & S. R. Co. v. McDermitt, 91 Ark. 112, 120 S. W. 831;

v. Goodwin, 113 Pa. 288, 6 Atl. 49, where it was said *obiter* that, on motion of the garnishee, the court may quash the writ of attachment if the proceedings are void or grossly irregular.

And where the statutory plea for the garnishee under scire facias was limited to "no goods," etc., it was held that under it he might raise the absence of judgment in attachment. Welsh v. Blackwell, 15 N. J. L. 55.

In Blake v. Jones, 7 Mass. 28, it was held that a trustee should not plead lack of jurisdiction over the principal, unless he has effects of the principal, when he may plead in abatement lack of such jurisdiction.

There are but few cases which question the right of the garnishee to question the principal judgment as void.

In Minor v. Cook, Kirby, 157, the court refused to permit the garnishee to plead no service, on the principal defendant stating that the garnishee would not be prejudiced, as he would be indemnified against any recovery by the principal defendant to the amount he had to pay in garnishment.

In Black v. Nease, 37 Pa. 433, a case without the scope of this note, it was stated that in execution attachment, as in foreign attachments, there could be no issue raised as to the validity of the principal judgment; but the later rule in Pennsylvania would seem to be that the garnishee may attack the principal judgment whenever the principal defendant might attack it. Melloy v. Deal, 124 Pa. 161, 16 Atl. 747; Keystone Brewing Co. v. Canavan, 221 Pa. 366, 70 Atl. 785.

It may be here noted that in Foster v. Jones, 1 M'Cord, L. 116, in overruling a motion to open a judgment against the garnishee on the ground of his attorney's neg-

Matheney v. Earl, 75 Ind. 531; Iron Cliffs Co. v. Lahais, 52 Mich. 394, 18 N. W. 121.

Section 6982, Rev. Codes 1905, providing for judgment against the principal defendant before the trial of the garnishment, is mandatory.

Streissguth v. Reigelman, 75 Wis. 212, 43 N. W. 1116; State v. Barry, 14 N. D. 316, 103 N. W. 637; Jordan v. Davis, 10 Okla. 329, 61 Pac. 1063; Traders' Mut. L. Ins. Co. v. Humphrey, 207 Ill. 540, 69 N. E. 375.

Messrs. Oscar J. Seiler and A. W. Aylmer for respondent.

Goss, J., delivered the opinion of the court:

In September, 1908, plaintiff, Atwood, began an action in district court against defendant Roan, and obtained personal service of a garnishment upon Tucker, Wallis, and Goyden, as garnishee defendants, within Stutsman county. Personal service was not had on defendant Roan, but after service of the garnishee defendants, plaintiff filed a defective affidavit for publication of

summons, reciting "that the last-known post-office address of the above-named defendant, Charles Roan, is unknown," instead of stating "the place of the defendant's residence, if known to the affiant, and, if not known, stating that fact," as required by § 6840, Rev. Codes 1905. The affidavit omits to state the place of defendant's residence, or that his residence was unknown. Instead, it does allege that his last known post-office address is unknown, the equivalent of saying that he does not know what his last postoffice address was. This affidavit was the basis for substituted service by publication of summons. The garnishee defendants defaulted in answering the garnishee summons. Judgment was entered March 2, 1909, against the defendant Roan for \$289.35 costs and damages upon such substituted service, and judgment was also then taken for said amount against all of the garnishee defendants. On September 23, 1911, the garnishee defendants moved to vacate the judgment taken against the defendant and themselves, basing the motion upon an affidavit reciting the alleged invalidity of the

lect, it was held that the garnishee could not, if the judgment were opened, attack the principal judgment for irregularity, as his payment under order of court would protect him. Followed in *Camberford v. Hall*, 3 McCord, L. 345 (a case without the scope of this note), apparently holding that a judgment of a court of competent jurisdiction is voidable, not void.

Time of attack.

It is not too late for the garnishee, after he has pleaded non assumpsit and *nulla bona*, to move to quash the writ of attachment on the ground of lack of legal notice to the principal defendant. *Stone v. Magruder*, 10 Gill & J. 383, 32 Am. Dec. 177.

But in *Carrington v. Eastman*, 1 Pinney (Wis.) 650, the court said: "Many other errors are complained of, such as defects in the affidavit upon which the writ was allowed; total want of legal service, etc., to all of which the ready reply is that, if ever it were competent for the garnishees to take advantage of such defects, it is too late for them to do so after their appearance to the *scire facias*, and plea to the merits." The court does not state whether the defects were mere irregularities or whether they rendered the judgment void.

Upon an order on the garnishee to show cause why judgment should not issue against him, he may show that the attempted service by publication upon the principal defendant was defective, and so there was no valid judgment against the principal defendant. *Everett v. Connecticut Mut. L. Ins. Co.* 4 Colo. App. 509, 36 Pac. 616.

It may be noted that where the garnishee pleaded *nulla bona*, he was allowed, 51 L.R.A. (N.S.)

after verdict, and on payment of costs, to move to quash the proceedings on the ground that the attachment was void as the principal defendant was in the county when the attachment was issued and served. *Webb v. Opera Co.* 3 Pa. Dist. R. 825.

Where both principal defendant and garnishee defaulted, the plaintiff entered judgment against the principal defendant and then brought an action against the garnishee for failing to answer, and it was held that the action must fail on the defense of the garnishee that there was no legal service upon the principal defendant in the suit against him. *Pope v. Hibernia Ins. Co.* 24 Ohio St. 481.

It is the theory in Georgia that the garnishee cannot attack the judgment against the principal defendant until judgment is about to be entered against him (the garnishee). *Merchants' & Mfrs. Nat. Bank v. Haiman*, 80 Ga. 624, 5 S. E. 795, cited in *Ingram v. Jackson Mercantile Co.* 2 Ga. App. 218, 58 S. E. 372, followed in terms in *Whaley v. Kear*, 139 Ga. 16, 76 S. E. 390, where it is not as clear as it might be that the rights of the garnishee are preserved by this practice.

—in arrest of judgment.

In *Dennison v. Taylor*, 142 Ill. 45, 31 N. E. 148, the court sustained the garnishee's motion in arrest of the judgment against him, on the ground of lack of jurisdiction in the principal suit by failing therein to make the statutory mailing of the notice to the principal defendant.

Upon statutory trials *de novo* on appeal.

Upon a trial *de novo* on appeal from a justice's court, the garnishee may for the first

service of summons by publication in the main action, and upon the entire record, contending that the entire proceeding is void, as had without jurisdiction of the defendant Roan or any subject-matter. This motion was denied by order dated February 3, 1912, and judgment thereon entered reaffirming the judgment sought to be vacated, with added costs taxed in the sum of \$15. From this order and judgment defendants appeal, staying proceedings pending appeal.

Two main questions are presented: (1) Is the affidavit for publication of summons a substantial compliance with the requirements of § 6840, or, on the contrary, is it a nullity; (2) if said affidavit be fatally defective, can the garnishee defendants, in default in answer after personal service had upon them, and who offer no answer or defense on the merits as against the purported judgment taken against them by default, now urge that the judgment taken by the

plaintiff against them as garnishee defendants is invalid?

As to the first contention, it is elementary that where constructive service of summons is had, the statute governing it must be strictly complied with. The attack here made on this judgment is direct, and not collateral. *Phelps v. McCollam*, 10 N. D. 536, 88 N. W. 292; and *Freeman v. Wood*, 11 N. D. 1, 88 N. W. 721. So we are not confronted with any presumptions applicable as tending to support the validity of a judgment against collateral attack. The affidavit for publication speaks for itself, and it is not contended that there is any presumption that any other affidavit of publication was ever filed. The fact that the plaintiff may have known the place of the defendant's residence and still have been able to truthfully declare on his oath that defendant's 'last-known postoffice address is unknown' to him, in itself, is enough to condemn the affidavit as invalid as a sub-

time raise the question of lack of service on the principal defendant. *Segar v. Muskegon Shingle & Lumber Co.* 81 Mich. 344, 45 N. W. 982.

It is not too late for the garnishee to show on a trial *de novo* in the appellate court, that the principal judgment was obtained against an unrepresented minor, and was therefore void. *Johnson v. Murphy*, 124 La. 143, 49 So. 1007.

After judgment against garnishee.

It would seem reasonable that one who is brought into court by process cannot be required to take notice of subsequent events unless they occur in the proceeding in which he is brought into court, or unless actual notice of such subsequent events is given to him. Consequently, where, at the time of process against the garnishee, there is no judgment in the principal action, a subsequent judgment in the principal action should be open to attack by the garnishee after he has actual notice of it. And if judgment is entered against the garnishee before he has actual notice of the judgment against the principal defendant, he ought to be able to attack such principal judgment after judgment against himself.

The cases of *Holbrook v. Evansville & T. H. R. Co.* 114 Ga. 1, 39 S. E. 937; *Hefernan v. Grymes*, 2 Leigh, 512; and *Central of Georgia R. Co. v. Wright*, 5 Ga. App. 514, 63 S. E. 630, are sufficiently dealt with in *Atwood v. Roan*. The same holding as in the *Wright Case viz.*, that the garnishee after judgment against him may not attack the principal judgment, was repeated in *Farmers' & T. Bank v. University Pub. Co.* 9 Ga. App. 128, 70 S. E. 602.

—on scire facias upon judgment against garnishee.

It has been held (in trustee process) that 51 L.R.A.(N.S.)

on a scire facias upon a judgment against the trustee, he might set up lack of legal service on the principal defendant. *Cota v. Ross*, 66 Me. 161; *Thayer v. Tyler*, 10 Gray, 164; *Pratt v. Cunliff*, 9 Allen, 90.

In *Thayer v. Tyler*, supra, the principal debtor and the trustee had both defaulted, and the court's decision was upon the ground that the trustee had had no day in court to raise the question of jurisdiction. The same theory prevailed in *Pratt v. Cunliff*, supra, where the trustee had answered, as he might properly assume that legal service would be thereafter made upon the principal defendant before the entry of judgment against the latter. In *Cota v. Ross*, supra, there was a jury trial, the nature of the garnishee's answer not appearing; but the court cites the foregoing Massachusetts cases.

—certiorari.

It was held in *St. Louis, I. M. & S. R. Co. v. McDermitt*, 91 Ark. 112, 120 S. W. 931, that a garnishee should set up defective service in the principal case as a defense, and if he has defaulted he should appeal, and he may not have the judgment questioned on certiorari.

—on appeal.

It has been held that the garnishee might raise the question for the first time on appeal.

In *Schaller v. Marker*, 136 Iowa, 575, 114 N. W. 43, it was held that the garnishee might raise for the first time on appeal, although he had answered below, an objection that the statutory notice had not been given to the principal defendant in the suit against him to obtain jurisdiction as to him, the defect appearing on the face of the record. The court said: "It is urged that

stantial departure from statutory requirements.

An examination of the authorities is conclusive against respondent's contention that the terms "residence" and "postoffice" are interchangeable and synonymous; and that the statutory requirement of a disclosure as to the fact of residence is not complied with by a showing of fact of "last-known postoffice address." See the recent cases of *Gibson v. Wagner*, — Colo. App. —, 136 Pac. 93, and *Norris v. Kelsey*, 23 Colo. App. 555, 130 Pac. 1088. The Colorado statute required the fact to be stated in the affidavit for publication that the postoffice address was unknown, and the affidavit filed stated the residence as unknown. The judgment entered thereon was held void under collateral attack, following *Empire Ranch & Cattle Co. v. Gibson*, 23 Colo. App. 344, 129 Pac. 520; *Empire Ranch & Cattle Co. v. Howell*, 22 Colo. App. 389, 125 Pac. 592; and *Empire Ranch & Cattle Co. v. Coldren*,

51 Colo. 115, 117 Pac. 1005, and numerous holdings cited in these opinions. See also *Ruby v. Pierce*, 74 Neb. 754, 104 N. W. 1142, where a return showing "last" usual place of residence was held not to be a compliance with the statutory requirement of service at the usual place of residence, and that the word "last" constituted an added unauthorized qualification to the return of service, and rendered the judgment entered thereon void. See also *Wick v. Rea*, 54 Wash. 424, 103 Pac. 462; *Gilmore v. Lampman*, 86 Minn. 403, 91 Am. St. Rep. 376, 90 N. W. 1113, where it is also pointed out why the California cases cited by respondent, particularly *San Diego Sav. Bank v. Goodsell*, 137 Cal. 420, 70 Pac. 300, and *Hanson v. Graham*, 82 Cal. 631, 7 L.R.A. 127, 23 Pac. 56, decisions under the provisions of §§ 412, 413, of the California Code of Civil Procedure, do not apply under our practice, inasmuch as under the California practice the affidavits and

want of jurisdiction was not raised by the garnishee until the objection is now made for the first time on appeal, and many cases are cited to the proposition that an objection not raised nor in any way presented in the trial court cannot be considered in the appellate court; but these cases on examination are found to be those in which the error relied upon might have been cured by some action of the trial court, if there presented. Absolute want of jurisdiction of the court could not have been cured by any action which might have been taken. The court could not proceed in a case in which it had no jurisdiction to render any judgment which would have validity, and it is immaterial, therefore, that the objection was not urged before the judgment was rendered."

It may be noted that in *Mahon v. Fansett*, 17 N. D. 104, 115 N. W. 79, where the principal defendant had appeared in the garnishment proceeding, and the garnishee had answered admitting indebtedness to him, it was held that there could not be raised for the first time on appeal the question that no judgment had been entered against the defendant in the principal action. The court said: "It is also contended that the judgment should be reversed for the reason that no judgment had been entered against the defendant in the principal action. This question is raised for the first time on appeal. The attention of the trial court should have been called to that fact, if true, by some objection, and that court given an opportunity to rule thereon. It is too late to present the question now for the first time."

—in subsequent suits.

It has been held that the garnishee might replevin his property taken in execution upon the judgment against him, where there 51 L.R.A. (N.S.)

had been no legal service upon the principal debtor in the principal suit. *Iron Cliffs Co. v. Lahais*, 52 Mich. 394, 18 N. W. 121 (where the judgment against the garnishee was rendered after a disclosure without any subsequent summons requiring it to show cause); *Missouri, K. & T. R. Co. v. Morris*, 153 Mo. App. 667, 134 S. W. 1027 (where, after answer by the garnishee and denial of it by the plaintiff, judgment had been taken against the garnishee by default).

In *Friedman v. First Nat. Bank*, 39 Okla. 486, 49 L.R.A. (N.S.) 548, 135 Pac. 1069, an action upon an order of garnishment failed where the judgment against the principal defendant in the suit against him was absolutely void, as there had been no legal service upon him. It does not appear whether or not the question was raised by the garnishee in the garnishment proceedings.

—enjoining judgment.

In *Matheney v. Earl*, 75 Ind. 531, the court overruled a demurrer to a complaint to enjoin a judgment entered against a debtor of the principal judgment debtor, alleging lack of service on the principal debtor in the action against him, the court stating that while the proceedings against the injunction plaintiff were not proceedings in attachment, as the moving party therein and the justice had so treated them, they ought to be so treated.

But on the other hand it was stated in *Peters v. League*, 13 Md. 58, 71 Am. Dec. 622, that the court would not enjoin a judgment against a garnishee on the ground that the judgment against the principal defendant was rendered by a justice without authority, as the validity of that judgment could not be assailed collaterally in the injunction suit.

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order for publication are not an essential part of the record in the case. Besides, under our practice and statutes, no order for the publication is required in obtaining substituted service of summons, since the change made in 1895 from the former practice and statutory procedure requiring such an order. In many jurisdictions an order for publication is a necessary step in constructive service, and decisions are found giving force to the presumption that proper evidence of nonresidence is presumed to have been exhibited or the order for service by publication could not have been obtained, and judgments void without such a presumption obtaining have been held valid. But no presumption to this effect has ever been indulged in this state, but rather the contrary was the law when an order for publication was essential. *Simensen v. Simensen*, 13 N. D. 305, 100 N. W. 708, passing on the validity of a judgment entered in 1893. Manifestly, if there be any relaxing of the rule as to essentials, it would be found in such jurisdictions, instead of in those like ours, where the affidavit for publication is a necessary part of the record, and the contents of which must affirmatively establish the right to proceed further with constructive service. Though it is held in *San Diego Sav. Bank v. Goodsell*, supra, that the term "address" may be, for the purpose of their procedure, considered as sufficient compliance with the statute requiring the residence of a nonresident defendant to be disclosed to the court, upon an application for an order for service by publication, with direction to be made in such order for mailing of summons, that holding is not authority to the effect that an affidavit stating, as here, that the "last-known postoffice address is unknown," is the equivalent of a statement as required by our statute that the place of the defendant's residence is unknown. A glance at the many authorities cited under "residence" in vol. 7, Words & Phrases, will disclose that the term "residence" has a definite legal meaning, i. e., as a place of one's abode, dwelling, home, or habitation. Conceding that the term "address" is synonymous with "abode" or "residence," as is intimated in the California case above cited, the qualification wherein affiant swears to defendant's last-known postoffice address may or may not in fact be a compliance with the requirements of the statute that the affidavit shall state "the place of defendant's residence, if known to the affiant, and, if not known, stating that fact," according to whether the postoffice address does or does not properly designate the place of the defendant's residence. For instance, one's residence may be within one state and his postoffice within another, in

which case, if the postoffice be taken as his residence, an attachment could not issue or service by publication could not be had, while with the actual place of defendant's residence stated either or both would be available. This is not only possible, but perhaps frequent as to those domiciled in either state who reside alongside of or near a boundary line between two states. We cannot hold a postoffice address to have been meant or intended to be synonymous with the mandatory statutory requirement that the place of defendant's residence, if known, shall be stated, and, if not known, that fact shall be stated, all as a basis for further proceedings in obtaining substituted service. For further cases on this subject, see *North Star Lumber Co. v. Johnson* (D. C.) 196 Fed. 50, appealed and affirmed in — C. C. A. —, 206 Fed. 624, discussing a similar statute of Oregon in proceedings *in rem* under attachment, although it seems publication is there made upon an order therefor, and *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. If we depart in one particular from the plain statutory requirement, on a matter concededly jurisdictional, under a theory, as here advanced, of substantial compliance, not only is the rule, consonant with all previous decisions on such jurisdictional questions, disregarded, that such requirements are to be strictly construed (see *Soderberg v. Soderberg*, 1 Dak. 503; *Whaley v. Carter*, 1 Dak. 504; *Chamberlain v. Hutchins*, 1 Dak. 506; *Beach v. Beach*, 6 Dak. 371, 43 N. W. 701; *Rhode Island Hospital Trust Co. v. Keeney*, 1 N. D. 411, 48 N. W. 341; *Yorke v. Yorke*, 3 N. D. 343, 55 N. W. 1095; *Birchall v. Griggs*, 4 N. D. 305, 50 Am. St. Rep. 654, 6 N. W. 842; *Severn v. Giese*, 6 N. D. 523, 72 N. W. 922; *Simensen v. Simensen*, 13 N. D. 305, 100 N. W. 708), but there is imported an element of uncertainty as to jurisdictional requirements in this and kindred proceedings *in rem*, where, if the plain language of the statute be adhered to as the guide, there can be neither uncertainty nor ambiguity.

We conclude that the affidavit for publication was void; that consequently no valid proceedings were thereafter had in the main action against the defendant, and that the only jurisdiction remaining in the court immediately after the filing of this purported affidavit for publication was such as was conferred upon it in a limited sense by the provisional remedy of garnishment and proceedings had thereunder. This takes us to the discussion of the garnishment side of the case.

The second question, as to the right of the garnishee defendants to attack the default judgment, involves a more extended

discussion of our statutes and the general law of garnishment. The controlling sections of the statute are § 6972, expressly authorizing the service of a summons by publication upon the defendant, where service of garnishee summons has been had, and § 6977, providing that "if any garnishee, having been duly summoned, shall fail to serve his affidavit [of nonliability], . . . the court may render judgment against him for the amount of the judgment which the plaintiff shall recover against the defendant in the action for damages and costs, together with the costs of such garnishee action," and also § 6982, providing that "the proceedings against a garnishee shall be deemed an action by the plaintiff against the garnishee and defendant as parties defendant," and prescribing the procedure, and that "when the garnishment is not in aid of an execution, no trial shall be had of the garnishee action, until the plaintiff shall have judgment in the principal action, . . . and if the defendant has judgment the garnishee action shall be dismissed with costs. The court shall render such judgment in all cases as shall be just to all the parties, and properly protect their respective interests, and may adjudge the recovery of an indebtedness, . . . or personal property disclosed or found to be liable to be applied to the plaintiff's demands, or . . . when proper, direct . . . any money or other thing paid over or delivered to the clerk or officer. The judgment against a garnishee shall acquit and discharge him from all demands by the defendant, or his representative, for all money, . . . delivered or accounted for by the garnishee by force of such judgment."

These statutes authorize the service by publication of a summons against the principal defendant after the service, as here had, of the garnishee summons and proceedings upon the garnishee defendant; and answer the contention of counsel for the appellant that valid garnishment cannot be had in an action wherein the service of the summons against the principal defendant must be had by publication. It is argued with some force that, inasmuch as the judgment against the garnishee defendant cannot be entered until the entry of judgment in the main action against the defendant, the court under substituted service, being without jurisdiction of the person of defendant, and powerless therefore to enter a personal judgment against him, can enter no valid judgment against the garnishee defendants. Such is not the construction to be placed upon these statutory provisions. The portions of § 6982 authorizing the court to "adjudge the recovery of an indebtedness . . . found to be liable to be

applied to plaintiff's demand" plainly have relation to the form of a judgment to be entered under § 6977 and as supplementary to that section; or, in other words, it provides that the judgment to be entered in proceedings where substituted service of the defendant is had shall be a judgment *in rem* (Hartzell v. Vigen, 6 N. D. 117, 35 L.R.A. 451, 66 Am. St. Rep. 589, 69 N. W. 203) against the fund to be applied to satisfy the indebtedness found to exist in plaintiff's favor against the principal defendant, and is analogous to similar proceedings under attachment. In either case, the property is subjected to the payment of the lien, whether obtained by attachment or garnishment, and the court does not, in a strict sense, render any judgment against the defendant, but merely adjudges the *prima facie* amount of plaintiff's recovery, and subjects the property lien in garnishment or attachment to its payment.

It is here noticeable that this defect, destroying jurisdiction over the *res*, the subject-matter in the main action, and of the power to proceed therein, is one of record. It does not depend upon any question of whether the record as made reflects the truth as to service, but, instead, it plainly appears from the jurisdictional papers that the affidavit for publication is insufficient to perpetuate the jurisdiction of the court over the *res*, already temporarily acquired by garnishment, beyond the sixty-day period after such garnishment, and upon the expiration of which period such limited jurisdiction of the court must fall in the absence of personal service in the main action, or of the first publication of a valid substituted service of the summons after the filing of a valid affidavit as a basis therefor. "Such service is a condition precedent to the preservation of such jurisdiction." Rhode Island Hospital Trust Co. v. Keeney, 1 N. D. 411, 48 N. W. 341; Gribbon v. Freel, 93 N. Y. 93. This time limit is prescribed by §§ 6844 and 6850, Rev. Codes 1905. Within sixty days after the garnishment and the jurisdiction thereunder acquired under § 6850, without a valid publication of this summons having been made upon a valid affidavit for publication, all jurisdiction, either of the *res* or of the garnishee defendants, was wholly divested by lapse of time, under the provisions of § 6844, Rev. Codes 1905. This must be so, unless the proceedings against the garnishee defendants are to be treated as a separate action or proceeding which may legally proceed to judgment independent of the outcome of the principal action. Section 6982 provides that the proceedings against a garnishee shall be deemed an action, and that the garnishee defendant is

a party defendant, but also provides that no trial of the garnishee action shall be had until the plaintiff shall have judgment in the principal action. Rights acquired by default of the garnishee defendant must be held in abeyance and be without force upon which to enter a judgment against the garnishee until after the judgment is entered against the principal defendant. Under our statute and under the general law, garnishment proceedings are "purely ancillary to the suit against the principal defendant, dependent upon it for their existence and validity. If for any reason the court fails to get jurisdiction of the principal suit, the garnishment must inevitably fall with it. This principle is universal. It is all the same whether the lapsing came from failure to get personal service of the summons in the principal suit upon the defendant therein in the time and manner prescribed by law, or from failure to comply with the statute directing the mode of obtaining substituted service thereof by publication or otherwise. . . . The garnishee may raise and rely upon the objection [of want of valid judgment against the principal defendant] at any stage of the proceedings. He does not waive it by answering and going to trial. If judgment has been rendered against the defendant, but is absolutely void, of course, it cannot support the garnishment proceedings, and the garnishee should move the court that he be discharged on that grounds. . . . On the other hand, if the court has jurisdiction of the principal suit, the garnishee can inquire no further, for no errors or irregularities therein not jurisdictional will in any manner impair the protective force of the garnishment judgment, and beyond this the garnishee has no interest." Rood, Garnishment, §§ 224-226. To the same effect, see Shinn, *Attachm. & Garnishment*, §§ 707-713: "No valid judgment can be entered against a garnishee until a valid judgment is first entered against the principal defendant. Therefore a judgment against the garnishee entered upon a judgment against the principal defendant which is void will be no protection to the garnishee when he is thereafter sought to be held liable on his indebtedness to the principal defendant." See also Waples, *Attachm. & Garnishment*, §§ 474-479: "The plaintiff's right of action, the effectiveness of the judgment, and the protection of the garnishee from subsequent attack after payment under judgment, depend upon the principal action, its rightful institution, rightful judgment thereon, and rightful execution of the judgment." And again: "The suit against the garnishee is hypothetical. The right of action depends upon the right of the plaintiff in the main suit. If the plain-

tiff is the creditor of the principal defendant, and has a right of action against the garnishee, he may step into the shoes of the principal defendant and so become the creditor of the garnishee. In other words, he has no right to recover of the garnishee unless he can show that he ought to be subrogated to the right of the garnishee's creditor and empowered to sue on that creditor's right. . . . He [garnishee] is held chargeable if the plaintiff should make out his main case. The decree, though literally positive and free from all contingency, is qualified by law so as to render it dependent upon the principal judgment. . . . He is sued by one not a party to the contract by which he became indebted, and is required to perform his contract obligations by violating them; at least the letter of the contract is disregarded by the law which diverts the payment." See also §§ 545, 546, and 552 of same authority. "Garnishment is in no sense a new suit, but is a special auxiliary remedy for more effectually reaching defendant's credits, and is always ancillary to the main action under which it is brought." 20 Cyc. 979. In 20 Cyc. 1146, we find: "Where payment is made under a judgment which is void by reason of the court not having jurisdiction of the subject-matter of the parties, such payment is regarded as voluntary, and will not be available to the garnishee as a defense," citing many cases.

But respondent contends that, though such defense might have been availed of by the garnishee defendant at any time prior to judgment taken against him, he cannot after entry thereof be heard to urge want of jurisdiction, and that the entry of judgment against him gives rise to a conclusive presumption that a valid judgment has been rendered against the principal defendant in the main action, citing 20 Cyc. 1140; *Holbrook v. Evansville R. Co.* 114 Ga. 1, 39 S. E. 937; *Heffernan v. Grymes*, 2 Leigh, 512, cited in Cyc. as supporting its text announcing such to be the general rule. An investigation of these cases discloses that neither sustain the text that a garnishee defendant is concluded by the judgment rendered against him from questioning the validity of the judgment rendered against the principal defendant, if the text has reference to such a proceeding as this, where the judgment against the principal defendant is not a judgment, but is void for want of jurisdiction. The text must be taken as announcing a rule under a judgment where a jurisdiction in the principal action was had in the court rendering it. This statement at 20 Cyc. 1140B must be considered with 20 Cyc. 1074, subdivs. 2 and 3, and 20 Cyc. 1144, subdivs. 3, b, c, d. The first

case above (*Holbrook v. Evansville R. Co.*) was a review of certiorari proceedings on a record in which jurisdiction affirmatively appeared, and an attack on the record disclosing jurisdiction in the main action was made by the garnishee to establish as a fact that service in the main action had never been had, and therefore no jurisdiction existed in the main case, and hence the garnishee judgment was void. And this question of fact of service was actually tried on the garnishee's application in the court entering the judgment, and determined in favor of the fact of service and the validity of the judgment before certiorari was instituted. The holding, then, is, in effect, simply that the garnishee under those circumstances had his day in court on the very question of fact of whether service had been had, the basis for jurisdiction, and he was concluded thereby on the facts as disclosed by the record reviewed in certiorari. There is much said in the opinion that would sustain respondent's contention in this case, and that may have caused the unqualified statement in the text in 20 Cyc. at 1140B. But the decision in the case cited turned on another point entirely. No authorities are cited or reviewed in that case, and the *obiter* is clearly contrary to fundamentals.

Likewise *Heffernan v. Grymes*, *supra*, is not authority for the proposition that a garnishee defendant, after judgment against him, cannot question jurisdiction of person or subject-matter in the main action. What is there said under garnishment and attachment is pure *obiter*, as the judgment against the garnishee defendant is in fact reversed on the merits, as was also the finding of the lower court, of liability of the absent and defaulting principal defendant to the plaintiff on the merits. However, in this connection, a later case of *Central of Georgia R. Co. v. Wright*, 5 Ga. App. 514, 63 S. E. 639, squarely supports respondent's contention that this garnishee is estopped by the judgment against him to question jurisdiction in the main suit against the principal defendant. But this case cites no authority. The opinion reasons in a circle, *i. e.*, "while it is true that there must be a valid judgment against this principal debtor . . . before a valid judgment can be rendered against the garnishee, still," because a "judgment is rendered against the defendant, the court is presumed to have had before it proof of jurisdiction and proper evidence on which to render it, and the garnishee is concluded." Because a court must have jurisdiction before rendering a valid judgment, it is there conclusively presumed that it must have had it because it purported to render

a judgment. And this was said in the face of a direct attack on the judgment on grounds of a want of jurisdiction, by a party who is not protected in payment, but is a volunteer therein, if he pays without the court having actually (not presumptively) had jurisdiction in the principal case. The very statement of the fallacy of such reasoning ought to be sufficient to condemn it. But let us see the possible consequences to this garnishee defendant of announcing a rule barring him, upon any mere presumption, from questioning jurisdiction of the court in the main action under this direct attack on jurisdictional grounds. Should we hold him to be so concluded, he must and does pay the judgment against him. Suppose he removes to Minnesota or some other state. The defendant there demands payment of this debt still owing to him from the garnishee, unless these garnishment proceedings protect the garnishee defendant against compulsory repayment. Payment is refused. Suit follows. The foreign court examines the record made in this case there offered by this garnishee, there a principal defendant, upon whom there rests the burden of establishing a defense of his payment of a judgment against him taken under valid garnishment proceedings, and the foreign court scans the offered record of this case, and discerns at once from the record that no jurisdiction was ever here obtained in the principal action to proceed by substituted service *in rem* against the fund temporarily liened by garnishment. The sole question always open in a defense or suit upon a foreign judgment is the question of fact, Did the foreign court have jurisdiction? Needless to say, the defendant there would not be concluded by these proceedings, void because of want of jurisdiction. Jurisdiction must there appear to have been here had to protect this garnishee, a defendant there. Though by circuitous reasoning, amounting but to judicial fiat, he might be here held concluded to question jurisdiction in this suit, that fact would not avail in such an inquiry there into jurisdiction, with the consequent and inevitable result that he would be called upon by legal proceedings to pay the debt the second time. Such a condition should be avoided, and all that is necessary to obviate it is an application of the usual and elementary rules applying to jurisdiction.

The defendant can urge want of jurisdiction of person or subject-matter at any stage of proceedings, and no good reason exists why a garnishee defendant should not be permitted to do likewise. A garnishee defendant has liabilities by contract and operation of law in common with the

defendant. He is held to an exercise of good faith toward his defendant, in any disclosure he may make under garnishment, and in many courts circumstances may compel him to defend in behalf of the defendant. 20 Cyc. 1143. Though on this a conflict exists. He is charged to know the record facts concerning jurisdiction in the main action, to enable him to know whether a payment under a purported judgment against himself as a garnishee is a legal payment of the debt of the defendant, or whether it is, on the contrary, a volunteer payment to a party not in privity of law by judgment with himself and the principal defendant. 20 Cyc. 1146.

On the question of the record concluding an attack for want of jurisdiction, consult Black on Judgments, §§ 275 and 276, holding the better rule to permit even collateral attack on jurisdictional grounds. We quote therefrom: "The pith of the argument extracted from them [cases like those cited by respondent, holding recitations in a record or judgment conclusive upon jurisdiction], and which is truly as applicable to one class of judgments as to the other [having reference to judgments *in personam* and judgments *in rem*], is that to say that the paper relied on is a record because it recites the defendant's appearance, and that he cannot deny the jurisdiction over him because the paper is a record, is reasoning in a vicious circle; and that unless a court has jurisdiction, it can never make a record such as to import absolute verity, and the party ought not to be estopped by any allegation in a supposed record from proving any fact which goes to establish the truth of a plea alleging want of jurisdiction." The leading case on this subject is *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589. If this is the law as to collateral attack, which question we do not decide, it certainly should be here applied, where the attack as here is direct by motion by a party to the proceedings.

On the conclusiveness of this judgment, see § 229, Rood on Garnishment: "The writer has found but few reported cases deciding the question whether the statements contained in the record of the main action are conclusive upon the garnishee. These all seem to have been rendered by courts adopting the doctrine that the record is conclusive. They hold that the garnishee cannot dispute the record of the main action. Whatever may be the law between the parties, or even between one of the parties and a stranger to the suit, the writer is of very firm conviction that this indisputable presumption should never be applied against a garnishee, who, from his position, can never raise the question

directly, and whose property may be taken from him upon that judgment, or proceedings ancillary to it, without any assurance of protection from future liability in another state. It is generally admitted that the record of any judgment may be contradicted, to show want of jurisdiction, where such judgment was rendered by a court of another state, and this has often been done in garnishment proceedings. Adding to this the well-settled principle that payment of a garnishment judgment rendered by a court having no jurisdiction affords the garnishee no protection, what assurance has the garnishee that he will not again be required to pay in a suit in another state?" The validity of a garnishment "depends upon the pursuit of the steps prescribed by law for its prosecution, and no aid can be lent to it by the voluntary acts of the garnishee. Like attachment by seizure, its validity depends upon the proper performance of each and every act prescribed by the statute, and without the performance of any one of them the court is without jurisdiction, and the whole proceeding is void and will be reversed on error."

If no act of the garnishee can lend validity to the garnishment proceedings, certainly no act of his can indirectly accomplish the same purpose in the proceedings attempted in the main action, when the court is, on the face of the record, without jurisdiction. Either the judgment in the main action binds both defendant and garnishee, and this independent of any act of the garnishee, whether defaulting or otherwise, or it binds neither defendant nor garnishee, being invalid as to both. It is hard to consistently reason that the garnishee defendant may be bound by his own act in defaulting in answer, and thereby be obligated to pay plaintiff a sum as a debt belonging to the defendant, and at the same time the defendant be not bound for want of jurisdiction, which concededly he may raise at any time. To so hold is to, in effect, by legal proceedings, confiscate the property of the garnishee defendants for the benefit of a third party, and to deny to him the command of the statute (§ 6982), that the court shall only render such a judgment "as shall be just to all the parties, and properly protect their respective interests." It is only a valid judgment, entered with jurisdiction and in strict compliance with statutory requirements, that operates to "acquit and discharge him [garnishee] of all demands by the defendant." It is only such a judgment with plain record proof of jurisdiction, that a foreign jurisdiction will recognize, and the record of the domestic judgment should affirmatively

disclose jurisdiction, that a garnishee compelled to pay a debt to another thereunder may exhibit the judgment record with proof of our statutes in the foreign jurisdiction, and be protected there as well as at home. He should not be forced to disgorge on some theory of estoppel against raising jurisdictional defects conceived by the domestic court, which theory the foreign court will not be obliged to respect if it follows the fundamentals governing jurisdiction. We hold the determination as to indebtedness, as well as all other proceedings had in the main action, were void for want of compliance with statute governing substituted service of summons; that all proceedings had in garnishment were merely ancillary thereto, and had for their source as to authority to enter judgment against the garnishee defendants the necessity of valid proceedings in the main action, and all fell with the failure of the qualified jurisdiction once obtaining in the main action; and that the garnishee's default in answer in nowise validated the judgment against the principal defendant, which, if void, rendered the judgment against the garnishees void, and that the garnishee is not estopped, by default in answer, to question the conclusiveness, on jurisdictional grounds, of the main judgment.

The order and judgment appealed from is ordered set aside, and all proceedings dismissed as void, for want of jurisdiction.

Burke, J., being disqualified, did not participate.

OKLAHOMA CRIMINAL COURT OF APPEALS.

VIRGIL LANDRUM, Appt.,
v.
STATE OF OKLAHOMA.

(9 Okla. Crim. Rep. 599, 132 Pac. 830.)

Intoxicating liquors — taking orders for foreign dealer — liability.

Where a liquor house situated in another state has a representative in a town in Oklahoma, who receives orders for whisky, and writes letters to the house, directing that whisky be sent to persons who give such agent orders, and the whisky is sent to such persons, and the bill is sent to the agent of the house, to collect payment for the same, this in law constitutes a sale of

intoxicating liquors in Oklahoma, and such agent is liable to prosecution and conviction for violating the prohibitory law of the state.

(June 14, 1913.)

A PPEAL by defendant from a judgment of the County Court for Carter County, convicting him of violating the prohibitory liquor law. Affirmed.

Statement by Furman, J.:

The case was tried upon the following agreed statement of facts: "That on the 15th day of June, 1911, Ed Smith approached the defendant, Virgil Landrum, in the city of Ardmore, and requested him, Landrum, to order for him, Smith, one gallon of whisky; that he wrote a letter at Smith's request, and signed Smith's name to said letter, same being addressed to H. Brann & Company of Ft. Worth, Texas, who are lawfully licensed and engaged in the sale of intoxicating liquors at Ft. Worth, Texas; that this order was received by H. Brann & Company, who passed upon said order and accepted same, and shipped by Wells Fargo Express one gallon of whisky to said Smith, at Ardmore, Oklahoma; that a bill for this was sent to Virgil Landrum, who afterwards collected from Smith the sum of \$3.75, the price of said whisky; that Landrum was not in any way interested in the whisky, but remitted the amount collected to H. Brann & Company; that H. Brann & Company alone had authority to pass upon orders received by them, and accept or reject such orders, as they saw fit; that Virgil Landrum was a collector for H. Brann & Company, and receives a commission on all money collected for them, and received his regular commission on the above money."

Messrs. Sigler & Howard for appellant.
Mr. C. J. Davenport, Assistant Attorney General, for the State.

Furman, J., delivered the opinion of the court:

If the agreed statement of facts is susceptible of a reasonable construction which would warrant the conviction of appellant, it is our duty to affirm this judgment.

It appears that Ed Smith had requested appellant to order for said Smith one gallon of whisky, but it does not appear that said Smith made any request of appellant as to the person or place from which the whisky should be ordered, or made any agreement with appellant as to how the whisky was to be sent or paid for. That thereupon appellant, of his own motion, selected H. Brann & Co. of Ft. Worth, Texas, and

Headnote by FURMAN, J.

Note. — As to place of sale of intoxicating liquor, see note to *Fisher v. Com.* 44 L.R.A. (N.S.) 435.
51 L.R.A. (N.S.)

wrote a letter to them to which he signed Smith's name, ordering a gallon of whisky to be sent to said Smith at Ardmore. Said H. Brann & Company received the letter and shipped the whisky by Wells Fargo Express to said Smith at Ardmore; that the bill for this whisky, which amounted to \$3.75, was sent by H. Brann & Company to appellant at Ardmore, and that appellant collected for the same from said Smith. It further appears that appellant was a collector for H. Brann & Company, and received a commission on all money collected by him for them.

In many respects there is a manifest difference between the case at bar and the case of *Williams v. State*, 5 Okla. Crim. Rep. 206, 114 Pac. 624. In *Williams's Case* the purchaser of the whisky requested *Williams* to write a letter to E. G. Stafford & Company of Sparta, Missouri, ordering the whisky in question. The record does not show that *Williams* was the agent of or had any connection whatever with E. G. Stafford & Company, or had ever represented them in any business transactions, or that he collected the money for the whisky ordered, or that he was even known to said E. G. Stafford & Company, or that he ever received a commission or compensation for his services. It simply presents a case of one friend writing a letter for another friend to entice strangers. Such is not the case at bar. Here appellant was the authorized agent of H. Brann & Company, and represented them in Ardmore. It was at his suggestion the order was sent to H. Brann & Company, and he wrote the letter directing H. Brann & Company to send the whisky to Smith at Ardmore, and he received a commission upon the sale made. The fact that appellant was in no way interested in the whisky in no manner militates in his favor. He was prosecuted and convicted, not for having an interest in the whisky, but for participating in the sale of the whisky. If he did this, although he received no compensation therefor, he would still be guilty. But the agreed statement of facts show that he did receive a commission on this sale. He therefore not only participated in the sale, but was financially interested therein. The fact that H. Brann & Company alone had authority to pass upon orders received by them, and to accept or reject such orders as they saw fit, does not in any manner excuse appellant. In the regular course of business this right exists in all cases where drummers are authorized to take orders which they send to the houses they represent. In all such cases the house has the option to accept or reject the order, as it sees fit. Far from helping appellant, the statement which we are now discussing 51 L.R.A.(N.S.)

clearly points to his guilt, for it is an admission that he was receiving orders for whisky in Oklahoma as agent of H. Brann & Company.

The trial court was authorized to find from the agreed statement of facts that this entire transaction was a cunningly devised subterfuge, deliberately planned for the purpose of defeating the law. This case is but an illustration of the fact that men who are engaged in the illegal sale of intoxicating liquors in Oklahoma will resort to any expedient or subterfuge for the purpose of carrying on their illegal business. If this judgment is reversed, every liquor house in the United States could establish an agent in every town in Oklahoma, to whom persons could apply, and get such agent to write letters, and sign the name of the purchaser, and forward them to his house, which, seeing the letter written in the handwriting of their agent, would take it as an indorsement of the solvency of the purchaser, and would, upon receipt of such letter, ship whisky to entire strangers of whom they knew nothing. If this can be done, the prohibitory law of Oklahoma will become the laughing stock of all intelligent persons, and this court would be open to the most severe censure for its misconstruction of the law. It is our duty in good faith to so construe the laws of Oklahoma as to enable them to be enforced with reasonable certainty.

Under all the circumstances appellant is clearly guilty of the crime charged.

The judgment of the lower court is affirmed.

Armstrong, P. J., and Doyle, J., concur.

OKLAHOMA SUPREME COURT. (Division No. 2.)

CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY, Plff. in Err.,

v.

CHARLEY EVANS, by Next Friend.

(— Okla. —, 138 Pac. 804.)

Carrier — entering car to transact business — trespasser

1. A person who enters a passenger train at a station, without ticket or money to pay

Headnotes by GALBRAITH, C.

Note. — For duty of carrier to one who enters its cars upon his own business, and not as a passenger, see notes to *Peterson v. South & W. R. Co.* 8 L.R.A.(N.S.) 1240, and *McElvane v. Central of Georgia R. Co.* 34 L.R.A.(N.S.) 715. The duty of carrier to newsboys is treated in the note to *Ingram*

fare, for the purpose of collecting an account from a passenger on such train, and remains on the train after it leaves such station, is not a passenger, and the company, through its servants and employees, may eject him from the train at a proper place for failure to produce a ticket, or to pay fare, or on account of boisterous conduct, and the company is not liable for injury resulting to such passenger when only such force is used as is reasonably necessary to eject him under the circumstances.

Same — wilful injury — liability.

2. A railroad company is liable for injury wilfully and wantonly inflicted upon a trespasser or licensee on one of its passenger trains.

Same — excessive force.

3. If, in ejecting a trespasser or licensee from one of its passenger trains, the servants and employees of the company use more force than is reasonably necessary, or if, after he is ejected, they wantonly and wilfully injure him, the company is liable for such injury.

(February 10, 1914.)

ERROR to the District Court for Seminole County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries caused by alleged forcible and wrongful ejection from defendant's train. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. C. O. Blake, H. B. Low, R. J. Roberts, W. H. Moore, and Willmott & Dean, for plaintiff in error:

The obligation to a passenger is not to eject him from the train with unnecessary force. To a licensee, a carrier owes a higher degree of duty than to a trespasser.

7 Thomp. Neg. § 3309; Morgan v. Oregon Short Line R. Co. 27 Utah, 92, 74 Pac. 523, 15 Am. Neg. Rep. 434; Atchison, T. & S. F. R. Co. v. Johnson, 3 Okla. 41, 41 Pac. 641, 6 Am. Neg. Cas. 187.

The servants of the carrier, in ejecting a person guilty of unlawful conduct and endangering the safety and peace of the passengers of the carrier, may use force to overcome resistance which might, under some circumstances, be held to be unnecessary force, and which was made necessary by the resistance of the plaintiff himself.

Atchison, T. & S. F. R. Co. v. Gants, 38 Kan. 608, 5 Am. St. Rep. 780, 17 Pac. 54; Clark v. Great Northern R. Co. 37 Wash.

v. Kansas City, S. & G. R. Co. 50 L.R.A. (N.S.) 688.

As to liability for injury to trespasser or bare licensee at station by train, see note to Neice v. Chicago & A. R. Co. 41 L.R.A. (N.S.) 162.

Generally as to who are passengers, see Index to L.R.A. Notes, "Carriers," §§ 5-9. 51 L.R.A. (N.S.)

537, 79 Pac. 1108, 2 Ann. Cas. 760; McGarry v. Holyoke Street R. Co. 182 Mass. 123, 65 N. E. 45; Moore v. Columbia & G. R. Co. 38 S. C. 1, 16 S. E. 781.

Messrs. B. B. Blakeney, G. O. Orump, A. M. Fowler, and J. L. Skinner, for defendant in error:

While railroad companies are authorized to remove trespassers from their trains, such removal must be made with reasonable and ordinary care; and, if unnecessary force is used, or if it is done in a wilful and wanton manner, in such a way as to imperil the trespasser's life or limb, the railroad company is liable in damages to such person.

Louisville, C. & L. R. Co. v. Sullivan, 81 Ky. 624, 50 Am. Rep. 186, 8 Am. Neg. Cas. 286; Louisville & N. R. Co. v. Cottengim, 31 Ky. L. Rep. 871, 13 L.R.A. (N.S.) 624, 104 S. W. 280; Southern R. Co. v. Shaw, 31 C. C. A. 70, 58 U. S. App. 201, 86 Fed. 865; Texas & P. R. Co. v. Lyons, — Tex. Civ. App. —, 50 S. W. 161; Mobile & O. R. Co. v. Seales, 100 Ala. 368, 13 So. 917; St. Louis, I. M. & S. R. Co. v. Hendricks, 48 Ark. 182, 3 Am. St. Rep. 220, 2 S. W. 783, 8 Am. Neg. Cas. 37; Kline v. Central P. R. Co. 37 Cal. 400, 99 Am. Dec. 282, 8 Am. Neg. Cas. 58; Northwestern R. Co. v. Hack, 66 Ill. 238; Illinois C. R. Co. v. King, 77 Ill. App. 581; Johnson v. Chicago, St. P. M. & O. R. Co. 116 Iowa, 639, 88 N. W. 811; Kansas City, Ft. S. & G. R. Co. v. Kelly, 36 Kan. 658, 59 Am. Rep. 596, 14 Pac. 172, 3 Am. Neg. Cas. 437; Krueger v. Chicago & A. R. Co. 84 Mo. App. 358; Hoffman v. New York C. & H. R. R. Co. 87 N. Y. 25, 41 Am. Rep. 337, 8 Am. Neg. Cas. 543; Cincinnati, H. & D. R. Co. v. Boyer, 10 Ohio C. D. 199; Pennsylvania R. Co. v. Vandiver, 42 Pa. 365, 82 Am. Dec. 520, 8 Am. Neg. Cas. 590; Gulf, C. & S. F. R. Co. v. Kirkbride, 79 Tex. 457, 15 S. W. 495, 8 Am. Neg. Cas. 631; Kansas City, P. & G. R. Co. v. Holden, 66 Ark. 602, 53 S. W. 45; Gallena v. Hot Springs R. Co. 4 McCrary, 371, 13 Fed. 116; Jeffersonville R. Co. v. Rogers, 28 Ind. 1, 92 Am. Dec. 276; Philadelphia, W. & B. R. Co. v. Larkin, 47 Md. 155, 28 Am. Rep. 442; Sanford v. 8th Ave. R. Co. 23 N. Y. 343, 80 Am. Dec. 286, 8 Am. Neg. Cas. 520; Moores v. Winter, 67 Ark. 199, 53 S. W. 1057.

Unnecessary force or unreasonable force and amount of damages were questions of fact for the jury.

Carr v. Maxwell Trading Co. 24 Okla. 758, 105 Pac. 333; Covington v. Fisher, 22 Okla. 207, 97 Pac. 615; Loeb v. Loeb, 24 Okla. 384, 103 Pac. 570; Chicago, R. I. & P. R. Co. v. Broe, 23 Okla. 396, 100 Pac. 523; Grant v. Milam, 20 Okla. 672, 95 Pac. 424; Wade v. Cornish, 23 Okla. 40, 99 Pac.

643; *McMaster v. City Nat. Bank*, 23 Okla. 550, 138 Am. St. Rep. 831, 101 Pac. 1103; *Hussey v. Blaylock*, 21 Okla. 220, 95 Pac. 773; *Chicago, R. I. & P. R. Co. v. Mitchell*, 19 Okla. 579, 101 Pac. 850; *Bird v. Webber*, 23 Okla. 583, 101 Pac. 1052; *Armstrong, B. & Co. v. Crump*, 25 Okla. 452, 106 Pac. 855; *Kaufman v. Boismier*, 25 Okla. 252, 105 Pac. 326; *Indian Land & T. Co. v. Taylor*, 25 Okla. 542, 106 Pac. 863.

Galbraith, C., filed the following opinion:

This was an action instituted by Charley Evans, a minor, by his father and next friend, for damages for personal injuries on account of an alleged forcible and wrongful ejection from one of the defendant's passenger trains between Holdenville and Wewoka, Oklahoma. Issue was properly joined, and there was a trial to the court and jury, and a verdict and judgment for the plaintiff against the defendant for \$1,945, from which an appeal was properly perfected to this court by petition in error and case-made.

Error is assigned in overruling the motion for a new trial and in rendering judgment for the plaintiff. It is urged by the plaintiff in error that the trial court erred in its instructions to the jury, and in refusing to give a requested instruction, and that the judgment is excessive.

It appears from the evidence that the plaintiff, who was a young man, nineteen years of age, boarded one of the plaintiff's passenger trains at Holdenville for the purpose of collecting a debt from one Mike Ryan, a passenger on said train, and that after he boarded the train he engaged in a controversy with Mike Ryan, and the train pulled out of Holdenville and continued on its journey toward Shawnee, and, when some 3 or 4 miles from Holdenville, the plaintiff, still engaged in his controversy with Mike Ryan, became boisterous and was creating a disturbance with the passengers on the train, and, the conductor's attention being then called to the disturbance, he went back to the part of the train where the plaintiff and Ryan were and attempted to quiet the plaintiff. The auditor then asked plaintiff for his ticket. The plaintiff said he had no ticket, wasn't going anywhere," and had no money to pay his fare, and the conductor, then failing to quiet him, gave the signal and stopped the train, and called the brakeman and a railroad detective, by the name of Burnett, to assist him, and proceeded to eject plaintiff from the train. The plaintiff put up a vigorous fight, but was finally ejected, and when he was jerked from the steps of the car to the ground he was then at the top of an em-

bankment or fill, variously estimated by the witnesses from 10 to 20 feet deep. A witness for the plaintiff testified that Burnett then grabbed the feet of the plaintiff and whirled him down the embankment. The brakeman testified for the defendant that Burnett pushed the plaintiff and that caused him to roll down the embankment. At any rate, he rolled down to the bottom of the fill. The train was then started, and a physician who was aboard the train suggested to the conductor that, for the protection of the company and plaintiff, he ought not to be left in that place, and suggested that the train be backed up and he be placed in the baggage car and taken to the next station, which was Wewoka, and turned over to the authorities. The train was then stopped and backed up, and the plaintiff was helped up, or got up, and without assistance walked and got into the baggage car, and rode there until the train arrived at Wewoka, where he was turned over to the county physician. All this occurred on May 25, 1909. The evidence shows that on August 2d following the plaintiff was adjudged insane by the insanity board of Pittsburg county, where his father resided, and where he was taken after this incident, and sent to the insane asylum at Norman, where he was still confined at the date of the trial, February 1, 1911. It was contended on behalf of the plaintiff that the force and violence used in ejecting him from the train and after he was ejected was the proximate cause of his subsequent insanity.

It is clear from the testimony that the plaintiff was not a passenger on the defendant's train, and that he did not intend to become a passenger when he entered the train. He neither purchased a ticket before entering nor provided himself with money to pay his fare from the station where he entered to the next station. The railroad company, therefore, did not owe him that high degree of care it owes a passenger on one of its trains. Its servants had a right to eject him in a proper manner and at a proper place for failure to pay his fare, or to produce a ticket, and on account of the boisterous conduct and annoyance he caused to the passengers on the train. Rev. Laws, 1910, § 813.

In instruction No. 2, complained of by the plaintiff in error, the court told the jury that the servants of the defendant had a right to eject the plaintiff from the train or to remove him from the passenger car to some other part of the train, but in so doing they were bound to use only such force as was reasonably necessary under the circumstances to remove and eject him.

In the third instruction of the court to

the jury, also complained of by the plaintiff in error, the court told the jury, in effect, that the plaintiff was not a passenger on the train, and he could not recover for such ejection without unnecessary force.

It is said by Commissioner Sharp in *Chicago, R. I. & P. R. Co. v. Stone*, 34 Okla. 363, 125 Pac. 1122: "Railroad companies are bound to exercise their dangerous business with due care to avoid injury to others; and when they fail to do so they are liable for damages, even to a trespasser, who has not been guilty of contributory negligence. *White, Personal Injuries on Railroads*, § 1075. A reckless disregard of consequences may be so great as to imply a willingness to inflict an injury, such as to entitle a trespasser to recover, although there is no actual intent to harm him. *Id.* § 1078. On the contrary, it is the general rule that the railroad company is not liable to a trespasser on its property, in the absence of any wantonness and wilfulness or gross negligence. Under settled rules of public policy, railway companies are not to be made liable for injuries received by trespassers upon their trains, unless the injury is inflicted under circumstances indicating wantonness or wilfulness in the servants of the companies. The rule seems to be almost universally recognized and approved, and is in consonance with reason and right." See cases cited.

It does not seem to be material in this case whether the plaintiff was a trespasser or a licensee; so long as he was not a passenger, the company's duty to him would not be any different, since it would be liable for injury wantonly and wilfully inflicted upon either trespasser or licensee.

The instruction requested by the plaintiff in error and refused by the court was as follows: "If you feel and believe from the evidence in this case that the plaintiff was a trespasser upon the passenger train of the defendant, then the defendant, through its employees and servants, was only bound to the duty of not wilfully and intentionally injuring the plaintiff." While this instruction requested by the plaintiff in error was possibly a correct statement of the rule of law as to the duty a carrier owes a trespasser on one of its trains, still, if the court in its instructions covered this duty in different language and in different form, it was not prejudicial error to deny the requested instruction. *Finch v. Brown*, 27 Okla. 217, 111 Pac. 391, and cases cited.

The court told the jury in instruction No. 3 that the plaintiff was not a passenger on defendant's train, and that the defendant's servants had a right to eject him without unnecessary force, and that he was not

entitled to recover for such ejection; and in instruction No. 2 told the jury that the servants of the plaintiff in error had a right to remove the plaintiff from the train, or from the passenger car to some other part of the train, but that in so doing they were bound to use only such force as was reasonably necessary under the circumstances. The jury doubtless understood from these instructions that the company was not authorized to use wanton or wilful violence toward the defendant, even though he were a trespasser, and that the company was only liable for injury resulting from wanton and wilful violence used in ejecting the plaintiff from the train.

The instructions of the court to the jury seem to reasonably cover the law of the case and the respective rights and duties of the parties under the circumstances, and we cannot hold that the refusal to give the requested instruction was prejudicial.

A careful reading of the entire record convinces us that the railroad employees did not use wanton and wilful force in ejecting the plaintiff from the train; that he put up a vigorous fight; and that they only used the necessary force to overcome his resistance, but that, after he was ejected and on the ground by the side of the car, the defendant's servant, Burnett, caught him by his feet and turned him a somersault, causing him to roll down the embankment. The jury may have found that this act of Burnett was wanton, wilful, and unnecessary violence, and if they so found, under the law, the company would be liable for any injuries that may have resulted to the plaintiff. *Moore v. Atchison, T. & S. F. R. Co.* 26 Okla. 682, 110 Pac. 1059; *Folley v. Chicago, R. I. & P. R. Co.* 16 Okla. 32, 84 Pac. 1090; *Chicago, R. I. & P. R. Co. v. Radford*, 36 Okla. 657, 129 Pac. 834; *St. Louis & S. F. R. Co. v. Lee*, 37 Okla. 549, 46 L.R.A.(N.S.) 357, 132 Pac. 1072.

It is also urged that the judgment is excessive. While the evidence fails to show that the plaintiff suffered any great bodily injury, still we cannot put our judgment as to the amount he was entitled to recover against that of the jury. He suffered some injury. The trial court in instruction No. 4 gave the jury the proper rule for measuring his injury and for estimating the reasonable damage resulting therefrom. The jury may have found that the plaintiff's insanity was due to heredity, or that the proximate cause thereof was the wanton and wilful act of Burnett in tumbling him down the embankment after his ejection from the train.

No sufficient reason appears for disturbing the finding of the jury. We therefore

recommend that the judgment appealed from be affirmed.

Per Curiam:

Adopted in whole.

OREGON SUPREME COURT.

N. B. SORENSON, Respt.,

v.

CHARLES A. SMITH, Appt.

(65 Or. 78, 129 Pac. 757.)

Broker — right to employ assistant.

1. A real estate agent employed by a non-resident to sell land located in the state of the agent's residence, who assumes authority to grant options on the property, has no power to employ an assistant at the expense of his principal.

Principal and agent — claim of authority — binding principal.

2. The claim of a real estate agent to be acting under his general authority from his principal in employing an assistant does not show that he undertook to bind the principal to compensate the assistant for services.

Evidence — ruling out question after answer is given — effect.

3. Ruling out a question after the witness has answered it does not, without more, eliminate the answer from evidence.

Broker — option contract — right to commission.

4. The securing by a customer introduced by a real estate broker of an option upon the property for a specified time makes time of the essence of the contract, so that the agent's commission is not earned if the sale is not consummated within the time specified.

Statutes of fraud — acceptance of service — liability for compensation.

5. The acceptance by a property owner of the benefit of services rendered by one employed by a broker to assist in disposing of the property does not ratify the contract of employment so as to render him liable to make compensation for the services where the statute provides that an agreement employing an agent to sell real estate shall be void unless in writing.

On Petition for Rehearing.

Trial — failure to object to evidence — effect on determination of law questions.

6. That no objection was made to the admission of evidence tending to establish a cause of action by a subagent employed by a broker to assist in securing a purchaser of real estate, against the property owner

Note. — For power of real estate broker to delegate authority, see note to *Sims v. St. John*, 43 L.R.A. (N.S.) 796. 51 L.R.A. (N.S.)

for compensation for his services, does not prevent the court from determining that the contract sued on was within the statute of frauds, and incapable of ratification except by writing executed for that purpose, and that there could be no recovery because of absence of ratification.

Same — motion for nonsuit and directed verdict — rule for determining sufficiency of evidence.

7. The same rule for determining the sufficiency of the testimony to support a judgment in favor of plaintiff is applicable to a motion for nonsuit and one for directed verdict in defendant's favor.

(February 11, 1913.)

A PPEAL by defendant from a judgment of the Circuit Court for Multnomah County in plaintiff's favor in an action brought to recover a broker's commission for services alleged to have been performed by plaintiff's husband in the sale of real property. Reversed.

Statement by Moore, J.:

This is an action by Mrs. N. V. Sorenson against C. A. Smith to recover \$15,000 as broker's commission for services alleged to have been performed by her husband and assignor, George Sorenson, in procuring purchasers who entered into a valid contract with the defendant, whereby they stipulated to pay him \$300,000 for his interest in real property in Douglas county, Oregon. The cause, being at issue, was tried, resulting in a judgment for plaintiff as demanded in the complaint, and the defendant appeals.

Messrs. Giltner & Sewall, A. H. Tanner, and Edwin H. Flick, for appellant: Where there is but one construction to be placed upon the testimony by reasonable minds, and that construction is against plaintiff's case, the court should grant a nonsuit.

Massey v. Seller, 45 Or. 272, 77 Pac. 397, 16 Am. Neg. Rep. 553; *Wolf v. City R. Co.* 45 Or. 446, 72 Pac. 329, 78 Pac. 668.

Before a real estate broker may recover a commission for his services, he must show that he was employed to perform the services.

4 Am. & Eng. Enc. Law, 2d. ed. p. 970; *Castner v. Richardson*, 18 Colo. 496, 33 Pac. 163; *Atwater v. Lockwood*, 39 Conn. 45; *Cook v. Welch*, 9 Allen, 350; 19 Cyc. 217.

A subagent employed by a broker must look to his immediate employer for his compensation.

19 Cyc. 238; *Jenkins v. Funk*, 33 Fed. 915; *Fudge v. Seckner Contracting Co.* 80 Ill. App. 35; *Houston Cotton Oil Mill & Mfg. Co. v. Bibby*, 43 Tex. Civ. App. 100, 95 S. W. 562; *Muller v. Bell*, — Tex. Civ.

App. —, 117 S. W. 993; Benham v. Ferris, 159 Mich. 632, 124 N. W. 538; Rice v. Post, 78 Hun, 547, 29 N. Y. Supp. 553; Carroll v. Tucker, 2 Misc. 397, 21 N. Y. Supp. 952; Atlee v. Fink, 75 Mo. 100, 43 Am. Rep. 385; Hill v. Morris, 15 Mo. App. 322.

Ratification by a principal of the employment of a subagent is not shown by proof that the principal accepted the services of the subagent, because the principal is entitled to the services of his agent's employees in and about the business he employed the agent to perform.

Hanback v. Corrigan, 7 Kan. App. 479, 54 Pac. 129; Carroll v. Tucker, 2 Misc. 397, 21 N. Y. Supp. 952; Rice v. Post, 78 Hun, 547, 29 N. Y. Supp. 553; Mueller v. Bell, — Tex. Civ. App. —, 117 S. W. 993; Benham v. Ferris, 159 Mich. 632, 124 N. W. 538; Merrill v. Lathan, 8 Colo. App. 263, 45 Pac. 524; Fordtran v. Stowers, 52 Tex. Civ. App. 226, 113 S. W. 631; Union Casualty & Surety Co. v. Gray, 52 C. C. A. 224, 114 Fed. 422.

Before a principal can ratify a contract made by his agent, it must appear that the agent contracted as agent and on behalf of the principal.

Backhaus v. Buells, 43 Or. 558, 72 Pac. 976, 73 Pac. 342; Mattocks v. Young, 66 Me. 459; Mitchell v. Minnesota Fire Asso. 48 Minn. 278, 51 N. W. 608; Ilfeld v. Ziegler, 40 Colo. 401, 91 Pac. 825; Wycoff, Scamman & Benedict v. Davis, 127 Iowa, 399, 103 N. W. 349; New England Dredging Co. v. Rockport Granite Co. 149 Mass. 381, 21 N. E. 947; Ferris v. Snow, 130 Mich. 254, 90 N. W. 850; Condit v. Baldwin, 21 N. Y. 219, 78 Am. Dec. 137; Rawlings v. Neal, 126 N. C. 271, 35 S. E. 597; Hamlin v. Sears, 82 N. Y. 327; Schlessinger v. Forest Products Co. 78 N. J. L. 637, 30 L.R.A.(N.S.) 347, 138 Am. St. Rep. 627, 76 Atl. 1024.

Before a principal will be held to have ratified the unauthorized contract made by his agent, it must appear that the principal was informed of the material facts before doing the thing which is claimed as a ratification.

19 Cyc. 220-256; Sullivan v. Jahren, 71 Kan. 127, 79 Pac. 1071; Hardinger v. Columbia, 50 Wash. 405, 97 Pac. 445; Foss Invest. Co. v. Ater, 49 Wash. 446, 95 Pac. 1017; Stemler v. Bass, 153 Cal. 791, 96 Pac. 809; Sill v. Pate, 230 Ill. 39, 82 N. E. 356; Strong v. Ross, 33 Ind. App. 586, 71 N. E. 918; Colvin v. Blanchard, — Tex. Civ. App. —, 103 S. W. 1118; Harris Bros. v. Reynolds, 17 N. D. 16, 114 N. W. 369.

Messrs. Martin L. Pipes, John M. Pipes, and George A. Pipes for respondent.

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Moore J., delivered the opinion of the court:

It is maintained that errors were committed in denying a motion for a judgment of nonsuit when the plaintiff had introduced her evidence and rested, and in refusing to direct a verdict for the defendant when the cause was finally submitted. There has been brought up a transcript of the entire testimony, which will be examined with reference to the application for an instructed verdict, since that request necessarily supersedes the motion for a judgment of nonsuit. The facts are that the defendant was the owner and holder of certificates issued by the Northern Pacific Railroad Company for 7,480 acres of timber land in township 27 south, of range 2 west, of the Willamette meridian. Smith, who, it appears, resided in Minnesota, employed F. A. Kribs, a real estate broker of Portland, Oregon, to negotiate a sale of his estate in the premises, which interest will be designated herein as lands. Kribs informed George Sorenson, who was engaged in the same business in that city, that these lands were for sale, and gave him a map on which the real property was represented. The plaintiff's assignor thereupon procured J. O. Storey, who, on September 28, 1906, was granted by Kribs an oral option of sixty days within which to purchase the premises at \$25 an acre, on account of which he was to have paid \$50,000 before the expiration of that limit, and the remainder at stated intervals. The time thus specified was allowed in order to permit an inspection of the quantity and quality of the timber growing on the real property so as to determine its value. After a partial examination, Storey was reasonably satisfied that the lands were worth the sum demanded; but, being unable to secure a complete cruise of several subdivisions of the tract within the time limited, he obtained from Kribs an extension for that purpose until December 15, 1906. In the meantime, Storey had engaged to sell the lands for \$250,000 to other persons, in whose interest he on December 9, 1906, offered to pay Kribs \$10,000 as evidence of good faith, but the proposal was declined. At the expiration of the time ultimately limited, but before a complete inspection of the timber could be made by Storey, and without his offering to pay the \$50,000 required, Kribs, at the defendant's direction, withdrew the lands from sale, and so notified Sorenson and Storey. The latter on July 7, 1907, commenced an action against Kribs in the circuit court of the state of Oregon for Multnomah county to recover \$63,000 as damages for an alleged breach of the agreement to sell and convey the land, and the

further sum of \$2,027 as expenses incurred in cruising the timber.

A written contract was prepared at Minneapolis July 23, 1909, whereby the defendant, in consideration of \$300,000 to be paid as specified, stipulated to sell and assign all his interest in the real property to C. P. Bratnobar of that city, and the Storey-Bracher Lumber Company, an Oregon corporation, of which J. O. Storey and G. Bracher were respectively the president and secretary. This contract, referring to the purchasers and to the defendant, contained a clause as follows: "The vendees agree to save the vendor harmless from any claim or demand on him by anyone save and excepting Frederick A. Kribs of Portland, Oregon, for commissions in the sale of the certificates hereinbefore mentioned, and also agree to save the said Frederick A. Kribs harmless from any claim or demand made by anyone on him for commissions on account of the sale of said certificates." This contract was executed by the several parties to it at Albany, Oregon, September 2, 1909. Thereafter Sorenson assigned his claim for a commission of 5 per cent of the stipulated purchase price to the plaintiff, who instituted this action, which eventuated as hereinbefore narrated.

George Sorenson testified, in substance, that after December 15, 1906, pursuant to Kribs' promise to pay him a commission of 5 per cent of the purchase price of the land, if a profitable sale thereof could be made, he continued to negotiate with Storey until July, 1909, when Kribs said to him, "If you can get Storey to give \$300,000 I can put the sale through," declaring, however, that Smith should be personally consulted about the matter. This information was communicated to Storey, who immediately went to Minneapolis, where the terms of the contract were settled. Sorenson admitted he never conversed with the defendant until after the sale was consummated; nor did he have any writing authorizing him to procure a purchaser of the lands, or promising to pay him a commission in case of a sale. This testimony was corroborated in many particulars by that of F. A. Kribs, who was asked, in reference to Sorenson's efforts, originally to procure Storey as a purchaser, "You acted upon your general authority from Mr. Smith to sell the land?" He replied, "Yes, sir." After this answer was given, defendant's counsel said, "Now, if the court please, I object to that question." A ruling was then made as follows: "The objection is sustained." In obedience to a subpoena duces tecum, Kribs produced and identified copies of letters which he had written to the defendant, and also telegrams which the latter had sent to him.

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These writings, having been received in evidence, show that, before the final bargain for the sale of the land was concluded, Smith knew that Sorenson claimed a commission for the services which he had performed.

J. O. Storey, referring to the visit at Minneapolis to confer with the defendant in July, 1909, testified as follows: "We had agreed on the negotiations for this land, and Mr. Sorenson, who was working with me at that time to get this land in our hands in some shape so we could jointly sell it again, telegraphed me and asked me what shape I had it, and replying I wired: 'Have Smith deal cinched. What can you get? Answer.'" Referring to that message, he said: "What I meant by that was, How much money can you get for the land?" This witness further said that the Storey-Bracher Lumber Company paid no money for the lands, and had no interest therein, except the right to sell the premises; that Mr. Bratnobar agreed to buy the property and allow us to sell it; but that neither Sorenson nor himself was able to find a purchaser at the price demanded. Storey received a letter written December 9, 1906, by Sorenson, wherein the writer, referring to Kribs and to the original option to purchase the lands, said: "He wanted to divide the commission with me and leave you out of the deal. I told him you was in on the deal, and that you was to get an equal division."

The foregoing is deemed to be a sufficient statement of all the material evidence involved in a consideration of the question whether or not, under the original option to sell the property, or by subsequent ratification, Smith became liable to Sorenson for the payment of a commission. It will be remembered that the defendant, a non-resident of Oregon, appointed F. A. Kribs, a real estate broker of this state, to sell lands therein. If Kribs had been a non-resident of Oregon, and Smith had known that he did not expect to come into the state, it might reasonably have been concluded that the selection of the agent, under such circumstances, carried with it, by necessary implication, the right to delegate his authority to a subagent. The modification of the general rule in this respect is founded on the assumption that, since the person originally appointed to negotiate a sale of land cannot, by reason of his nonresidence, be expected to visit and inspect the real property, he must of necessity select in his stead someone who can identify the premises to a prospective purchaser. *Eastland v. Maney*, 36 Tex. Civ. App. 147, 81 S. W. 574. This principle, however, can have no application to the case at bar, since Kribs

resided in the state where the land is situated.

It is also to be kept in mind that Kribs originally allowed an option of sixty days, and further extended the time in which the timber might be inspected. The privilege thus granted implies a bestowal of power, the exercise of which evidences a personal trust and confidence that, in the absence of express authority, negatives a right to appoint a subagent, for a performance of whose services the principal would be liable. Story, Agency, §§ 12, 13; 1 Am. & Eng. Enc. Law, 2d ed. 972. From a careful examination of the entire evidence, it is believed that Sorenson was only a subagent, and that no privity existed between him and the defendant. This conclusion seems to be confirmed by Sorenson's letter to Storey, wherein he stated that Kribs wanted to divide with the writer the commission, and to exclude Storey from any participation therein. The statement in the letter that Sorenson had told Kribs that Storey "was in on the deal" and "was to get an equal division" reasonably implies that Kribs, Storey, and Sorenson were ratable to share the expected commission. The letter referred to unmisstakably shows that, for the services originally performed by Sorenson, he must have believed a part of the compensation to be paid Kribs would be shared with him, and that he was only a subagent of the latter.

This deduction, in our opinion, is not defeated by Krib's reply to the inquiry, whereby he stated that, in giving Sorenson a plat of the lands and requesting him to procure a purchaser, he acted upon his general authority from the defendant. An objection was made to this answer after it was given; but no motion was made to strike it out. When a witness responds to a question before an attorney has had time to object to the inquiry, the proper practice is to move to strike out the answer, unless the court, in sustaining the objection, also directs the jury not to consider the reply given. The testimony referred to was not properly eliminated; but, in our opinion the answer was a legal conclusion, and not the statement of a material fact. In any event, the reply to the inquiry does not show that Kribs undertook to bind his principal, nor does it negative the conclusion that he employed Sorenson as a subagent, with whom Smith sustained no relation as a contracting party. Mechem, Agency, § 197; Barnard v. Coffin, 141 Mass. 37, 55 Am. Rep. 443, 6 N. E. 364.

The original offer to sell the land having been definitely limited, Storey's acceptance of the proposal made the period of time so stipulated of the essence of the agreement. Watson v. Brooks, 11 Or. 271, 3 Pac. 679; 51 L.R.A. (N.S.)

Hardy v. Sheedy, 58 Or. 195, 113 Pac. 1133. Where the employment of a broker is thus precisely fixed, his agency terminates with the end of the time specified. Zeimer v. Antisell, 75 Cal. 509, 17 Pac. 642; La Force v. Washington University, 106 Mo. App. 517, 81 S. W. 209.

Whatever the rule may be with respect to annulling a real estate broker's contract, it will be kept in mind that Sorenson testified that he was directed by Kribs to continue his efforts to consummate a sale of the premises after the original option was declared canceled. Any services, however, that were performed pursuant to the latter order, must be construed as acts done by a subagent at the command of an agent, and for the payment of which the principal would not be liable.

This conclusion leaves for consideration the question of Smith's acceptance of the purchase price that was partly paid, and his consummation of a valid bargain for the sale of the land, with full knowledge of the benefit which he probably derived from Sorenson's endeavor to procure a purchaser. When a principal, with entire comprehension of a usurpation of authority by a person who pretends to act for him in dealing with his property, accepts the advantages which might accrue, he thereby ratifies the unwarranted conduct and renders himself liable for all the burdens that may result. Hahn v. Guardian Assur. Co. 23 Or. 576, 37 Am. St. Rep. 709, 32 Pac. 683; Connell v. McLoughlin, 28 Or. 230, 42 Pac. 218; Rumble v. Cummings, 52 Or. 203, 95 Pac. 1111. Any unauthorized act by an agent for his principal that tends to impair the public health or to corrupt the public morals is void *ab initio*, and for that reason it is incapable of ratification, since any attempted approval of the transaction would necessarily be contaminated with the original illegality, thereby making the principal *in pari delicto* with the agent. Clark & S. Agency, § 115. In the same section of the work referred to, it is said: "If, however, the act or contract was one merely voidable in its nature, it may be subsequently ratified by the principal, although unauthorized." Another text-writer, in discussing this subject, observes: "An act, to be capable of ratification, must be voidable or defeasible only, and not void. That an act which could not have been authorized in the first instance cannot be ratified seems clear, and upon this point the adjudications are in full accord." Reinhard, Agency, § 98.

It is sometimes said that any unjustifiable conduct of one person in disposing of, or procuring property for, or prejudicial or beneficial to the rights of, another, which act could have been previously authorized

by the latter, may subsequently be ratified by him. This observation is not universally applicable, for where a statute declares a particular act to be void, and its performance without authority is denounced as a misdemeanor in the enactment, which also prescribes a penalty upon conviction for a violation thereof, the word "void," as thus used is occasionally held to mean what its technical sense would imply, and not voidable, thereby rendering the unauthorized act incapable of ratification. 8 Words & Phrases, 7332. Thus, under a statute making it a misdemeanor on the part of a broker to earn a commission for the sale of real property without written authority, it was held that, in the absence of a writing of that kind, no action could be maintained. *Adler v. Schaumberger* (Sup.) 84 N. Y. Supp. 235; *Charles v. Arthur* (Sup.) 84 N. Y. Supp. 284; *Kronenberger v. Quinn* (Sup.) 86 N. Y. Supp. 139. It has also been ruled that, without such written authority, no recovery could be had on a *quantum meruit*. *Blair v. Austin*, 71 Neb. 401, 98 N. W. 1040; *Rodenbrock v. Gress*, 74 Neb. 409, 104 N. W. 758; *Barney v. Lasbury*, 76 Neb. 701, 107 N. W. 989; *Whiteley v. Terry*, 39 Misc. 93, 78 N. Y. Supp. 911.

Under a section of a statute of frauds declaring that "no broker or real estate agent selling or exchanging land for or on account of the owner shall be entitled to any commission for the same, or exchange any real estate, unless the authority for selling or exchanging such land is in writing, signed by the owner or his authorized agent, and the rate of commission on the dollar shall have been stated in such authority," it was determined that, in the absence of a previous written contract, a subsequent written promise to pay the commission was without consideration and void. *Leimbach v. Regner*, 70 N. J. L. 608, 57 Atl. 138; *Stout v. Humphrey*, 69 N. J. L. 436, 55 Atl. 281; *Bagnole v. Madden*, 76 N. J. L. 255, 69 Atl. 967. A different conclusion was reached in the case of *Muir v. Kane*, 55 Wash. 131, 26 L.R.A.(N.S.) 519, 104 Pac. 153, 19 Ann. Cas. 1180, where, in construing a statute providing that any agreement authorizing a broker to sell or purchase real property for a commission should be void unless the contract or some note or memorandum thereof was in writing, it was decided that the performance of the services under an oral agreement, void under the statute of frauds, raised a moral obligation which was a sufficient consideration to support a subsequent written promise to pay the stipulated compensation. When an enactment expressly declares that an agreement for the payment of a commission for securing a purchaser of land is void un-

less it is in writing and signed by the owner of the real property, the rule is well established that, in the absence of a written contract, a full performance of the services by the broker does not take the case out of the statute of frauds. *Myres v. Surryhne*, 67 Cal. 657, 8 Pac. 523; *Shanklin v. Hall*, 100 Cal. 26, 34 Pac. 636; *McGeary v. Satchwell*, 129 Cal. 389, 62 Pac. 58; *Dolan v. O'Toole*, 129 Cal. 488, 62 Pac. 92; *Beahler v. Clark*, 32 Ind. App. 222, 68 N. E. 613; *Price v. Walker*, 43 Ind. App. 519, 88 N. E. 78; *King v. Benson*, 22 Mont. 256, 56 Pac. 280; *Marshall v. Trerise*, 33 Mont. 28, 81 Pac. 400; *Blair v. Austin*, 71 Neb. 401, 98 N. W. 1040; *Rodenbrock v. Gress*, 74 Neb. 409, 104 N. W. 758; *Barney v. Lasbury*, 76 Neb. 701, 107 N. W. 989; *Gerard-Fillio Co. v. McNair*, 68 Wash. 321, 123 Pac. 462.

Our statute of frauds, providing that, "in the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents in the cases prescribed by law"—was amended February 9, 1909, by adding the following: "An agreement entered into subsequent to the taking effect of this act, authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission." L. O. L. § 808. This supplemental clause went into effect after the original option referred to herein was given, but before the final bargain for the sale of the land was concluded.

A text-writer, in discussing the phraseology of the common designation of a very celebrated English statute, enacted in 1677 (29 Car. II. chap. 3), and which has been adopted in a more or less modified form in nearly all states of the Union, says: "It may be said that an oral contract within the statute of frauds is not illegal or void, but is only voidable or nonenforceable. Such contracts have been likened to *nuda pacta*. The lack of a writing is merely matter of evidence." *Reed*, Stat. Fr. § 678; 20 Cyc. 284. Such an enactment simply annexes the necessity of a writing to the common-law requirement that a contract must be based upon an adequate consideration. 20 Cyc. 281. While there is an irreconcilable conflict in the decisions with respect to the proper methods of ratifying the act of an agent whose authority should originally have been in writing, it is believed that reason supports the rule that the approval by the principal of such act cannot be predicated upon the mere acceptance of the benefits of a bargain concluded

for him; but, when the act is not declared by the statute to be a misdemeanor, the ratification must be evidenced by a writing, which mode of proving the act is made by the statute indispensable. Reed, Stat. Fr. § 382, and notes. An exception to this requirement exists in cases where possession of real property has been taken by a purchaser, who has made permanent and valuable improvements upon land pursuant to an oral contract to sell and convey the premises. This departure from the general precept is founded upon the principal that, unless specific performance was decreed in a suit instituted for that purpose, the purchaser could not be adequately compensated in an action at law to recover the damages sustained. Another reason is that, in suits to enforce the specific performance of an oral contract to convey land, the possession and betterment of which by a stranger to the title, when such occupancy and improvement are clearly traceable to the contract relied upon, afford indisputable evidence of the actual or constructive assent of the owner, thereby establishing the purchaser's right, and sufficient in law to take the case out of the statute of frauds. Brown v. Lord, 7 Or. 302; Wagonblast v. Whitney, 12 Or. 83, 6 Pac. 399.

The purpose sought to be accomplished by the enactment of the English statute mentioned was to prevent the practice of frauds which were supposed to be perpetrated, and to preclude a resort to perjuries which were believed to have been committed, when oral contracts respecting certain matters could be enforced upon evidence existing only in the recollection of witnesses. It is thought that the primary object that induced the enactment of our statute, hereinbefore quoted, demands that, where the original contract respecting the broker's compensation was not in writing, as required, the ratification can only be by a writing. The plaintiff's assignor never having been employed by Smith, nor the services rendered by Sorenson ratified in the manner indicated, it follows that error was committed in refusing to direct a verdict for the defendant.

The judgment should therefore be reversed, and the action dismissed, and it is so ordered.

A petition for rehearing having been filed, Moore, J., on April 29, 1913, handed down the following response (65 Or. 91, 131 Pac. 1022):

It is maintained in a petition for rehearing that, since no exception was taken to the introduction of any testimony tending to establish the plaintiff's cause of action, errors were committed by this court in de-

termining that the contract sued upon was within the statute of frauds and incapable of ratification by the defendant, except by the execution of some writing adopted for that purpose, and in concluding that the motion for a directed verdict in Smith's favor should have been allowed.

It was said in the former opinion that the request for a directed verdict, made after all the evidence had been reviewed, superseded the denial of a motion for a judgment of nonsuit interposed when the plaintiff introduced her testimony and rested in chief. Based on this deduction the petition states generally that it must be supposed that the court assumed a difference between the two motions, and refused to apply to the request for a directed verdict the rules of law governing motions for a judgment of nonsuit. The latter motion probably called attention to the particular defect in the evidence whereby it was asserted that a cause of action had not been established sufficient to be submitted to the jury. The motion for the nonsuit having been denied, the deficiency in the evidence, to which notice had been attacked, would be remedied if possible by the introduction of testimony on the particular subject.

A motion for a judgment of nonsuit and a motion for a directed verdict in the defendant's favor are tantamount to demurrers to the evidence, and the same rule for determining the sufficiency of the testimony is alike applicable to each. A motion for a directed verdict for the defendant, however, is generally less hazardous to the plaintiff's rights than is a motion for a judgment of nonsuit.

In the former opinion the testimony admitted without exception was deemed competent, and it was also considered that the statute of frauds, as far as it related to Sorenson's employer, was waived by not objecting to the admission of testimony tending to show that the contract sued upon was not evidenced by any writing. From an original examination of the entire transcript of the evidence it was not thought, nor from a re-examination thereof is it now believed, that the testimony so received without objection or exception, together with all the inferences and presumptions reasonably deducible therefrom, was sufficient to establish a cause of action to be submitted to the jury; because George Sorenson, the plaintiff's assignor, was employed by, and was the subagent of, F. A. Kribs, that no privity of contract existed between such substituted agent and the defendant, Charles A. Smith, and the latter, never having stipulated in writing to pay a commission to the subagent, did not, by negotiating the sale of the

lands to C. P. Bratnober and the Storey-Bracher Lumber Company, ratify Krib's employment of Sorenson.

We are compelled to adhere to the former opinion, and the petition for a rehearing is denied.

TENNESSEE SUPREME COURT.

ARTHUR KING

v.

TENNESSEE CENTRAL RAILROAD COMPANY.

(— Tenn. —, 164 S. W. 1181.)

Railroads — signals — statutory duty upon backing into station.

1. The statutes governing the duty of railroad companies to keep lookouts ahead and to give signals and stop trains upon the appearance of a person on the track do not apply in case of the backing of a train into

Note. — To what places and operations does statute or ordinance requiring lookout on trains apply.

As to the duty to maintain lookout on railroad train, generally, see note to Smith v. Norfolk & S. R. Co. 25 L.R.A. 287.

Operations in railroad yards and depot grounds.

A statute requiring some person upon the locomotive always upon the lookout ahead does not apply to railway employees about the yards and depots of the railroad. Louisville & N. R. Co. v. Robertson, 9 Heisk. 276. There is no occasion in this case to extend the rule further than employees, and the court limits itself to that situation. This case is cited and followed in Haley v. Mobile & O. R. Co. 7 Baxt. 239.

The general question, however, as to what persons the railroad is liable to under statutes requiring lookouts, is not within the scope of this note.

In Southern R. Co. v. Pugh, 95 Tenn. 419, 32 S. W. 311, an action for injuries by detached cars making a running switch in railroad yards, it is held that the above statute does not apply "when the employees of a railway company are engaged in the distribution of detached cars, in the making up of trains, and in other necessary switching in and upon its yards, depot grounds, and side tracks."

And the same statute is held not to apply to an engine running backwards in a depot yard in the process of pumping water from the tender into the engine. Cox v. Louisville & N. R. Co. 2 Leg. Rep. 168, 1 Shannon, Cas. 475.

So, the Federal circuit court of appeals, in a case involving the above statute, holds that it does not apply to the operation of backing in order to reunite the two sections of a train which has broken in two

a station which it has run past a short distance before coming to a stop.

Carrier — overshooting station — negligence of passenger in following train.

2. One desiring to take a train at a flag station at night is negligent in attempting to walk down the track to board it when it passes the station before stopping, and is slowly backing to the regular stopping place, which will preclude his holding the carrier liable for injury due to collision with the train in the dark.

(April 2, 1914.)

CERTIORARI by both parties to the Court of Civil Appeals to review a judgment reversing a judgment of the Circuit Court for Wilson County in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Plaintiff's petition denied. Defendant's petition granted.

The facts are stated in the opinion.

upon a side track in the depot grounds. Although the train had merely been waiting for another train to pass it, and had broken in two upon starting to leave the side track, the court bases its decision upon the ground that the Tennessee statute does not apply when a "train is being made up in the depot grounds, as this one was." Payne v. Illinois C. R. Co. 83 C. C. A. 589, 155 Fed. 73.

But this statute is held to apply to a fully organized train backing out of a passing track, where it has been waiting for another train to pass, although it has been switching on adjacent tracks in order to let out or take in some cars immediately before going into the passing track. Cincinnati, N. O. & T. P. R. Co. v. Davis, 88 C. C. A. 414, 161 Fed. 334.

As to the applicability of this statute to a passenger train which has overshot the station, and is backing to the proper position for taking up passengers, see KING v. TENNESSEE C. R. Co.

And this statute is held applicable to a through train upon the main track, not engaged in switching, although it is passing through the railroad yards or station grounds. Mobile & O. R. Co. v. House, 96 Tenn. 552, 35 S. W. 561.

And in some jurisdictions it is held that a statute making it the "duty of all persons running trains upon any railroad to keep constant lookout" applies to trains in a railroad yard. Little Rock & H. S. W. R. Co. v. McQueeney, 78 Ark. 22, 92 S. W. 1120; Kansas City Southern R. Co. v. Morris, 80 Ark. 528, 98 S. W. 363, 10 Ann. Cas. 618; St. Louis Southwestern R. Co. v. Graham, 83 Ark. 61, 119 Am. St. Rep. 112, 102 S. W. 700. In the first of these cases, the court says: "To sustain this contention [against applicability of statute] it will be necessary to hold that the tracks in the yards do not constitute a part of the railroad. . . . The act was obviously in-

Mr. Walter S. Faulkner, for plaintiff: Plaintiff had the right to have the jury instructed that the rule of the statutes to prevent injuries applied.

Katzenberger v. Lawo, 90 Tenn. 238, 13 L.R.A. 185, 25 Am. St. Rep. 681, 16 S. W. 611; *Little Rock & M. R. Co. v. Wilson*, 90 Tenn. 278, 13 L.R.A. 364, 25 Am. St. Rep. 693, 16 S. W. 613; *East Tennessee, V. & G. R. Co. v. Martin*, 85 Tenn. 134, 2 S. W. 381; *Illinois C. R. Co. v. Clarkson*, — Tenn. —, 28 Am. & Eng. R. Cas. 459; *East Tennessee, V. & G. R. Co. v. Fain*, 12 Lea, 41; *East Tennessee, V. & G. R. Co. v. Pratt*, 85 Tenn. 13, 1 S. W. 618; *Patton v. East Tennessee, V. & G. R. Co.* 89 Tenn. 370, 12 L.R.A. 184, 15 S. W. 919.

Messrs. J. R. Smith, Julian Campbell, and Lillard Thompson for defendant.

Buchanan, J., delivered the opinion of the court:

This suit was begun in the circuit court,

tended for the protection of persons and property upon railroad tracks, and all tracks and cars moved thereon come within its provisions."

An ordinance providing that no train shall be run backward without a watchman on the rear thereof applies to the private switch yard of a railroad. *Baltimore & O. S. W. R. Co. v. Peterson*, 156 Ind. 364, 59 N. E. 1044.

And Bennett v. Grand Trunk R. Co. 3 Ont. Rep. 448, contains *dictum* to the effect that a statute requiring a lookout on the last car of a train moving reversely applies to the station grounds of the company.

Operations in private railroad yards of manufacturer.

An ordinance providing for a lookout is inapplicable to the operation of trains within an inclosed, private railroad yard used by a manufacturer of railroad cars in moving cars erected at the plant. *Western Steel Car & Foundry Co. v. Nowalanski*, 135 Ill. App. 137. The court said: "The track where appellee was injured was not a railway track within the meaning of the ordinance, although it was of the same width and construction as ordinary railways, and a locomotive was operated upon it for the purpose stated. It was wholly within appellant's private yard or inclosure. It was not a common or public highway. It did not cross or run upon a public highway. It was not used for transportation of freight or passengers for the public. It was used exclusively by appellant, in the processes of manufacture."

Operations at public crossings.

"It is made by statute the duty of a railroad company to keep a lookout; and especially is this duty incumbent upon it at 51 L.R.A. (N.S.)

and was there prosecuted to judgment in favor of King for the sum of \$2,500 and costs. It was then taken to the court of civil appeals by the railroad company. That court reversed and remanded the cause for a new trial; and, based on that judgment, two petitions for certiorari have been filed in this court,—one by King, insisting that the judgment of the trial court should have been affirmed; and one by the railroad company, insisting that both the trial court and the court of civil appeals were in error in not holding that it was entitled to a directed verdict, which was seasonably requested by it at the close of the evidence in chief offered by King, and again at the close of all evidence in the trial of the case in the circuit court.

The cause of action is predicated on personal injuries sustained by King as the result of a collision with a passenger coach; to wit, loss of an arm and other less serious injuries. The declaration was in two

public crossings." *Louisiana & A. R. Co. v. Ratcliffe*, 88 Ark. 524, 115 S. W. 396.

And in *Alabama G. S. R. Co. v. Hardy*, 131 Ga. 238, 62 S. E. 71, it is held inferentially that the Tennessee statute requiring a lookout ahead upon a locomotive applies to a switch engine upon a public crossing, not in the railroad yards.

See also *Pittsburgh, C. C. & St. L. R. Co. v. McNeil*, 34 Ind. App. 310, 69 N. E. 471, on former appeal in 66 N. E. 777, under "Running backwards," *infra*.

Running backwards.

The Tennessee statute mentioned in the following cases is to the effect that "every railroad company shall keep the engineer, fireman, or some other person upon the locomotive always on the lookout ahead, and when any person, animal, or other obstruction, appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident."

That this statute cannot be complied with when an engine is pushing cars before it does not make the statute inapplicable, but, on the contrary, renders such operation an infraction of the statute, for which the liability is absolute. *Little Rock & M. R. Co. v. Wilson*, 90 Tenn. 271, 13 L.R.A. 364, 25 Am. St. Rep. 693, 16 S. W. 613. As to the reason for this rule, the court says: "The lookout must be kept ahead on the locomotive, and the locomotive must, of course, be kept there for him to be upon or he cannot be upon it and kept in the place required. The keeping of the locomotive there, therefore, is one of the parts of the observance, like all others, absolutely essential to constitute the whole observance."

And it is held in *Iron Mountain R. Co. v. Dies*, 98 Tenn. 655, 41 S. W. 860, 3 Am.

counts,—the first averring a breach by the company of its common-law duty; the second averring a failure on its part to observe the statutory precautions as the proximate cause of the injuries. To this declaration the company pleaded not guilty.

By the evidence of King, and otherwise, it appears that, at the time he was injured, he was living with Mr. Smith, who resided about 1 mile from Eagansville, a flag station on the line of the railroad company, and in company with Henry Wood, colored (King being also colored), he went to Eagansville to take passage on the passenger train bound for Lebanon, where he expected to attend a supper; that he had often prior to that time taken passage on that train at Eagansville, his habit being to go to Lebanon from that station every two weeks; that he knew how to get on the train, which way was by flagging the train by means of lighting a piece of paper, which was done on the night he was injured, the flagging being done on that night by Henry Wood, who stood in the middle of the track and lighted the paper; that on the former occasions the train had always stopped at the station, but on the night he was injured it ran beyond the station about 100 yards and stopped. He saw it when it stopped, knew it had stopped, and, instead of waiting where he was until the train came back, he concluded that it was waiting for him, and that he would go up and board it where

it stood; and so he and his companion, Henry Wood, left the station and walked up the track toward the train without notice to those in charge of the train; and the latter, expecting to find those intending passengers who had flagged the train at the flag station, began to back the train to that point, and while so backing the rear car of the train collided with King, knocked him down, cut off his arm, and otherwise injured him. No comprehensible reason is given either by King or his companion, Wood, for their failure to observe the backing train as it moved slowly back at the rate of 3 or 4 miles an hour to the flag station. It was after dark; the back door of the rear car was open; there were lights in the car. King and his companion do not deny these facts, and yet they say they did not see the rear car as it backed down the track toward them; and King says that the first knowledge he had of its movement toward him was when it struck him. He testifies that after his injuries, and manifestly while the car was still in motion, he crawled out from under it, and laid beside the track while the train passed on, and while it stopped at the flag station; and while, after it stopped at the flag station, it again started on its way to Lebanon, during all this time he was lying close to the rails, where he had received his injury.

King testifies that the point where he was struck by the train was "mighty nigh

Neg. Rep. 273, that the same statute renders a railroad company absolutely liable for injuries by an engine which has been detached from an incoming train and is being returned to the roundhouse over tracks not within the railroad yards, with the tender preceding the engine. The court, in discussing the decision in the preceding case, says: "It is further held, and such is the inevitable logic of the other propositions, that when the train is being run backwards or by means of an engine placed elsewhere than in front, the liability of the company for injuries inflicted is absolute, because the statutory precautions can only be complied with when a train is moving forward by means of an engine in front." The court agrees with this holding in the following language: "To hold a doctrine different from this would be virtually to annul the provisions and requirements of the statute."

Knoxville, C. G. & L. R. Co. v. Acuff, 92 Tenn. 26, 20 S. W. 348, cites the Wilson Case and follows it, holding that the statute applies to a train operated with the cars preceding the engine.

But it is held, in Southern R. Co. v. Simpson, 65 C. C. A. 563, 131 Fed. 705, that, under the same statute, it is immaterial that the engine is running backwards, provided the view of the lookout is not obstructed and every precaution required by the terms of 51 L.R.A. (N.S.)

the statute is observed. This is on the theory that the statute does not specifically provide against running backwards, and that the actual terms of the statute may sometimes be as well complied with when running backwards as forwards. The court attempts to reconcile its holding with those of the Wilson and Dies Cases on the grounds that in each of those cases the position of the engine obstructed the view and prevented compliance with the statute. In so doing the court seems to overlook the specific language of the opinions of those cases as set out above.

And in Cincinnati, N. O. & T. P. R. Co. v. Davis, 88 C. C. A. 414, 161 Fed. 334, supra, the railroad, in accordance with the preceding case, is held liable, not merely because the train was moving backward, but because of the inability to keep the required lookout on account of a long train of intervening cars.

But, in Towles v. Southern R. Co. 103 Fed. 405, where an engine was pushing cars ahead of it into the company's yard from a switch built to serve an industrial plant, it was held that the statute did not apply, since, under the existing conditions, compliance was impossible. The court said that "whenever the company is compelled by the conditions to run train or cuts of cars backwards without an engine in front, as the statute contemplates, the statute never ap-

100 yards" from the flag station. He admits that he made no outcry to attract the attention of employees in charge of the train when he received his injury, while the train passed on its way to the flag station, and during its stop at the flag station, or during the time the train passed him after it stopped at the flag station on its way to Lebanon. His companion, Henry Wood, also admits that he in no way made his presence known to the train crew during the time the train was making the movements aforesaid. He testifies that, when the train struck King, he (Wood) sprang from the track, and thus escaped injury; and after the train had gone on its way to Lebanon, he found his injured companion, and with him went back to the farm of Mr. Smith about one mile from the flag station, where King had been living, and where during the same night King received surgical attention.

The failure of King and Wood to make known to the employees in charge of the train the injuries which King had received is entirely unexplained upon this record. The explanation which King offers is that he was in misery. No such explanation can be offered for Wood, and so far as King is concerned, it is an explanation which does not explain. Their apparent concealment of their presence, and of the injury which King had sustained, at a time when he was manifestly in desperate need of immediate surgical attention, brings serious-

ly into question the truth of their entire evidence in the cause.

The flagman on the train testifies in substance that he was on the rear end of the rear car as the train was backed toward the flag station with a white light in his hand, and that, as the train backed, the air whistle on the rear end was blown at short intervals from the time the train started backing until it reached the station; that during all this time he was looking ahead to see if anyone was on the track and saw no one; that he could see some 10 or 12 feet down the track by means of the reflection from the light in his hand and of the light from the rear coach; that there were lights on the rear of the train, which showed red from the rear and green from the front; that the inside of the coach was lighted; that the rear door of the rear coach was glass above the handle; that the train, upon backing up, reached the flag station, it stopped, and that he was still on the rear platform; that nobody got on at the flag station, and the train pulled out therefrom.

His evidence is corroborated on most of these points by other employees in charge of the train, but the evidence of these witnesses was contradicted by evidence introduced on behalf of King; but it is undisputed in the record that the train was backing very slowly toward the station, the rate

plies, no matter how remote from a switching yard the exigency may arise."

Ordinary care as well as the spirit of an ordinance providing for lookouts on top of the cars farthest from the engine while backing within the city limits demand that, when a train is backing at midnight into a chute where a man cannot with safety ride on the foremost car, a man precede the train on foot. *Peperkorn v. St. Louis Transfer R. Co.* 171 Mo. App. 709, 154 S. W. 836.

And an ordinance requiring a lookout at the rear of trains running backwards applies where a train has been cut in two at a crossing, and one section of it is backing over the crossing, to be connected with the other section. *Pittsburgh, C. C. & St. L. R. Co. v. McNeil*, 34 Ind. App. 310, 69 N. E. 471, on former appeal agreeing upon this point in 66 N. E. 777.

A statute providing for the stationing of a brakeman on the last car of a train running reversely requires the stationing of a brakeman on cars being connected with a train and forced backward by the concussion made in coupling. *Helson v. Morrissey, F. & M. R. Co.* 1 D. L. R. 33, 19 West. L. Rep. 835, 17 B. C. 65. This is upon the theory that the newly connected cars become immediately a part of the train.

The general question as to what constitutes a train within the meaning of such 51 L.R.A.(N.S.)

statutes is not within the scope of this note.

For other cases of backing trains, see supra, under "Operations in railroad yards and depot grounds," *Bennett v. Grand Trunk R. Co.* 3 Ont. Rep. 446; *Baltimore & O. S. W. R. Co. v. Peterson*, 156 Ind. 364, 59 N. E. 1044; *Cincinnati, N. O. & T. P. R. Co. v. Davis*, 88 C. C. A. 414, 161 Fed. 334; *Payne v. Illinois C. R. Co.* 83 C. C. A. 589, 153 Fed. 73; *Cox v. Louisville & N. R. Co.* 2 Leg. Rep. 168, 1 Shannon, Cas. 475.

Miscellaneous operations.

An ordinance requiring lookouts within the city limits does not apply to a desolate, uninhabited part of the city where there are no crossings. *Baltimore & O. R. Co. v. State*, 62 Md. 479, 50 Am. Rep. 233.

Nor does a statute requiring a lookout on the rear car of every freight train apply to work trains. *Bacon v. New York, N. H. & H. R. Co.* 194 Mass. 489, 80 N. E. 458.

The Tennessee statute requiring "the engineer, fireman, or some other person upon the locomotive" to be constantly upon the lookout "ahead" has no application to cars which become detached from the rear of a motive shall be sounded at the distance of behind. *Patton v. East Tennessee, V. & G. R. Co.* 89 Tenn. 370, 12 L.R.A. 184, 15 S. W. 919. E. L. D.

of speed being not more than 3 or 4 miles an hour. King says "it was eased along."

The first point for decision under these facts is whether the rights of the parties to this suit should be determined under §§ 1166-1168, of the Code of 1858, now appearing as §§ 1574*-1576, Shannon's Code, or whether such rights are to be determined according to the principles of the common law.

We think the statutes above mentioned do not apply in the present case.

In *Patton v. East Tennessee, V. & G. R. Co.* 89 Tenn. 372, 12 L.R.A. 184, 15 S. W. 919, where the person injured was walking upon the track, and was overtaken by a train of freight cars, and stepped aside until the train passed, when he returned to the track and resumed his journey in the rear of the train which had passed him, and was overtaken and killed by some freight cars which had belonged to the train which had just passed him, but had become detached therefrom, and were following downgrade at the time of the injury, this court, speaking through Judge Lurton, held that the statutes above mentioned did not apply, saying: "The case provided for by the statute is that of a train pulled by a locomotive, and the precautions are those required to be observed by those servants upon the engine, and have regard to obstacles on the track in front of or ahead of the engine," etc.

In *East Tennessee, V. & G. R. Co. v. Rush*, 15 Lea, 150, construing these statutes, it was pointed out by Judge Cooper, speaking for this court, that, in view of the stringent terms of the statutes and the manifest object of the legislature, the court had not extended their provisions to every case which might be embraced in their general language; and it was there said that the statutes were intended for the benefit of the general public, and not for the servants of the company whose

negligence caused or contributed to cause the accident. Cases illustrative of the exceptions to the operation of the statutes are cited in the opinion, and it is there noted that the statutes do not apply for the benefit of a stranger when the company is making up a switching train within its yards; the case of *Cox v. Louisville & N. R. Co.* 2 Leg. Rep. 168, 1 Shannon, Cas. 475, being cited to sustain the point.

The case of *Southern R. Co. v. Pugh*, 95 Tenn. 421, 32 S. W. 311, is very much in point. There the plaintiff relied in his declaration upon an averment that he was struck and seriously injured by certain detached cars of the defendant while he was walking between the side track and depot platform at Charleston, and that the collision and injury resulted from the making of a running switch, by which the cars were driven by the depot at an excessive rate of speed, having no one on the lookout ahead. This court, in disposing of that case, held that the statutory precautions did not apply in cases where employees of a railroad company were engaged in the distribution of cars in the 'making up' of trains, and in other necessary switching in and upon its yards, depot grounds, and side tracks;" the reason given for the ruling being that "it is not possible, in such cases, to have the engine always in front of the moving portions of the train, yet the doing of the things indicated is absolutely indispensable to the efficient operation of railroads."

We think the present case falls clearly within the principle announced in the case last above referred to. In that case, as above shown, the injury occurred to one not an employee of the company, but who was at the time of receiving the injury at one of the depot places of the company. In the present case, the movement of the train by which King was injured was, within the meaning of our cases, a movement

*§ 1574, which has been 1166 and 1298 in former Codes, and which declares the duty of the railroad company, is as follows:

Accidents on railroads, precautions to prevent.—In order to prevent accidents upon railroads, the following precautions shall be observed:

(1) The overseers of every public road crossed by a railroad shall place at each crossing a sign marked, "Lookout for the cars when you hear the whistle or bell;" and the county court shall appropriate money to defray the expenses of said signs; and no engine driver shall be compelled to blow the whistle or ring the bell at any crossing, unless it is so designated. (1855-56, chap. 94, § 6.)

(2) On approaching every crossing so distinguished, the whistle or bell of the locomotive shall be sounded at the distance of 61 L.R.A. (N.S.)

one fourth of a mile from the crossing, and at short intervals till the train has passed the crossing. (Id. § 6.)

(3) On approaching a city or town, the bell or whistle shall be sounded when the train is at the distance of 1 mile, and at short intervals till it reaches its depot or station; and on leaving a town or city, the bell or whistle shall be sounded when the train starts, and at intervals till it has left the corporate limits. (Id. § 5.)

(4) Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident. (Id. § 8, 1857-58, chap. 44, § 3.)

of the train at one of the depots of the company. The station at which the injury occurred was, to be sure, a flag station; but this fact can make no difference in the application of the principle. To that station King had gone for the purpose of taking passage upon the train which injured him. To his signal given at that station the engineer of the train had responded by stopping the train. It is an undisputed fact in the record that the failure to stop in the first instance immediately at the flag station was due entirely to the fault of complainant and his companion, who gave the signal to the engineer when the train was only 150 feet from the station, and after receiving the signal the train was stopped as soon as practicable. It is also clear that, in obedience to this signal which the engineer had received, the train at the time of the injury was backing to receive as passengers King and his companion, who had given the signal.

King had no legal right to suppose that the company would accept him as a passenger at a point 150 yards beyond the platform, where he says the train stopped in obedience to his signal; nor had he the right to act upon this supposition, in the absence of an express invitation of the company so to do. It was the right of the company to select the place where it would receive King as a passenger.

The movement of the train backward from the point where it first stopped was, within the meaning of *Southern R. Co. v. Pugh*, *supra*, a switching in and upon its depot grounds, and in the execution of that movement, and in the injury which King suffered, the common law, and not the statutes, measures the rights of the parties. It is clear that the legislature, in the passage of the statutes, never intended them to apply to a case like this. In proper cases for their application the statutes are wise and beneficent, but to apply them here would work a gross and manifest miscarriage of justice.

Turning now to a consideration of the rights of the parties under the principles of the common law, we hold that under the facts of this record the gross negligence of King was the proximate cause of the injuries which he received. Had he remained at the flag station, as it was right and his duty to do, his signal would have been obeyed and he would have been able to board the train without injury. We have already observed that he had no right to suppose or act upon the supposition that the company would receive him as a passenger at the point where the train first stopped.

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His act in abandoning a place of safety, walking down to meet an approaching train, without heed or care apparently of the consequences, can only be characterized as one of gross negligence, and clearly the proximate cause of his injuries.

It results that the company was entitled to the peremptory instruction which it requested at the trial of this cause, and therefore the petition for certiorari filed by King is denied. The petition of the company is granted, the judgment of the Court of Civil Appeals is reversed, and the suit dismissed at King's cost.

WASHINGTON SUPREME COURT. (Department No. 1.)

CATHERINE D. STIRTAN et al., Appts.,
v.

A. J. BLETHEN, Resp't.

(— Wash. —, 139 Pac. 618.)

Contract — to institute recall election — validity.

1. A contract employing an agent to institute and carry out a movement for a recall election against certain officers, without disclosing the true motives and real parties behind the movement, and undertaking to pay necessary expenses therefor, is contrary to public policy and void.

Same — illegal contract — right to reimbursement for expenses.

2. An agent who expends money to institute and carry out a recall election, under promise of his principal to defray the expenses, cannot, upon the contract being declared invalid, hold the principal liable to reimburse him for his outlay on the theory that when an agreement has been fully executed, the one profiting by it will not be permitted to defeat an action by the other party for money had and received upon the ground of illegality.

Same — reliance on illegal contract — effect.

3. A plaintiff who, to make out a case, must rely on an illegal contract, cannot recover, although the other party has received a benefit from his act.

(March 27, 1914.)

A PPEAL by plaintiffs from a judgment of the Superior Court for King County sustaining a demurrer to a complaint

Note. — An extensive search has not disclosed any case other than *STIRTAN v. BLETHEN* passing upon the legality of a contract to procure the recall of an officer.

See note to *Houlton v. Dunn*, 30 L.R.A. 737, and continuation of this note appended to *Stroemer v. Van Orsdel*, 4 L.R.A.(N.S.) 212, as to the validity of contract for services to procure legislation.

filed to enforce a contract for the institution and carrying out of a movement for a recall election against certain municipal officers. Affirmed.

The facts are stated in the opinion.

Messrs. Parker & Brown, for appellants:

The defendant, by his solemn promise, caused the said \$1,500 to be paid to his own use, and the plaintiffs to be thereby deprived of that amount of money; and by reason thereof the law charges the defendant with a solemn and binding obligation, which he cannot shake off or evade, and which can be discharged only by making restitution to the plaintiffs.

9 Cyc. 558; *Tenant v. Elliott*, 1 Bos. & P. 3, 4 Revised Rep. 755; *Baldwin Bros. v. Potter*, 46 Vt. 402; *Willson v. Owen*, 30 Mich. 474.

A lender may recover of a borrower money paid at his request in discharge of an illegal contract.

9 Cyc. 564; *Williams v. Carr*, 80 N. C. 294; *Grayson v. Latham*, 84 Ala. 546, 4 So. 200, 866; *Powell v. Smith*, 66 N. C. 401; *Holt v. Barton*, 42 Miss. 711, 2 Am. Rep. 640; *Barker v. Parker*, 23 Ark. 390; *Terry v. Olcott*, 4 Conn. 442.

An illegal transaction does not preclude an accounting between the parties.

McDonald v. Lund, 13 Wash. 412, 43 Pac. 348; *De Leon v. Trevino*, 49 Tex. 89, 30 Am. Rep. 101; *Pfeuffer v. Maltby*, 54 Tex. 454, 38 Am. Rep. 631; *Dent v. Ferguson*, 132 U. S. 50, 33 L. ed. 242, 10 Sup. Ct. Rep. 13; *Armstrong v. American Exch. Nat. Bank*, 133 U. S. 433, 33 L. ed. 747, 10 Sup. Ct. Rep. 450; *Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. ed. 472; *Brooks v. Martin*, 2 Wall. 87, 17 L. ed. 738; *McBlair v. Gibbes*, 17 How. 238, 15 L. ed. 135; *Smith v. Blachley*, 188 Pa. 550, 68 Am. St. Rep. 887, 41 Atl. 619; *Martin v. Richardson*, 94 Ky. 183, 19 L.R.A. 692, 42 Am. St. Rep. 353, 21 S. W. 1039; *Hertzler v. Geigley*, 196 Pa. 419, 79 Am. St. Rep. 724, 46 Atl. 366.

There is nothing in the recall movement that is contrary to public policy.

Zeigler v. Illinois Trust & Sav. Bank, 245 Ill. 180, 28 L.R.A.(N.S.) 1112, 91 N. E. 1041, 19 Ann. Cas. 127; *Stroemer v. Van Orsdel*, 74 Neb. 132, 4 L.R.A.(N.S.) 212, 121 Am. St. Rep. 713, 103 N. W. 1053, 107 N. W. 125.

Messrs. Bausman & Kelleher, for respondent:

This is an executory contract.

McDonald v. Lund, 13 Wash. 412, 43 Pac. 348; *Reed v. Johnson*, 27 Wash. 42, 57 L.R.A. 404, 67 Pac. 381; *Hoffman v. McMullen*, 45 L.R.A. 410, 28 C. C. A. 178, 48 U. S. App. 596, 83 Fed. 372; *Smith v.* 51 L.R.A.(N.S.)

David B. Crockett Co. 85 Conn. 282, 39 L.R.A.(N.S.) 1148, 82 Atl. 569; *Samuels v. Oliver*, 130 Ill. 73, 22 N. E. 499; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553.

The contract sought to be enforced is contrary to public policy.

Keating v. Hyde, 23 Mo. App. 555; *Whitman v. Ewin*, — Tenn. —, 39 S. W. 742; *Nichols v. Mudgett*, 32 Vt. 546; *Sussman v. Porter*, 137 Fed. 161; *Providence Tool Co. v. Norris*, 2 Wall. 45, 17 L. ed. 868; *Sweeney v. McLeod*, 15 Or. 330, 15 Pac. 275; *Marshall v. Baltimore & O. R. Co. Taney*, 204, Fed. Cas. No. 9,124, affirmed in 16 How. 314, 14 L. ed. 953; *Crichfield v. Bermudez Asphalt Paving Co.* 174 Ill. 466, 42 L.R.A. 347, 51 N. E. 552; *Richardson v. Scott's Bluff County*, 59 Neb. 400, 48 L.R.A. 294, 80 Am. St. Rep. 682, 81 N. W. 309; *Hazelton v. Sheckells*, 202 U. S. 71, 50 L. ed. 939, 26 Sup. Ct. Rep. 567, 6 Ann. Cas. 217.

ELMS, J., delivered the opinion of the court:

This action was brought to recover expenses incurred by the plaintiff Catherine D. Stirtan at the instance of the defendant in promoting a recall movement against certain officials of the city of Seattle. A demurrer to the complaint was sustained. The plaintiffs electing not to amend, the action was dismissed. They appeal.

The complaint alleges the adoption by the city of Seattle of a charter prescribing the procedure for effecting the removal of elective officers; that, among other things, it provides that a petition signed by voters equal in number to at least 25 per cent of the entire vote at the last preceding election, for all candidates for the office, the incumbent of which is sought to be removed, demanding an election of a successor to such person, shall be filed with the city clerk. It is then alleged: "That on or about the 20th day of June, 1911, the said defendant, under and by virtue of said charter provision, was desirous of recalling, and having successors elected to, certain officers in said city of Seattle, to wit: George W. Dilling, mayor of said city of Seattle, Max Wardall, J. Y. C. Kellogg, E. F. Blaine, and F. Steiner, councilmen of said city of Seattle, and employed the said plaintiff, Catherine D. Stirtan, by an oral contract, as his agent and representative, to institute and carry out a movement to recall said officers of said city, and then and there, to wit, on or about the day last aforesaid, ordered and directed the said Catherine D. Stirtan to lay out and expend certain money neces-

sary to promote and carry it to a successful termination, the said recall movement, to wit, to hire an office for the transaction of certain business incident to said movement, to pay the necessary office expenses, to hire canvassers to circulate petitions for the recall of said officers among the voters of the city of Seattle, and solicit signatures of such petitions, to hold public meetings, and to do all that might and would be necessary to promote and advance said recall movement, but without disclosing the name of her principal, the said A. J. Blethen, but at all times to exercise great care and caution to keep his name secret, and in no event to disclose his connection with the said movement, and then and there undertook, and solemnly promised the said plaintiff Catherine D. Stirtan that he, the said A. J. Blethen, would pay and be responsible for all such expenses and disbursements, and that he would promptly and fully and without delay pay the same from time to time as the same accrued, arose, or were incurred by the said Catherine D. Stirtan for the purposes aforesaid." This is followed by allegations that Catherine D. Stirtan, pursuant to this contract, hired an office, held public meetings, hired canvassers, and secured sufficient names to petitions to procure a recall election in the case of each of the officers named; that on June 1, 1912, defendant caused to be filed a number of the names with the city clerk, withholding others, and subsequently withdrew the petitions and abandoned the movement; that defendant paid the expenses as they accrued without objection, down to a short time prior to the discontinuance of the movement; that a short time before such discontinuance, the defendant ceased paying the expenses, and there accumulated salaries of canvassers and other necessary expenses in the amount of \$1,500; that this fact was reported to the defendant, who directed Mrs. Stirtan to pay the same, and promised to reimburse her within a short time; that she paid these expenses in the sum of \$1,500, by reason whereof the defendant became and is liable to the plaintiffs in that sum.

Two questions are presented by this appeal: (1) Was the contract in question contrary to public policy? (2) Assuming that it was, can the plaintiffs recover from the defendant money expended in the prosecution of the enterprise?

1. The appellant insists that the contract pleaded violated no sound canon of public policy. It is argued, in substance, that a recall election is not contrary to public policy; that it is a means by which society may protect itself against undesir-

able public servants; that to hire an office, hold public meetings, circulate petitions among the voters, and solicit signatures is within the express or implied authority conferred by the law relating to recall elections; that these things are incidental to popular government; that it therefore follows that any means by which the public may recall undesirable officers is wholesome and for the public good. Stripped to its essentials, the naked thought which underlies the argument is just this: That because a recall is not contrary to public policy, a contract secretly to finance a movement to create a factitious sentiment in favor of recall, without divulging the true motives or the real personality behind the movement, is to be commended as in furtherance of the public good, rather than condemned as against public policy. It seems to us that a policy which would justify such a contract, even on a plea of a good motive, would open wide the door to secret contracts of the same character in furtherance of the most sinister and corrupt purposes, since the true motive on either side would be difficult to prove, and, if corrupt, would hardly be announced from the housetops. The insidious tendency of the agreement is made manifest by the very fact that public knowledge of its existence would tend largely to defeat its purpose. The very secrecy enjoined by the contract should be held a conclusive badge of corrupt motive. The recall, as an instrument of popular government, is of recent application in this country, and we are cited to no decisions passing upon the validity of such a contract as that here involved. An analogy, however, is found in contracts to influence elections and contracts to influence legislation. The purpose and genesis of the recall make this analogy plain. It cannot be questioned that the recall and its usual concomitant, the referendum, are wholesome means to the preservation of responsible popular government. They embody a principle as old as the English Constitution. The frequent appeals of the English ministry from a vote of Parliament to a vote of the people on a given measure, requiring the members of Parliament to stand for re-election upon that measure as an issue, the continuance or resignation of the ministry being dependent upon the result, is obviously but a recall as to the personnel of the government and a referendum as to the given measure. It is patent, therefore, that every secret compact looking to the advancement of private personal ends by the financing of a recall is just as inimical to a sound public policy as it existed at the common law as would be the

same course of conduct when applied to an election itself, or as would be a contract to influence legislation by a secretly paid lobby. That contracts to influence elections or appointments to public office are void as contrary to public policy is sustained by ample authority. In *Keating v. Hyde*, 23 Mo. App. 555, a contract intended to influence a primary, though not falling within the express prohibition of any statute, was held void because contrary to public policy. The court said: "There is a clear distinction between the purchase of services to be devoted only to an advertising of the fact that one is, or desires to be, a candidate, and the purchase of service to be employed in advocating his peculiar merits and eligibility, so as to influence the choice of the voter." See also *Whitman v. Ewin*, — Tenn. —, 39 S. W. 742; *Nichols v. Mudgett*, 32 Vt. 546. There can be no sound distinction between a contract intended to influence the election of an official and a contract intended to influence the recall of an official after he is elected. The employment of hired canvassers to bring about either result has an inevitable tendency to corrupt the electorate.

Contracts to influence legislation have been almost universally condemned. In *Sussman v. Porter* (C. C.) 137 Fed. 161, the plaintiff declared upon a contract whereby his assignor had undertaken to obtain from municipal authorities a franchise for a trolley line and the consent of property owners thereto, and pay the necessary expenses in connection therewith. The court held the contract void as contravening public policy, and denied a recovery. After citing many authorities sustaining its judgment, the court said: "Cases to the above effect might be cited indefinitely, and very many are cited in the cases already referred to. It is clearly deducible from them that a contract to procure or influence legislation is bad, whatever the intention of the parties may have been, and whether the influences actually exerted thereunder were honest or corrupt. It is the temptation to corruption and dishonesty which the courts will not tolerate. It will be noticed, too, that some of the cases cited lay great stress upon the fact that a contingent fee is dependent upon the success of the service. The rule of law in all these and similar cases is that the court will not aid either party to the contract, but each will be left in the position in which he has placed himself. Judicial aid will not be given to either party to a corrupt agreement. This is not because the court desires to favor either party, but because the agreement is corrupt

and tainted." See also *Sweeney v. McLeod*, 15 Or. 330, 15 Pac. 275; *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 14 L. ed. 953; *Crichfield v. Bermudez Asphalt Paving Co.* 174 Ill. 466, 42 L.R.A. 347, 51 N. E. 552; *Richardson v. Scott's Bluff County*, 59 Neb. 400, 48 L.R.A. 294, 80 Am. St. Rep. 682, 81 N. W. 309, *Hazleton v. Sheckells*, 202 U. S. 71, 50 L. ed. 939, 26 Sup. Ct. Rep. 567, 6 Ann. Cas. 217.

Here, again, there can be no sound distinction between a secret contract to influence legislation and a secret contract to influence the removal of the noncompliant legislators. The tendency of both is to corrupt the public service. The recall was intended to place in the hands of the people an orderly means of combating just such secret and sinister influences, not to cloak a new avenue for their exercise. To hold valid a secret contract to foment a recall through hired canvassers would be to place in the hands of powerful private interests, with unlimited means, a weapon for secret intimidation and covert attack against executive and legislative officers sufficient to deter upright and self-respecting men from accepting the public trust. The legislature of this state, in 1913, doubtless moved by these considerations, has declared just such practices as those contemplated by the contract here in question gross misdemeanors. Laws of Washington 1913, chap. 146, § 16. This legislation merely declares criminal those practices which the common law has always recognized as contrary to public policy. While the parties to this contract and their hired canvassers are not subject to punishment as for a crime, by reason of the lateness of the act, the contract itself is none the less subject to the ban of the common law. We hold this contract contrary to public policy, void, and unenforceable.

2. The appellants claim that, though the contract was contrary to public policy, the agent should be permitted to recover the money which she advanced in its prosecution. They rely upon the familiar rule that where the agreement has been fully executed, the agent or partner who has received the proceeds or profits of an illegal business or transaction will not be permitted to defend against an action of the principal or other partner for money had and received, upon the ground of such illegality. In such a case, the right of recovery is referable to an independent implied contract of deposit. *McDonald v. Lund*, 13 Wash. 412, 43 Pac. 348; *De Leon v. Trevino*, 49 Tex. 88, 30 Am. Rep. 101; *Pfeuffer v. Maltby*, 54 Tex. 454, 38 Am. Rep. 631; *Planters' Bank v. Union Bank*,

16 Wall. 483, 21 L. ed. 473; Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732.

There is, however, another rule equally familiar, the complement of that just stated. It is this: Where a plaintiff, to make a case, must rely upon the illegal contract itself, he cannot recover. The law will aid neither party to an illegal agreement, but will leave the parties where it finds them. Reed v. Johnson, 27 Wash. 42, 57 L.R.A. 404, 67 Pac. 381; Hoffman v. McMullen, 45 L.R.A. 410, 28 C. C. A. 178, 48 U. S. App. 596, 83 Fed. 372; Smith v. David B. Crockett Co. 85 Conn. 282, 39 L.R.A.(N.S.) 1148, 82 Atl. 569; Samuels v. Oliver, 130 Ill. 73, 22 N. E. 499; Gibbs v. Consolidated Gas Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553.

Typical of the authorities cited by the appellants in this connection is the decision of this court in McDonald v. Lund, 13 Wash. 412, 43 Pac. 348. In that case, both of the rules above stated are recognized, and the principles upon which they rest are clearly announced. There, the plaintiff and defendant had been partners in certain gambling games, each contributing one half of the money invested. When they had ceased operations, it was understood and agreed between the parties that the plaintiff was entitled to certain moneys, the proceeds of the games, in the defendant's hands, but which he refused to pay to the plaintiff. The court permitted a recovery on the ground that the plaintiff was not compelled to rely upon the illegal contract of partnership, but was entitled to recover upon the admission that the defendant held money belonging to the plaintiff, which raised an implied contract to pay it. The court said: "Again, this is not a case to enforce any illegal contract, but it is to assert title to money which was accumulated under such illegal contract. If the plaintiff here had brought an action against the defendant for not complying with his contract in running these games, of course it would fall within the rule claimed by the respondent, but here the real contract on which he sues, it seems to us, is a contract of deposit. Under the stipulated facts the illegal transaction which these parties had agreed to pursue had ended. The partnership for that purpose was no longer in existence. The business was no longer being carried on. A determination of the amount of money due from the defendant to the plaintiff had been reached. It was agreed that the defendant owed the plaintiff the sum of money sued for, and that he was entitled to that amount, and the plaintiff's portion was simply left with the defendant on deposit. . . . This distinction, 51 L.R.A.(N.S.)

viz., the difference between suing on, or trying to enforce, the illegal contract itself, and a suit to recover money which is admitted to be due, although it may have been obtained by prosecuting an illegal enterprise,—has always been respected by the courts from its announcement in the cases we have above cited up to the present time. . . . In the case at bar it is conceded by the statement of facts that the defendant has in hand a thing of value that belongs to plaintiff. It certainly does not belong to defendant, and he has no right, either moral or legal, to keep it. If the question were between the plaintiff and the parties from whom this money was obtained, of course another principle would intervene, but to allow a depository of a person's money to refuse to turn it over to him because the owner of the money had violated some law in obtaining it would be little short of encouraging robbery."

The distinction between suits in which reliance must be placed upon the original illegal contract and a suit for money had and received on an independent implied contract runs through all of the decisions.

In Reed v. Johnson, 27 Wash. 42, 57 L.R.A. 404, 67 Pac. 381, the plaintiff sued to enforce specific performance of a contract held violative of public policy. The court denied relief on the ground that, the contract being contrary to public policy, the court would refuse either party its aid, quoting from the supreme court of Georgia in Howell v. Fountain, 3 Ga. 176, 46 Am. Dec. 415, as follows: "The law leaves the parties to such a contract where it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply-practised fraud, which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from one to the other, or to equalize the benefits or burdens which may have resulted by the violation of every principle of morals and of laws."

In Hoffman v. McMullen, 45 L.R.A. 410, 28 C. C. A. 178, 48 U. S. App. 596, 83 Fed. 372, the plaintiff and the defendant had entered into a contract to stifle competition in bidding for public work, the agreement being that if either should get the contract, the profits and losses should be divided equally between them. The defendant secured the contract. The plaintiff sued for a division of the net profits. The court held that he could not recover because he could not make a case without reliance upon the illegal agreement, using

the following language: "The distinction between the cases where a recovery can be had and the cases where a recovery cannot be had of money connected with illegal transactions, to be gleaned from all the authorities, is substantially this: That wherever the party seeking to recover is obliged to make out his case by showing the illegal contract or transaction, or through the medium of the illegal contract or transaction, or when it appears that he was privy to the original illegal contract or transaction, then he is not entitled to recover any advance made by him in connection with that contract, or money due him as profits derived from the contract; but that when the advances have been made upon a new contract, remotely connected with the original illegal contract or transaction, and the title or right of the party to recover is not dependent upon that contract, and his case may be proved without reference to it, then he is entitled to recover." In *Smith v. David B. Crockett Co.* 85 Conn. 282, 39 L.R.A.(N.S.) 1148, 82 Atl. 569, it was held that a contract providing that an employer would reimburse a salesman for money paid as bonuses or bribes to purchasing agents to secure contracts of sale was illegal and opposed to public policy, and that the salesman could not recover from his employer any sums paid out by him for such purpose. In *Samuels v. Oliver*, 130 Ill. 73, 22 N. E. 499, the supreme court of Illinois held that an agent who knowingly aids his principal in effecting an unlawful combination cannot recover from his principal advances made for such illegal purposes.

Applying these principles to the case before us, it is plain that the plaintiffs cannot recover. The money which Mrs. Stirtan advanced was for the purpose of hiring canvassers to circulate recall petitions. This purpose, as we have seen, was contrary to public policy. The money she advanced was for an illegal purpose, under the admitted facts. The contract between Mrs. Stirtan and the respondent has never passed beyond the executory stage. The appellants allege that Mrs. Stirtan has fully performed her part of the contract, namely, the undertaking to organize the recall movement and secure the necessary signatures, but they also allege that the respondent has not performed his part, namely, the undertaking to pay the necessary expenses of the recall movement. The appellants, in their effort to recover the money which Mrs. Stirtan has paid out in furtherance of the illegal agreement, were compelled to plead, and did plead, 51 L.R.A.(N.S.)

as ground of their action, the original agreement between Mrs. Stirtan and the respondent. Without that agreement, there would be no consideration whatever, illegal or otherwise, for a promise on the respondent's part to repay the money so advanced. Without pleading the original agreement, the payment by Mrs. Stirtan to the canvassers would conclusively appear to be a payment of her own debt, a discharge of her own undertaking to her own employees. Manifestly, in order to connect the respondent with the transaction in any manner, she was compelled to plead the original illegal agreement between herself and the respondent.

The case is clearly distinguished from *McDonald v. Lund*, supra, upon which the appellants mainly rely. The money sought to be recovered here was not fruits of the illegal venture, nor profits of a closed illegal transaction. It was money expended in furtherance of the illegal contract itself. The situation of Mrs. Stirtan is precisely the same as that of the plaintiff in the case of *Smith v. David B. Crockett Co.* supra. She was the agent of the respondent under the contract pleaded. She claims that she, as such agent, advanced money which the respondent had agreed to pay in his undertaking to finance the recall. As said in that case: "It is contrary to public policy. It is illegal, and the time spent and the expense incurred by the plaintiff in so accomplishing or attempting to so accomplish sales were as much a part of the illegal transaction as was the actual payment of the bonus itself. If such was the real character of this provision, the plaintiff could neither recover for services rendered, nor for expenses incurred, nor for bonuses paid in making the sales." As said in *Samuels v. Oliver*, supra: "To say, in such a case, that the agent employed to aid his principal in an illegal enterprise cannot recover of his principal for services or money advanced in execution of the illegal purpose, or under his employment, is a correct statement of the law; but the like rule is equally applicable to the principal as to the agent. . . . When the employment of an agent relates to the performance of an immoral or illegal act, it is said by Wharton in his work on Agency, § 25, neither party can make the contract the basis of a suit against the other. Advances for illegal purposes fall within the same rule, and cannot be recovered by the principal of the agent, or the agent of the principal. Id. § 319."

The contract here involved being contrary to public policy, none of its provisions

will be enforced in favor of either party. We must leave the parties where we find them.

The judgment is affirmed.

Crow, Ch. J., and Chadwick, Main, and Gose, JJ., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

H. A. REASNOR, Plff. in Err.,
v.

WATTS, RITTER, & COMPANY.

(— W. Va. —, 80 S. E. 839.)

Master and servant — contract of employment — duration.

1. An employment upon a monthly or annual salary, if no definite period is otherwise stated or proved for its continuance, is presumed to be a hiring at will, which either

Headnotes by LYNCH, J.

Note. — Duration of contract of hiring which specifies no term, but fixes compensation at a certain amount per day, week, month, or year.

This note is a continuation of one on the same subject appended to Warden v. Hinds, 25 L.R.A.(N.S.) 529.

The recent cases do not show such a conflict as appears in the former note. The tendency is apparently toward the rule that a hiring at so much per year, month, or week is, in absence of other circumstances controlling its duration, an indefinite hiring only, terminable at the will of either party.

Thus, it is held in Watson v. Gugino, 204 N. Y. 535, 39 L.R.A.(N.S.) 1090, 98 N. E. 19, Ann. Cas. 1913D, 215, reversing 140 App. Div. 33, 124 N. Y. Supp. 321, that a contract specifying a weekly salary, without stipulating a definite period of service, is a hiring at will, and that the master may discharge the servant at any time.

So, where an employee's salary is calculated on a semi-monthly basis, the hiring is at will, and he may be discharged at any time. Gibney v. National Jewelers' Bd. of Trade, 144 N. Y. Supp. 321.

And "a hiring at the rate of so much per year, no time being specified, is an indefinite hiring; and such a hiring is a hiring at will, and may be terminated at any time by either party." Feiber v. Home Silk Mills, 143 N. Y. Supp. 1014.

It is likewise held in Alger v. New York Post Graduate Medical School & Hospital, 140 N. Y. Supp. 394, that a stipulation as to a monthly payment, in the absence of the fixing of a definite period of service, constitutes only a hiring at will.

The acceptance of a proposition for employment at a specified rate per year does not constitute an employment for a year, 51 L.R.A.(N.S.)

party may at any time determine at his pleasure without liability for breach of contract.

Evidence — burden of proof — duration of hiring.

2. The burden of proving that such hiring was obligatory for a year rests on the party who seeks to establish that the contract covered that period.

Master and servant — termination of relation.

3. Unless the understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring, and is determinable at the will of either party.

(December 9, 1913.)

ERROR to the Circuit Court for Cabell County to review an order granting a new trial after verdict in plaintiff's favor in an action brought to recover certain balances claimed to be due him under a contract of employment with defendant. Reversed.

The facts are stated in the opinion.

but merely at will. Cuppy v. Stollwerck Bros. 158 App. Div. 628, 143 N. Y. Supp. 967.

Where the testimony of an employee is that "I told him (the employer) that the least I would go for was \$1,500 a year," such evidence can be construed only to establish an employment at will at the specified rate. Chadwick v. Morris, 170 Ill. App. 569.

A hiring at a thousand dollars per year, without specifying the term of the employment, is a hiring at will, and may be terminated by either party at any time. Brookfield v. Drury College, 139 Mo. App. 339, 123 S. W. 86.

"That wages are payable at a stipulated period raises the presumption that the hiring is for such period," by the terms of a Georgia statute.

Under this statute it was held in Webb v. McCranie, 12 Ga. App. 269, 77 S. E. 175, that the fact that wages are payable weekly raises the presumption that the contract of hiring is by the week.

And in Phillips Lumber Co. v. Smith, 7 Ga. App. 222, 66 S. E. 623, it is held: "That wages are paid at a stipulated period raises the presumption that the hiring is for such period, if nothing in the contract shows that the hiring was for a longer or shorter period."

Mason v. New York Produce Exch. 127 App. Div. 282, 111 N. Y. Supp. 163, holding that a contract of employment "at a salary of \$2,500 for the first year, and if your services prove satisfactory, . . . your remuneration for the second year and thereafter will be \$3,000 per annum," constituted a hiring from year to year, which is cited in the note to Warden v. Hinds, is affirmed without opinion in 196 N. Y. 548, 89 N. E. 1104. E. L. D.

Mr. George S. Wallace, for plaintiff in error:

The employment of the plaintiff was a general or indefinite hiring, and not a contract or employment by the year.

Wood, Mast. & S. p. 272; Hotchkiss v. Godkin, 63 App. Div. 468, 71 N. Y. Supp. 629; Copp v. Colorado Coal & I. Co. 20 Misc. 702, 46 N. Y. Supp. 542; Edwards v. Seaboard & R. R. Co. 121 N. C. 490, 28 S. E. 127; Chadwick v. Morris, 170 Ill. App. 569.

The form of contract between plaintiff and defendant being a question of fact, upon which there was a conflict of evidence, and having been submitted to a jury, the court was not warranted in setting aside the verdict of the jury.

Coalmer v. Barrett, 61 W. Va. 237, 56 S. E. 385; Miller Supply Co. v. Crane, 61 W. Va. 658, 57 S. E. 268.

Messrs. Holt, Duncan, & Holt for defendant in error.

Lynch, J., delivered the opinion of the court:

Upon the general issue in assumpsit, the jury found in favor of plaintiff \$576.83, claimed by him as a balance due under a contract of employment. The court, on motion of defendant, set aside the verdict as "contrary to the law and the evidence," and awarded a new trial. By his writ of error, plaintiff asks reversal of this ruling and a judgment here upon the verdict. His contention is that the contract proved is a general or indefinite hiring, terminable at will; that, upon voluntary withdrawal therefrom, he is entitled to the compensation then earned, represented by the sum sued for. Defendant, on the other hand, claims the employment was for the definite period of one year, and that, having quit before full performance, plaintiff cannot recover on the contract or on a *quantum meruit*. The terms of the contract, except its duration, are clearly proven. In the latter part of 1907, plaintiff entered the employment of defendant, a wholesale dealer in dry goods and notions, as traveling salesman, upon an agreement for a monthly salary and expenses, and the further compensation of 5 per cent commissions in excess of salary and expenses, on goods sold by him, the excess to be ascertained and paid on settlements made at the end of each year. No definite duration was fixed for the employment. Plaintiff worked until December, 1908, when he was paid the commissions due for the year, and a new contract made with the same terms, except that the monthly salary was increased and new territory added. Watts, president of the company, says the contract was "for

one year," but he does not further indicate there was a mutual agreement to that effect. Plaintiff continued to work under this contract until the close of 1909, except that his commissions were reduced by Watts in February from 5 to 3 per cent. Upon the annual settlement at the close of 1909, no commissions were due plaintiff, his commissions being \$10 less than the aggregate of his salary and expenses for that year. Both he and Watts say no new arrangement was made for 1910; that the agreement for 1909 continued without change. During the employment defendant rendered monthly statements to plaintiff, showing both the sums paid him as salary and expenses and the amount of goods sold by him during the preceding month. Plaintiff continued in the employment of the company until May, 1910, when, having become interested as stockholder in another similar company, he notified Watts of his intention to discontinue his previous engagements, and, without objection by defendant, quit its service. He had then earned in that year \$576.83 in commissions in excess of salary and expenses. To recover this balance, he instituted this action, having already received all salary and expenses then due. These are the facts from which we must determine whether the employment was for a year or at will. This is the crucial test of plaintiff's right to recovery. No proof defines the duration of the employment. It is general, not definite. Being of such indefinite character, it is necessary to ascertain by construction the extent of the engagement.

The authorities, while not wholly in accord, generally state the doctrine applicable to such cases to be that an employment upon a weekly, monthly, or annual salary, if no definite period is otherwise stated or proved for its continuance, is presumed to be a hiring at will. Many authorities so hold. Edwards v. Seaboard & R. R. Co. 121 N. C. 490, 28 S. E. 137; Currier v. W. M. Ritter Lumber Co. 150 N. C. 604, 134 Am. St. Rep. 955, 64 S. E. 763; Finger v. Koch & S. Brewing Co. 13 Mo. App. 310; Evans v. St. Louis, I. M. & S. R. Co. 24 Mo. App. 114; Hotchkiss v. Godkin, 63 App. Div. 468, 71 N. Y. Supp. 629; Speeder Cycle Co. v. Teefer, 18 Ind. App. 476, 48 N. E. 595; Bentley v. Smith, 3 Ga. App. 242, 59 S. E. 720; Prentiss v. Ledyard, 28 Wis. 131; Haney v. Caldwell, 35 Ark. 156; Booth v. National India Rubber Co. 19 R. I. 696, 36 Atl. 714; Orr v. Ward, 73 Ill. 318. Labatt on Master & Servant, vol. 1, § 159, says: "The doctrine applied by the great majority of the courts which have so far [1913] expressed an opinion on the subject consists essentially in a complete repudiation of the presump-

tion that a general or indefinite hiring is a hiring for a year, and the substitution of another presumption, viz., that such a hiring is a hiring at will. . . . Under this doctrine, the burden of proving that such a hiring was obligatory for a year rests upon the party who seeks to establish that the contract covered that period." So, *Martin v. New York L. Ins. Co.* 148 N. Y. 117, 42 N. E. 416, says that "a hiring at so much a year, no time being specified, is an indefinite hiring; and such a hiring is a hiring at will, and may be terminated at any time by either party." Wood on Master & Servant, § 134, states the doctrine even stronger,—that "a hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve; . . . [and] in all such cases the contract may be put an end to by either party at any time, unless the time is fixed; and a recovery had, at the rate fixed, for the services actually rendered." *Greer v. Arlington Mills Mfg. Co.* 1 Penn. (Del.) 531, 43 Atl. 609, though with greater caution, declares that "a hiring at a certain sum a year, no time being specified, and unaccompanied by any facts or circumstances in proof from which a different intent may be inferred, and when the testimony as to the contract is not conflicting, is an employment for an indefinite period, and not for a year, and is determinable at any time at the option of either party thereto."

Application of this test does not lead to the conclusion that, upon the facts disclosed here, the contract required plaintiff to serve during the year 1910. Defendant changed its terms in February, 1909, from a 5 to a 3 per cent commission, conceding to its salesmen the option to quit or further continue in its employment. It paid the salary and expenses, except commissions, at the end of each month, and commissions at the end of each year,—in case of the latter, only because until that time it could not ascertain whether the amount due to each salesman exceeded his salary and expenses. This postponement was thus a necessary convenience, solely for the purpose of an annual adjustment of accounts, and not an essential ingredient of the contract of employment.

For defendant, it is urged that plaintiff's testimony shows an annual employment. We do not reach that conclusion. His statement that the same arrangement was made or modified for the next succeeding year does not mean that when so made or modified it required his service for an entire year. Nor is defendant's testimony 51 L.R.A. (N.S.)

on this subject in any degree convincing. It is true he says that at the end of each year the contract was renewed for the succeeding year, and was to cover a year. But for 1909 it did not thus continue, because altered, as we have seen, in February of that year. He then construed it as a contract at will, and therefore subject to alteration or revocation. Again, it is not sufficient for defendant to state only that the contract was for a year, and that he did not contract with his salesmen for a shorter period, without more. He must, in view of the authorities cited, also show that plaintiff so understood and agreed to the contract as one requiring service during such period. "Unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring, and is determinable at the will of either party." Wood, Mast. & S. § 134; *Kansas P. R. Co. v. Robertson*, 3 Colo. 142, 146; *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 557, 11 Atl. 176; *Prentiss v. Ledyard*, 28 Wis. 131; *Orr v. Ward*, 73 Ill. 318; *Haney v. Caldwell*, 35 Ark. 156. Here there is no such proof. To constitute an agreement, the minds of the parties must concur, or meet upon its terms; otherwise there is no agreement.

Besides, it was a question for the jury to say, by its verdict, under the instructions clearly presenting the theories of the parties, whether the contract required a year's service, which inquiry it thereby answered in the negative. Both by reason and authority, the burden to show a definite term of employment rested with defendant, as the contract did not expressly state the term. The court erred in disturbing the finding of the jury.

Our conclusion is that the contract proved was for an indefinite term, and therefore revocable at the will of either party. Being of that opinion, we reverse the judgment of the trial court, overrule defendant's motion for a new trial, and enter judgment on the verdict of the jury.

Petition for rehearing denied February 12, 1914.

FLORIDA SUPREME COURT.

M. G. MUNN et al., Appts.,

v.

W. L. FINGER.

(— Fla. —, 64 So. 271.)

Municipal corporation — power of legislature to establish commission government.

The state Constitution expressly confers

Headnote by WHITFIELD, J.

upon the legislature authority to prescribe the powers of a municipality, and to alter or amend the same at any time; and a statutory enactment which in effect is that, upon stated affirmative favorable action taken by the city council and the electors of a municipality, and the due election of commissioners, a commission form of government for the municipality "shall become operative," is not unconstitutional, and such enactment is not void for uncertainty, since the intent is that the designated commissioners shall exercise the authority theretofore vested in the mayor and city council, the only elective officers under the charter acts.

(January 9, 1914.)

A PPEAL by defendants from a decree of the Circuit Court for Polk County enjoining the election of a mayor and councilmen in the city of Lakeland. Affirmed.

The facts are stated in the opinion.

Mr. Kelsey Blanton, for appellants:

A municipality can exercise only such authority as is expressly conferred upon it

by the legislature, or such as is necessarily implied. The existence of authority to act cannot be assumed, and in cases where there is reasonable doubt as to the existence of authority, such doubt is resolved against the municipality.

Florida C. & P. R. Co. v. Ocala Street & Suburban R. Co. 39 Fla. 306, 22 So. 692; State ex rel. Worley v. Lewis, 55 Fla. 570, 46 So. 630; State ex rel. Ellis v. Tampa Waterworks Co. 56 Fla. 858, 19 L.R.A. (N.S.) 183, 47 So. 358; Hardee v. Brown, 56 Fla. 377, 47 So. 834; Porter v. Vinzant, 49 Fla. 213, 111 Am. St. Rep. 93, 38 So. 607; Jacksonville Electric Light Co. v. Jacksonville, 36 Fla. 229, 30 L.R.A. 540, 51 Am. St. Rep. 24, 18 So. 677; Galloway v. Tavares, 37 Fla. 58, 19 So. 170.

A municipal office can be created only by the legislature, or by the municipality when expressly authorized. A city has no power to create an office other than that expressly provided for in the Constitution, law, or charter.

Note. — *Constitutionality of commission form of government for municipalities.*

The earlier cases on the question are discussed in the note to State ex rel. Hunt v. Tausick, 35 L.R.A. (N.S.) 802, and that to State ex rel. Simpson v. Mankato, 41 L.R.A. (N.S.) 111.

Since the latter note the power of the legislature to establish a commission form of government for municipalities of the state has again been judicially declared in Jackson v. State, 102 Miss. 663, 59 So. 873.

Such a form of government is not a denial of representative government. Ibid.

Nor is it invalid as being a delegation of legislative power. Ibid.

The guaranty by the Federal Constitution of a republican form of government does not extend to municipal government, and therefore is not violated by a city charter establishing the commission form of government, and subjecting the commissioners to the control of the initiative, referendum, and recall. Walker v. Spokane, 62 Wash. 312, 113 Pac. 775, Ann. Cas. 1912C, 994.

Likewise, the declaration in § 42 of the Constitution of Alabama, that the powers of government shall be divided into three distinct departments, *viz.*, the legislative, executive, and judicial, each of which shall be confided to a separate body, was held not applicable to municipal government, in State ex rel. Wilkinson v. Lane, — Ala. —, 62 So. 31.

The abolishing of certain offices by the establishment of the commission form of government for municipalities does not render the act so establishing this form of government unconstitutional. Jackson v. State, *supra*.

While the following points do not relate to the constitutionality of the commission 51 L.R.A. (N.S.)

form of government as such, they bear on various provisions contained in commission government acts, and are therefore closely allied thereto; but on these points this note and those preceding do not purport to be exhaustive.

The provision in the Mississippi commission government act, that candidates for office shall be placed on the official ballot by the nomination of a party primary, does not restrict the constitutional right of voters to cast their ballots for whomsoever they please, since the law refers only to what should be printed on the ballot, and does not prevent the elector from writing the name of another candidate thereon. Ibid.

A commission charter which prohibited the designation of the political party or the affiliation of the candidates upon the ballot was held not to be an invasion of the rights of any political party, in State ex rel. Duniway v. Portland, 65 Or. 273, 133 Pac. 62.

The fact that the governor of the state is given the power by an act creating a commission form of municipal government, to appoint the first three members of the board of commissioners, does not render the act unconstitutional. State ex rel. Wilkinson v. Lane, *supra*.

The Wisconsin law providing for a commission form of government for cities was held not obnoxious to the Constitution because it did not apply to cities of the first class, in State ex rel. Bloomer v. Canavan, 155 Wis. 398, 145 N. W. 44.

The method of adopting an amendment changing the form of municipal government to the commission form of government was sustained in People ex rel. Moore v. Perkins, — Colo. —, 137 Pac. 55, but the constitutionality of this form of government was not raised. W. A. E.

Brown v. Blake, 46 Conn. 549; *State v. Hillard*, 42 Conn. 168; *Lowery v. Lexington*, 116 Ky. 157, 75 S. W. 202; *State, Anderson, Prosecutor, v. Camden*, 58 N. J. L. 515, 33 Atl. 846; *Hoboken v. Harrison*, 30 N. J. L. 73.

The sole power to make law is lodged in the legislature, with competency, however, to organize it by adopting an enactment complete in itself, and prescribing the conditions under which it shall be vitalized, as by a vote of the people at large, or those of a particular district, according to circumstances.

State ex rel. Mueller v. Thompson, 43 L.R.A.(N.S.) 339 note, 149 Wis. 488, 137 N. W. 20, Ann. Cas. 1913C, 774; *Elliott v. Detroit*, 121 Mich. 611, 84 N. W. 820; *State, Dexheimer, Prosecutor, v. Orange*, 60 N. J. L. 111, 36 Atl. 706; *State ex rel. Hunt v. Tausick*, 35 L.R.A.(N.S.) 802, and note, 64 Wash. 69, 116 Pac. 651; *State ex rel. Simpson v. Mankato*, 41 L.R.A.(N.S.) 111, and note, 117 Minn. 458, 136 N. W. 264; *State v. Atlantic Coast Line R. Co.* 56 Fla. 617, 32 L.R.A.(N.S.) 639, 47 So. 969.

As a complete system of municipal government, § 70 is defective and void.

State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 266, 77 Am. St. Rep. 765, 55 S. W. 627; *McGuire v. District of Columbia*, 24 App. D. C. 22, 65 L.R.A. 430; *Augustine v. State*, 41 Tex. Crim. Rep. 59, 96 Am. St. Rep. 765, 52 S. W. 77.

Mr. S. W. Lawler also for appellants.

Mr. Epps Tucker, Jr., for appellee.

Whitfield, J., delivered the opinion of the court:

This appeal is from a decree enjoining the election of a mayor and four councilmen in the city of Lakeland, Florida. The charter of the city (chapter 6363, Acts of 1911) provides elaborately for a municipal government by the usual officers and methods, and also contains the following: "The city of Lakeland is hereby authorized at any future time to establish a commission form of government and to elect its commissioners by popular vote, as it may determine. Such commission form of government shall be established in the following manner, to wit: Upon a two-thirds vote of the city council to adopt such commission form of government, the city council shall make a code of laws governing the city, which may be enforced by three commissioners. The said code shall be published for a period of thirty days in a newspaper published in the city. An election shall be called by the mayor and the city council for the purpose of submitting the question of ratification of such commission form of government to the voters of the city, which election shall be 51 L.R.A.(N.S.)

held not less than thirty days from the adoption by the city council." Chapter 6711, Acts of 1913, amends § 70 of the charter act, as follows:

"The city of Lakeland is hereby authorized at any future time to establish a commission form of government; to elect (5) commissioners by popular vote, one to be elected from each ward of the city of Lakeland, and one at large, to serve for two years each from the date of their qualification, or until their successors are elected and qualified.

"Such commission form of government shall be established in the following manner, to wit: Upon a two-thirds vote of the city council to adopt such commission form of government, an election shall be called by the mayor and the city council for the purpose of submitting the question of ratification or rejection of the commission form of government to the voters of the city, which election shall be held not less than thirty days from the adoption by the city council of such commission form of government.

"The provisions of said commission form of government shall include the powers commonly known as the initiative, the referendum, and the recall, same to be submitted to the voters for their acceptance or rejection.

"If the majority of the qualified electors voting at said election shall vote in favor of the commission form of government, the same shall become operative and of full force and effect as a method of government for the said city.

"In the event said commission form of government should be ratified, the commissioners so chosen shall have the right to employ a municipal manager to have complete control of the business interests of the said city as a business manager, subject always to the direction, supervision, and control of the said commissioners, at a salary fixed by said commissioners, and subject to be removed by them at their pleasure, with or without cause."

In the decree of the court is the following finding: "That the city of Lakeland has the power, under chapter 6711, Acts of Legislature of the State of Florida for 1913, to establish a commission form of government; that the election held on the 8th day of October, 1913, for the purpose of ratification or rejection of the commission government was regular, and that the five commissioners were duly and regularly elected as a commission for the government of the city of Lakeland, in accordance with § 6 of said charter. The court further finds that it was the intention of the legislature to vest the commission with power and au-

thority to carry on the municipal government and affairs, and while the act fails to completely define the details of the government, yet it submits to the vote of the people for ratification 'a method of government' called commission form."

At an election called by a two-thirds vote of the city council for that purpose, a majority of the electors duly voted for a commission form of government.

It is contended in effect that the quoted amendment of the charter by the legislature of 1913 is inoperative and void, if it is designed that the commission form of government is to supersede the other and usual form provided for in the charter act, for the reason, it is argued, that there is in the statute or in this state no prescribed commission form of municipal government, and the power to establish a commission form of government is legislative, and cannot lawfully be delegated to the city itself.

The Constitution provides (§ 24, article 3): "The legislature shall establish a uniform system of . . . municipal government, which shall be applicable except in cases where local or special laws are provided by the legislature that may be inconsistent therewith." Also in § 8, art. 8: "The legislature shall have power to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time."

Under these sections of the Constitution the legislature may, by law, confer upon a municipality any powers relating to its government that are not in conflict with other organic provisions; and a grant by the legislature to a municipality of the right to submit to its electors for adoption a commission form of government, upon which adoption the statute by its own terms makes such commission form operative, does not appear, beyond a reasonable doubt, to conflict with any provision or principle of the state or Federal Constitution.

The above-quoted organic provisions of this state contemplate varying powers for different municipalities, and expressly authorize the legislature to prescribe the powers of municipalities as varying exigencies may demand; and such express legislative authority carries with it a discretion in conferring powers upon a municipality that has no limitations in the Constitution affecting this case. The implied principle that the general lawmaking power of the legislature may not be delegated is not violated in the exercise by the legislature of its authority to prescribe the powers of a municipality. See *Yazoo City v. Lightcap*, 82 Miss. 148, 33 So. 949; 28 Cyc. 241; *Dobbin* 51 L.R.A. (N.S.)

v. San Antonio, 2 Posey Unrep. Cas. (Tex.) 708.

The above-stated principle with reference to municipalities under our present Constitution was recognized in *State v. Atlantic Coast Line R. Co.* 56 Fla. 617, 32 L.R.A. (N.S.) 639, 47 So. 969, where it was held that the legislature could not lawfully delegate to the railroad commissioners power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but the legislature may enact a law complete in itself, and authorize designated officials, within definite limitations, to exercise discretionary authority in effectuating the law. In *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 43 L.R.A. (N.S.) 339, 137 N. W. 20, Ann. Cas. 1913C, 774, and other like cases, the state Constitution required a uniform system of municipal government; and authority conferred upon a municipality to change its charter would destroy the organic requirement of uniformity, as well as infringe upon the implied principle applied in such cases forbidding a delegation of legislative power. The only limitations upon the lawmaking power of the legislature are those contained in the Federal and state Constitutions, and it does not clearly appear that the power of the legislature, by law, to confer upon a municipality the authority here contested, is denied or limited by any provision or principle of the organic law.

Section 70 of the charter act of the city of Lakeland, as amended by chapter 6711, Acts of 1913, does not prescribe the details of the commission form of government which it authorizes the city to establish, but it does prescribe definitely the manner of establishing a commission form of government, and provides for the election of five commissioners "by popular vote." It is therein expressly provided that, "if a majority of the qualified electors voting at said election shall vote in favor of the commission form of government, the same shall become operative and of full force and effect as a method of government for the said city." The apparent intent of the law is that when the commission form of government is duly submitted by the designated city authorities, and affirmatively voted for by the electors of the city, then such form of government shall become operative by force of the statute itself, and that the five commissioners, duly elected as the law contemplates, shall exercise the authority theretofore vested in a mayor and city council, which are the usual functions of commissioners under a commission form or plan of government in a municipality. See *McQuillin, Mun. Corp.* §§ 92, 340, 391; *Brown v. Galveston*, 97 Tex. 1, 75 S. W.

488; Fla. Laws, chaps. 6770, 6772. In other words, the question presented on this appeal is in effect the power of the legislature to declare that upon the happening of a certain contingency the power vested in the mayor and city council shall pass to five commissioners. We see no constitutional objections to the exercise by the legislature of such power, and upon the fulfilment of that condition the offices of the mayor and council *ipso facto* cease; a mere change in the agencies to exercise the powers of the municipality becomes effective by legislative direction upon the joint action of the council and the plebiscite. This intent harmonizes with the other provisions of the city charter, under which the elective officers are the mayor and the members of the city council. It does not appear from the pleadings or from the charter statutes that, with the five commissioners appropriately exercising functions of mayor and city council, the commission form of government will not be effective for municipal purposes, under the essential provisions of the charter acts. The decree is affirmed.

Shackleford, Ch. J., and Taylor, Cockrell, and Hocker, JJ., concur.

GEORGIA SUPREME COURT.

ABRAHAM PEEPLES, Plff. in Err.,

v.
T. W. GARRISON & SON.

(141 Ga. 411, 81 S. E. 116.)

Execution — levy — power of officer.

1. A fl. fa. issued upon the foreclosure of a chattel mortgage in the superior court,

Headnotes by BECK, J.

Note. — *Estoppel by giving forthcoming bond to question legality of levy under an execution.*

This note, so far as the question has arisen in proceedings concerning the bond, is supplemental to the note to Oliver v. Warren, 4 L.R.A. (N.S.) 1020. Cases concerning the right to raise the questions of exemption of the property or of the title to it are excluded.

In suits on the bond.

The former note is referred to in O'Neill Mfg. Co. v. Harris, 127 Ga. 640, 56 S. E. 739, where, though judgment against the claimant in a suit on his forthcoming bonds was reversed on other grounds, it was held that the executions were properly admitted in evidence over objections that the same were satisfied by entries of levies, previously made, unexplained, and that the execu-

and directed to "all and singular the sheriffs, or their lawful deputies and coroners of this state," could not be levied, except by one of the officers to whom it was directed. A levy by a constable of a justice's court was invalid, and such a levy should have been dismissed upon a motion made at the trial.

Levy — estoppel to question validity.

2. The fact that the defendant had made a counter affidavit and given a forthcoming bond, in both of which was recited the fact of the levy, did not estop him, at the trial, from raising the issue as to the validity of the levy.

(February 24, 1914.)

ERROR to the Superior Court for Cobb County to review a judgment overruling a motion to dismiss the levy of an execution in proceedings to foreclose a mortgage. Reversed.

The facts are stated in the opinion.

Messrs. Griffin & Johnson for plaintiff in error.

Messrs. Mozley & Moss for defendant in error.

Beck, J., delivered the opinion of the court:

Garrison & Son foreclosed a mortgage for \$160 against Peebles, the plaintiff in error, by affidavit in Cobb superior court, on May 30, 1912; and on the same day the clerk issued a fl. fa. thereon, directed, as the law requires, "to all and singular the sheriffs, or their lawful deputies, and coroners of this state." On June 19, 1912, this fl. fa. was levied on a horse by W. A. Bishop, a constable of a justice's court, acting in this capacity and signing the levy as such constable. On the same day the defendant filed an affidavit of illegality, denying indebtedness on the mortgage; and

tions had not been entered on the general execution docket of the county in which the levy was made (which was not the county of the judgment), and were not properly backed. The court said: "In this suit, the defendant could not question the validity of the levies upon the property for the forthcoming of which it had given the claim bonds. In a case of this character, 'neither the legality of the levy nor the authority of the officer to make it is an issuable fact, these issues being concluded by the judgment in the claim case.' Oliver v. Warren, 124 Ga. 549, 110 Am. St. Rep. 188, 53 S. E. 100. The case just cited is reported in 4 L.R.A. (N.S.) 1020-1023, and in the 'case note' thereto appended it is said: 'It is very generally held that an obligor, whether principal or surety, in a forthcoming bond in which a levy is acknowledged, will not be allowed to attack the levy or the authority of the officer making it, in an

gave bond for the forthcoming of the horse levied on. The horse was thereupon returned to him, and the constable returned the *fi. fa.* with the affidavit and bond to the office of the clerk of the superior court. When the case came on to be tried in that court, the defendant moved the court to dismiss the levy, because the said constable had no authority or jurisdiction under the law to levy the execution, it being a superior court execution directed to the sheriffs, their deputies and coroners. This motion the court overruled, and Peeples excepted.

The court erred in refusing to dismiss the levy. "A levy by an officer without authority of law is no levy at all." *Oliver v. Warren*, 124 Ga. 549, 550, 4 L.R.A. (N.S.) 1020, 110 Am. St. Rep. 188, 53 S. E. 100. But it is insisted that the defendant is estopped from denying the legality of the levy, having made an affidavit

of illegality, and given a bond in which the factum of the levy is recited. "But the estoppel does not extend to the validity of the process, nor to the authority of the officer to make the levy." *Ibid.* And in the case of *Pearce v. Renfro*, 68 Ga. 194, it is said: "'A levy by an officer who has no authority is the same as no levy. Under § 888 of the Code, the sheriff had no authority to levy a tax execution when the principal amount did not exceed \$50.' *Morris v. Tinker*, 60 Ga. 466. It is, however, contended by counsel for plaintiff in error that a claimant is estopped from denying the levy, because he must admit that there was one, before he has any of the rights of a claimant. We think this correct, and means only that after he has sworn that the property seized, if personal, was his property, and the bonds given under the claim laws being an admission upon his part that the property claimed was so

action upon the bond;' and numerous cases from other jurisdictions, as well as some of our own, are cited to this effect."

In an action on a forthcoming bond the obligors are estopped to deny the authority of the officer who made the levy. *Smith v. Davis*, 3 Ga. App. 419, 60 S. E. 199, where the court said: "From *Roebuck v. Thornton*, 19 Ga. 149, to *Stroud v. Hancock*, 116 Ga. 336, 42 S. E. 496, the rule in Georgia has been uniform that neither maker nor surety on a forthcoming bond will be heard to attack the legality of the levy in any respect." (It would seem, however, from a later part of the decision, that the court considered that the officer had authority.)

Reference may be made in this connection to *Stroud v. Hancock*, 116 Ga. 332, 42 S. E. 496, where it was held in an action on a bond given by a mortgagor upon a mortgage *fi. fa.* that, after judgment against the mortgagor, a surety was estopped to deny the recitals in the bond in reference to the levy and the existence of the property, although such bond was not the bond contemplated by the statute in such cases, but was an ordinary forthcoming bond.

But, as is shown in the former note, the rule is not invariable. See *Van Cleave v. Haworth*, 5 Ala. 188, *infra*, "Collateral attack."

In view of the nature of the objection in *PEEPLS v. T. W. GARRISON & SON*, it is interesting to refer to the early case of *Couch v. Miller*, 2 Leigh, 545, where it was held that the court properly granted a motion by the surety (made in opposition to an award of execution against him on the bond) to question a forthcoming bond "for defects apparent on the face of the execution upon which it was taken," where the execution was directed to the sheriff of Campbell county, but the condition of the bond stated that the writ was directed to the sergeant of Lynchburg, that he levied it, and that he had taken the bond; and the 51 L.R.A. (N.S.)

court considered that no one but the sheriff to whom the execution was directed could levy it.

It may be noted that it was said *inter alia* in *Reynolds Bkg. Co. v. Southern Pacific Guano Co.* 140 Ga. 498, 79 S. E. 132, in affirming the dismissal of a suit by the claimant to enjoin suit on his forthcoming bond: "The defense that the plaintiffs in the judgment were adjudicated bankrupts, and their property administered in the bankrupt court, or that there are no parties plaintiff for whom the sheriff could recover for their use, even if a good defense (and as to that we express no opinion), could be set up in the suit on the bond; and there is no reason for the intervention of equity to enjoin that suit."

Collateral attack.

There is some difference of opinion in the courts as to whether, in proceedings other than those upon the forthcoming bond, the obligor in such bond is estopped to question the legality of the levy under the execution.

In *Roebuck v. Thornton*, *supra*, the court said, in compelling a purchaser at a sale in execution to comply with his bid, where there was a question as to the sufficiency of the levy: "The levy in this case must, we think, be held to have been good. The defendant gave a forthcoming bond. That bond, by its terms, estopped him from saying there had been no sufficient levy. But if it estopped him, the purchaser got a good title, for it does not appear that there was anybody else interested in the property."

In *May v. Johnson*, 3 Ind. 449, it was held that the making of a delivery bond is a good defense in an action of trespass by an execution defendant against a constable, and the obligor is estopped from showing that the judgment upon which the execution was issued was against another person of like name. The court said: "The suit is

seized, that then it would be absurd to allow him to come into court and deny his oath and the obligation of his contracts. But the seizure or levy is one thing, and the mandate of the court by which the act is done is altogether another and quite a different thing. And so also is the authority by which the officer, as such, makes the seizure. But this view of the case was considered wholly immaterial by the very learned counsel who argued it, and it was most earnestly maintained that the claimant could not deny that the levy was a legal levy, although it might have been made by himself or any other wholly unauthorized person. We cannot so hold. Nor do we think that this view is at all inconsistent with the cases in *Cohen v. Broughton*, 54 Ga. 297, and *Scolly v. Butler*, 59 Ga. 849. The question in the first case was whether the levy was complete; the possession being the point of the levy."

between the parties interested in that bond, and in relation to the subject-matter of it. In a suit upon the bond against the obligor for a failure to deliver the property according to the condition, the admission in question would have estopped the obligor from denying it, there being no fraud; and we think said admission as effectual an estoppel in this as it would be in such a suit."

And it was said in *Eldridge v. Grice*, 132 Ala. 667, 32 So. 683, a suit for trial of the right of property, that the claimant's affidavit and claim bond estop him to deny a proper levy.

But in *Page v. Coleman*, 9 Port. (Ala.) 275, the court was of the opinion, upon a motion to quash an execution on the ground that the entry of the original judgment was insufficient, that the giving of a forthcoming bond was not a waiver of the irregularity of the execution, and said: "The entering into this cannot be construed as a consent that the proceedings should be considered as regular, or as a waiver of the irregularity. If the suit was on the bond, the party might not be permitted to deny the validity of the judgment, because he would be estopped by his solemn deed, in which the existence of it is admitted; but this very rule would make it the more important for him to obtain the judgment of the court setting aside the execution, and consequently destroying the legal effect of the bond."

This case was referred to in *Van Cleave v. Haworth*, 5 Ala. 188, where it was held in a proceeding by supersedeas against the enforcement of a forthcoming bond that the giving of the bond was not a waiver of the irregularity of issuing an execution more than ten years after the issuing of a prior execution without any scire facias. The court said: "It is also contended that this is a mere irregularity under the statute, and was waived by entering into the forthcoming

It is true that these were claim cases in which the claimant was raising the question as to the validity of the levy. But we see no reason why the defendant in proceedings to foreclose a mortgage on personalty, relatively to the right to raise this question, does not stand in as good a position as a claimant.

The ruling here made, while seemingly in conflict with that in the case of *Smith v. Camp*, 84 Ga. 117, 10 S. E. 539, is not actually so. This court did there rule that "a defendant in *fi. fa.* who has recited a levy, both in his affidavit of illegality and the bond given for the forthcoming of the property, will not be heard to controvert the fact of such levy at the trial of the affidavit of illegality." But this holding was made, not with reference to the validity of the process, or the authority of the officer to make the levy, or the right of the defendant in *fi. fa.* to

ing bond. In the case of *Page v. Coleman*, 9 Port. (Ala.) 275, this point was considered and we then held that the giving of such a bond was no waiver of a previous irregularity."

And the present case of *PEEPLES v. T. W. GARRISON & SON* permits the objection of nullity of the levy to be made on the trial of the principal case.

Miscellaneous.

In *Easley v. Walker*, 10 Ala. 671, where the question was not in the case, the court said: "We apprehend that the execution of a forthcoming bond for property subject to seizure would estop the party from controverting the regularity of the levy."

If a warehouseman in possession of the goods agrees to act as bailee for the sheriff, he may not assert that the levy was incomplete. *Higdon v. Warrant Warehouse Co.* — Ala. App. —, 63 So. 938, where, however, it was found that the warehouseman did not agree to act as such bailee.

In *Jones v. Miles*, 1 How. (Miss.) 50, the court quashed a forthcoming bond given upon an execution against the goods, etc., of Hugh Jones in the hands of his administrator, Thomas Jones, executed by Thomas Jones and another, and reciting "which said writ hath been levied on all the goods and chattels of the said defendant, Thomas Jones; which said property is permitted to remain in the possession of the said Thomas Jones, etc." The court said: "I do not think the levy in this case can help the bond, as it does not show upon what property it was made; and as the law requires that the levy should be recited, we must suppose that the recital in the bond conforms to the levy."

It may be noted that in *Scolly v. Butler*, 59 Ga. 849, cited in *PEEPLES v. T. W. GARRISON & SON*, there was no bond.

B. B. B.

test these questions at the trial, but with reference to the contention of the defendant that he should have been permitted to show on the trial that no levy or seizure of the property had been made by the levying officer; and, as to this contention, the court announced that, having recited the levy, both in his affidavit of illegality and the bond given for the forthcoming of the property, the defendant would not be heard to controvert the fact of such levy. It is clear that this case last referred to is entirely different from the case in hand, and the latter falls within the ruling made in the first two cases referred to above.

Having held that the levy should have been dismissed, what took place on the trial subsequently to the motion to dismiss was entirely nugatory; and this court will not undertake to determine the questions raised during the trial after the overruling of the motion to dismiss, which should have been sustained and the case thereby disposed of.

Judgment reversed.

All the Justices concur.

KANSAS SUPREME COURT.

J. W. ELKINS, Appt.,

v.

BOARD OF COUNTY COMMISSIONERS
OF WYANDOTTE COUNTY

and

HENRY T. ZIMMER, Intervener.

(91 Kan. 518, 138 Pac. 578.)

Sheriff — special deputy — duties.

1. Evidence that a person was a "special and nonpay" deputy sheriff implies that his activities in that regard were limited to performing acts specifically directed, and that he was under no obligation to devote time to investigating criminal offenses.

Reward — claim of special deputy sheriff.

2. Such a deputy sheriff is not precluded by his office from claiming a reward offered for the arrest and conviction of an offender, where by his own efforts he has discovered

Headnotes by MASON, J.

Note. — As to right of public officer to claim reward for arrest, see notes to *Somerset Bank v. Edmund*, 11 L.R.A.(N.S.) 1170; *Burkee v. Matson*, 34 L.R.A.(N.S.) 924; and *Mason v. Manning*, 43 L.R.A.(N.S.) 131; and see later case, *Hartley v. Granville*, 48 L.R.A.(N.S.) 392.

As to what must be done to earn reward for arrest, see note to *Elkins v. Wyandotte County*, 46 L.R.A.(N.S.) 662, and other notes there referred to.
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by whom a crime was committed and by what evidence this can be proved.

Same — duty to arrest.

3. A person who discovers the perpetrator of a crime and the evidence by which he can be convicted may be entitled to a reward offered for the "arrest and conviction" of the offender, even although, having the power to make the arrest himself, he omits to exercise it, and permits someone else to take the defendant into custody.

(February 7, 1914.)

A PPEAL by plaintiff from a judgment of the District Court for Wyandotte County in favor of intervener in an action to recover a reward offered for the arrest of a murderer. Reversed.

The facts are stated in the opinion.

Messrs. J. McCabe Moore and J. N. Baird for appellant.

Mr. James Meek for appellee Board of County Commissioners.

Messrs. T. A. Pollock and E. C. Little for intervener.

Mason, J., delivered the opinion of the court:

The board of county commissioners of Wyandotte county offered a reward for the "arrest and conviction" of the person who had committed a murder. J. W. Elkins brought action against the county for the amount, asserting that he had met the conditions. H. T. Zimmer set up a conflicting claim, which he sought to enforce by interpleading. The county admitted its liability to one or the other of the claimants. Upon a trial the court sustained a demurrer to the evidence of Elkins and rendered judgment for Zimmer, which was reversed on appeal. *Elkins v. Wyandotte County*, 86 Kan. 305, 46 L.R.A.(N.S.) 662, 120 Pac. 542. Upon a new trial judgment was again rendered in favor of Zimmer, and Elkins again appeals.

There was evidence tending to establish these facts: Elkins, learning of the offer of the reward, began an investigation of the case. By talking with one James McMahon he induced him to produce and turn over some articles, including a gun, which were hidden in a cornfield. He told the sheriff of this, stating that McMahon was the guilty person. The sheriff directed the undersheriff and Zimmer to send and get him. McMahon was arrested, and on being confronted with the articles found in the field confessed. Elkins was at the time a "special and nonpay" deputy sheriff. The description of Elkins as a "special and nonpay" deputy seems fairly to imply that, while he held a commission as a deputy sheriff, his activities in that connection were

limited to serving such papers as might be delivered to him, or performing such other acts as might be specifically directed. Clearly he was under no obligation to devote time to the investigation of criminal offenses. This was evidently the view of the trial court, for the mere fact of Elkins's official character was not held to prevent his recovering the reward.

A reversal is asked because of an instruction to the effect that it was the duty of anyone seeking to earn the reward to do all he legally had a right to do towards the arrest of the murderer; that, if Elkins was a deputy sheriff, he had a legal right to arrest McMahon upon discovering him to be the murderer; and that if, having the right and the opportunity to make such arrest, he voluntarily chose not to do so, and Zimmer, acting for his own benefit and for himself, arrested McMahon, then Zimmer was entitled to the reward. Public policy forbids an officer to claim a reward for merely doing his duty, but that is the extent to which his official character affects the matter. *Marsh v. Wells, F. & Co. Exp.* 88 Kan. 538, 43 L.R.A.(N.S.) 133, 129 Pac. 168. See also 24 Am. & Eng. Enc. Law, 953; 34 Cyc. 1753; notes in Ann. Cas. 1912C, 1294 and in 43 L.R.A.(N.S.) 131; *Hartley v. Granville*, 216 Mass. 38, 48 L.R.A.(N.S.) 392, 102 N. E. 942. If Elkins is entitled to the reward, it is because of voluntary investigations, not required by his office, which resulted in discoveries leading to the arrest and conviction of McMahon. His official character can hardly enter into the matter, because as a private citizen he had authority to make the arrest. *State v. Mowry*, 37 Kan. 369, 377, 15 Pac. 282; *Garnier v. Squires*, 62 Kan. 321, 62 Pac. 1005; 5 Enc. L. & P. 484; 3 Cyc. 885. If, in order to gain the reward, he was required to do all he legally could toward the arrest, his omission to make the arrest would be equally fatal to his recovery, whether he was an officer or a private citizen.

In some circumstances the person actually making an arrest might obviously be entitled to the reward,—for instance, where a known and unconcealed murderer was at large, and the difficulty in enforcing the law lay in taking him into custody. The present case does not appear to be one to which that rule applies. The jury may have found that the only real difficulty in the affair was to ascertain by whom the murder was committed and by what evidence this could be proved; that Elkins by his own efforts discovered the facts that made it known that McMahon was the murderer, that he reported these facts to the sheriff, and that, as the natural result 51 L.R.A.(N.S.)

of this report, the arrest was made by Zimmer. Such findings, in the opinion of this court, would require a verdict for Elkins. But, under the instruction complained of, such a verdict was forbidden if the jury also found that Elkins could have himself arrested McMahon, but omitted to do so. We think the instruction put too much stress upon the question as to who made the arrest, and unduly limited the effect of another instruction, in the following words, which correctly stated the principle by which the matter in dispute should be determined: "A literal compliance with the terms of the reward is not required, neither need there be an actual physical arrest by a claimant; but if you find from a preponderance of the evidence that one of the said parties, plaintiff or intervener, acting with a knowledge that said reward had been offered, and with a view to obtain it, performed substantially the terms of said offer of reward, and discover[ed] evidence and performed services which were the primary, proximate, procuring, and predominant cause of the arrest and conviction of one James McMahon for the crime in question, you will find for that party."

The argument is made that Elkins in his petition alleged that he had made the arrest, and therefore that he cannot complain of the ruling in question. However defective his pleading may have been, the character of his claim was necessarily made clear at the first trial, and Zimmer cannot have been misled. It may be remarked that situations frequently arise in which substantial justice is promoted by the division of a reward among several claimants. The right of a court of equity to make such an apportionment has been asserted, although in other instances it has been denied. *Rogers v. McCoach*, 66 Misc. 85, 120 N. Y. Supp. 686; 42 Century Dig. Rewards, § 16; 17 Decen. Dig. Rewards, § 12.

After the first judgment in favor of Zimmer was appealed from, Zimmer gave a bond to enforce it notwithstanding the appeal, and it was paid. The county asks that it be relieved of liability for the costs that have since accrued. The controversy is between Elkins and Zimmer, and the costs should be awarded accordingly.

The judgment is reversed, and a new trial ordered.

All the Justices concur.

A petition for rehearing having been filed, Mason, J., on May 20, 1914, handed down the following response (— Kan. —, 140 Pac. 896):

In a petition for a rehearing it is sug-

gested that the evidence (some of which is not abstracted) shows that Elkins was appointed a deputy sheriff, at his own request, to assist in discovering and arresting the murderer. This cannot be the case, as the appointment was made October 9, 1909, and the murder was not committed until October 19, 1909.

It is also suggested that the opinion states as facts certain matters concerning which there was a conflict in the evidence. The statement made was that there was evidence tending to establish these facts; there was no purpose on the part of the court to treat them as established.

The jury must, of course, be the judge of the facts, but there is abundant evidence to support the conclusion that each of the claimants rendered effective service in bringing the offender to justice, and the case is one where a division of the reward suggests itself as the most equitable solution of the problem.

The petition for a rehearing is denied.

All the Justices concur.

MINNESOTA SUPREME COURT.

CASEY PURE MILK COMPANY, Resp.,
v.
BOOTH FISHERIES COMPANY et al.,
Appts.

(124 Minn. 117, 144 N. W. 450.)

Pleading — conversion — alternative allegations.

In an action for conversion of personal property, an allegation in the alternative that one or the other of two defendants converted the goods, but which one plaintiff is unable to determine, states no cause of action against either defendant.

(December 19, 1913.)

Headnote by HALLAM, J.

Note. — Joinder of parties with alternative allegations as to liability.

There seems to be no question but that, at common law, the liability of several defendants cannot be pleaded in the alternative, at least where the doubt as to who is liable does not arise from a close business relationship or the conduct of the parties. In equity, however, there are decisions allowing joinder of defendants with allegation of liability in the alternative, especially where the situation or relationship between the parties is such that the whole matter should, in order to render full and adequate relief, be settled in one proceeding. And in some jurisdictions joinder of parties with alternative allegations as to liability is permitted in case of doubt as to who, if any- 51 L.R.A. (N.S.)

SEPARATE APPEALS by defendants from an order of the Municipal Court of St. Paul, overruling their separate demurrers to the complaint in an action for the conversion of butter. Reversed.

The facts are stated in the opinion.

Messrs. Briggs, Thygeson, & Everall, for appellants:

Where two persons are named as defendants in the same action, the declaration or complaint is defective and subject to a general demurrer unless it alleges a cause of action against both defendants.

Oglesby v. State, 73 Tex. 658, 11 S. W. 873; Thorndale Mercantile Co. v. Evens, — Tex. Civ. App. —, 146 S. W. 1053.

Messrs. Thomas C. Daggett and John R. Foley for respondent.

Hallam, J., delivered the opinion of the court:

Plaintiff sues two defendants, alleging: That an order for goods was received from defendant Produce Company; that on October 12, 1910, plaintiff took the goods to the building occupied by both defendants, and, although the goods were intended for the Produce Company, they were delivered to defendant Fisheries Company; that the next day plaintiff notified the Fisheries Company to deliver the goods to the Produce Company, and the Fisheries Company agreed to do so; that on the 1st of the following month plaintiff demanded payment of the Produce Company; that the Produce Company denied receiving the goods; that the Fisheries Company, on inquiry, stated that it had delivered the goods to the Produce Company. It is alleged that one or the other of defendants received the goods and converted them to its own use, but which one plaintiff is unable to determine by reason of the counterclaims of defendants. Defendants demur separately on the ground that the complaint states no cause of action.

We cannot sustain this complaint. We

one, is liable, either by express statutory provision or by the rules of practice.

In absence of controlling regulation.

The rule laid down in CASEY PURE MILK Co. v. BOOTH FISHERIES Co. is supported by a few cases involving a similar state of facts.

Thus, in Brown v. Illinois C. R. Co. 100 Ky. 525, 38 S. W. 862, an action against two railroad companies for alleged negligence in delivering a car of stock different and inferior to that shipped by the plaintiffs, it was held that an averment that the loss occurred "by reason of the negligence of one or the other of defendants, or of both defendants, and as to which plaintiffs are unable to say as to whether the one or the

do not wish to detract from the very wholesome rule that pleadings should be liberally construed, but there are a few cardinal principles of pleading that must be observed. One of them is that a complaint must state, with ordinary directness, facts which constitute a cause of action against each defendant. If the facts are not within the knowledge of plaintiff or his attorney, they may be alleged upon information and belief. This complaint does not allege facts showing liability of either defendant. Both defendants might answer admitting every allegation of the complaint, and still the court could not order judgment on the pleadings against either defendant.

We are of the opinion that this form of pleading is not permissible under the Code

Procedure, and such we believe to be the generally accepted rule. *Price v. Virginia-Carolina Chemical Co.* 136 Ga. 175, 71 S. E. 4; *Brown v. Illinois C. R. Co.* 100 Ky. 525, 38 S. W. 862; *Oglesby v. State*, 73 Tex. 658, 11 S. W. 873; 30 Cyc. 131. A different practice prevails in some jurisdictions, but this is by virtue of express provisions of statute. *Honduras Inter-Oceanic R. Co. v. Lefevre*, 36 L. T. N. S. 46, L. R. 2 Exch. Div. 301, 46 L. J. Exch. N. S. 391, 25 Week. Rep. 310; *Child v. Stenning*, 36 L. T. N. S. 426, 46 L. J. Ch. N. S. 523, L. R. 5 Ch. Div. 695, 25 Week. Rep. 519; *Bennetts v. McIlwraith*, 75 L. T. N. S. 145, [1896] 2 Q. B. 464, 8 Asp. Mar. L. Cas. 176, 65 L. J. Q. B. N. S. 632, 45 Week. Rep. 17; *Phenix Iron Foundry v.*

other or both, but one of these alternatives is true,"—was insufficient as against either of the defendants under the rule that a pleading is to be taken most strongly against the pleader.

And in *Tift v. Tift*, 4 Denio, 175, it was said with reference to an averment that the defendant "or his family" did the wrong complained of, that it would have been bad on general demurrer, there being nothing stated to show the defendant's liability for the acts of his family.

And in *Oglesby v. State*, 73 Tex. 658, 11 S. W. 873, where a tax collector had defaulted and the state alleged in effect that, from the evidence at hand, it had been unable to determine which of two sets of sureties was liable, and both were joined in an action to recover the amount of the defalcation "to the end that whatever equities that may exist between them on said two bonds, if any, may be adjusted, and thus a multiplicity of suits avoided by casting the liability where it justly belongs,"—it was held that the petition was defective. The court said: "The demand of the state against the sureties on either bond was strictly a legal demand, and the defenses to it were of a like character. There is no privity between the sureties upon the first bond and those on the second. Their obligations were separate and distinct, and the liability of those upon the one bond was in no sense dependent upon the liability of those upon the other. It is true that both sets of sureties were not responsible for the same defalcation, and that, from the very nature of the case, what the one set was liable for the other was not. But this fact does not establish any legal or equitable relation between the sureties on the one obligation and those on the other, nor does it, in a suit to recover upon either or both, relieve the state from the necessity of alleging unequivocally the facts which show the unconditional liability of the parties sought to be charged. To allege in a petition against A and B that A is liable if B is not, and that B is liable if A is not, does not allege the unconditional liability of either. We know of no au-

thority which tolerates such pleading in cases like the present." The *Oglesby* Case was followed in *Thorndale Mercantile Co. v. Evens*, — Tex. Civ. App. —, 146 S. W. 1053, wherein it was held that a petition which showed that either of two defendants was liable to the plaintiff for the balance due upon a building contract did not state a cause of action, in that it did not assert a distinct or unconditional liability against either defendant. In connection with this and the next preceding case see *Love v. Keowne* and *Skipwith v. Hurt*, as set out infra.

So, in *Price v. Virginia-Carolina Chemical Co.* 136 Ga. 175, 71 S. E. 4, an equitable petition against two defendants, containing an alternative statement of facts, wherein it was alleged that if one statement was true, one defendant was indebted to the plaintiff, and that if the other statement was true, the other defendant would be indebted to him, and in which the prayer was that the defendants be required to interplead so as to determine which one was liable to him, and to have judgment against such defendant,—was held to be multifarious. In this case the payee of a note drawn by one of the defendants discounted it, and the discounting bank sent it to the second defendant for collection, and not receiving the money, plaintiff paid same. The defendant who made the note claimed that it paid the note to the collecting bank, which denied that it received either the note for collection or the money from the maker. The pertinent allegation of the petition was that if the note was paid by the maker to the collecting bank, then that bank was indebted to the petitioner; but that if it was not so paid as claimed, then the note had been lost if it was never received by the defendant bank, or, if it was received by the bank, it had appropriated and converted it to its own use; and that either one defendant or the other was indebted to petitioner in the amount of the note. In reaching the above-stated conclusion, the court said: "Instead of alleging that he [plaintiff] has funds belonging to one or the other of the defendants, whom he in-

Lockwood, 21 R. I. 556, 45 Atl. 546; Rules of Practice, 58 Conn. 561, 20 Atl. v.

There is some authority for the proposition that an exception is made in cases where it is impossible to determine where liability rests, by reason of some close relation between defendants, or of some conduct on the part of defendants, and that in such cases both parties may be joined, with an alternative allegation that the acts constituting liability were committed by one or the other. See *Braun & F. Co. v. Paulson*, — Tex. Civ. App. — 95 S. W. 617. Whether such circumstances give rise

to an exception to the rule we need not determine, for it does not appear that this is an exceptional case. The complaint contains no allegation of any close relation or community of action between these parties, except that they are tenants of the same building. It does not allege that they occupy the same business premises. The fact is, plaintiff made the mistake of delivering to one business house goods intended for another, and, instead of taking the trouble to make the transfer itself, relied upon the promise of the party to whom it made delivery to do so. The ulti-

vites to settle their respective rights to the same, the plaintiff alleges that he is entitled to recover of one of the defendants a certain sum of money on an alternative state of facts, and asks that they litigate between themselves which state of facts presents the truth and which one of the defendants is liable to him. This is not permissible. If the bank collected the note, it is accountable to the plaintiff, and that is one cause of action. If the makers have not paid the note, they are liable thereon to the plaintiff, and that is an altogether different cause of action. The petition contains two distinct causes of action against different defendants, and violates the fundamental principle of pleading which prohibits the inclusion of separate and independent controversies against different parties in the same action."

But it has been held that a bill in equity may be framed in the alternative. Thus, in *Thomason v. Smithson*, 7 Port. (Ala.) 144, it was held that a bill to restrain enforcement of a judgment which was alleged to have been satisfied could be framed so as to obtain relief against the judgment creditor if he had authorized the one attempting to enforce the judgment to do so, or so as to obtain relief against such third person if he was attempting to collect the judgment without authority from the judgment creditor. The court said that such a pleading would inform such third person of the claim set up against him, and would enable him by cross bill against the judgment creditor to adjust the equity between them, or to defend in any other manner he might choose. In connection with this case, see also the following cases wherein, as set out *infra*, joinder of parties in the alternative was held permissible in an equitable proceeding: *Love v. Keowne*; *Skipwith v. Hurt*; *Alexander v. Mercer*.

As is stated in *CASEY PURE MILK Co. v. BOOTH FISHERIES Co.*, an exception to the general rule has been allowed where, by reason of some close relationship between defendants, or of some conduct on the part of defendants, it is impossible to determine where liability rests, joinder of the parties with an alternative allegation that the acts constituting liability were committed by one or the other being allowed in such case. This was the rule adopted in *Braun & F. 51 L.R.A.(N.S.)*

Co. v. Paulson, — Tex. Civ. App. —, 95 S. W. 617 (writ of error denied by the supreme court), wherein it was held that two corporations of the same name and controlled by the same persons, who had ordered goods from the plaintiff which were distributed between the two corporations, could be joined where plaintiff did not know which of the two was liable, by an allegation that one of the corporations had ordered all the goods, and in the alternative, that the other had done so, and recover the amount owed by each. In reaching this conclusion the court said: "The two corporations were controlled by the same individuals, and appellee, being uncertain in the name of which corporation the debt was made, was justified in alleging that the Arizona corporation had ordered all the fixtures and was liable for all of them, and in the alternative that the Texas concern had ordered all the fixtures and was liable for their value; and under those allegations the jury had the power to return a verdict against each for the amount it owed. In this case the two appellants are shown to have been in such close relations, and there is such privity of interest in the subject-matter of the suit, and every fact in the suit bearing alike upon both of them, that appellee could not separate them and be put to the trouble and expense of two suits. There existed such privity of relation and community of action between them that a common or alternative liability of all of them could be maintained. It was utterly impossible for appellee to ascertain which one of them was liable for the fixtures, and he had the right to join them in the suit."

And in *Love v. Keowne*, 58 Tex. 191, it was held in an action before a court whose jurisdiction was one of blended law and equity, against separate sets of sureties on an administrator's bonds, in which it was alleged that, because of the loss of the papers of the estate, it was impossible to determine the amounts converted by the administrator under the respective bonds, and in which the petition prayed that the amount for which each set of sureties was liable be ascertained, etc.,—that while the breach of each of the bonds doubtless constituted a cause of action against the makers of the several bonds ordinarily sepa-

mate question in the case will doubtless be whether the Fisheries Company did transfer the goods to the Produce Company, as it promised to do. Similar questions are liable to arise in any case where one person is directed to deliver goods to another, to pay money to another, or to carry on almost any form of business negotiation with a third party. Similar situations may often be presented in negligence cases, where one person is injured in the region of operation of two others.

Plaintiff's counsel states in his brief that he suggested to his adversaries that he

amend his complaint so as to allege liability of both defendants. Had he asked this of the court on the hearing, his petition would doubtless have been granted. *Harp v. Bull*, 3 How. Pr. 45; *Lord v. Hopkins*, 30 Cal. 77; 31 Cyc. 396. But he did not do this. He saw fit to stand upon the complaint as originally framed. However, the defects in plaintiff's complaint relate to matters of form. Demurrers and appeals on this ground are not encouraged, and no costs will be allowed to the appellant.

Order reversed.

rate and distinct, yet the relation of the two sets of sureties was such that they might be joined in the alternative in the one action not only for the protection of those interested in the estate, but also for the purpose of adjusting the equities existing among the sureties themselves. It was said: "If separate suits had been brought and a discovery sought in each, the proceedings, evidence, and judgment in the one would not have been binding upon the sureties in the other, and between the two, the plaintiffs may have failed to obtain the relief, if any, to which they may be entitled. In the suit as brought, all the parties in interest were before the court. The general subject-matter and object sought were the same; the plaintiffs claimed relief in the same general right, and the proceedings and decrees could have been adjusted to the respective rights and interests of all the parties to the suit, and would have been binding upon them."

So, in *Skipwith v. Hurt*, 94 Tex. 322, 60 S. W. 423, following *Love v. Keowne*, supra, an action upon the several bonds of a defaulting county treasurer, wherein it was alleged that it was difficult to determine during which of two terms the default occurred, it was held that in such case the facts were so blended and connected as to the rights of the county against the two sets of sureties that their joinder was proper.

And in *Alexander v. Mercer*, 7 Ga. 553, it was held that an insolvent administrator and his two sets of sureties, one of which succeeded the other, could be joined in an equitable action to discover the amount of the devastavit, and the time when it occurred, in order to determine which of the two sets of sureties was liable. The court, after holding that it was not essential to the action for judgment that it should have been first brought against the principal, discussed the propriety of proceeding against both sureties in the same action as follows: "Suppose the administrator *de bonis non* had filed his bill against the principal alone, as it is insisted he should have done, relying upon the discovery which he obtains, to establish both the amount of the devastavit and the time when it was committed, and it is located by the decree during the liability of the first securities. A 51 L.R.A. (N.S.)

suit is then brought upon the bond to charge them with the recovery. Not having had their day in court before, they come in, and prove conclusively that the defalcation did not occur until after their discharge. Of course they are acquitted, and the complainant is remediless; for, by the terms of the decree, the second securities stand exonerated, and the complainant is estopped by it; and this is no improbable case, it would happen constantly. Even if the finding discharging the other set of securities could be got round in a suit against them, the very same result might follow; for different juries might, and frequently would, arrive at variant results, even upon the identical same evidence.

"Indeed, if this proceeding, bringing all the parties before the court, and ascertaining and fixing, not *prima facie* only, but permanently, the liability of the several sets of securities, cannot be supported, I should consider the rights of those interested in an estate greatly jeopardized, if not entirely destroyed; and this practice will not prejudice the securities."

In *Love v. Keowne*, *Skipwith v. Hurt*, and *Alexander v. Mercer*, supra, much stress was laid upon the fact that the action was equitable in its nature. But, in this connection, see *Oglesby v. State*, as set out supra.

Under statute.

In at least one jurisdiction the present question has been the subject of express statutory regulation.

Thus, in Rhode Island it has been expressly provided by statute (*Gen. Laws*, chap. 233, § 20; court and practice act 1905, § 240) that whenever in any action the plaintiff is in doubt as to the person from whom he is entitled to recover, he may join two or more defendants with the view of ascertaining which, if either, is liable, and may recover against such only as are liable. See *Phenix Iron Foundry v. Lockwood*, 21 R. I. 556, 45 Atl. 546; *Haley v. Calef*, 28 R. I. 332, 67 Atl. 323 (holding that when a traveler injured by a defective bridge did not know which of two towns was liable, he might properly join both towns as defendants); and *Kilkenny v. Bockius*, 187 Fed. 382, all of which either directly or indirectly construe the statute.

And see *Taylor v. Lumb Knitting Co.* — R. I. —, 70 Atl. 1008, wherein it was held in an action by an employee against his employer for injuries caused by the falling of an arc lamp that, upon its appearing that another than the defendant might be liable, such third party should be made a defendant by virtue of the provisions above set out, together with that portion of § 243 of the court and practice act of 1905 which authorizes the bringing in of new parties.

But statutes permitting averment of facts in the alternative do not permit the pleading of parties in the alternative with a definite averment of facts as to each. Thus, in *Brown v. Illinois C. R. Co.* 100 Ky. 525, 38 S. W. 862, in holding that an averment that loss was caused "by reason of the negligence of one or the other of the defendants or of both defendants and as to which plaintiffs are unable to say as to whether the one or the other or both but one of these alternatives is true" was insufficient as against either of the defendants under a statutory provision that "a party may allege alternatively the existence of one or another fact if he states that one of them is true, and that he does not know which of them is true," the court said: "The Code provides for averment of alternative facts. The facts thus averred in the alternative must be alleged of and concerning a definite party or parties. There is no effort in this pleading to allege alternative facts. The facts are definitely averred, but the party of whom they are alleged to be true is alleged in the alternative. Under the rule that a pleading is to be taken most strongly against the pleader, this averment of the petition is insufficient as against either of the appellees." And in *Louisville & N. R. Co. v. Ft. Wayne Electric Co.* 108 Ky. 113, 55 S. W. 918, it was held that the statute set out in *Brown v. Illinois C. R. Co.*, supra, did not authorize a consignor to allege that the defendant carrier had delivered a certain shipment of goods to the defendant consignees, with a prayer for judgment against them, and in another paragraph to allege that the defendant carrier had wrongfully delivered such goods to a person other than the consignees, with prayer for judgment against the carrier, and in a third paragraph alleged that the plaintiff did not know which of the allegations was true, the ground being, as in the *Brown Case*, that the statutory provision was not intended to relieve a plaintiff of the necessity of naming definitely and certainly the party sought to be held liable, and from stating a cause of action against him, which is not the case where the liability of two defendants is alleged alternatively.

Under rules of practice.

In some jurisdictions the rules of practice regulate the right to join parties in the alternative.

There is a rule to this effect in at least one state. See the Connecticut rules of 51 L.R.A.(N.S.)

practice (chap. 1, § 3) as set out in 58 Conn. 561, 20 Atl. v. which provides that persons may be joined as defendants against whom the right to relief is alleged to exist in the alternative, although a right to relief against one may be inconsistent with a right to relief against the other.

And in England it has been expressly provided (order XVI., rules 3, 6, rules of supreme court 1875; order XVI., rules 4, 7, rules of supreme court 1883) that (rules 3, 4) all parties may be joined as defendants against whom the right to any relief is alleged to exist in the alternative that judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment, and that (rules 6, 7), where the plaintiff is in doubt as to persons from whom he is entitled to redress, he may join two or more defendants to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties.

Under these rules it has been held that a shipowner in an action against a broker for breach of warranty of the authority of a principal to charter a ship, upon discovering that possibly there was authority as warranted, may join the principal as a co-defendant, alleging liability for breach of contract to load the ship, in the alternative, notwithstanding the plaintiff's cause of action against the principal was different from that against the broker, it having arisen out of the same transaction. *Bennetts v. McIlwraith* [1896] 2 Q. B. 464, 75 L. T. N. S. 145, 8 Asp. Mar. L. Cas. 176, 65 L. J. Q. B. N. S. 632, 45 Week. Rep. 17. And in *Massey v. Heynes*, L. R. 21 Q. B. Div. 330, 57 L. J. Q. B. N. S. 521, 36 Week. Rep. 834, an action wherein damages were claimed against one defendant for breach of warranty of authority to effect a charter party, and in the alternative against the principal for breach of the charter party, was regarded as properly brought and the defendants as properly joined.

And it was held in *Honduras Inter-Oceanic R. Co. v. LeFevre*, L. R. 2 Exch. Div. 301, 46 L. J. Exch. N. S. 391, 36 L. T. N. S. 46, 25 Week. Rep. 310, that in an action against an alleged principal for failure to take debentures in plaintiff's company as contracted for, through an alleged agent whose authority the principal denied, and in the alternative against the agent for damages in case it should appear that he acted without authority from the other defendant, that the defendants were properly joined under rule 6 of order XVI. of 1875.

And in *Sanderson v. Blyth Theatre Co.* [1903] 2 K. B. 533, 72 L. J. K. B. N. S. 761, 52 Week. Rep. 33, 89 L. T. N. S. 159, 19 Times L. R. 660, it was held that the plaintiff in an action for work done and material supplied in constructing a building for defendant could, upon it appearing that the person who had ordered the work, etc., was not authorized to do so by the

defendant, join such person as a codefendant, alleging in the alternative for damages for breach of warranty of authority should it be proved that he did not act so as to bind the original defendant as principal.

So it has been held that a lessee in an action to restrain other persons claiming a right of way over the leased land from further trespassing, and in the alternative asking damages against the lessor for breach of covenant of quiet enjoyment in the lease should it turn out that the first defendants were not trespassers, but had a right of way, could not be required to elect against which of the defendants he would proceed, but could proceed against both. *Child v. Stenning*, on demurrer, L. R. 5 Ch. Div. 695, 46 L. J. Ch. N. S. 523, 36 L. T. N. S. 426, 25 Week. Rep. 519, on trial, L. R. 7 Ch. Div. 413, 47 L. J. Ch. N. S. 371, 38 L. T. N. S. 232, 26 Week. Rep. 265, modified as to amount of damages in L. R. 11 Ch. Div. 82, 48 L. J. Ch. N. S. 392, 40 L. T. N. S. 302, 27 Week. Rep. 462.

But it has been held that these rules do not permit the joining of parties in the alternative where the claim discloses two separate and distinct causes of action, and must be limited to the joining of defendants where there is but one transaction. Thus, in *Thompson v. London County Council* [1899] 1 Q. B. 840, 68 L. J. Q. B. N. S. 625, 80 L. T. N. S. 512, 47 Week. Rep. 433, it was held that, in an action against defendants for negligently excavating near plaintiff's house, upon denial of liability upon the ground that the damage was caused by the negligence of a water company in allowing water to escape, the plaintiff could not join the water company as a codefendant, because the actions were upon separate torts which did not arise out of the same transaction. And see *Lilly v. Tilling*, 57 Sol. Jo. 59, where, as set out in the 1912 Continuation of *Butterworth*, Ten Year Digest, p. 537, it appears that, in an action for personal injuries caused by the upsetting of an omnibus, owing to a wheel being wrenched off by tram lines, the plaintiff claimed damages against the owner of the omnibus, and in the alternative against the owner of the tram lines.

The English rules above set out correspond with the Ontario Consolidated Rules 186 and 192.

These rules have, like the English rules, been held limited so as merely to authorize joinder of defendants where there is substantially one legal transaction having different aspects; or, in other words, that the rules do not authorize the joinder of parties in the alternative where the claim discloses distinct and separate causes of action. This limitation was expressly adopted in *Quigley v. Waterloo Mfg. Co.* 1 Ont. L. Rep. 606, where it was held that the purchaser of a machine could not join the vendors, alleging a breach of warranty of title, with a third party who had seized the machine upon a lien alleged to be paramount to the plaintiff's title, and against whom relief for conversion was alleged in 51 L.R.A. (N.S.)

the alternative, the ground being that the causes of action were entirely separate, and therefore not within the intent of the statute. And the same conclusion was reached upon similar reasoning in *Chandler v. Grand Trunk R. Co.* 5 Ont. L. Rep. 589, it being held that an action could not be brought against a carrier for destruction by fire of a machine after its arrival at the point for delivery to the purchaser, and in the alternative against the purchaser for the purchase price, if there had been delivery, actual or constructive, so as to pass title to the consignee.

Illustrative of those cases wherein a joinder of parties in the alternative will be allowed is the case of *Madgett v. White*, 10 Ont. Week. Rep. 787, wherein it was held that an action could be maintained against an alleged principal joined in the alternative with an alleged agent whose authority the alleged principal denied. And see *O'Meara v. Ottawa Electric Co.* 10 Ont. Week. Rep. 1068, wherein the court dismissed a motion to require plaintiff to elect against which party he would proceed in an action for damages for injuries alleged to have been caused both by the joint negligence of two defendants and, in the alternative, by either one or the other, but in which the decision seems to have been based upon the possibility that there might have been a joint liability. See also *Castle v. Chaput*, 2 Ont. Week. Rep. 499, wherein joinder of the parties in the alternative was allowed.

And similar rules of practice seem to be in force in British Columbia. At least, the cases of *Bennetts v. McIlwraith*, supra, was followed in *Bradley v. Yorkshire Guarantee & Securities Corp.* 13 B. C. 68, wherein, in an action against a corporation for rectification of a contract for the sale of land, alleged to have been entered into with the corporation through defendant's agent, which agency was denied by the corporation, it was held that the plaintiff had a right to make the agent a party defendant, and to set up a claim against him in the alternative for damages for breach of warranty of authority should the defendant corporation succeed in proving that he was not a properly authorized agent.

G. J. C.

MINNESOTA SUPREME COURT.

RE ESTATE OF GEORGE MOTZ. Deceased.

ELLA WHITBY, Appt.,

v.

MARY MOTZ, Respnt.

(125 Minn. 40, 145 N. W. 623.)

Evidence — of intent to pretermitt child.
1. Under § 7260, Gen. Stat. 1913, which

Headnotes by TAYLOR, C.

provides that if a parent omit to provide for a child in his will, such child shall take the same share of the estate which he would have taken if such parent had died intestate, "unless it appears that such omission was intentional," parol testimony is admissible to show that such omission was intentional.

Same — burden of proof.

2. The burden is upon those claiming that such omission was intentional to prove such fact.

Same — sufficiency.

3. The evidence in this case raised a question of fact as to whether her father intentionally omitted to provide for appellant, and is sufficient to sustain the finding of the trial court.

(February 20, 1914.)

APPEAL by applicant from an order of the District Court for Wabasha County affirming a judgment of the Probate Court rejecting her claim to a share in the property of George Motz, deceased, and assigning it in accordance with the terms of the will. Affirmed.

Note. — Admissibility of extrinsic evidence as to whether omission of child from will was intentional.

For an earlier note upon this subject, but limited to cases involving disinheritance of after-born children only, see 13 L.R.A. (N.S.) 781. "Child" as here used includes any child with respect to whom the testator's intention may be material, including in some cases the descendants of deceased children.

Statutes which apply expressly to children unintentionally omitted, and provide that they shall take as in case of intestacy, are held, by the weight of authority, to refer to the intention of the testator irrespective of the sufficiency of its expression in the will, and consequently permit the consideration of all evidence appropriate to the proof of intention as an independent fact (*Wilson v. Fosket*, 6 Met. 400, 39 Am. Dec. 736; *Lorieux v. Keller*, 5 Iowa, 196, 68 Am. Dec. 696), whether it be extrinsic evidence of surrounding circumstances (*Buckley v. Gerard*, 123 Mass. 8; *Re Stebbins*, 94 Mich. 304, 34 Am. St. Rep. 345, 54 N. W. 159; *Leonard v. Enochs*, 92 Ky. 186, 17 S. W. 437, but under slightly different statute), or evidence of declarations and statements of the testator at about the time of making the will (*Whittemore v. Russell*, 80 Me. 297, 6 Am. St. Rep. 200, 14 Atl. 197; *Converse v. Wales*, 4 Allen, 512; *Ramsdill v. Wentworth*, 101 Mass. 125, subsequent appeal 106 Mass. 320; *Brown v. Brown*, 71 Neb. 200, 115 Am. St. Rep. 568, 98 N. W. 718, 8 Ann. Cas. 632, subsequent appeal 77 Neb. 125, 108 N. W. 180; *Schultz v. Schultz*, 19 N. D. 688, 125 N. W. 555; *Re O'Connor*, 21 R. I. 465, 79 Am. St. Rep. 814, 44 Atl. 591; *Re Atwood*, 14 Utah, 1, 60 Am. St. 51 L.R.A. (N.S.)

The facts are stated in the Commissioner's opinion.

Mr. A. J. Rockne, for appellant:

The burden of proof is upon those opposing the application of a pretermitted child, to show that the child was intentionally omitted.

Thomas v. Black, 113 Mo. 66, 20 S. W. 657; *Bradley v. Bradley*, 24 Mo. 311; *Pounds v. Dale*, 48 Mo. 270; *Wetherall v. Harris*, 51 Mo. 65; *Tucker v. Boston*, 18 Pick. 162; *Merrill v. Sanborn*, 2 N. H. 499; *Rupp v. Eberly*, 79 Pa. 141.

Extraneous evidence is inadmissible.

Re Garraud, 35 Cal. 336; *Re Salmon*, 107 Cal. 614, 48 Am. St. Rep. 164, 40 Pac. 1030; *Rhoton v. Blevin*, 99 Cal. 645, 34 Pac. 513; *Re Stevens*, 83 Cal. 322, 17 Am. St. Rep. 252, 23 Pac. 379; *Burns v. Allen*, 93 Tenn. 149, 23 S. W. 111; *Boman v. Boman*, 1 C. C. A. 274, 7 U. S. App. 63, 49 Fed. 329; *Chace v. Chace*, 6 R. I. 407, 78 Am. Dec. 446; *Thomas v. Black*, 113 Mo. 66, 20 S. W. 657; *Hill v. Hill*, 7 Wash. 409, 35 Pac. 360.

Rep. 878, 45 Pac. 1036; *Loring v. Marsh*, 6 Wall. 337, 18 L. ed. 802, affirming 2 Cliff. 469, Fed. Cas. No. 8,515).

The rule has been applied to the admission of statements of the testator to the scrivener (*Goff v. Britton*, 182 Mass. 293, 65 N. E. 379; *Moon v. Evans*, 69 Wis. 667, 35 N. W. 20), and to the admission of drafts of earlier wills in the handwriting of the testator (*Coulam v. Doull*, 133 U. S. 216, 33 L. ed. 596, 10 Sup. Ct. Rep. 253, affirming 4 Utah, 267, 9 Pac. 568).

Where the form of the statute is that an omitted child shall take as in case of intestacy, "unless it shall appear that such omission was intentional," it is argued that a presumption arises "contrary to the intent which the language of the will expresses,"—which presumption is rebuttable by direct evidence of intention. *Hedderich v. Hedderich*, 18 N. D. 499, 123 N. W. 276; *Re Atwood*, 14 Utah, 1, 60 Am. St. Rep. 578, 45 Pac. 1036; *Coulam v. Doull*, 133 U. S. 216, 33 L. ed. 596, 10 Sup. Ct. Rep. 253.

But this argument would not apply where the statute provides that the child shall take as in case of intestacy, where it has been omitted "and" it appears that the omission was not intentional, or where it is "not provided for, nor expressly excluded, but only pretermitted;" in either of which events, extrinsic evidence has been considered, both to show the omission was unintentional (*Re Stebbins*, 94 Mich. 304, 34 Am. St. Rep. 345, 54 N. W. 159 where the will contained a reference to the child, *Newman v. Waterman*, 63 Wis. 612, 53 Am. Rep. 310, 23 N. W. 696), and to show that the omission was intentional (*Leonard v. Enochs*, 92 Ky. 186, 17 S. W. 437; *Brown v. Brown*, 77 Neb. 125, 108 N. W. 180; *Moon v. Evans*, 69 Wis. 667, 35 N. W. 20).

Mr. Michael Marx, for respondent:

Extraneous evidence or testimony *dehors* the will is admissible.

Wilson v. Fosket, 6 Met. 400, 39 Am. Dec. 736; Converse v. Wales, 4 Allen, 512; Buckley v. Gerard, 123 Mass. 8; Ramsdill v. Wentworth, 101 Mass. 125; Lorieux v. Keller, 5 Iowa, 196, 68 Am. Dec. 696; Stebbins v. Stebbins, 94 Mich. 304, 34 Am. St. Rep. 345, 54 N. W. 159; Moon v. Evans, 69 Wis. 667, 35 N. W. 20; Brown v. Brown, 71 Neb. 200, 115 Am. St. Rep. 568, 98 N. W. 718, 8 Ann. Cas. 632; Hedderich v. Hedderich, 18 N. D. 488, 123 N. W. 281; Schultz v. Schultz, 19 N. D. 688, 125 N. W. 555; Re Atwood, 14 Utah, 1, 60 Am. St. Rep. 878, 45 Pac. 1036.

Taylor, C., filed the following opinion:

George Motz and the mother of appellant were married in 1885, and lived together as husband and wife until 1891, when they separated. Appellant was born a few months after the separation and is their only child. Subsequently Motz obtained a divorce on the ground of desertion, and,

on September 14, 1897, married the respondent, Mary Motz, with whom he lived until his death, on August 9, 1911. He left a will by which he gave the respondent all his property except one horse. Appellant was not mentioned or referred to in the will. After it had been admitted to probate, appellant made an application to the probate court for a share of the property on the ground that she was a pretermitted child, and as such entitled thereto under the statutes making provision for pretermitted children.

The probate court rejected her claim and entered a final decree assigning the property in accordance with the terms of the will. She appealed therefrom to the district court, where, after a trial *de novo*, the judgment of the probate court was affirmed. A further appeal brings the case before this court.

From the parol testimony offered by respondent and received in evidence by the court, the court found as a fact, "that said omission to provide for appellant in said last will and testament, or to men-

It may be remarked that without some extrinsic data questions concerning the omission of children from a will would not arise at all. As often observed, "the court has not only to construe the will as a piece of English; it has also to apply it to the existing facts" (Theobald, Wills, 7th ed. p. 127), and it is in pursuit of the latter function that it discovers the existence of children not provided for. It has sometimes been thought, therefore, that there is here an analogy to the rule with respect to admitting extrinsic evidence to resolve latent ambiguities (Coulam v. Doull, 133 U. S. 216, 33 L. ed. 596, 10 Sup. Ct. Rep. 253).

But the sound basis for the rule is that the claim of an omitted child does not arise out of the will, but out of the statute; and the principles applicable to the admission and exclusion of extrinsic evidence are therefore not relevant to the situation at all. Whittemore v. Russell, 80 Me. 297, 6 Am. St. Rep. 200, 14 Atl. 197; Wilson v. Fosket, 6 Met. 400, 39 Am. Dec. 736; Ramsdill v. Wentworth, 101 Mass. 125; Re O'Connor, 21 R. I. 465, 79 Am. St. Rep. 814, 44 Atl. 591.

And the statutory foundation for the claim is only emphasized by the remark of the court in Brown v. Brown, 71 Neb. 200, 115 Am. St. Rep. 568, 98 N. W. 718, 8 Ann. Cas. 632, supra, that it is difficult to reconcile the finding that a child was unintentionally omitted, with the rule which requires courts to give effect to the intentions of the testator, for "when such fact is once established, what his intentions actually were becomes a matter of conjecture, because, had he made provision in the will for the pretermitted child, such provision of necessity would have resulted in

a modification of the provisions made for the objects of his bounty."

By a rather unusual decision, the rule has become established in California that omitted children always take as in case of intestacy, unless the testator has expressed in the will his intention to exclude them. This carries the rule of excluding extrinsic evidence to the absurd length of making it the means of disestablishing, as remarked in Brown v. Brown, supra, the very arrangements it was intended to protect.

The case referred to is Re Garraud, 35 Cal. 336. The court looked at the sections of the statute surrounding the one involved, and found that, as in *Re Motz*, the clauses of the former were worded, "unless it appear from the will." They concluded from this that, notwithstanding the particular section in question differed, in that it omitted a reference to the will, the statute on the whole evinced a policy of requiring the intention of the testator to be proved by the will. On the other hand, they held that Wilson v. Fosket, 6 Met. 400, 39 Am. Dec. 736, was not a precedent, for the reason that the California statute was worded so that it applied where it appeared the omission was not intentional, while the Massachusetts statute differed in that it added the clause, "and not occasioned by any mistake or accident." This reasoning has been questioned, and certainly seems questionable, but it has been consistently adhered to. Re Stevens, 83 Cal. 322, 17 Am. St. Rep. 252, 23 Pac. 379; Rhoton v. Blevin, 99 Cal. 645, 34 Pac. 513; Re Salmon, 107 Cal. 614, 48 Am. St. Rep. 164, 40 Pac. 1030; and see also Re Callaghan, 119 Cal. 571, 39 L.R.A. 680, 51 Pac. 860 (where it was sought to show that through a mistake of the testator a devise failed of its purpose).

tion her name therein, was intentional, and not occasioned by accident or mistake."

Appellant insists: (1) That such parol testimony was not admissible, and that the question as to whether she was intentionally omitted must be determined solely from the will itself. (2) That the evidence is not sufficient to sustain the above finding, even if such parol testimony were admissible.

1. The legislation making provision for omitted children appears to have originated in Massachusetts, and Minnesota appears to have taken her original statutes on the subject from Wisconsin. They appear in the Revised Statutes of 1851, and, with an unimportant change in verbiage, in the General Statutes of 1866; and consist of two sections which, in the revision of 1866, read as follows:

"When any child is born after the making of his parent's will, and no provision is made therein for him, such child shall have the same share in the estate of the testator, as if he had died intestate, and the share of such child shall be assigned to him, as provided by law in case of intestate estates, unless it is apparent from the will that it was the intention of the testator that no provision should be made for such child." Gen. Stat. 1866, chap. 47, § 22.

Even under statutes applying universally to after born children, or to children not named or provided for, and requiring that they shall take as in case of intestacy, it is usually held that the intention to cut off without a portion, if properly expressed in the will, may be given effect. But extrinsic proof of the fact that the testator desired to leave such children unprovided for is not admissible. *Gay v. Gay*, 84 Ala. 47, 4 So. 45, per Somerville, J.; *Bradley v. Bradley*, 24 Mo. 311; *Thomas v. Black*, 113 Mo. 66, 20 S. W. 657; *Flanner v. Flanner*, 160 N. C. 126, 75 S. E. 936 (*obiter*); *Bower v. Bower*, 5 Wash. 225, 31 Pac. 598; *Hill v. Hill*, 7 Wash. 409, 35 Pac. 360; *Morrison v. Morrison*, 25 Wash. 466, 65 Pac. 779; *Boman v. Boman*, 1 C. C. A. 274, 7 U. S. App. 63, 49 Fed. 329; *Knut v. Knut*, 22 Ky. L. Rep. 972, 68 S. W. 583.

The same rule applies at common law and under early statutes, in so far as the intention to leave children unprovided for was involved in the question of disinheritance (*Graham v. Graham*, 23 W. Va. 36, 48 Am. Rep. 364; *Wilkins v. Allen*, 18 How. 385, 15 L. ed. 396; *Gifford v. Dyer*, 2 R. I. 99, 57 Am. Dec. 708; but see *Re McMullen*, 12 N. M. 31, 71 Pac. 1083); and so far as it was material in connection with the revocation of a will by birth of issue (*Alden v. Johnson*, 63 Iowa, 124, 18 N. W. 696). The latter case, of course, refers to the intention of the testator when making the will. The argument against permitting proof of

"When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, and it appears that such omission was not intentional, but was made by mistake or accident, such child, or the issue of such child, shall have the same share in the estate of the testator, as if he had died intestate, to be assigned as provided in the preceding section." Gen. Stat. 1866, chap. 47, § 23.

Under § 22 a child born after the making of the will cannot be disinherited unless the will itself shows that such was the intention of the parent. In the cases governed by § 23 there was no restriction as to the evidence by which the omitted child or grandchild may show that such omission was unintentional. There are obvious reasons why the questions arising under this section should not be determined solely from an inspection of the will itself. This section casts upon the omitted child or grandchild the burden of showing that such omission was not intentional. Such fact would seldom appear from the will itself. As said in *Case v. Young*, 3 Minn. 209, Gil. 140, among the cases which the legislature had in mind in enacting this statute are those in which the child was omitted under the belief that he was dead, and those in which the grandchildren were

a subsequent intention is quite different. Compare *Marston v. Roe*, 8 L. J. Exch. N. S. 293, 8 Ad. & El. 14, 2 Nev. & P. 504, and *Hill v. Hill*, 7 Wash. 409, 35 Pac. 360.

Wigram's distinction, *Extrinsic Evidence on Wills*, ¶ 10, "between evidence which is ancillary only to a right understanding of the words to which it is applied, and which is therefore simply explanatory of the words themselves,—and evidence which is applied to prove intention itself as an independent fact," is applicable, however, in determining whether or not the intention to omit a child has been expressed; and for the purpose of showing that a bequest to another is such an allusion to the omitted one as to indicate that he or she was present in the mind of the testator, when omitted, extrinsic evidence of their relationship has been received. *Hockensmith v. Slusher*, 26 Mo. 237 (where it was shown that the legatee was the omitted daughter's husband).

But in jurisdictions where, as a matter of statutory interpretation, it is held that mere allusion or reference by suggestion like the above is not a sufficient expression of the intention to exclude (see *Re Barker*, 5 Wash. 390, 31 Pac. 976), the motive of the legacy, in accordance with the general rule, cannot be more fully explained by evidence of the testator's declarations. *Bowers v. Bower*, 5 Wash. 225, 31 Pac. 598, *supra*. This situation must be distinguished from that in *Hockensmith v. Slusher*, *supra*.

C. F. L.

omitted because the testator was ignorant of their existence. Children and grandchildren not referred to for these reasons would be absolutely barred were evidence *dehors* the will excluded. That parol testimony is admissible under such a statute is implied in *Case v. Young*, *supra*, and has been directly decided in Wisconsin, from which our statute was derived, and in Michigan and Nebraska. *Moon v. Evans*, 69 Wis. 667, 35 N. W. 20; *Re Stebbins*, 94 Mich. 304, 34 Am. St. Rep. 345, 54 N. W. 159; *Brown v. Brown*, 71 Neb. 200, 115 Am. St. Rep. 568, 98 N. W. 718, 8 Ann. Cas. 632.

In the Revised Laws of 1905 our statutes were changed so as to read as follows:

"If any child of a testator, born after the death of such testator, has no provision made for him by his father in his will or otherwise, he shall take the same share of his father's estate that he would have taken if the father had died intestate." Rev. Laws 1905, § 3668; Gen. Stat. 1913, § 7259.

"If a testator omits to provide in his will for any of his children or the issue of a deceased child, they shall take the same share of his estate which they would have taken if he had died intestate, unless it appears that such omission was intentional, and not occasioned by accident or mistake." Rev. Laws, 1905, § 3669; Gen. Stat. 1913, § 7260.

While perhaps not material here, certain substantial changes made in the first section by the revision of 1905 may be noted. That section no longer applies to children born after the making of the will and before the death of the testator, but only to posthumous children. The power to disinherit a posthumous child entirely is taken away, and the right of such child to inherit is absolute unless the father has made provision for it, "in his will or otherwise." If provision has been made for such child otherwise than by will, the statute contains no restriction as to the manner in which that fact may be shown.

The second section is so changed that the right of a pretermitted child to inherit is absolute, "unless it appears that such omission was intentional, and not occasioned by accident or mistake." Under the original statute the burden was upon the omitted child to show that such omission was unintentional. Under the present statute, when it appears that a child has been omitted, the burden is upon those who claim that such omission was intentional, to establish that fact. The statute contains no restriction as to the manner in which such fact may be shown. Appellant, however, insists that the statute should be construed as if it provided that an omitted

child should inherit, "unless it appears from the will that such omission was intentional." In other words that the court, in effect, should interpolate the words italicized. It is difficult and frequently impossible to prove the intention of the testator. The legislature has shifted the burden of doing this from the child to the adverse party. If it had intended to go further and to limit the evidence upon the question to the will itself, it would, doubtless, have used appropriate language to express that intention.

Other courts, in construing statutes substantially the same as our present statute, hold that parol evidence is admissible for the purpose of showing that such child was intentionally omitted. *Coulam v. Doull*, 133 U. S. 216, 33 L. ed. 596, 10 Sup. Ct. Rep. 253; *Wilson v. Fosket*, 6 Met. 400, 39 Am. Dec. 736; *Converse v. Wales*, 4 Allen, 512; *Ramsdill v. Wentworth*, 101 Mass. 125; *Lorieux v. Keller*, 5 Iowa, 196, 68 Am. Dec. 696; *Whittemore v. Russell*, 80 Me. 297, 6 Am. St. Rep. 200, 14 Atl. 197; *Re Atwood*, 14 Utah, 1, 60 Am. St. Rep. 878, 45 Pac. 1036; *Schultz v. Schultz*, 19 N. D. 688, 125 N. W. 555.

The only court cited by appellant which excludes parol testimony under a similar statute is the supreme court of California. In *Re Garraud*, 35 Cal. 336, the California court attempted to make a distinction between the statute of that state and the statute of Massachusetts, and as a result of that distinction declined to follow the Massachusetts rule, and held that parol evidence was not admissible. This decision has been followed in the subsequent cases in that state. *Re Stevens*, 83 Cal. 322, 17 Am. St. Rep. 252, 23 Pac. 379; *Rhoton v. Blevin*, 99 Cal. 645, 34 Pac. 513; *Re Salmon*, 107 Cal. 614, 48 Am. St. Rep. 164, 40 Pac. 1030. In *Coulam v. Doull*, *supra*, the Supreme Court of the United States, in construing the statute of Utah copied from that of California, criticized and declined to follow the California rule, and followed that adopted by Massachusetts, where the statute originated.

As authority for the proposition that parol evidence is not admissible, appellant also cites decisions of the courts of Missouri, New Hampshire, Oregon, Rhode Island, Tennessee, and Washington. These courts hold that parol evidence is not admissible under the statutes of those states. But those statutes do not contain the provision here in question, and are so materially different from our own statute that decisions construing them are not in point.

As the legislature, without indicating any intention to exclude parol evidence, changed our statute to its present form after the

great weight of authority had determined that such evidence was admissible under similar statutes, the court cannot read into the statute the restriction urged by appellant, and it follows that the ruling of the trial court was correct.

2. The trial court found from the evidence that the failure to make any provision for the appellant was intentional on the part of the testator, and not occasioned by accident or mistake. It is not necessary to discuss the testimony in detail, and we will merely say that it tended to show that the testator believed that the appellant was a spurious child, and not his own, and that they had never communicated with or seen each other. The evidence clearly raised a question of fact, and is sufficient to sustain the finding of the trial court.

The order appealed from is affirmed.

MINNESOTA SUPREME COURT.

HERMAN KRAHN, Respt.,
v.
J. L. OWENS COMPANY, Appt.
(125 Minn. 33, 145 N. W. 626.)

Sale — dangerous machine.

1. Defendant manufactures bean and pea threshers. It sold an outfit to a firm of threshermen who engaged to thresh for plaintiff, a farmer. Plaintiff, after cleaning up about the machine got on top of the separator to throw the remnants into the feeder. While so engaged a board broke, and his foot caught in the cylinder.

Same — liability of manufacturer.

2. One who manufactures and sells an article not ordinarily of a dangerous nature, which is calculated for use by others than the vendee, may be liable to a person not the vendee, who uses the article in the usual course of business, for injuries due to defects which render the use of the article dangerous to life or limb.

The conditions necessary to a recovery, as applied to this case, are: That the board was so defective as to be dangerous to life and limb; that defendant knew of the defect when it sold the machine, or at least ought to have known it; that the defect was the proximate cause of the injury; that the defect was concealed to such an extent that ordinary observation on the part of plaintiff would not discover it; that the

Headnotes by HALLAM, J.

Note. — As to liability of manufacturer, packer, or vendor to person not in privity of contract, for injury from defects in article sold, see notes to Tomlinson v. Armour & Co. 19 L.R.A.(N.S.) 923, and Mazzetti v. Armour & Co. 48 L.R.A.(N.S.) 213; and see also reference in latter note to notes on analogous questions.
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board was intended for the purpose for which it was being used; and that plaintiff was one of the class of persons by whom it was contemplated the article would be used.

Appeal — evidence of custom.

3. The question whether sufficient foundation has been laid to enable a witness to testify as to a custom is a matter which the trial judge must, in the exercise of a sound discretion, pass upon as a question of fact, and his decision ought not to be reversed except in a very clear and strong case.

Trial — instructions — credibility of witnesses.

4. The trial court properly refused to single out particular witnesses, and to charge particularly as to matters bearing upon their credibility. Other rulings upon requests to charge present no reversible error.

Damages — excess.

5. The damages are excessive.

(February 20, 1914.)

APPEAL by defendant from an order of the District Court for Hennepin County denying its motion for judgment notwithstanding a verdict in plaintiff's favor, in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed on condition.

The facts are stated in the opinion.

Messrs. Lind, Ueland, & Jerome, for appellant:

A local custom could not bind defendant unless it had knowledge thereof prior to the sale of the machine to Murphy & Hughes, and at the time of sale had in view such custom, so that it could be charged with knowledge of the manner in which the machine would probably be used.

Minneapolis Trust Co. v. Menage, 73 Minn. 441, 76 N. W. 195; Fluhrer v. Lake Shore & M. S. R. Co. 121 Mich. 212, 80 N. W. 23; Hathesing v. Laing, L. R. 17 Eq. 92, 43 L. J. Ch. N. S. 233, 29 L. T. N. S. 734, 2 Asp. Mar. L. Cas. 170; The Reeside, 2 Sumn. 567, Fed. Cas. No. 11,657.

Proof of local custom without establishing knowledge of the same in the party sought to be bound is not sufficient.

Talbot v. Mattox, D. & P. Realty Co. 26 Okla. 298, 109 Pac. 128; Barrie v. Quinby, 206 Mass. 259, 92 N. E. 451; Lemke v. Hage, 142 Wis. 178, 135 Am. St. Rep. 1066, 125 N. W. 440; Chateaugay Ore & Iron Co. v. Blake, 144 U. S. 476, 36 L. ed. 510, 12 Sup. Ct. Rep. 731; Hone v. Mutual Safety Ins. Co. 1 Sandf. 137; Simmons v. Law, 8 Bosw. 213; Van Hoesen v. Cameron, 54 Mich. 609, 20 N. W. 609; Strong v. Grand Trunk R. Co. 15 Mich. 206, 93 Am.

Dec. 189; *The Gualala*, 102 C. C. A. 548, 178 Fed. 402; *Smith v. National Bank*, 191 Fed. 231; *William Laurie Co. v. McCullough*, 174 Ind. 477, 90 N. E. 1014, 92 N. E. 337, Ann. Cas. 1913A, 49.

Defendant would not be liable in case the defect was not concealed, or in case it was known to the owners of the machine.

Griffin v. Jackson Light & P. Co. 128 Mich. 653, 55 L.R.A. 318, 92 Am. St. Rep. 496, 87 N. W. 888; *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Bragdon v. Perkins-Campbell Co.* 66 L.R.A. 924, 30 C. C. A. 567, 58 U. S. App. 91, 87 Fed. 109, 5 Am. Neg. Rep. 277; *Carter v. Towne*, 103 Mass. 507; *Fitzmaurice v. Fabian*, 147 Pa. 199, 23 Atl. 444; *Curtin v. Somerset*, 140 Pa. 70, 12 L.R.A. 322, 23 Am. St. Rep. 220, 21 Atl. 244; *Glynn v. Central R. Co.* 175 Mass. 510, 78 Am. St. Rep. 507, 56 N. E. 698, 7 Am. Neg. Rep. 442.

Mere negligence in the manufacture of an article which is subsequently sold and passes into the hands of a remote vendee or user who has no contractual relation with the manufacturer, and who is injured by the defective condition of the manufactured article, is not sufficient to render the manufacturer liable.

Heizer v. Kingsland & D. Mfg. Co. 110 Mo. 605, 15 L.R.A. 821, 33 Am. St. Rep. 482, 19 S. W. 630; *Hasbrouck v. Armour & Co.* 139 Wis. 364, 23 L.R.A.(N.S.) 876, 121 N. W. 157, 21 Am. Neg. Rep. 430.

There can be no recovery unless there is actual knowledge on the part of the manufacturer of the defective condition of the manufactured article at or prior to the time of sale.

Huset v. J. I. Case Threshing Mach. Co. 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865; *Zieman v. Kieckhefer Elevator Mfg. Co.* 90 Wis. 497, 63 N. W. 1021.

No cause of action arises unless the defect was actually known to the defendant at or prior to the time of sale.

Zieman v. Kieckhefer Elevator Mfg. Co. supra.

Nor does any cause of action arise unless such defect was concealed by the manufacturer in such a manner that the vendee could not or would not be likely to discover such defect.

Pierce v. C. H. Bidwell Thresher Co. 153 Mich. 323, 116 N. W. 1104; *Woodward v. Miller*, 119 Ga. 618, 64 L.R.A. 932, 100 Am. St. Rep. 188, 46 S. E. 847; *Kuelling v. Roderick Lean Mfg. Co.* 183 N. Y. 78, 2 L.R.A.(N.S.) 303, 111 Am. St. Rep. 691, 75 N. E. 1098, 5 Ann. Cas. 124, 19 Am. Neg. Rep. 407; *Schubert v. J. R. Clark Co.* 49 Minn. 331, 15 L.R.A. 818, 32 Am. St. Rep. 559, 51 N. W. 1103; *O'Brien v. American Bridge Co.* 110 Minn. 364, 32

L.R.A.(N.S.) 980, 136 Am. St. Rep. 503, 125 N. W. 1012.

The verdict of \$15,000 awarded to plaintiff was clearly excessive, and appears to have been given under the influence of passion and prejudice.

Goss v. Goss, 102 Minn. 346, 113 N. W. 690; *Kanz v. J. Neils Lumber Co.* 114 Minn. 466, 36 L.R.A.(N.S.) 269, 131 N. W. 643, 3 N. C. C. A. 53; *Gibson v. Chicago G. W. R. Co.* 117 Minn. 143, 38 L.R.A.(N.S.) 184, 134 N. W. 516, Ann. Cas. 1913C, 1263; *Anderson v. Foley Bros.* 110 Minn. 151, 124 N. W. 987; *Sloniker v. Great Northern R. Co.* 76 Minn. 306, 79 N. W. 168, 6 Am. Neg. Rep. 298; *Rangenier v. Seattle Electric Co.* 52 Wash. 401, 100 Pac. 842; *Wimber v. Iowa C. R. Co.* 114 Iowa, 551, 87 N. W. 505; *Bell v. Globe Lumber Co.* 107 La. 725, 31 So. 994; *Slette v. Great Northern R. Co.* 53 Minn. 341, 55 N. W. 137.

Messrs. L. K. Eaton, Walter D. Corrigan, Henry Mahoney, and Walter L. Gold, for respondent:

Defendant's liability is well settled.

O'Brien v. American Bridge Co. 110 Minn. 364, 32 L.R.A.(N.S.) 980, 136 Am. St. Rep. 503, 125 N. W. 1012; *Pierce v. C. H. Bidwell Thresher Co.* 153 Mich. 323, 116 N. W. 1104; *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, 53 L. ed. 453, 29 Sup. Ct. Rep. 270; *Berger v. Standard Oil Co.* 126 Ky. 155, 11 L.R.A.(N.S.) 238, 103 S. W. 245; *Schubert v. J. R. Clark Co.* 49 Minn. 331, 15 L.R.A. 818, 32 Am. St. Rep. 559, 51 N. W. 1103; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Elkins v. McKean*, 79 Pa. 493; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154; *Moon v. Northern P. R. Co.* 46 Minn. 106, 24 Am. St. Rep. 194, 48 N. W. 679; *Huset v. J. I. Case Threshing Mach. Co.* 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865; *Coughtry v. Globe Woolen Co.* 56 N. Y. 124, 15 Am. Rep. 387; *Bright v. Barnett & Co.* 88 Wis. 299, 26 L.R.A. 524, 60 N. W. 418; *Roddy v. Missouri P. R. Co.* 104 Mo. 234, 12 L.R.A. 746, 24 Am. St. Rep. 333, 15 S. W. 1112; *Earl v. Lubbock* [1905] 1 K. B. 253, 74 L. J. K. B. N. S. 121, 53 Week. Rep. 145, 91 L. T. N. S. 830, 21 Times L. R. 71, 1 Ann. Cas. 753; *Holmvik v. Parsons Band Cutter & Self-Feeder Co.* 98 Minn. 424, 108 N. W. 810; *Lechman v. Hooper*, 52 N. J. L. 253, 19 Atl. 215; *Woodward v. Miller*, 119 Ga. 618, 64 L.R.A. 932, 100 Am. St. Rep. 188, 46 S. E. 847; *Randall v. Newson*, L. R. 2 Q. B. Div. 102, 46 L. J. Q. B. N. S. 259, 36 L. T. N. S. 164, 25 Week. Rep. 313, 23 Eng. Rul. Cas. 480;

Hasbrouck v. Armour & Co. 139 Wis. 357, 23 L.R.A.(N.S.) 876, 121 N. W. 157, 21 Am. Neg. Rep. 430; Wickert v. Wisconsin C. R. Co. 142 Wis. 375, 125 N. W. 943, 20 Ann. Cas. 452; Pizzo v. Wiemann, 149 Wis. 235, 38 L.R.A.(N.S.) 678, 134 N. W. 899, Ann. Cas. 1913C, 803, 3 N. C. C. A. 140.

The doctrine of *res ipsa loquitur* is applicable.

O'Brien v. American Bridge Co. 110 Minn. 364, 32 L.R.A.(N.S.) 980, 136 Am. St. Rep. 503, 125 N. W. 1012; Ryder v. Kinsey, 62 Minn. 85, 34 L.R.A. 557, 54 Am. St. Rep. 623, 64 N. W. 94; Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530; 1 Shearm. & Redf. Neg. §§ 59, 60; 2 Thomp. Neg. 1231; Montbriand v. Chicago, St. P. M. & O. R. Co. 191 Fed. 988; Pierce v. C. H. Bidwell Thresher Co. 153 Mich. 323, 116 N. W. 1104; Moore v. Parker, 91 N. C. 275; Strup v. Edens, 22 Wis. 432.

The damages were, under all the circumstances, moderately assessed.

Canfield v. Chicago, R. I. & P. R. Co. 142 Iowa, 658, 121 N. W. 186; Rogers v. Hiram J. Allen Lumber Co. 129 La. 900, 39 L.R.A.(N.S.) 202, 57 So. 166; Cross v. Lee Lumber Co. 130 La. 66, 57 So. 631; Retan v. Lake Shore & M. S. R. Co. 94 Mich. 146, 53 N. W. 1094; Smith v. Whittier, 95 Cal. 279, 30 Pac. 529; Texas & N. O. R. Co. v. Kelly, 34 Tex. Civ. App. 21, 80 S. W. 1073; Alberti v. New York, L. E. & W. R. Co. 43 Hun, 421; Erham v. Brooklyn City Co. 60 Hun, 580, 38 N. Y. S. R. 990, 14 N. Y. Supp. 336; Missouri P. R. Co. v. Mackey, 33 Kan. 298, 6 Pac. 291; Roth v. Union Depot Co. 13 Wash. 525, 31 L.R.A. 861, 43 Pac. 641, 44 Pac. 263; O'Brien v. J. G. White & Co. 105 Me. 308, 74 Atl. 721; International & G. N. R. Co. v. Brice, — Tex. Civ. App. —, 126 S. W. 613; Lannon v. Chicago, 159 Ill. App. 595; Fourche River Valley & I. T. R. Co. v. Tippet, 101 Ark. 376, 142 S. W. 520; Freeman v. Johnson, — Tex. Civ. App. —, 136 S. W. 275; Greer v. Great Northern R. Co. 115 Minn. 213, 132 N. W. 6; Freeman v. Harrison, — Tex. Civ. App. —, 143 S. W. 686; Freeman v. McElroy, — Tex. Civ. App. —, 149 S. W. 428; Bugge v. Seattle Electric Co. 54 Wash. 483, 103 Pac. 824; Kanz v. J. Neils Lumber Co. 114 Minn. 466, 36 L.R.A.(N.S.) 269, 131 N. W. 643, 3 N. C. C. A. 53; Eichhorn v. Central R. Co. 185 Fed. 624; Gibson v. Chicago G. W. R. Co. 117 Minn. 143, 38 L.R.A.(N.S.) 184, 134 N. W. 516, Ann. Cas. 1913C, 1263; Texas & N. O. R. Co. v. Brouillette, — Tex. Civ. App. —, 130 S. W. 886; Choppin v. New Orleans & C. R. Co. 17 La. Ann. 19; Galveston, H. & S. A. R. Co. v. Hynes, 21 Tex. Civ. App. 51 L.R.A.(N.S.)

34, 50 S. W. 624, 6 Am. Neg. Rep. 208; Chicago City R. Co. v. Wilcox, 33 Ill. App. 450; Galveston, H. & S. A. R. Co. v. Abbey, 29 Tex. Civ. App. 211, 68 S. W. 293; Galveston, H. & S. A. R. Co. v. Porfert, 72 Tex. 344, 10 S. W. 207; Texarkana & F. S. R. Co. v. Toliver, 37 Tex. Civ. App. 437, 84 S. W. 375; Chicago, B. & Q. R. Co. v. Dunn, 106 Ill. App. 194; Spooner v. Delaware, L. & W. R. Co. 115 N. Y. 22, 21 N. E. 696; Kalfur v. Broadway Ferry & M. Ave. R. Co. 161 N. Y. 660, 57 N. E. 1113; Hicks v. Nassau Electric R. Co. 47 App. Div. 479, 62 N. Y. Supp. 597; Williamson v. Brooklyn Heights R. Co. 53 App. Div. 399, 65 N. Y. Supp. 1054, 8 Am. Neg. Rep. 311; Allen v. Wisconsin C. R. Co. 107 Minn. 1, 119 N. W. 423; Burho v. Minneapolis & St. L. R. Co. 121 Minn. 326, 141 N. W. 300; Tierney v. Minneapolis & St. L. R. Co. 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. 229; Olson v. St. Paul & D. R. Co. 45 Minn. 536, 22 Am. St. Rep. 749, 48 N. W. 445, 4 Am. Neg. Cas. 244; Larson v. Haglin, 103 Minn. 257, 114 N. W. 958; Clay v. Chicago, M. & St. P. R. Co. 104 Minn. 1, 115 N. W. 949; Sprague v. Wisconsin C. R. Co. 104 Minn. 58, 116 N. W. 104; Whitehead v. Wisconsin C. R. Co. 103 Minn. 13, 114 N. W. 254, 467.

Hallam, J., delivered the opinion of the court:

1. Defendant manufactures self-feeding bean and pea threshers. On August 8, 1910, it sold one of its outfits to Murphy & Hughes, in Wisconsin. The separator of this thresher looks much like the separator of an ordinary grain thresher, and operates upon similar principles. It is fed at the front. The feed table stands 4 feet 7 inches from the ground. Just back of the feed table is a raised hood or cap. Within this are two knife cylinders with interlocking knives. Just back of this hood or cap, and directly above the rear part of the cylinder, is a removable board, 9 inches wide, extending across the machine, resting upon bearings at the ends, and held in place by a cleat at each end. The board is removable to permit of access to the cylinders when they become clogged. The top of this board is painted red, the bottom is unpainted. Plaintiff is a Wisconsin farmer. On September 2, 1910, he engaged Murphy & Hughes to thresh peas on his farm. As the job was about finished the crew gathered up the loose remnants about the machine and put them in bags. Plaintiff climbed on top of the machine to empty these bags into the feeder, standing as he did so upon the removable board, and reaching over the hood or cap. While so engaged this board broke, his left foot

came into contact with the knives and amputation became necessary. Plaintiff had a verdict for \$15,000.

2. There was no contractual relation between plaintiff and defendant. But it is well settled that there may be liability for personal injury independent of any contractual relation. A duty with respect to instrumentalities delivered under contract may exist towards others than the contracting parties. One who manufactures and sells an article not ordinarily of a dangerous nature, which is calculated for use by others than the vendee, may be liable to a person not the vendee, who uses it in the usual course of business, for injuries due to defects which render the use of the article dangerous to life or limb. *Schubert v. J. R. Clark Co.* 49 Minn. 331, 15 L.R.A. 818, 32 Am. St. Rep. 559, 51 N. W. 1103; *O'Brien v. American Bridge Co.* 110 Minn. 364, 32 L.R.A.(N.S.) 980, 136 Am. St. Rep. 503, 125 N. W. 1012.

The conditions necessary to a recovery, as applied to this case, are as follows:

It must appear that the board was so defective as to be dangerous to life or limb. There was ample proof that it was defective. Several of defendant's witnesses admitted it. One portion of the broken board, the longer end, was exhibited to the jury and to this court. The board was cross-grained and unfit for use in any place where it was required to bear a man's weight. Its position, over a knife cylinder, was such that the consequence of a man's breaking through was necessarily extremely dangerous.

It must appear that the defendant knew of these defect when it sold the separator, or at least that it ought to have known of it. Many cases hold that actual knowledge is necessary, and that the action is in effect one sounding in deceit, and not in negligence. *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 605, 15 L.R.A. 821, 33 Am. St. Rep. 482, 19 S. W. 630; *Bragdon v. Perkins-Campbell Co.* 66 L.R.A. 924, 30 C. A. 567, 58 U. S. App. 91, 87 Fed. 109, 5 Am. Neg. Rep. 277; *Curtin v. Somerset*, 140 Pa. 70, 12 L.R.A. 322, 23 Am. St. Rep. 220, 21 Atl. 244; *Kuelling v. Roderick Lean Mfg. Co.* 2 L.R.A.(N.S.) 303, and note (183 N. Y. 78, 111 Am. St. Rep. 691, 75 N. E. 1098, 5 Ann. Cas. 124, 19 Am. Neg. Rep. 407); 1 *Thomp. Neg.* § 827. Others hold that mere negligence is sufficient. *Watson v. Augusta Brewing Co.* 124 Ga. 121, 1 L.R.A.(N.S.) 1178, 110 Am. St. Rep. 157, 52 S. E. 152, 19 Am. Neg. Rep. 107; *Clement v. Crosby & Co.* 148 Mich. 293, 10 L.R.A.(N.S.) 588, 12 Ann. Cas. 265, 111 N. W. 745; *Haasbrouck v. Armour & Co.* 139 Wis. 357, 23 L.R.A.(N.S.) 876, 51 L.R.A.(N.S.)

121 N. W. 157, 21 Am. Neg. Rep. 430; 1 *Thomp. Neg.* § 828. It is not necessary in this case to determine whether anything short of actual knowledge on the part of defendant will furnish a basis of liability, for the jury found in answer to a special question, that defendant did know of the defect at the time of the sale. This finding is amply sustained by the proof. Every board that went into the machine was closely inspected by defendant before it was used. The defect in this board was so obvious that an inspection could not fail to discover it.

It must appear that the breach of duty on the part of defendant was the proximate cause of the accident. Defendant contends that *Murphy & Hughes*, to whom the separator was sold, had knowledge of the defect before the accident, and that this knowledge on their part made the negligence their own, and broke the sequence of events necessary to make the negligence of the defendant the proximate cause. The jury found that *Murphy & Hughes* had no such knowledge. This finding is sustained by the evidence. Both *Murphy and Hughes* so testified. There is no direct evidence to the contrary. This board was very frequently taken up and had they examined the under side they would have observed the defect. But they were under no duty to examine it. The circumstances disclosed by the evidence do not compel a finding that *Murphy & Hughes* knew of the defect. We do not wish to be understood as holding that knowledge on the part of *Murphy & Hughes* would relieve defendant from liability. Some cases so hold. *Griffin v. Jackson Light & P. Co.* 128 Mich. 653, 55 L.R.A. 318, 92 Am. St. Rep. 490, 87 N. W. 888. Others hold to the contrary. See *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, 179, 53 L. ed. 463, 463, 29 Sup. Ct. Rep. 270, and cases cited. That question is not involved here, and we do not decide it. It is claimed that the board was not in its proper position, and that this, and not the defect in the board, caused it to break. The jury found that the board was in place. The evidence sustains this finding. The only direct evidence is to this effect. Defendant contends that the appearance of the remnants of the board, together with other circumstances, compels the inference that the board was out of place and that it slipped into the cylinder before it broke. We have examined the evidence with care and are unable to arrive at that conclusion.

It must appear that the defect was concealed to such an extent that ordinary observation on the part of plaintiff would not discover it. *Schubert v. J. R. Clark*

Co. 49 Minn. 331, 15 L.R.A. 818, 32 Am. St. Rep. 559, 51 N. W. 1103. This defect was concealed by paint so that a careful examination of it from the outside would not disclose it. Only by turning the board over could the defect be seen. To all intents and purposes it was a concealed defect.

It must appear that the board was intended for the purpose for which it was being used. The evidence is quite decisive that men necessarily stand and walk on top of these separators when not in operation, in driving from place to place, and in cleaning out the cylinders. There is also ample evidence that one of the operators of the thresher was necessarily often on top of the machine when it was in operation, going upon every part of the top from end to end, adjusting belts, oiling the bearings, and watching the work of the men. This, however, is not enough.

It must appear that plaintiff was one of the class of persons by whom defendant contemplated the board would be used. Otherwise defendant would owe him no duty. Negligence presupposes a duty to exercise care toward the person complaining. If defendant owed plaintiff no duty of care, there was no negligence of which plaintiff could complain. *O'Brien v. American Bridge Co.* 110 Minn. 364, 32 L.R.A. (N.S.) 980, 138 Am. St. Rep. 503, 125 N. W. 1012. We are of the opinion that the evidence amply shows that the work that plaintiff was doing brought him within the class of persons by whom it was contemplated this board would be used. The process of cleaning up was necessary. The loose stuff so cleaned up could not be pitched into the feeder with a fork. It was necessary to use bags or baskets. The feeder was too high to make it convenient to empty bags or baskets into it from the ground. It is claimed that they could be emptied into a repeat elevator which catches the unthreshed pods that go over the sieve and carries them back to the cylinder again. Plaintiff's witnesses, however, testify that this is not practicable. There is also evidence that the manner in which plaintiff was doing this work was customary in the operation of such machines, and that the custom was so common that defendant's knowledge of it may be presumed. The jury might fairly find that plaintiff was doing a necessary part of the work in a reasonable, practicable, and customary way, and that he was one of the class of persons by whom it was contemplated the board should be used.

We are of the opinion that, by reason of the foregoing facts, the question of defend-

ant's liability to plaintiff was one for the jury to determine.

3. Defendant assigns some errors in law. The court permitted plaintiff to give evidence that he was following a customary method of work at the time he was injured. This is assigned as error, the alleged ground of error being that plaintiff had not shown sufficient knowledge of the method of operation of a bean and pea thresher to render him competent to testify on this subject. Plaintiff had never worked about a bean and pea thresher before. He had, however, worked for years about a grain thresher. We do not regard the admission of this evidence as reversible error. The qualification of the witness to testify in such a case is a matter which the trial judge must, in the exercise of a sound discretion, pass upon as a matter of fact, and his decision ought not to be reversed except in a very clear and strong case. *Stevens v. Minneapolis*, 42 Minn. 130, 43 N. W. 842; *Meyers v. McAllister*, 94 Minn. 510, 103 N. W. 564. In view of the similarity between grain threshers and bean and pea threshers, we do not consider that the court abused its discretion in receiving plaintiff's testimony.

4. Defendant requested the court to charge the jury that in determining the weight to be given to the testimony of *Murphy & Hughes*, it was proper to take into consideration their interest in the outcome, and more specifically that an admission by them of their knowledge of the defective condition of the board might render themselves liable to plaintiff for his injuries. The court refused this request, but charged fully and correctly as to the credibility of the witnesses generally, and as to the consideration to be given to their interest in the outcome of the case. This was sufficient. The practice of singling out a particular witness and charging specifically as to his interest in the case has often been disapproved by this court, on the ground that it gives undue prominence to his testimony and tends to discredit it. The request to charge was properly refused. *Harriott v. Holmes*, 77 Minn. 245, 79 N. W. 1003; *Kerling v. G. W. Van Dusen & Co.* 109 Minn. 481, 124 N. W. 235, 372.

Defendant assigns as error the refusal of the court to give its request to instruct the jury that, if plaintiff was not one of the class of persons who were contemplated as likely to go upon the separator when in operation, he could not recover. The request was proper enough, but the court fully covered the subject by the instructions in fact given.

5. We are constrained to hold that the

damages are excessive. In view of the age of plaintiff, forty-eight years old, we have decided, with some hesitation, that a new trial should be granted, unless plaintiff shall, within twenty days after filing of a remittitur, consent to a reduction of the amount of the verdict to \$12,000. In all other particulars the order appealed from is affirmed.

Petition for rehearing denied.

NORTH DAKOTA SUPREME COURT.

L. O. LARSON et al., Appts.,
v.
ALBERT HANSON et al., Resp'ts.
(26 N. D. 406, 144 N. W. 681.)

Replevin — redelivery undertaking — effect.

1. The redelivery undertaking in claim and delivery is not only a substitute for the possession of the property by the plaintiff, but is security for any money judgment recovered.

Headnotes by SPALDING, Ch. J.

Note. — *Liability of sureties on bond in judicial proceedings, where judgment is in favor of one principal and against another.*

Introduction and scope.

Generally, as to the effect upon surety of judgment against principal, see note to P. Ballantine & Sons v. Fenn, 40 L.R.A. (N.S.) 698.

As to compromise or consent to affirmance as affecting liability of surety upon appeal bond, see note to First Nat. Bank v. C. E. Stevens Land Co. 43 L.R.A. (N.S.) 1040.

As to amendment of claim or pleading as discharge of sureties on bonds given to dissolve attachments or on bail bonds in civil actions, see note to Com. v. A. B. Baxter & Co. 42 L.R.A. (N.S.) 484.

The present note is intended to deal only with the question of the liability of parties whose primary undertaking was that of surety, and not that of principal in the bond. Therefore, cases like Lewis v. Maulden, 93 Ga. 758, 21 S. E. 147, holding the principals in an appeal bond are sureties for each other, and that judgment may be entered against all of such principals, though the verdict is against a part only, are not in point in this note.

But in Landa v. Moody, — Tex. Civ. App. —, 57 S. W. 51, it was held that parties who sign an appeal bond as principals cannot be held liable thereunder for the amount of the judgment affirmed against their co-principals, when as to them the judgment on appeal is in their favor, as they are bound not as sureties, but as principals. 51 L.R.A. (N.S.)

Same — construction.

2. The redelivery undertaking in claim and delivery must be construed with reference to the intent of the legislature in providing for it, and the purpose for which it is given.

Bond — replevin — dismissal as to one principal — effect.

3. An action in claim and delivery was brought against two defendants; they furnished a statutory redelivery undertaking, which recited that the defendants were desirous of having the property to which the action related returned to them. They each signed the undertaking. H. and F. at their request executed such undertaking as sureties. At the conclusion of the taking of the evidence on the trial, counsel for the two defendants moved a dismissal as to one defendant. This was not resisted by the plaintiffs; the record indicates that it was assented to; a verdict was rendered and judgment entered in favor of the plaintiffs, and against the other defendant; held, that the dismissal of the one defendant did not release the sureties from liability upon the undertaking.

Replevin — judgment — inability to return property.

4. Where, on the record of the trial of an action in claim and delivery, it appears that the property which is the subject of the action cannot be returned, judgment

Cases like Blair v. Sanborn, 82 Tex. 686, 18 S. W. 159, and Ovington v. Smith, 78 Ill. 250, in which the judgment is in favor of one obligee in the bond and against another, but in which the effect of the judgment is the same as to all the principals in the undertaking, are not within the scope of this note. Neither are cases like Bryan v. Simonton, 8 N. C. (1 Hawks) 51, in which one or more of the principals in the bond taken in a judicial proceeding are released by the obligee after a judgment against all, within its scope.

As a rule, statutes have been enacted in the different jurisdictions prescribing, in effect at least, what shall be the condition of the bonds taken in the various judicial proceedings in which such undertakings are common. The purpose of all these enactments being practically the same, namely, the protection of the obligee in the particular undertaking (Vandyke v. Weil, 18 Wis. 277), the authorities, almost as a whole, unite in holding that the sureties in such obligations are not discharged from liability by a judgment in favor of one principal and against another. If the rule were otherwise, a great hardship might be worked upon the obligee in the undertaking, for if the obligor acquitted was the only solvent one, the obligee would be without recourse, the sureties having also been discharged. Almost *sine exceptione*, the few cases not sustaining the above rule have been either overruled, or else are explainable on the theory of the peculiar phraseology of the condition of the particular bond under consideration.

need not be entered for its return or possession.

Same — dissipation of property — judgment for money.

5. Where the record in an action in claim and delivery shows that the defendants sold the property, which consisted of about forty head of live stock, at auction to ten or twelve different purchasers, that some of them resold it to others, and that it was scattered over a wide territory a year before the trial of the action in claim and delivery, the plaintiff has made out a case sustaining a judgment for money only in such action, and the sureties on the redelivery undertaking are liable on such undertaking, unless they show clearly and explicitly that the property could have been returned to plaintiffs; and opinions of the principals on the undertaking that they

could have returned such property at such time are inadequate to overcome the showing made by the plaintiffs that the property had been sold and scattered, and much of it resold.

Evidence — sufficiency.

6. Evidence examined, and it is held that it was sufficient to support a judgment in claim and delivery for money only, as against the sureties on the redelivery undertaking, and this is especially so when it is shown that the sureties executed the undertaking on the day of the advertised sale, and knew that it was to be sold, were present at the sale, saw it sold, and made no objection thereto; such sale occurring prior to the trial of the action in claim and delivery.

(November 20, 1913.)

This is true notwithstanding the fact that ordinarily "sureties are said to be favorites of the law, and a contract of suretyship must be strictly construed to impose upon the surety only those burdens clearly within its terms, and must not be extended by implication or presumption." 32 Cyc. 73.

Appeal bonds.

In accord with what has already been said, the great weight of authority supports the rule that the sureties upon bonds given upon appeal are not discharged from liability upon their undertaking by an affirmance of the judgment as to part of the principals in the bond, and a reversal as to the others. *Porter v. Singleton*, 28 Ark. 483; *Wood v. Orford*, 56 Cal. 157; *Ives v. Hulce*, 17 Ill. App. 35; *Ferguson v. Allen*, 91 Ill. App. 591; *Lutt v. Sterrett*, 26 Kan. 561; *Gilpin v. Hord*, 85 Ky. 213, 3 S. W. 143; *Cook v. Ligon*, 54 Miss. 625; *Hood v. Mathis*, 21 Mo. 308; *Seacord v. Morgan*, 3 Keyes, 636, 35 How. Pr. 487, affirming 17 How. Pr. 394; *Goodwin v. Bunzl*, 102 N. Y. 224, 6 N. E. 399; *Fritchie v. Holden*, 57 Hun, 585, 32 N. Y. S. R. 276, 11 N. Y. Supp. 171; *Johnstone v. Conner*, 13 N. Y. Civ. Proc. Rep. 19; *Schultz v. United States Fidelity & G. Co.* 201 N. Y. 230, 94 N. E. 601, affirming 134 App. Div. 260, 118 N. Y. Supp. 977; *Ford v. Townsend*, 1 Robt. 39; *Gardner v. Barney*, 24 How. Pr. 467; *Brown v. Conner*, 32 N. C. (10 Ired. L.) 75; *Alber v. Froehlich*, 39 Ohio St. 245, overruling *Lang v. Pike*, 27 Ohio St. 498; *MacNeale v. Frackler*, 3 Ohio L. J. 11; *Bentley v. Dorcas*, 11 Ohio St. 398; *Moore v. Gore*, 2 Tex. App. Civ. Cas. (Willson) 61; *Dignowity v. Staacke*, — Tex. Civ. App. —, 25 S. W. 824; *McFarlane v. Howell*, 91 Tex. 218, 42 S. W. 853; *Vandyke v. Weil*, 18 Wis. 277.

While the particular wording of the condition of the undertaking of the sureties must be considered in determining the question of their liability when the judgment is affirmed as to a part only of the appellants, the courts have, nevertheless, concurred in holding that the condition of the

bond is not fulfilled by such partial affirmance. Thus, the sureties were held liable, although the judgment was affirmed as against part only of the principals, where the bond was conditioned that—

—the principals would prosecute their appeal with effect, and in case of judgment against them, that they would perform the judgment, sentence, or decree, and pay all such damages as might be awarded against them. *McFarlane v. Howell*, 91 Tex. 218, 42 S. W. 853. When judgment is affirmed as to one of several joint appellants, it cannot be said that they have prosecuted the appeal to effect. One has; the other has not. The condition of the bond being that both shall prosecute to effect, the failure of either is a breach of it. *Cook v. Ligon*, 54 Miss. 625;

—the principals would pay the full amount of condemnation and costs, in case a decree should be rendered in favor of the appellees. *Bentley v. Dorcas*, 11 Ohio St. 398. The court said: "The judgment in the district court is against a part only. We think the sureties in the bond given by all are the sureties of all, and bound for the default of all. . . . By the terms of the bond, they are sureties equally for all; and all, by uniting in the bond, must be regarded as bound for each other;"

—appellants would satisfy such judgment and costs as might be adjudged against them, not exceeding a certain sum, and that they would prosecute their appeal to effect, etc. *Alber v. Froehlich*, 39 Ohio St. 245, overruling *Lang v. Pike*, 27 Ohio St. 498 (The court was of the opinion that the language of the statute in accordance with which the appeal bond in both cases was conditioned was broad enough to bind the sureties in such bond, where the judgment was in favor of one of the joint appellants and against the other. The decision in this case also overruled the decision in *Marsh v. Byrnes*, 7 Ohio L. J. 345);

—appellants would pay if judgment was affirmed. *Vandyke v. Weil*, 18 Wis. 277;

—defendants would prosecute their appeal to effect and without unnecessary delay, and satisfy such judgment and costs

APPEAL by plaintiffs from a judgment of the District Court for Stutsman County in defendants' favor in an action brought to recover upon a redelivery bond given by them in a claim and delivery action. Reversed.

Statement by Spalding, Ch. J.:

The story of the litigation leading to this appeal may be epitomized as follows: In November, 1906, appellant Larson brought an action in claim and delivery against one Foley, and process was placed in the hands of the appellant Walker, as an officer, for service. Walker took into his possession under the process ten horses, three cows, three calves, thirty-five hogs, and some other property, at the village of Kensal, in

Stutsman county. Not having means for caring for the live stock, he intrusted it, as he supposed to the keeping of William Caven and W. L. Caven. December 1, 1906, judgment against Foley awarding the possession of the property to the plaintiff Larson was rendered, whereupon Walker applied to the Cavens for possession in order that the property might be sold to satisfy the lien adjudged thereon in favor of Larson. William Caven, who was in fact the proprietor of the livery barn in which the property was held, refused to deliver the property, or any of it, unless a feed bill amounting to \$523.50, should first be paid. It would appear that this amount was tendered, but refused, whereupon it was deposited in a bank to the credit of

as might be rendered against them. Lutt v. Sterrett, 26 Kan. 561;

—satisfaction would be given "if the judgment of the justice be affirmed, or if, on the trial anew in the circuit court, judgment be given against the appellants." Hood v. Mathis, 21 Mo. 308;

—appellants would prosecute their appeal with effect, and pay whatever judgment should be rendered against them upon trial of the appeal, or by confession, or, should the appeal be dismissed, would pay the judgment appealed from. Ives v. Hulce, 17 Ill. App. 35;

—the sureties would pay if any part of the judgment was affirmed. Wood v. Orford, 56 Cal. 157.;

—defendants would prosecute a writ of review to final judgment, and that they would pay such judgment as might be rendered against them, and the plaintiff discontinued as to one of the defendants. Happenny v. Trayner, 111 Mass. 279. Such discontinuance does not affect the rights or means of indemnity of the sureties, which depend on their relation to their principals, as shown by the bond, and are not secured through the judgment.

It is immaterial whether the undertaking is a supersedeas bond or a regular appeal bond. Porter v. Singleton, 28 Ark. 483; Dignowity v. Staacke, — Tex. Civ. App. —, 25 S. W. 824; Missouri, K. & T. R. Co. v. Lacy, 13 Tex. Civ. App. 391, 35 S. W. 505; Bridgford v. Fogg, 12 Ky. L. Rep. 570, 14 S. W. 600; Gilpin v. Hord, 85 Ky. 213, 3 S. W. 143.

The appeal being by more than one appellant, the undertaking of the sureties is as a rule regarded as several as to each one of the principals. McFarlane v. Howell, 91 Tex. 218, 42 S. W. 853; Ives v. Hulce, 17 Ill. App. 35; Alber v. Froehlich, 39 Ohio St. 245, overruling Lang v. Pike, 27 Ohio St. 498; Vandyke v. Weil, 18 Wis. 277; Lutt v. Sterrett, 26 Kan. 561. In Ives v. Hulce, supra, the court said: "We think it would be unduly technical to hold that because judgment was rendered against one alone, then the bond should be discharged. It is not contended by counsel, as we under-

stand, that Ives and Ator are not liable on the bond, but that the sureties are not so liable. If the principals are still bound by the terms of the bond, then the sureties are also. By what process of reasoning the sureties can be discharged while the principals are bound is not made plain. The statute, in providing a form for a bond which may be used in the case of one defendant, clearly contemplated appeals by several defendants, and the object of the undertaking is to secure the plaintiff in the judgment. It is a reasonable and fair construction to hold, in such cases, that the undertaking of the sureties is several as to each one of the principals, and that where judgment goes against but one, it is within the condition of the instrument."

Also in Lutt v. Sterrett, supra, the court said: "As we have before stated, an appeal taken jointly by two or more defendants, by giving one and the same undertaking or appeal bond, must, under the laws of this state, be considered as a several appeal as well as a joint one, and the surety on the appeal bond must, under the laws of this state, be considered as undertaking severally for each of the defendants, as well as jointly for all of them. To hold otherwise would be giving a very narrow construction to the statute authorizing appeals, and a construction not required by either the words or the obvious intention of the legislature, and a construction tending to defeat, rather than to promote, the administration of justice."

And in Alber v. Froehlich, supra, the court used this language: The "defendants, instead of separately appealing from the judgment, united, and this single undertaking was executed. The effect of it was to vacate the judgment against each, and the action thereupon was transferred to the court of common pleas for trial upon that cause of action, upon which a several judgment might be rendered. In the light of the statute and the state of the case, and considering the purpose of the undertaking as ascertained from the surrounding circumstances, its effect is precisely the same as if the sureties had executed a separate un-

William Caven. The Cavens, however, still refused to deliver possession of the property, and action was commenced by Larson and Walker against them, to recover possession, on or about the 7th of February, 1907. Process was issued and served by the sheriff of Stutsman county, who took possession of all property mentioned, whereupon William and W. L. Caven procured the execution of an undertaking, in the sum of \$2,000, for the redelivery to them of the property in question, under the statute relating to the action of claim and delivery. This redelivery undertaking was signed by William Caven and W. L. Caven, and by the defendants herein, Albert Hanson, and Julius Frederickson, and was conditioned for the delivery of such property to the plaintiffs,

if delivery should be adjudged, and for payment to them of such sum as might, for any cause, be recovered against the defendants in the action. The sheriff approved the sureties and returned the property to the possession of the defendants in the action, the two Cavens. The undertaking recited that the property had been taken from the defendants, and that the defendants were desirous of having it returned to them.

On the same day on which the property was returned, W. L. Caven, acting as agent for William Caven, sold it under an agister's lien, claimed at that time to amount to \$952.50; it being claimed for the keeping of said property from the time it was delivered to them by the officer, about the 26th day of November, 1906, to the date of sale,

undertaking for each of the defendants. They undertake that the defendants will pay any judgment that may be rendered against them (or either of them) in an action in which, legally, a separate judgment may be rendered against one only, but by virtue of which undertaking the judgment is vacated as to both. There cannot be the slightest doubt that such was the intention and understanding of the parties, and 'to hold that the surety is discharged because the judgment is not against both, after he has arrested the right of the plaintiff to collect as to either, seems' . . . a narrow and technical construction of the statute, not required by its words nor the obvious intention of the legislature. Such construction tends to defeat, rather than promote, the administration of justice."

This rule may not apply in a case in which the judgment appealed is founded upon a liability joint merely, and not joint and several, provided the law of the jurisdiction requires a joint judgment against all the original defendants. But it would seem that in such a case the question would not arise, for then a reversal of the judgment as to one defendant would reverse it as to all. In some states, however, all joint obligors need not be sued, and a judgment may be taken against one or more without being taken against all. Each party to a suit against whom a judgment is rendered, who desires to supersede the judgment, is required to give an appeal bond; and each may give a separate bond; and while they may give a joint bond, it was never intended that by so doing either they or their sureties could change their liability in the appellate court. *McFarlane v. Howell*, supra.

The court in *Gilpin v. Hord*, 85 Ky. 213, 3 S. W. 143, takes the position that the consideration which upholds a supersedeas bond is the depriving of the successful party of his right to enforce satisfaction of his judgment, not only as against all of the parties who have superseded, but as against any one of them; that therefore, to hold that the reversal of a judgment as to only a portion of the appellants discharges the

sureties in the bond from payment of a judgment which is affirmed as against the other appellants would strike down the consideration of the bond, to wit, the suspension of the appellee's right to proceed against any one of the appellants to enforce the satisfaction of his judgment.

So, the surety upon a supersedeas bond to a judgment against a partnership in the firm name was not discharged from liability by a reversal of the judgment on appeal as to two of the partners, and an affirmance as to the other partner. *Bridgford v. Fogg*, 12 Ky. L. Rep. 570, 14 S. W. 600.

The sureties in an appeal bond are not discharged from liability merely because some of the appellants abandon their appeal, if the appellee obtains an affirmance of the judgment from which the appeal was taken. *Burrall v. Vanderbilt*, 1 Bosw. 637, 6 Abb. Pr. 70. The appeal in this case does not appear to have been dismissed or discontinued as to those who abandoned it. The undertaking of the sureties in this case was "that if appellants will pay all costs and damages against them," and "if the judgment or any part thereof shall be affirmed, the appellants will pay," etc.

And where the judgment appealed from was against several defendants *in solido*, and it was so changed by the appellate court as to discharge one of them and to hold the others liable jointly, and not *in solido*, the surety on the appeal bond was liable. *Culver v. Leovy*, 27 La. Ann. 58. The conditions of the bond in this case were "that the appellant shall satisfy whatever judgment may be rendered against him, etc., and that the surety shall be liable in his stead." The court said that the condition of the bond signed by the surety was the one required by law, and expressed the opinion that the defense set up by the surety was more specious than weighty.

But where the obligation of the sureties in an appeal bond was to satisfy whatever judgment might be rendered against a partnership on appeal, and there was a reversal as to the partnership, but a judgment against a partner was rendered when there was none against him in the lower court, the

about the 9th of February, 1907. The horses were purchased by six different buyers, the cows and calves by four others, and the hogs by still another. The sale aggregated \$1,085.25, of which sum, William Caven retained \$1,028.50, and paid the balance of \$56.75 to Foley, the party from whom the property had been originally taken. The action in claim and delivery brought by Larson and Walker against the two Cavenas was tried at the January, 1908, term of the district court, in Stutsman county. The defendants, Cavenas, filed a joint answer, resisting the rights of the plaintiffs to possession, and defended the action. At the conclusion of the trial the attorney for the defendants moved the dismissal of the action as to W. L. Caven, for

the reason that it appeared that, throughout the transaction, he had acted only as the agent for William Caven. Counsel for the plaintiffs said that the motion was not resisted, or words to that effect, whereupon the motion was granted. The case was submitted to the jury, which found plaintiffs entitled to possession of all the personal property described, or the value thereof in case delivery could not be had, and that the value of the property was \$1,000; and it also assessed \$200 damages for the detention, and for money spent in recovery of the property. On January 23, 1908, the court rendered judgment in favor of the plaintiffs, Larson and Walker, against the defendant William Caven, for the sum of \$1,200 and costs. A few days thereafter,

sureties were not liable. *Grieff v. Kirk*, 17 La. Ann. 25.

And a judgment on appeal from a justice's court against one of two defendants by consent of parties, but without the consent of the surety on the appeal bond, discharged the surety. *Shimer v. Hightshue*, 7 Blackf. 238.

Attachment bonds.

It is well established that the sureties upon attachment bonds executed by, or on behalf of, the defendants in the attachment proceedings, are not discharged by a judgment in favor of part of the defendants and against the others. Thus, the sureties in bonds given to discharge attachments against property of some or all of the defendants were held liable, although judgment was in favor of part of the principals, where the condition of the bond was—

—to pay "whatever" judgment might be rendered against the "defendants," *Heynemann v. Eder*, 17 Cal. 434;

—to secure payment to plaintiff of the amount of the judgment which he might recover, *Leonard v. Speidel*, 104 Mass. 356; *Campbell v. Brown*, 121 Mass. 516; *Sutro v. Bigelow*, 31 Wis. 527;

—to pay plaintiff the amount which he might recover against several specified defendants, *Way v. Murphy*, 168 Mass. 472, 47 N. E. 500;

—to pay "if the plaintiff shall recover judgment in said action," *McCutcheon v. Weston*, 65 Cal. 37, 2 Pac. 727;

—to pay the judgment which might be recovered against the defendants, *Gilmore v. Crowell*, 67 Barb. 62;

—to return the property released by the bond to the sheriff if the plaintiff recovered any judgment, *McCormick v. National Surety Co.* 134 Cal. 510, 66 Pac. 741.

By holding the sureties liable in such cases as these, the substituted security is made available. The property seized being such as could be applied to the judgment obtained, the sureties should occupy the 51 L.R.A.(N.S.)

same relation to the plaintiffs. *Gilmore v. Crowell*, supra.

In accordance with the foregoing rule, it is equally as well settled that discontinuance of the action as to a part of the defendants, and proceeding to judgment against the remainder, do not release the sureties from liability upon their undertaking. So the sureties were liable where the undertaking was conditional—

—to pay the judgment against the "defendants," *Salomon v. Buehler*, 129 Ill. App. 176 (The court said that the statute governing the recognizance here made the sureties liable for any judgment recovered in the suit in question);

—that defendants would pay plaintiff the amount, if any, which he should recover in the said action, *Poole v. Dyer*, 123 Mass. 363;

—to pay the judgment which the plaintiff might recover in the action, *Prior v. Pye*, 164 Mass. 316, 41 N. E. 353;

—that the defendants in the suit, or either of them, would on demand pay the plaintiff the amount of the judgment that might be recovered against them not exceeding a certain amount, *Inbusch v. Farwell*, infra; see also *Snelling v. Merritt*, 85 Conn. 83, 81 Atl. 1039.

The rule is the same even though the property of only one of the defendants is attacked. *McCormick v. National Surety Co.* and *Prior v. Pye*, supra.

Such bond becomes a substitute for the property released. *Inbusch v. Farwell*, 1 Black, 586, 17 L. ed. 188. It dissolves the attachment made upon the property of each defendant, and should therefore stand as security to the plaintiff for the default of either. *Poole v. Dyer*, supra.

Furthermore, a discontinuance as to one of several defendants will not have the effect to discharge a bond which the defendants have jointly given to dissolve an attachment, for such discontinuance does not change the identity of the action, and the judgment recovered against only one of the defendants is the same judgment described in the bond. If the surety desires to escape liability for a judgment against

execution was issued against William Caven, and returned, wholly unsatisfied. Subsequently, in April, 1909, this action was commenced upon the redelivery undertaking against the sureties thereon, Hanson and Frederickson. On trial a verdict was rendered in favor of the plaintiffs for \$1,742.80 and costs, and judgment was entered accordingly. An appeal was taken to this court from such judgment, and a reversal secured, on the ground that the judgment was not entered in the alternative for the return and delivery of the property, or for its value in case a delivery could not be had, and that the sureties could not be holden on such judgment, in the absence of evidence in the record before this court to show that the property had been destroyed or dispersed, or could not be returned to

the plaintiffs. It was held that, when the evidence was not before this court, no presumption could be indulged that such a showing was made as against the sureties, and that, in order to recover against them, plaintiff must allege and prove that they were entitled to judgment in the form in which it was entered. See *Larson v. Hanson*, 21 N. D. 411, 131 N. W. 229. The record was returned to the district court, plaintiffs amended their complaint by inserting an allegation with reference to the showing made in the district court in the trial of the case of *Larson & Walker* against W. L. Caven and William Caven. It alleged that it appeared that after the return and redelivery to said William Caven and W. L. Caven of said personal property and before the trial of said action, said per-

only one of the defendants, he should give a bond limited to a judgment against both. *Dalton v. Barnard*, 150 Mass. 473, 23 N. E. 218.

And the surety on a bond to release attached property in the hands of a garnishee was not discharged from liability in *Bedard v. Mahoney*, 30 R. I. 469, 136 Am. St. Rep. 965, 76 Atl. 113, where the suit was discontinued as to some of the defendants, and other names were added, but the name of the principal defendant was retained, and those added were copartners.

But in *Andre v. Fitzhugh*, 18 Mich. 93, it was held that the sureties on a bond given to discharge an attachment were released where the plaintiff on the trial discontinued the action as to two of the three defendants against whom it was instituted. The court said: "The bond to be given by the defendant or person found in possession of the goods is to be executed by sureties. When executed, it must be considered as tacitly referring to the suit as then constituted in respect to parties, and not as it should possibly be thereafter constituted at the instance of the plaintiff to avoid defeat. The sureties, on entering into a contract, measure the risk they incur by the chances which the plaintiff has to recover against the defendants in the writ, and the ability of the latter in case of defeat to respond to the plaintiff, or the sureties themselves if called on. As the writ only issues against the particular defendants, after a showing upon oath by the plaintiff or someone in his behalf, that the defendants named are indebted to him, it cannot be presumed that the sureties suppose themselves to engage to abide a discontinuance by such plaintiff as to part of the defendants, and still remain liable. Any such change of parties, however, as that made by the plaintiff in this case, would not only transform the prosecuted cause of action from a joint to an individual one, but would necessarily alter the operation of the contract of the sureties, and without their consent. It would allow the plaintiff to recover, when, but for the discontinuance, §1 L.R.A. (N.S.)

he would be defeated; and therefore, upon the theory of the plaintiff, would fix a liability upon the sureties which could not otherwise exist. It would also have the effect to compel the sureties to look for indemnity to such defendant or defendants as should be left in the case at judgment, instead of the whole number of defendants named in the writ at the giving of the bond; and it might well happen that in the responsibility of the latter, the sureties would know themselves to be safe, while in that of the former they would know themselves to be without remedy."

And the surety was not liable when, after the action had been entered in court, the suit was dismissed as to one of the original defendants, and a new party was joined and summoned as a defendant, without notice to the surety. *Tucker v. White*, 5 Allen, 322.

The same was true where the suit was discontinued as to one of the defendants, who, however, was not a party to the bond, and a new defendant was summoned without notice to the surety. *Richards v. Storer*, 114 Mass. 101.

And likewise in *Knight v. Dorr*, 19 Pick. 48, where the plaintiff in an action of assumpsit, after one of the two defendants was adjudged not liable, amended by striking the name of such defendant from the writ.

Of course, where the obvious purpose of an attachment bond is that it shall stand as security for one only of the defendants, the sureties are not liable for any default of the other. *Walker v. Dresser*, 110 Mass. 350; *Eveleth v. Burnham*, 108 Mass. 374.

Replevin bonds.

In accord with the holding in *Larson v. Hanson*, the rule is well established that the sureties in a replevin bond are not discharged by a judgment or discontinuance in the favor of part of the defendants, and a judgment against the remainder. *Pilger v. Mardér*, 55 Neb. 113, 75 N. W.

sonal property and all of the same had been, by said William Caven and W. L. Caven, or with their permission and consent, and by their procurement, lost, destroyed, removed from the state, or otherwise disposed of, so that none of the same could be found or recovered or returned to the possession of these plaintiffs, and that the court, taking into consideration such evidence of the disposal of the property, and that none of it could be returned to plaintiffs, and that it had been disposed of and removed with the consent and procurement of these defendants herein, entered a judgment for money only. A retrial was had at the December, 1911, term of the district court, and at the conclusion of the testimony, counsel for both sides moved for a directed verdict in favor of

their respective clients. The court discharged the jury, made findings of fact and conclusions of law, and directed a judgment in favor of the defendants, upon the ground that the failure of the court to find in the case of Larson and Walker against the Cavens that the property sought to be recovered in said action could not be returned; and by its failure to adjudge a return of the property to the plaintiffs in that case, and by the voluntary acceptance by plaintiffs of a money judgment against one of the defendants, the plaintiffs waived any right or claim against the sureties on the redelivery bond, and because, by the voluntary agreement of the plaintiffs in the former action to discharge W. L. Caven as a defendant, they canceled the obligation of the sureties. Judgment was entered in accordance with

559; *Goodwin v. Bunzl*, 102 N. Y. 224, 6 N. E. 399; *Auerbach v. Marks*, 10 Daly, 171.

In *Wandelohr v. Grayson County Nat. Bank*, 102 Tex. 20, 108 S. W. 1154, 112 S. W. 1046, the sureties on a replevin bond for sequestered real property bound themselves for the payment of the rents by the principals or either of them in case they or either of them was condemned so to do. Judgment was against one of the principals only. It was held that the sureties were liable for the rents.

And the amendment of a libel by dismissing it as to the pilot, and sustaining it as against the vessel and the master or owner, was not injurious to the sureties in the bond given for the property, where their liability was neither increased nor diminished. *Newell v. Norton*, 3 Wall. 257, 18 L. ed. 271.

But a dismissal of the action as to one of the joint principals on a forthcoming bond in replevin was held in *Tyler v. Davis*, 63 Miss. 345, to discharge the liability of the sureties in the bond. The court said: "The sureties were entitled to the protection which was afforded them by the fact that Mrs. Davis was a party to the suit, and presumably contending that she, and not the plaintiff, was entitled to the property in controversy. By his own act the plaintiff thrust Mrs. Davis from the suit. She had no right to insist that the suit should be continued as to her against the wishes of the plaintiff, and since the effect of dismissing as to her was to relieve her of liability on the bond as principal, it follows as a consequence that the sureties are also discharged. The contract of the sureties was to respond to any judgment which might be entered in the suit to which Mrs. Davis and her husband were parties. They were connected with the suit by their connection with both parties as principals on the bond, and though a judgment has been entered against Davis, there has been none against Mrs. Davis, nor any in any suit to which she is a party within the condition of the bond."

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Bail bonds.

Only cases of bail bonds in civil actions are included here.

Where one is arrested in a suit against himself and another as copartners, and gives a bail bond to appear, answer, and abide the judgment in the suit, the liability of the sureties on the bond is not affected by a discontinuance of the original action as to the other partner. *Sanderson v. Stevens*, 116 Mass. 133.

And dismissing a suit against one of two defendants was held in *Hamlin v. McNeil*, 32 N. C. (10 Ired. L.) 307, not to discharge the bail of the other, although but a single bond was given by the two defendants. Practically the same conclusion is reached in *Bradhurst v. Pearson*, 32 N. C. (10 Ired. L.) 55. And see *Karek v. Avinger*, 3 Hill, L. 215.

But a judgment entered by agreement against one of two defendants discharged the surety in a *capias* bond, in *Com. v. Clay*, 9 Phila. 121, where the condition of the bond was that if the defendants in the original action were condemned, they would surrender themselves or pay the condemnation money and costs.

Injunction bonds.

The sureties upon a bond given to secure the satisfaction of any judgment that may be rendered against the defendants in an injunction suit cannot, in an action on the bond, set up the defense that their liability had been increased through the dismissal of the original action as to one of the defendants, when such defendant is one of the principals in the bond. *Kleeb v. Bard*, 12 Wash. 140, 40 Pac. 733.

In *Hill v. McKenzie*, 39 Ala. 314, the court found it unnecessary to decide whether the sureties were liable in damages in a suit on an injunction bond, where the injunction was perpetuated as to two of the principals and dissolved as to a third.

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the findings. From such judgment, this appeal is taken.

Preliminary to a consideration of the two points around which all the assignments of error made by appellant revolve, we may note that respondents raised certain objections to the sufficiency of the complaint, which were overruled by the court. We have carefully examined these objections, and find them without merit. They are of such a nature and of such length that it would serve no purpose to treat them more specifically. Further reference to facts will be made in consideration of the two law points involved, as suggested by the reason above given by the trial court in its conclusions of law, for the judgment entered.

Mr. S. E. Ellsworth, for appellants:

A court is authorized, upon the trial of a replevin action in which it appears that the property has been destroyed, dispersed, or for some reason cannot be delivered, to enter a money judgment for its value.

Selby v. McQuillan, 59 Neb. 158, 80 N. W. 504; Lee v. Hastings, 13 Neb. 508, 14 N. W. 476; Eisenhart v. McGarry, 15 Colo. App. 1, 61 Pac. 56; Mason v. Richards, 12 Iowa, 73; Boswell v. First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 601; Clark v. Dreyer, 9 Colo. App. 453, 48 Pac. 818; New England Furniture Co. v. Bryant, 64 Minn. 256, 66 N. W. 974.

Any judgment in plaintiff's favor that would have bound the property if it was in his hands or in the hands of the sheriff will bind the sureties upon a redelivery bond.

Wells, Repevin, §§ 405, 436, 437, 439; Cobbey, Replevin, § 1329; Siebolt v. Konatz Saddlery Co. 15 N. D. 87, 106 N. W. 564; Greenlaw v. Logan, 2 Lea, 185; Pilger v. Marder, 55 Neb. 113, 75 N. W. 559; Clark v. Dreyer, 9 Colo. App. 453, 48 Pac. 818; Goodwin v. Bunzl, 102 N. Y. 224, 6 N. E. 399, affirming 18 Jones & S. 441; Auerbach v. Marks, 10 Daly, 171; Inbusch v. Farwell, 1 Black, 566, 17 L. ed. 188; Sutro v. Biglow, 31 Wis. 527; McCormick v. National Surety Co. 134 Cal. 510, 66 Pac. 741; McMillan v. Dana, 18 Cal. 339; Gilmore v. Crowell, 67 Barb. 62; Poole v. Dyer, 123 Mass. 363; Dalton v. Barnard, 150 Mass. 473, 23 N. E. 218; Prior v. Pye, 164 Mass. 316, 41 N. E. 353.

Messrs. Knauf & Knauf, for respondents:

By voluntarily relieving one of the principals from performance of the conditions of the obligations contained in the undertaking, the sureties are released.

Crook v. Lipscomb, 30 Tex. Civ. App. 567, 70 S. W. 995; Brandt, Suretyship & Guaranty, 569; Crane Co. v. Specht, 39 Neb. 51 L.R.A.(N.S.)

123, 42 Am. St. Rep. 562, 57 N. W. 1015; Wandelohr v. Grayson County Nat. Bank, 102 Tex. 20, 108 S. W. 1154, 112 S. W. 1046; Nickerson v. Chatterton, 7 Cal. 572; White Sewing Mach. Co. v. Hines, 61 Mich. 423, 28 N. W. 157; Standard Oil Co. v. Arnestad, 6 N. D. 255, 34 L.R.A. 862, 66 Am. St. Rep. 604, 69 N. W. 197; Friendly v. National Surety Co. 46 Wash. 71, 10 L.R.A.(N.S.) 1160, 89 Pac. 177; Woodburn v. Driver, 81 Ark. 333, 99 S. W. 384; Tyler v. Davis, 63 Miss. 345; Gerlaugh v. Ryan, 127 Iowa, 226, 103 N. W. 128; Cobbey, Replevin, § 1310; 25 Harvard L. Rev. p. 203; Central Bkg. & T. Co. v. Pusey, 22 S. D. 223, 116 N. W. 1126; Harris v. Taylor, 3 Sneed, 536, 67 Am. Dec. 576; Means v. Worthington, — Tex. Civ. App. —, 147 S. W. 345.

The exceptional facts warranting a money judgment in lieu of an alternative judgment must be alleged and proved against the sureties in an action on the undertaking.

Larson v. Hanson, 21 N. D. 411, 131 N. W. 229; New England Furniture & Carpet Co. v. Bryant, 64 Minn. 256, 66 N. W. 976.

The judgment in an action in claim and delivery, under our state statute, must be in the alternative, for a return of the property, or the value thereof in case a return cannot be had.

New England Furniture & Carpet Co. v. Bryant, supra; Gallarati v. Orser, 27 N. Y. 326; Nickerson v. Chatterton, 7 Cal. 572; Field v. Lombard, 53 Neb. 397, 73 N. W. 703; Clary v. Rolland, 24 Cal. 147; Mitchum v. Stanton, 49 Cal. 302; Gerlaugh v. Ryan, 127 Iowa, 226, 103 N. W. 128; Colorado Springs Co. v. Hopkins, 5 Colo. 206; Lewin v. Stein, 7 Colo. App. 65, 42 Pac. 185.

Spalding, Ch. J., delivered the opinion of the court:

Did the order of the court and judgment entered thereon, on motion of the attorney for the two Cavens, made either with the consent of the plaintiffs' attorneys in the replevin action, or without objection on their part, dismissing W. L. Caven, one of the defendants therein, "from said cause of action," discharge the sureties from liability upon the redelivery undertaking executed by the two Cavens as principals, and the respondents herein as sureties? The action of claim and delivery is to secure the possession of personal property belonging to the plaintiff. The Code makes provision for the process, and for the giving of an undertaking by the plaintiff, to entitle him to take possession of the property, pending the determination of the case. If the defendants desire to retain possession of the property during such time, they are permitted to do so by furnishing a statutory undertaking,

executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery is adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. Rev. Codes 1905, § 6922. The plaintiff is entitled to the property on commencing his action and furnishing his undertaking and the service of process, unless a redelivery undertaking is furnished by the defendant. It is clear that the statute contemplates such an undertaking as will render the plaintiff secure, if the property is redelivered and retained in the possession of the defendant. It provides for a return of the property if the plaintiff is adjudged to be entitled to it, and for the payment to him of such sum as, for any cause, may be recovered against the defendant. The undertaking is not only a substitute for the possession of the property by the plaintiff, but is security for any money judgment recovered. The defendant has his option whether to permit the property to remain with the plaintiff, or to furnish the undertaking in lieu thereof, and covering also the money part of any judgment recovered, and retain possession himself. Now, if the language of this provision is to be taken with the narrow literalness contended for by the respondents herein, the word, "defendant," being in the singular, the provision is not applicable to an action in claim and delivery where there is more than one defendant. The respondent contends that, because the undertaking follows the language of the statute, but uses the word "defendant" in the plural, and because judgment was recovered against only one of the two defendants, the proceedings have effected a change in the contract of the sureties without their knowledge or consent, and that thereby they are released or discharged. We are of the opinion that the terms of the statute must be taken in a much broader sense or meaning, and that they apply to the recovery by the plaintiff as against any or all of the defendants named in the process on which the undertaking was given. To hold otherwise would be to emasculate the law relating to claim and delivery. It would render it extremely hazardous to take possession in any action in which more than one party is made defendant. This case serves to illustrate such danger. It appears from the record that the defendant William Caven was the proprietor of a livery barn, but it was managed by his agent, W. L. Caven. Under such circumstances, and governed by appearances, the plaintiff naturally brought his action against the two parties who appeared to be

in possession. When it later developed on the trial that the proprietorship was in one only, and the other was simply his agent, counsel for the Cavens moved to dismiss as to the agent. This motion was not resisted, and we may assume the order dismissing him was made with the consent of the plaintiffs herein. Can it be possible that, in order to protect their rights and hold the sureties on the undertaking, the case should have been tried through and submitted to the jury, and that the plaintiffs should have protested at all times against the court entering a judgment of dismissal as to one defendant, when there may have been not a *scintilla* of proof to show liability as to him? If not, where can the line be drawn between the degree of assent or opposition to the order of dismissal on the part of the plaintiffs necessary to hold the sureties? We think the word "defendant" is used in the statute, and the word "defendants" in the undertaking, as a general term, applying to one or more as the case may be, and according as the judgment may be rendered, so long as the parties against whom judgment is rendered were defendants when the redelivery undertaking was executed and delivered.

But other considerations enter into this question, which it appears to this court are not only persuasive, but conclusive. As we have observed, the undertaking was executed by both Cavens as well as the sureties. It recites that the defendants—that is William Caven and W. L. Caven—are desirous of having said personal property returned to them, and, when the defendant W. L. Caven was dismissed from the action, he was not relieved from liability on the undertaking. He was a party executing that undertaking, and was held thereon, notwithstanding the order of dismissal, and even if, as was contended on the trial, he was the only one of the principals who was responsible financially, the sureties were not prejudiced, for they still retained, so far as appears, their remedy against him. Had the undertaking only been executed by the sureties, as is done in some instances, or in the case of undertakings in some forms of action, there might be some question, but no such case is before us. W. L. Caven contracted, himself, for a return of the property, or for the payment of any judgment obtained, and the sureties have lost none of their rights by the action of the court. This is not a case when plaintiffs and the original defendants by agreement between themselves released one defendant from liability, or perpetrated a fraud on the sureties. It is the action of the court in the regular proceedings of the trial, and which all parties must have contemplated might

occur, and the sureties contracted with reference to it.

Many authorities are cited by both parties on this proposition; we think we have examined each one of them, at least all those cited by the respondents. If we were to concede that one or two of those relied upon by respondents were in point, which we doubt, the greater number are in no manner applicable to this case, and those holding the sureties still liable preponderate overwhelmingly. We shall not take the space to review all those cited by respondents, but refer to a few as illustrative of practicality all.

Harris v. Taylor, 3 Sneed, 536, 67 Am. Dec. 576, simply holds that the sureties on a replevin bond in behalf of all the defendants are discharged when the plaintiff voluntarily discharges one of the defendants. The question is not discussed further than for the court to say the undertaking of the sureties is in joint behalf of the two defendants, and the discharge of one of the latter by the voluntary act of the plaintiff operated as a discharge of the sureties from the obligation of their bond; but in *Kelly v. Gordon*, 3 Head, 683, the Tennessee court holds that the undertaking of the surety in an injunction bond, where there are several complainants, is in law for the principals severally, as well as jointly; that the surety is in effect bound that each and all of his principals shall perform and fulfil whatever decree may be rendered against all or either of them, and that therefore abatement as to one of several joint defendants, of the discharge of one upon some ground applicable to him alone, cannot affect the liability of the surety for the surviving party or parties against whom a decree is rendered. The court distinguishes the *Harris* Case, *supra*, on the ground that in that case the plaintiff by his voluntary act discharges one of the defendants, while here the act of the plaintiff was failure to revive the suit against the personal representative of the deceased party, and holds that, inasmuch as the law did not impose any active duty or obligation upon the plaintiffs to do so, it was not equivalent to a voluntary discharge of one party; that it was an omission to do what they might have done, but which they were not required to do, and that the discharge of one of the defendants upon some ground applicable to him alone cannot affect the liability of the surety for the surviving party or parties, against whom a final decree may be properly rendered. This, therefore, becomes an authority supporting appellants' contention in the instant case.

Shimer v. Hightshue, 7 Blackf. 238, was decided in 1844, and the facts differentiate 51 L.R.A. (N.S.)

it from the case at bar. In that case two suits were brought, each by three plaintiffs; two of the plaintiffs being the same in each case, but the third a different person. By consent of the parties the two suits were consolidated without the knowledge or consent of the surety, one of the plaintiffs who was not a party to one of the suits was discharged, and it was held that his release might be assimilated to a release of the principal debtor by the payee of a note or bond, which discharged the surety from his liability.

Standard Oil Co. v. Arnestad, 6 N. D. 255, 34 L.R.A. 861, 66 Am. St. Rep. 604, 69 N. W. 197, is not in point; it relates to a bond for the fidelity of a firm, and holds that the sureties are not liable for funds misappropriated by one member of the firm after the dissolution and the retirement of the other partner. *Crane Co. v. Specht*, 39 Neb. 123, 42 Am. St. Rep. 562, 57 N. W. 1015, is not in point, except as it deals with the construction of the contract of guaranty, and holds that it will be strictly construed, and not extended by implication. It holds that sureties are not liable for goods furnished after a change in the firm for which they had become guarantors.

Woodburn v. Driver, 81 Ark. 333, 99 S. W. 384, is not in point. Summary judgment was rendered in that case against the sureties on defendants' retaining bond for the amount of the debt due plaintiffs from defendants, when under the statute in force no provision was made for summary judgment for the debt; hence the court held the judgment erroneous. *Friendly v. National Surety Co.* 46 Wash. 71, 10 L.R.A. (N.S.) 1160, 89 Pac. 177, simply holds that where one member of a firm of contractors assigns his interest to his partner, and is released from liability on the contract without consent of the sureties on the contractor's bond, such sureties are released.

Crook v. Lipscomb, 30 Tex. Civ. App. 567, 70 S. W. 993, is not in point. In that case there were several defendants, and the plaintiff entered into an agreement with a portion of the defendants, whereby judgment was to be taken against such defendants without opposition, but no execution was to be issued against them. The sureties and the other defendants were not informed of such agreement, and it seems to have been a fraud upon the other defendants.

In *Wandelohr v. Grayson County Nat. Bank*, 102 Tex. 20, 108 S. W. 1154, 112 S. W. 1046, the court expressly declines to decide the question whether a separate action could be maintained on a joint and several bond, against one of the defendants and the sureties; and that case is not in point for other reasons, especially because it rests up

on a peculiar statute. See also *Sartain v. Hamilton*, 14 Tex. 348, and *Wandelohr v. Grayson County Nat. Bank*, supra.

So much for illustrations of the authorities cited by respondent. On the other hand, we find numerous authorities to the effect that the sureties are not relieved from liability by the dismissal or discharge of one defendant. In *Sutro v. Bigelow*, 31 Wis. 527, an undertaking was given to procure the discharge of certain garnishees in an action. The language of the undertaking was identical in all material respects with that in the case at bar. It was: "To pay unto the said plaintiffs the amount of said judgment, if any, which the said plaintiff may recover in the action against the said defendants," not exceeding a sum named. There were two defendants. Subsequent to the giving of the undertaking, it was discontinued as to one, and judgment was taken against the other only. The reported case is the action against the sureties on the undertaking, who, as in the case at bar, claimed to be released by the discontinuance as to one defendant. The court held that it was the obvious intent of the statute that the persons executing such undertaking should be bound to the same extent as the garnishees discharged from liability by virtue of it, or the property of the principal debtor in the hands of such garnishees would have been bound, and that the undertaking must be liberally construed with reference to such intent, and that therefore the sureties were still liable on the undertaking.

In *Heynemann v. Eder*, 17 Cal. 434, the identical question involved in the instant case was passed upon. The bond was to pay whatever judgment might be rendered against "said defendants." Judgment was obtained against one only of the defendants. The court held that the security required by the statute was a security for the satisfaction of any judgment that might be obtained, and that the bond was such a security, and that failure to obtain judgment against one defendant did not discharge the sureties. In *Poole v. Dyer*, 123 Mass. 363, it is held that the result, so far as the sureties are concerned, is the same, whether the plaintiff discontinues against one defendant, or fails to recover against him upon the trial. The action was brought against the sureties on the undertaking after the original action had been discontinued as to one defendant.

Pilger v. Marder, 55 Neb. 113, 75 N. W. 559, was replevin brought against three defendants; property was taken under the writ; trial was had with the result that judgment was entered in favor of one of the defendants; action was instituted on the undertaking given by the plaintiffs, to recover

of the sureties the value of the property, etc. It was urged that, inasmuch as the bond was given in favor of three obligees, they should all have been parties to the suit. The court says: "In an action of replevin in which there are two or more defendants, each may recover a part of the property, or one may be adjudged the owner and entitled to the possession of all of the property, and to have a return of it, or to recover its value. . . . It is also true that all of the parties to a case in replevin are bound by the adjudication of the rights involved and put in issue therein. It seems a correct conclusion that the sureties of a replevin undertaking are liable to the party or parties to whom the final determination of the issue may accord a recovery."

In *Goodwin v. Bunzl*, 102 N. Y. 224, 6 N. E. 399, it is held that where final judgment was rendered in replevin against two defendants only, and in favor of a third, the sureties on the bond were not released.

Auerbach v. Marks, 10 Daly, 171, is also directly in point. In that case, on the trial of the replevin suit, the complaint was dismissed as to one defendant, a verdict rendered for the plaintiff against the other two defendants, and judgment entered thereon. On the failure to deliver the property and return of execution unsatisfied, action was brought against the sureties. The defense was that, when the suit was commenced, the property replevied was in the sole possession of one of the defendants, at whose request and in whose behalf they executed the undertaking; that the property was thereupon returned to that defendant; that the other two defendants had no interest in, or possession of, the property, and it was claimed that, no judgment having been rendered against the one defendant, their liability ceased. Evidence was excluded to show these facts, and the verdict directed for the plaintiff, and it was held that the defendants were not entitled to show the facts recited above; that when the undertaking given by the defendants was executed and delivered, the property was in the hands of the sheriff, and that the sureties bound themselves for the delivery to the plaintiff, if the delivery should be adjudged, etc. The court says that the fact that no cause of action was established against the defendant Goodman, and that the complaint was dismissed as to him, does not discharge the defendants from their obligation; that they became bound for the delivery of the property to the plaintiff, and, in case a delivery could not be had, for its value; that, in consequence of the undertaking, the property was returned to all the defendants in the replevin action. This conclusion is based upon the language of the undertaking, to

the effect that the three defendants were desirous of having it returned to them, and that, in consideration of the return of it to them, the defendants became bound, etc.; that the sureties became bound for the delivery of the property by each and all of the defendants, if a delivery of it to the plaintiff was adjudged; and it was held that they were not discharged of their liability when the defendant Goodman was released from any obligation to deliver it, by a judgment in his favor, if they still remained bound for the delivery by the other defendants; that the dismissal as to one defendant in no way affected the plaintiff's right to the property; that the effect of the judgment was that the one defendant did not wrongfully detain it; and that such a judgment does not entitle a defendant to the return of the property, for it in no way affects the ownership or title of the property; that where there are several defendants, the court may adjudge the return of it to one of them, and refuse it to others, or may award to all of them, or part to one and part to another, or to the plaintiff, as the rights of the parties shall appear, or for other relief not necessary here to state. The court remarks that "the action of replevin is founded upon a tort; it is brought by a party entitled to property against those in possession of it, who have wrongfully taken or wrongfully withheld it, or who wrongfully conceal or put it out of their possession, to defeat the suit. Where there are several defendants sued as wrongdoers, each may set up a separate defense, each may claim exclusive title to the property, or set up any matter in defense, without reference to the pleading or defense of the other, and judgment may be given in favor of one and against the others, or judgment may be for both parties. . . . Thus, a defendant may succeed, and not be entitled to a return, if a return of the property is ordered only when it appears just." The court further says: "What the sureties undertook was to be bound for the delivery of the property, if delivery of it should be adjudged to the plaintiff, and the payment of such sum as might be awarded against the defendants. The argument is that the sureties agreed to be bound if all the defendants failed to deliver it. The answer is that one of the defendants was relieved from delivering it by the judgment of the court. In the language of the undertaking, a delivery of it by him was not adjudged, but it was adjudged that it should be delivered to the plaintiff by the other two defendants, and it is for their failure to deliver or pay the sum recovered, if the property was not delivered, that the defendants are answerable." The language of the undertaking was 51 L.R.A.(N.S.)

identical with the case at bar,—that the defendants were desirous of having the property returned to them. We commend the reading of the opinion to counsel. It is exactly apropos to the case at bar, and is most persuasive. We have only quoted a small portion.

We conclude that the sureties were not released from liability on the undertaking by the fact that the action of claim and delivery was dismissed at the close of the evidence, on motion of counsel for the principals, either with the consent of or simply without opposition by counsel for the plaintiffs therein.

2. Were the respondents relieved from liability by the form of the judgment taken against one of their principals, namely, not in the alternative, but only for money, the value of the property and damages? It is true that, in the usual method of practice under the Code, a judgment in claim and delivery is taken in the alternative for return or the possession of the property, or its value, if a return cannot be had, and undoubtedly, in many cases, the fact that judgment was not so entered would be fatal, in the absence of a motion on the part of the judgment creditor to correct it; but the law does not require idle acts, and it is well established that where, on the record, it appears that the property cannot be returned, judgment need not be entered for its return or possession.

What is the record in the case at bar on which the money judgment was entered? C. H. Olson was a witness. He was the official stenographer who took the testimony in shorthand in the claim and delivery action. He testified in the case before us that he heard the testimony of W. L. Caven, as a witness in the claim and delivery action, with reference to the property that was taken and turned back to the defendants. With his transcript of such evidence before him, he testified that said Caven testified that he sold the property in question for a feed bill incurred in the livery barn, for \$950 or \$951, on the 7th of February, 1908, and that he was not in position to reproduce the property and turn it over to the plaintiff therein, because the property was gone; that the sale was made under notice and publication. Olson did not have the minutes of all the testimony taken in the case, as a portion of such minutes seem to have been lost between the clerk of the court and counsel for the respondents, which, however, is immaterial. One Bouer testified that he was present at the trial and heard testimony relating to the property having been sold at auction, and regarding the report of such sale, and that it was brought out that the Cavens had sold the property

under the lien claimed by them, and filed a report of such sale at Jamestown. In the case at bar, the report of the sale was received in evidence. It showed the process, and the persons to whom the different items were sold, and was made by W. L. Caven under oath as agent for William Caven. This report also showed that the property had been sold to some ten or twelve different people. Bouer also testified that he was present at the sale. William Caven testified that he was not asked a certain question contained in the record to which Olson, the stenographer, testified, and did not make the answer given.

So much for the record relating to the disposition of the property in the claim and delivery action. It is this record that the court had before it when it rendered the judgment for money only. There is certainly enough in it to sustain the action of the court in rendering such judgment, even if it be conceded that there is a conflict in the evidence by reason of the testimony of William Caven, to which reference has been made. On the facts shown by the record, it was for the trial court to determine what kind of a judgment to enter, and that court must have found, in its consideration of the subject and from the record, that the property could not be returned. No appeal is before us from that judgment. It has become final, and the evidence was sufficient to sustain it. See last two sentences of the opinion in 21 N. D. 411, 131 N. W. 229.

We refer to one other phase of the record in the case at bar. It appears that evidence was received to support the judgment in the claim and delivery action, and it was conclusively shown that the Cavens sold the property involved at auction to a number of persons more than a year before the trial; that some of it had been removed to the northwestern part of the state by the purchasers, the hogs sold to a butcher, and the horses to several farmers, and considerable of them were resold by the purchasers. The respondents undertook to show that it was within the power of William Caven to collect and return each item of such property to appellants. We are not determining whether it was proper to receive evidence in this case to support that judgment. We are inclined to doubt its admissibility, and to think that the record made in the claim and delivery action is the record on which it must be determined whether the form of judgment is justified. See 21 N. D. 411. It, however, seems to have been assumed by both parties on the trial of the instant case that it was then proper and competent to show that the property could, or could not, have been returned when the former judgment was rendered. As to the new proof

on this subject, when the holders of the judgment in the former case had shown that the defendants had sold the property to ten or twelve different purchasers more than a year prior to the trial of the action; that it had been scattered over a wide territory, and some resold to other parties; that the plaintiffs had made out a case showing the inability of the defendants to return the property, which, in the absence of a further showing by the defendants, would support the judgment for money only, in view of the circumstances, and particularly in view of the fact that the means of knowledge regarding the ability to return the different pieces of property was necessarily with the defendants in that case, who were witnesses for the defendants in the case at bar, something more devolved upon them than to testify in effect to the opinion that, at all times after the auction sale, they could have gathered together the property and returned it to its owners. It would seem but reasonable to require them to testify as to each specific item, and disclose the source of their knowledge and its extent, and to make clear their ability to return the property, before it should be held to overcome the case made by the evidence, uncontradicted, of its sale at auction and dispersion. We are impressed by the record with the belief that the Cavens went as far as they could go towards showing their ability to return the property, and that this showing amounted to nothing more than the naked statement of their opinions that they were able so to do, and that that statement was rendered highly improbable by all the surrounding circumstances, at least so improbable that it was incumbent upon them to overcome, by specific and persuasive evidence, such improbabilities. In that connection, and as bearing on these questions, we may say that both of the defendant sureties testified in the case at bar that they were present at the auction sale referred to, saw the property sold, and knew that it was distributed among numerous purchasers; that the sale was on the same day that they executed the redelivery undertaking, and that they made no objection to the sale, and were willing that it should be sold and distributed around among different persons in that community or elsewhere. They appear to have executed the undertaking with knowledge that the property was to be sold and scattered, and for the sole purpose of enabling Caven to sell and scatter it.

In *Burke v. Koch*, 75 Cal. 356, 17 Pac. 228, the court found that the defendants had sold and disposed of a large portion of the property replevined, and had appropriated the proceeds thereof; and, that fact appearing at the trial, it was held that the

trial court was not bound to find the character or value of the articles which should be returned, or enter a judgment in the alternative. *Gallarati v. Orser*, 27 N. Y. 324, disclosed a record that failed to show that the property could not be returned; hence it was held that it would not support a judgment for money only. In *Lee v. Hastings*, 13 Neb. 508, 14 N. W. 476, it is held that the judgment in an action of replevin must be in the alternative, unless it is shown by the record that a return of the property could not have been had. In *Field v. Lombard*, 53 Neb. 397, 73 N. W. 703, it is held that the judgment should have been in the alternative, and that, as it was not so entered, the sureties were not liable, but the opinion does not disclose, as we read it, whether the record showed the possibility of a return of the property, and if any inference is to be drawn on the subject, it would seem to be that it either showed that it could have been returned or failed to show anything; hence it is not in point. See also *Ingersoll v. Bostwick*, 22 N. Y. 425; *Johnson v. Carnley*, 10 N. Y. 570, 61 Am. Dec. 762; *Sweeney v. Lomme*, 22 Wall. 208, 22 L. ed. 727; *Cheatham v. Morrison*, 37 S. C. 187, 15 S. E. 924; *Kennedy v. Brown*, 21 Kan. 171; *Atkinson v. Foxworth*, 53 Miss. 733; *Campbell v. Brown*, 121 Mass. 516; *McCarthy v. Strait*, 7 Colo. App. 59, 42 Pac. 189; *Wells, Replevin*, §§ 428-431; *Davis v. Gray*, 39 Okla. 386, 134 Pac. 1100. The above authorities have more or less bearing on this question. We are satisfied that a sufficient showing was made to sustain the action of the appellants against the sureties on the undertaking in question. It is clearly so when giving proper weight to evidence adduced by the party against whom the order was directed on the motion for a directed verdict.

One or two other assignments of error may be noticed. Appellants contend that it was error to exclude proof offered to show that William Caven withdrew from the bank in which appellants had deposited the amount of their claim for the keeping of the property, and appropriated such fund to their own use, and also because evidence was admitted tending to show that respondents became sureties on the redelivery bond in reliance upon the solvency of W. L. Caven. It is not necessary, in view of our conclusion on the two main questions, to pass upon these assignments. In conclusion, we may add that, in so far as the respondents were aware of the facts, and participated in or assented to the sale of the property, they are not in position to criticize too closely the regularity or irregularity of the legal proceedings by means of which 51 L.R.A. (N.S.)

appellants attempted to regain or recover for their property. They stood by and saw the property dispersed after they signed the undertaking; they made no objection, and are in much the same position that Caven occupies.

We have made no reference to the findings of fact made by the court, because they in no manner conflict with our conclusions, and in fact sustain them. Among other things, the court expressly found that the property was sold by the two Cavens, and that they, by such sale, divested themselves of all title in and to such property, or any part thereof, and in and to the possession thereof, and never again became its owners or possessors. The conclusions of law found by the court render it unnecessary to further consider the findings.

The judgment of the District Court is reversed, and the District Court will enter judgment for plaintiffs, with costs.

Burke, J., disqualified.

Petition for rehearing denied December 29, 1913.

OKLAHOMA CRIMINAL COURT OF APPEALS.

EX PARTE EUGENE WILLIAMS.

(— Okla. Crim. Rep. —, 136 Pac. 597.)

Extradition — fugitive — purpose of departure.

1. To be a fugitive from justice under the laws of the United States, it is not necessary that the person charged with having left the state in which the crime was alleged to have been committed should have done so for the purpose of avoiding prosecution anticipated or begun, but simply that, having committed a crime within the state, he leaves such state, and, when he is sought to be subjected to its criminal process to answer for his offense, he is found within the territory of another state.

Same — prisoner under parole.

2. A convicted prisoner, who has a parole, and who goes into another state, is a fugi-

Headnotes by FURMAN, J.

Note. — Who are fugitives subject to extradition.

This note is supplementary to the note to *State v. Hall*, 28 L.R.A. 289.

General rule.

The general rule is well settled that one who was within a state at the time of the alleged commission therein of a crime with which he is charged, and who, when sought to be subjected to the criminal process of

tive from justice within the provisions of the United States Constitution and laws, and as such is subject to extradition if his parole is revoked.

Courts — jurisdiction — revocation of parole.

3. The legality of the revocation of a parole in the state of Indiana is a question for the courts of Indiana, for they alone have the right to construe the Constitution and laws of that state.

Same — sustaining action of governor.

4. Whenever the action of the governor of Oklahoma in any matter is authorized by law, and comes before the court for review, it is our duty to sustain the governor, and we take great pleasure in doing so.

(December 1, 1913.)

the state for the crime, has left the jurisdiction and is found within another state, is a fugitive from justice within the meaning of the provisions of the United States Constitution and statute with reference to interstate extradition. *Re Strauss*, 63 C. C. A. 99, 126 Fed. 327; *Re Bruce*, 132 Fed. 390, affirmed on opinion below in 69 C. C. A. 342, 136 Fed. 1022; *Drinkall v. Spiegel*, 68 Conn. 441, 36 L.R.A. 486, 36 Atl. 830; *Depoilly v. Palmer*, 28 App. D. C. 324; *Ex parte Dickson*, 4 Ind. Terr. 481, 69 S. W. 943; *State ex rel. Munsey v. Clough*, 71 N. H. 594, 67 L.R.A. 946, 53 Atl. 1036; *Re Galbreath*, 24 N. D. 582, 139 N. W. 1050; *Com. ex rel. Burlingame v. Hare*, 36 Pa. Super. Ct. 125.

And it has been held that the fact that a person charged in one state with a crime involving his personal presence there is subsequently in another state makes him a fugitive from justice within the meaning of the Federal statute. *Ex parte Edwards*, 91 Miss. 621, 44 So. 827.

In *Bruce v. Rayner*, 62 C. C. A. 501, 124 Fed. 481, however, it was held that one who was within a state at the date of a crime alleged to have been committed therein by him, and who remained within reach of the criminal process of the state during the whole period within which he could have been prosecuted therefor, did not become a fugitive from justice, within the meaning of the provisions of the Constitution and statute of the United States relating to extradition, upon thereafter leaving the state.

But in *Depoilly v. Palmer*, 28 App. D. C. 324, it was held that the alleged fact that the accused person sought to be extradited had resided in the demanding state for more than the limitation period for prosecution, after the alleged date of the crime with which he was charged, was immaterial upon the question whether he was subject to extradition as a fugitive from justice, as such matters of defense must be determined by the court where the accused was to be tried upon the charge.

Must have been in demanding state.

Supplementing note in 28 L.R.A. 289.
51 L.R.A. (N.S.)

PETITION for a writ of habeas corpus to secure release from custody under extradition proceedings. Writ denied.

Statement by Furman, J.:

It appears from the record in this cause that the petitioner, Eugene Williams, was legally charged by indictment, and was tried and convicted for the crime of grand larceny in the circuit court of Vanderburgh county, in the state of Indiana, on the 12th day of July, 1909, and was sentenced to imprisonment in the penitentiary of Indiana from one year to fourteen years; that before the expiration of said sentence petitioner was paroled by the board of commissioners of the Indiana State Prison, and removed from

The recent cases are in accord with the unanimous holding of earlier American cases, as appears from the earlier note, to the effect that a person cannot be a fugitive from justice, subject to interstate extradition under the provisions of the United States Constitution and statute relating thereto, unless he was present in the demanding state at the time of the alleged commission therein of the crime with which he is charged. *Munsey v. Clough*, 196 U. S. 364, 49 L. ed. 515, 25 Sup. Ct. Rep. 232 (*obiter*); *Hyatt v. New York*, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311, affirming 172 N. Y. 176, 60 L.R.A. 774, 92 Am. St. Rep. 706, 64 N. E. 825, which reversed 72 App. Div. 629, 76 N. Y. Supp. 1026; *Ex parte Hoffstot*, 180 Fed. 240, affirmed without opinion in 218 U. S. 665, 54 L. ed. 1201, 31 Sup. Ct. Rep. 222; *Farrell v. Hawley*, 78 Conn. 160, 70 L.R.A. 686, 112 Am. St. Rep. 98, 61 Atl. 502, 3 Ann. Cas. 874; *Re Lyon*, 24 Wash. L. Rep. 679; *Dennison v. Christian*, 72 Neb. 703, 117 Am. St. Rep. 817, 101 N. W. 1045, affirmed without opinion in 196 U. S. 637, 49 L. ed. 630, 25 Sup. Ct. Rep. 795; *Re Kuhns*, 36 Nev. 487, 50 L.R.A. (N.S.) 507, 137 Pac. 83; *Regan v. Jessup*, 34 Tex. Civ. App. 74, 77 S. W. 972 (*obiter*).

This rule was also recognized and applied in *Hayes v. Palmer*, 21 App. D. C. 450, the court saying: "The decisions of the Supreme Court of the United States, heretofore cited, all indicate that the actual presence of the accused in the demanding state, at the time of the commission of the crime as charged in the indictment, is an essential condition of extradition. . . . It remains to apply the doctrine enounced to the special facts in the case at bar." And it was held not to have been shown that the accused was not present.

So, in *People ex rel. Meeker v. Baker*, 142 App. Div. 598, 25 N. Y. Crim. Rep. 498, 127 N. Y. Supp. 382, the rule was recognized that "that question [whether as a matter of fact the relator was a fugitive within the meaning of the extradition laws] depended for its solution upon whether the relator was physically present in the state of Texas [the demanding state] at the time of the

the state of Indiana to the state of Oklahoma; that on the 1st day of December, 1912, petitioner was declared a delinquent, and his parole was revoked. On this state of facts the governor of Indiana presented requisition papers for the said Eugene Williams to the governor of Oklahoma, which were honored by the governor of this state, and his warrant issued for the arrest of petitioner, to be returned to the state of Indiana, as requested by the governor of that state.

Mr. J. G. Harley for petitioner.

Messrs. Munden & Staley for the State.

Furman, J., delivered the opinion of the court:

When this matter was presented to the governor of Oklahoma, he properly referred it to the attorney general for legal advice. The attorney general advised the governor that, to be a fugitive from justice under the

commission of the alleged crime,"—the court holding that the evidence sufficiently showed that the relator was in fact in the demanding state at the time of the commission of the offense in question, and during the accomplishing of the purposes of the conspiracy for which he had been indicted.

And in *People ex rel. Genna v. McLaughlin*, 145 App. Div. 513, 130 N. Y. Supp. 458, which reversed an order dismissing a writ of habeas corpus and remitted the matter to the court below for a determination by it of the question whether the relator was in fact a fugitive from justice,—the court below having held that, inasmuch as there was a conflict of testimony on this point, it had not the power to determine that the relator had not been in the demanding state at the time of the commission of the crime,—the rule was recognized that, to be a fugitive from justice subject to extradition, the accused must have been within the demanding state at the time of the commission of the alleged offense; the court saying: "Before a warrant of extradition can be sustained, it must appear as a jurisdictional fact that the prisoner is a fugitive from justice; that is, it must be shown that he was actually present in the demanding state when the crime was committed."

So, the mere subsequent presence of a person in a state on business, for one day, eight days after the alleged commission of an offense therein, and months before complaint is made or an indictment found against him therefor, does not, upon his leaving the state after the conclusion of his business, render him a fugitive from justice within the meaning of the United States statute. "He must have been there when the crime was committed, as alleged, and if not, a subsequent going there and coming away is not a flight." *Hyatt v. New York*, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311, affirming 172 N. Y. 176, 60 L.R.A. 774, 92 Am. St. 51 L.R.A. (N.S.)

act of Congress, it is not necessary that the person charged with having left the state in which the crime was alleged to have been committed did so for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed a crime against the laws, leaves such state, and, when he is sought to be subjected to its criminal process to answer for his offense, he is found within the territory of another state. In support of this proposition, the attorney general cited the following authorities: *Ex parte Dickson*, 4 Ind. Terr. 481, 69 S. W. 943; *Op. Gov. Fairfield (Me.)* 24 Am. Jur. 226; *State ex rel. Burner v. Richter*, 37 Minn. 436, 35 N. W. 9; *Re Voorhees*, 32 N. J. L. 141; *People ex rel. Draper v. Pinkerton*, 17 Hun, 199; *Johnson v. Ammons*, 6 Ohio Dec. Reprint, 747, 7 Am. L. Rec. 662; *Hibler v. State*, 43 Tex. 197; *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291;

Rep. 706, 64 N. E. 825, which reversed 72 App. Div. 629, 76 N. Y. Supp. 1026.

And the fact that one charged with the commission of a crime within a state went to and was in that state after his indictment, and subsequently left it again, does not operate to constitute him a fugitive from justice, if in fact he was not there at the time of the commission of the crime. *Hayes v. Palmer*, *supra*

But in *Ex parte Knowles*, 17 Ky. L. Rep. 588, it was held that, although one charged with a crime in a state was not actually present in the state at the time when the crime was committed, he becomes a fugitive from justice within the meaning of the Constitution and statute of the United States regarding extradition, by going into the state after the commission of the crime, thus subjecting himself to its jurisdiction, and then leaving the state.

No constructive presence.

Supplementing note in 28 L.R.A. 289.

The recent cases also agree with the earlier ones, that the mere constructive presence of an accused in the demanding state at the time of the alleged commission thereof of the crime with which he is charged is not sufficient to render him a fugitive from justice subject to extradition. *Munsey v. Clough*, 196 U. S. 364, 49 L. ed. 515, 25 Sup. Ct. Rep. 282 (*obiter*); *Hayes v. Palmer*, 21 App. D. C. 450 (*obiter*); *Re Lyon*, 24 Wash. L. Rep. 679; *People ex rel. Meeker v. Baker*, 142 App. Div. 598, 25 N. Y. Crim. Rep. 498, 127 N. Y. Supp. 382; *People ex rel. Genna v. McLaughlin*, 145 App. Div. 513, 130 N. Y. Supp. 458.

Setting crime in motion.

Supplementing note in 28 L.R.A. 289.

"It is a well-settled doctrine that a person who departs from a jurisdiction after having committed an act in furtherance of a crime subsequently consummated is a fugi-

Re Bruce (C. C.) 132 Fed. 300; Re Bloch (D. C.) 87 Fed. 981; Re White, 5 C. C. A. 20, 14 U. S. App. 87, 55 Fed. 54; Ex parte Brown (D. C.) 28 Fed. 653.

We are of the opinion that the advice of the attorney general to the governor states the law correctly. In further support of this proposition, we desire to cite the case of *Drinkall v. Spiegel*, 68 Conn. 441, 36 L.R.A. 486, 36 Atl. 830. In that case the supreme court of Connecticut held that a prisoner who violates a parole, and goes into another state, is a fugitive from justice within the provisions of the United States Constitution and laws, and that such person is subject to extradition.

There is but one question in this case, and that is the legality of the revocation of the parole of petitioner; but this is a question for the courts of Indiana, for they alone have the right to construe their Constitution and laws. When the governor's ac-

tion in any matter is authorized by law, it is our duty to sustain such action, and we take great pleasure in doing so. We find that the governor's action in this case is entirely proper, and within the law, and it is therefore upheld and sustained, and the writ is denied, and any officer of the state of Oklahoma who may now have petitioner in his custody is directed to surrender him to the duly authorized representative of the state of Indiana, in obedience to the governor's warrant issued in this proceeding. It is further ordered that the extradition papers may be withdrawn from the files by the attorneys representing the state of Indiana.

Mandate will issue without delay.

Armstrong, P. J., and Doyle, J., concur.

tive from justice, and subject to extradition." *State ex rel. Rinne v. Gerber*, 111 Minn. 132, 126 N. W. 482.

"The criminal need not do within the state every act necessary to complete the crime. If he does there an overt act which is, and is intended to be, a material step toward accomplishing the crime, and then absents himself from the state and does the rest elsewhere, he becomes a fugitive from justice when the crime is complete, if not before. . . . For all that is necessary to convert a criminal under the laws of a state into a fugitive from justice is that he should have left the state after having incurred guilt there, . . . and his overt act becomes retrospectively guilty when the contemplated result ensues." *Strassheim v. Daily*, 221 U. S. 280, 55 L. ed. 735, 31 Sup. Ct. Rep. 558.

So, if one charged with conspiracy within a state was present in that state when any act material in carrying out the objects of the conspiracy was done, his subsequent departure from the state renders him a fugitive from justice within the meaning of the United States Constitution and statute regarding extradition. *Ex parte Hoffstot*, 180 Fed. 240, affirmed without opinion in 218 U. S. 665, 54 L. ed. 1201, 31 Sup. Ct. Rep. 222.

And one charged with the crime of keeping and managing a house for gambling within a state, on a certain date, who went into that state and opened the gaming-house shortly before the date alleged, and went frequently between it and his residence in another state, after that date, may be a fugitive from justice subject to extradition, although he was not within the state demanding him, on the precise date alleged. *Hayes v. Palmer*, 21 App. D. C. 450.

The purpose of the flight.

Supplementing note in 28 L.R.A. 289.
51 L.R.A. (N.S.)

It is not necessary that one charged with a crime should have left the state in which the crime is alleged to have been committed, for fear of arrest, or for the purpose of avoiding prosecution, anticipated or begun, but it is sufficient to render him a fugitive subject to extradition, simply that he is charged with the commission of a crime within the state, at a time when he was there, and when he is sought to be subjected to the state's criminal process for the crime, he has left its jurisdiction and is found in another state. *Ex parte Hoffstot*, supra; *Re Galbreath*, 24 N. D. 582, 139 N. W. 1050; *Com. ex rel. Burlingame v. Hare*, 36 Pa. Super. Ct. 125.

So, the fact that one charged with the commission of a crime in one state, and found in another state when proceedings were begun for his prosecution, left the first state openly, and not in flight, or with any intent to avoid arrest, does not prevent his being a fugitive from justice. *Taylor v. Wise*, — Iowa, —, 126 N. W. 1126.

Nor is it material that he left the first state openly and in the legitimate pursuit of his business. *Re Bruce*, 132 Fed. 390, affirmed on opinion below in 69 C. C. A. 342, 136 Fed. 1022.

And the mere fact that a person charged with the commission of a crime within a state had no belief, when he left that state, that he had violated its criminal laws, and did not "consciously" flee from justice in order to avoid prosecution, when he left the state, does not prevent his being a fugitive from justice within the meaning of the provisions of the United States Constitution and statute relating to extradition proceedings. *Appleyard v. Massachusetts*, 203 U. S. 222, 51 L. ed. 161, 27 Sup. Ct. Rep. 122, 7 Ann. Cas. 1073.

One who was within a state at the time of the commission there of a crime with which he is charged, and who has since left the state,—no matter for what purpose,

or with what motive, or under what belief,—is a fugitive from the justice of that state within the meaning of the provisions of the Constitution and laws of the United States with reference to extradition. *Ibid.*; *Bassing v. Cady*, 208 U. S. 386, 52 L. ed. 540, 28 Sup. Ct. Rep. 392, 13 Ann. Cas. 905; *Re Bloch*, 87 Fed. 981; *Depoilly v. Palmer*, 28 App. D. C. 324.

So, the fact that one charged with the commission of a crime within a state was in that state after his indictment, and did not leave to escape a pursuing officer,—no effort having been made to arrest him there,—does not operate to relieve him from liability to extradition as a fugitive from justice, if he was in the state at the time of the commission of the crime, and subsequently left. *Hayes v. Palmer supra*.

And a person charged with the commission of a crime within a state, for which he has been indicted a second time, after the dismissal of an indictment on which he was extradited, is none the less a fugitive from justice within the meaning of the provisions of the Constitution and laws of the United States with reference to extradition, because, after the dismissal of the first indictment, he left the state with the knowledge of, and without objection by, the state authorities. *Bassing v. Cady*, 208 U. S. 386, 52 L. ed. 540, 28 Sup. Ct. Rep. 392, 13 Ann. Cas. 905.

And the fact that one charged with a crime in a state remained in that state for some time after the commission of the crime, then moved to another state, remaining in constant communication with the authorities in the first state, or at least his whereabouts being well known to them, and later moved from the second state to a third state, where he has lived a number of years, does not prevent his being a fugitive from justice, subject to extradition from the third state to the first. *Coleman v. State*, 53 Tex. Crim. Rep. 93, 113 S. W. 17.

A citizen of one state who goes into and commits a crime in another state, and then returns to his home, is a fugitive from justice within the meaning of the provisions of the United States Constitution relating to extradition. *Re Hess*, 5 Kan. App. 763, 48 Pac. 596.

And "if a person commits a crime and withdraws himself from the state where he has committed it, without any thought of fleeing from justice, but for the purpose of going to his own home, he is still, within the extradition laws, a fugitive from justice of the state in which he has committed the crime." *Dennison v. Christian*, 72 Neb. 703, 117 Am. St. Rep. 817, 101 N. W. 1045, affirmed without opinion in 196 U. S. 637, 49 L. ed. 630, 25 Sup. Ct. Rep. 795.

The fact that one charged with the crime of obtaining money under false pretenses in a certain state left that state with the consent of the complaining witness, and for the purpose of raising money to repay him, does not prevent the accused from being a fugitive subject to extradition. *Re Galbreath*, 24 N. D. 582, 139 N. W. 1050, 51 L.R.A.(N.S.)

But in *Re Tod*, 12 S. D. 386, 47 L.R.A. 566, 70 Am. St. Rep. 616, 81 N. W. 637, 12 Am. Crim. Rep. 303, it was held that one who had left a state in which he was charged with having committed a crime, and had come into another state, with the knowledge, and at the special request, and as an employee, and in pursuance of the business, of the individual alleged to have been injured by the crime, and who was seeking his return, was not a fugitive from justice subject to extradition.

Prisoner in custody.

Generally, as to extradition of person who is under confinement in asylum state, see note to *Re Opinion of Justices*, 24 L.R.A. (N.S.) 799, which considers the question of precedence between the two jurisdictions, as to such person.

In *People ex rel. American Surety Co. v. Benham*, 71 Misc. 345, 128 N. Y. Supp. 610, it is said (*obiter*) that if a person who has been convicted of a crime in a state court is incarcerated in a Federal prison outside of the state, under a judgment of a Federal court, he will be, under the Constitution of the United States and the act of Congress governing such cases, technically a fugitive from justice, subject to extradition upon the expiration of his sentence under the Federal judgment.

But one who has been convicted of a crime within a state and sentenced to imprisonment is not a fugitive from justice within the meaning of the United States Constitution, while he is passing through an adjoining state in charge of a duly qualified officer of the first state, who is conveying him to a penitentiary. *Re Maney*, 20 Wash. 509, 72 Am. St. Rep. 130, 55 Pac. 930,

Prisoner under parole.

One who, having been convicted of a crime and sentenced and subsequently paroled, violates his parole and leaves the state, is a fugitive from justice. *Hughes v. Pfanz*, 71 C. C. A. 234, 138 Fed. 980; *Ex parte Williams*.

And a prisoner in a reformatory, who, having been paroled with the direction and permission to go to one state, violates his parole by going to another state, is a fugitive from justice. *Drinkall v. Spiegel*, 68 Conn. 441, 36 L.R.A. 486, 36 Atl. 830.

A. C. W.

OKLAHOMA SUPREME COURT. (Division No. 1.)

CITY OF SHAWNEE, Plff. in Err.,

v.

FANNIE W. CHEEK, Admr., etc., of
James Cheek, Deceased.

(— Okla. —, 137 Pac. 724.)

Negligence — unsafe premises — trespasser.

1. A landowner owes a trespasser a duty,

in respect to safety from dangerous artificial condition of premises, not to injure him intentionally or wantonly.

Evidence — unsafe premises — recklessness.

2. A mere omission, although superficially characterized by mere thoughtlessness or heedlessness, but, in its deeper explanation, involving a reckless disregard for the safety of merely technical and reasonably anticipated trespassers, such as children of tender years, especially if unconscious trespassers, in respect to obviously and seriously dangerous artificial condition of premises, may amount to wantonness in a landowner; but the attractiveness and accessibility of the place or thing involving such danger to, and the probability of, such trespassers, the gravity of the danger in such condition, the length of time such condition has existed, the smallness of cost and of deprivation of beneficial use involved in eliminating same, and the reasonableness of the inference that the landowner, as a person of ordinary sensibilities and prudence, knew or should have known of, and under all the facts and circumstances in the case, should have eliminated, such danger, are proper considerations in determining whether there was such reckless disregard for the safety of such trespassers.

Trespass — by child.

3. A child under seven years of age, or, in the absence of evidence of capacity, between seven and fourteen years of age, is presumed to be incapable of guilt of more than technical trespass, as affecting question of duty of owner in respect to dangerous condition of premises, and the character of the trespass may be a circumstance to be considered by the jury in ascertaining whether there is contributory negligence.

Death — statutory action for.

4. Section 4313, Stat. 1893 (§ 5281, Rev. Laws 1910), does not operate as a continuance of any right of action which the injured person would have had but for his death, but confers upon the beneficiary thereof a property right in the pecuniary value to him of the life of his decedent, and gives him a new or independent cause of

action for the pecuniary loss he has sustained by reason of such death.

Abatement — action for personal injury.

5. A cause of action arising under § 4313, Stat. 1893 (§ 5281, Rev. Laws 1910), has the quality of survivability, is not extinguished by the death of the beneficiary therein, and may be revived and prosecuted in the name of his administratrix.

Pleading — dangerous premises — injury to child.

6. A petition which does not allege facts from which a reckless disregard for the safety of reasonably anticipated technical, if not unconscious, trespassers, amounting to wantonness, appears as a legal conclusion, nor the ultimate fact of reckless disregard for the safety of such trespassers amounting to wantonness, is not sufficient, as against a demurrer, to warrant a recovery of damages for death resulting to such trespasser from dangerous artificial condition of defendant's premises.

(December 23, 1913.)

ERROR to the District Court for Pottawatomie County to review a judgment in plaintiff's favor, in an action brought to recover damages for the alleged negligent killing of her son. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. E. E. Hood, W. M. Engart, and W. T. Williams for plaintiff in error.

Messrs. Blakeney & Maxey for defendant in error.

Thacker, C., filed the following opinion:

The plaintiff in error will be designated as defendant, and defendant in error as plaintiff, in accord with their respective titles in the trial court.

About May 24, 1908, defendant owned and possessed, within its corporate limits, a brick pump house, with three rooms, in one of which there was a pump pit about

Note. — Generally, as to the duty of property owner to trespassing child, see note to Walsh v. Pittsburgh R. Co. 32 L.R.A. (N.S.) 559. The doctrine of attractive nuisance is discussed at length in the note to Cahill v. E. B. & A. L. Stone & Co. 19 L.R.A. (N.S.) 1094. For the specific application of that doctrine to ponds, reservoirs, waterways, etc., see page 1143 of that note, and the supplemental note to Thompson v. Illinois C. R. Co. 47 L.R.A. (N.S.) 1101. Many cases on other phases of the general doctrine which have appeared since the note first referred to may be found by consulting the L.R.A. Digest, under the title "Negligence."

As to whether or not the statutory action for wrongful death survives to the personal representatives of the original beneficiary, 51 L.R.A. (N.S.)

see note to Gilkeson v. Missouri P. R. Co. 24 L.R.A. (N.S.) 844. The related question as to the right of the beneficiary next entitled to maintain an action for negligent death, where the beneficiary first entitled does not bring action, is discussed in the note to Hammond v. Lewiston, A. & W. Street R. Co. 30 L.R.A. (N.S.) 78, which includes some cases where the beneficiary first entitled commenced the action, but died before recovering judgment.

The right to recover for ordinary negligence under an allegation of gross, wilful, or wanton negligence, or *vice versa*, is treated in the note to Rideout v. Winnebago Traction Co. 69 L.R.A. 601. As to sufficiency of general allegations of negligence, see note to King v. Oregon Short Line R. Co. 59 L.R.A. 209.

G. H. P.

11 feet deep, and covering practically the entire floor space of the room, except a walk way about 10 feet wide on one side. This pump house was on an unbuilt-up and little used portion of a public street within the corporate limits of defendant, and was in a valley about 75 or 100 yards, according to one witness, or 350 or 440 yards, according to other witnesses, south from the south end of the built-up and more traveled portion of this street, which built-up and more traveled portion of the street extends downward, and ends on the south side of a hill north of the valley. About 75 or 80 yards south of the pump house was the channel of the North Canadian river, with which the pump house pit was connected by a pipe. About 200 yards from the pump house was a race track and within 60 or 70 feet of the pump house were the stables connected, in use or purpose, with the race track. The defendant had used the pump house in connection with its system of waterworks; but three or four years before the date mentioned, had taken its pump and pumping equipment away from the pit and building, and had abandoned use of the same because of the flooding of the pump pit through its said pipe connection on the occasion of a rise in the river. The pipe from the river entered the pump pit about 12 or 18 inches above its bottom, which it appears was above the ordinary level of the water in the river; but plaintiff, in her testimony, mentioned three occasions on which the pump pit had been flooded by rises from the river. After defendant abandoned the pump house, it was, with the knowledge and consent of a member of defendant's council, occasionally used by parties having animals in the race track stables for storage of hay; but on May 24, 1908, when, as a result of a rise in the river commencing about two days before, there was about 9 feet of water in the pump pit, there was no hay in the pump house except a remnant scattered about over the floor and on the surface of the water, which hay on the water had been raised, by the rising of the water, from the bottom of the pump pit. The defendant had made no other use of the premises for three or four years. The glass, if not the sash, had disappeared from the windows, the doors had fallen into a dilapidated condition, both doors and windows were open, and such had been the condition during the greater portion of the time of defendant's abandonment of its use of the pump house. James Cheek, the original plaintiff, and Fannie W. Cheek, in whose name, as administratrix, the action was revived, on May 24, 1908, resided with their family 51 L.R.A.(N.S.)

outside of defendant's corporate limits, about 150 yards from the pump house, and their children, as well as other children in that vicinity, played about the pump house during the time of its abandonment. The plaintiff's children also hunted eggs in the hay in the pump house; but plaintiff forbade her children playing about the same. The evidence does not show that defendant had actual knowledge of such use of its premises by children, nor actual knowledge of the coat of hay on the surface of the water, nor of the depth or fact of water in the pump pit at the time of the accident. On May 24, 1908, the original plaintiff, with Thompkins Cheek, the nine-year-old son of the two successive plaintiffs, and an older son, had occasion to be, and were, near the pump house; but the father and older boy went a short distance away in a boat, leaving Thompkins Cheek to watch some hogs near the pump house, and, when the father and older boy, soon after, returned, Thompkins Cheek could not be found. In the afternoon of the same day the body of Thompkins Cheek was found drowned on the bottom of the pump pit. At that time the surface of the water in the pit was practically covered with hay that was dry on top, although at places the hay was very thin in its covering, and, by close observation, the water could not only be seen through the hay at places, but there were open spaces from the size of a man's hand to a foot or more square where the same could be seen. It appears inferentially that Thompkins Cheek, for some unknown purpose, although probably to gratify an instinctive curiosity or desire to re-explore the silent chambers of the deserted building, and possibly lounge upon the hay he thought to find therein, or to search for hens' nests, or to gratify some other boyish impulse, had entered the pump house through an open door, had stepped upon the dry hay, apparently, to his view, covering the surface of the water in the pit, without knowledge of there being water in the same, and, the surface of the water being about 2 feet below the top of the pit, had been unable to extricate himself. The evidence shows he had been an industrious boy, and helped his parents, not only by work in the field, but by doing chores about the house, and his father, who died about ten months later, was sixty-one years of age when he was drowned.

This action was begun by petition filed August 6, 1908; but no trial was had until November 11, 1911, when a verdict for \$2,000 was returned for plaintiff.

The case presents the vexed question of the liability of a landowner for personal

injuries and death resulting from a child trespasser's contact with a dangerous condition of the premises.

In 1841 Lord Denman, Ch. J., in *Lynch v. Nurdin*, 1 Q. B. 29, 4 Perry & D. 672, 10 L. J. Q. B. N. S. 73, 5 Jur. 797, sustained a verdict for an injury upon a plaintiff under seven years of age, who, with several other children, was playing with defendant's horse and cart in a public street, where same had been left unattended for half an hour, when another boy, by leading, caused the horse to move, and plaintiff, falling from the shaft, was run over by a wheel of the cart, and suffered a fractured leg.

That appears to be the first case in which an owner of property, without actual intent to injure, or actually setting in motion a force or setting a trap from which injury resulted, had been held liable for personal injuries caused by trespasser's contact with a dangerous condition of his property, not aside from and so near a public highway as to be dangerous to travelers getting off the same, although other cases are there cited as if supporting the conclusions there reached.

It appears that there was no extended discussion of the doctrine announced in that case until after the decision of the turntable case (*Stout v. Sioux City & P. R. Co.* 2 Dill. 294, Fed. Cas. No. 13,504, affirmed in 17 Wall. 657, 21 L. ed. 745), in 1873; but, with the great volume of litigation involving the same that has followed, a war of conflicting ideas has since raged with unabated vigor about this doctrine. The doctrine, apparently without good reason, is known as the "attractive nuisance" doctrine.

The cases sustaining the doctrine, or allowing a recovery, have not only based their conclusions in some instances upon somewhat different grounds, but are not agreed as to the limitations which should be placed upon the doctrine, and this has been urged by some of the critics as evidence of lack of solidity in any ground whatever for the doctrine.

In answer to the argument that the special attractiveness of the thing or place was an implied or constructive invitation to children, it has been said that the condition or use of land by its owner is not intended as such invitation; that the distinction between invitation and temptation is ignored by such argument; that there are but few things or places not attractive to children, and that it is difficult, if not impossible, to find and mark out, so that landowners may be able to see and know, the boundary line between the things or places that are, and the things and places that are not, so attractive as to constitute 51 L.R.A.(N.S.)

such invitation, and render them liable for injuries to trespassing children coming in contact with such things or places; but the duty to use ordinary care for the safety for one by invitation upon the premises is indisputable, and most of the cases in which there is any attempt to find the principle upon which recovery is allowed do so on that of such invitation.

In answer to the argument that the landowner may be held liable upon the ground of an implied intent to injure, it has been said that it is absurd to imply such intent where it is clear that it does not in fact exist; but, of course, the duty and the liability for negligence in a breach of the duty to abstain from intentionally injuring even a trespasser, unless in the lawful exercise of the right of defense or expulsion, is indisputable.

In answer to the argument that the maxim of *sic utere tuo ut alienum non ledas* (which, literally translated, means, "enjoy your own property in such a manner as to not injure that of another person") requires the landowner to exercise care to make his premises so safe as to avoid injury to trespassing children who may come in contact with a dangerous condition of the same, it has been said that the true legal meaning of this maxim is, "so use your own property as not to injure the rights of another," and that, as a trespasser has no right to be upon the landowner's premises, this maxim is inapplicable, and, although we express no opinion on this point, in *Walker v. Potomac, F. & P. R. Co.* (Pannill v. Potomac, F. & P. R. Co.) 105 Va. 226, 4 L.R.A.(N.S.) 80, 115 Am. St. Rep. 871, 53 S. E. 113, 8 Ann. Cas. 862, 20 Am. Neg. Rep. 221, the court said there might be more, but there was one conclusive answer to this argument, in that the maxim referred to only acts of the landowner the effect of which extended beyond the limits of his property.

In the well-considered case of *Bottum v. Hawks*, 84 Vt. 370, 35 L.R.A.(N.S.) 440, 79 Atl. 858, Ann. Cas. 1913A, 1026, 3 N. C. C. A. 186, decided May 8, 1911, the doctrine is condemned, and that court's conception of the status and tendency of judicial opinion, both in England and this country, on the subject, seems worthy of statement here, and appears in the following extract from the opinion: "As said by (now) Mr. Justice Lurton, in *Felton v. Aubrey*, 20 C. C. A. 436, 43 U. S. App. 278, 74 Fed. 350, 7 Am. Neg. Cas. 405: 'It seems to us that many of the American cases which we have cited fail to draw the proper distinction between the liability of an owner of premises to persons who sustain injuries as a result of the mere condition of the premises, and those who come to harm by

reason of the subsequent conduct of the licensor inconsistent with the safety of persons permitted to go upon the premises and who he was bound to anticipate might avail themselves of his license. This seems to be sharply emphasized in the case of *Corby v. Hill*, 4 C. B. N. S. 556, 27 L. J. C. P. N. S. 318, 4 Jur. N. S. 512, 6 Week. Rep. 575, and is a distinction which should not be overlooked.' . . . Some uncertainty, however, seems to have existed in England as to the standing of the case, and much inconsistency appears in the English cases since decided (a review of which is found in *Friedman v. Snare & T. Co.* 71 N. J. L. 605, 70 L.R.A. 147, 108 Am. St. Rep. 764, 61 Atl. 401, 2 Ann. Cas. 497); but all doubt is now set at rest by the recent case of *Cooke v. Midland G. W. R. Co.* [1909] A. C. 229, [1909] 2 I. R. 499, 78 L. J. P. C. N. S. 76, 100 L. T. N. S. 626, 25 Times L. R. 375, 5 Ann. Cas. 557, wherein the *Lynch Case* is expressly approved, and its doctrine applied to a turntable case. . . . Notwithstanding the unstable foundation upon which the *Stout Case* stands, it was expressly approved and adhered to in *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619, and must, doubtless, be accepted as the law of that court. . . . It must be admitted that a majority of the cases adopt the rule of the *Stout Case*. The list includes *Alabama G. S. R. Co. v. Crocker*, 131 Ala. 584, 31 So. 561; *Barrett v. Southern P. Co.* 91 Cal. 296, 25 Am. St. Rep. 186, 27 Pac. 666; *Ferguson v. Columbus & R. R. Co.* 77 Ga. 102; *Chicago & E. R. Co. v. Fex*, 38 Ind. App. 268, 70 N. E. 81; *Edgington v. Burlington*, C. R. & N. R. Co. 116 Iowa, 410, 57 L.R.A. 561, 90 N. W. 95; *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Brown v. Chesapeake & O. R. Co.* 135 Ky. 798, 25 L.R.A.(N.S.) 717, 123 S. W. 298; *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393; *Nagel v. Missouri P. R. Co.* 75 Mo. 653, 42 Am. Rep. 418; *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 65 Neb. 889, 59 L.R.A. 920, 91 N. W. 880, 12 Am. Neg. Rep. 300; *Bridger v. Asheville & S. R. Co.* 25 S. C. 24; *Ilwaco R. & Nav. Co. v. Hedrick*, 1 Wash. 446, 22 Am. St. Rep. 169, 25 Pac. 335; *Ft. Worth & D. C. R. Co. v. Robertson*, — Tex. —, 14 L.R.A. 781, 16 S. W. 1093. On the other hand, the rule is utterly rejected in *Wilmot v. McPadden*, 79 Conn. 367, 19 L.R.A.(N.S.) 1101, 65 Atl. 157; *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 13 L.R.A. 248, 26 Am. St. Rep. 253, 28 N. E. 283; *Ryan v. Towar*, 128 Mich. 463, 55 L.R.A. 310, 92 Am. St. Rep. 481, 87 N. W. 644; *Frost v. Eastern R. Co.* 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790; *Delaware & W. R. Co. v. Reich*, 61 N. 51 L.R.A.(N.S.)

J. L. 635, 41 L.R.A. 831, 68 Am. St. Rep. 727, 40 Atl. 682, 4 Am. Neg. Rep. 522; *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068; *Wheeling & L. E. R. Co. v. Harvey*, 77 Ohio St. 235, 19 L.R.A.(N.S.) 1136, 122 Am. St. Rep. 503, 83 N. E. 66, 11 Ann. Cas. 981, 21 Am. Neg. Rep. 272; *Thompson v. Baltimore & O. R. Co.* 218 Pa. 444, 19 L.R.A.(N.S.) 1162, 120 Am. St. Rep. 897, 67 Atl. 768, 11 Ann. Cas. 894; *Paolino v. McKendall*, 24 R. I. 432, 60 L.R.A. 133, 96 Am. St. Rep. 736, 53 Atl. 268, 12 Am. Neg. Rep. 550; *Walker v. Potomac, F. & P. R. Co.* (Pannill v. Potomac, F. & P. R. Co.) 105 Va. 226, 4 L.R.A.(N.S.) 80, 115 Am. St. Rep. 871, 53 S. E. 113, 8 Ann. Cas. 862, 20 Am. Neg. Rep. 221; *Ritz v. Wheeling*, 45 W. Va. 262, 43 L.R.A. 148, 31 S. E. 993. That there is a strong tendency to limit rather than extend the doctrine is admitted on all sides. 'This tendency is sufficiently shown by the following cases from the states wherein the turntable doctrine is approved: *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 398, 54 L.R.A. 314, 39 S. E. 82, 10 Am. Neg. Rep. 8, which was the case of a five-year-old boy drowned in a pool formed in an excavation on the premises of the plaintiff in error; *Stendal v. Boyd*, 73 Minn. 53, 42 L.R.A. 288, 72 Am. St. Rep. 597, 75 N. W. 735, which was the case of a boy not quite five years old drowned in a quarry hole on the defendant's premises; *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L.R.A. 755, 56 Am. St. Rep. 543, 36 S. W. 659, which was the case of a nine-year-old boy drowned in a quarry hole; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L.R.A. 573, 66 Am. St. Rep. 856, 41 S. W. 62, which was the case of a three-year-old child drowned in a pool of water on defendant's right of way; *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915, which was the case of a ten-year-old boy drowned in a pond allowed to form on the defendant's premises; *Mayfield Water & Light Co. v. Webb*, 129 Ky. 395, 18 L.R.A.(N.S.) 179, 130 Am. St. Rep. 469, 111 S. W. 712, which was the case of an eleven-year-old boy killed while playing on a telephone guy wire; *Harris v. Cowles*, 38 Wash. 331, 107 Am. St. Rep. 847, 80 Pac. 537, which was the case of a child of tender years injured while playing with a revolving door; *Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 106, 47 Pac. 113, 598, 1 Am. Neg. Rep. 4, which was the case of an eleven-year-old boy drowned in a pond of surface water which was allowed to stand on defendant's lot. Other cases, like *Brown v. Salt Lake City*, 33 Utah, 222, 14 L.R.A.(N.S.) 619, 126 Am. St. Rep. 828, 93 Pac. 670, 14 Ann. Cas. 1004; *Pekin v. McMahon*, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep.

114, 39 N. E. 484; Indianapolis Water Co. v. Harold, — Ind. App. —, 79 N. E. 542; and Price v. Atchison Water Co. 58 Kan. 551, 62 Am. St. Rep. 625, 50 Pac. 450, 3 Am. Neg. Rep. 392,—with much more consistency, apply the doctrine to the cases of open conduits, ditches, and water holes, and hold the landowner liable."

It appears that Illinois (see *St. Louis V. & T. R. Co. v. Bell*, 81 Ill. 76, 25 Am. Rep. 269, and *Pekin v. McMahon*, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484) and Tennessee (see *East Tennessee & W. N. C. R. Co. v. Cargille*, 105 Tenn. 628, 59 S. W. 141, 9 Am. Neg. Rep. 200, and *Bates v. Nashville, C. & St. L. R. Co.* 90 Tenn. 36, 25 Am. St. Rep. 665, 15 S. W. 1069) should also be included in the first foregoing enumeration of states favoring the doctrine.

In *Uthermohlen v. Bogg's Run Min. & Mfg. Co.* 50 W. Va. 457, 55 L.R.A. 911, 88 Am. St. Rep. 884, 40 S. E. 410, the court said that the doctrine of the turntable cases shifted the duty of watchfulness and care from the shoulders of parents, where the Creator had placed it, to the shoulders of the landowners using their property to make a living, and thus materially detracted from the full ownership of property, sacred under the Constitution; but we only refer to that statement as an extreme view.

In *Ryan v. Towar*, 128 Mich. 463, 55 L.R.A. 310, 92 Am. St. Rep. 481, 87 N. W. 644, the doctrine is also condemned, and the court, in criticism, referred to an application thereof in a Kansas case, and said: "Here we have the doctrine of the turntable cases carried to its natural and logical result. We have only to add that every man who leaves a wheelbarrow or a lawnmower or a spade upon his lawn, a rake, with its sharp teeth pointing upward, upon the ground or leaning against a fence, a bed of mortar prepared for use in his new house, a wagon in his barnyard, upon which children may climb, and from which they may fall, or who turns in his lot a kicking horse or cow with calf,—does so at the risk of having the question of his negligence left to a sympathetic jury. How far does the rule go? Must his barn door, and the usual apertures through which the accumulations of the stable are thrown, be kept locked and fastened, lest twelve-year-old boys get in and be hurt by the animals, or by climbing into the haymow, and falling from beams? May a man keep a ladder or a grindstone or a scythe or plow or reaper, without danger of being called upon to reward trespassing children, whose parents owe and may be presumed to perform the duty of restraint? Does the new rule go still further, and make it necessary for a 51 L.R.A. (N.S.)

man to fence his gravel pit or quarry? And, if so, will an ordinary fence do, in view of the known propensity and ability of boys to climb fences? Can a man nowadays safely own a small lake or fish pond, and must he guard ravines and precipices upon his land? Such is the evolution of the law less than thirty years after the decision of *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, when, with due deference, we think some of the courts left the solid ground of the rule that trespassers cannot recover for injuries received and due merely to negligence of the persons trespassed upon."

In the same case it is further said in the opinion: "That a landowner is under no obligation to use care to protect a trespasser is a broad, and, until recently, undisputed, rule without exception; liability for injuries sustained by such being limited to cases of intentional or wanton injuries. The rule, with this limitation, is sustained to-day by the great weight of authority. It is contended by some lawwriters, and has been held in some cases, that an exception exists in favor of children of tender years. The varying reasons given should lead us to doubt the solidity of the foundations upon which these cases rest, especially when none of the reasons are of recognized authority. The law has never before denied the liability of children for trespass because of tender years. On the contrary, it was intimated in *Mangan v. Atterton*, L. R. 1 Exch. 239, 35 L. J. Exch. N. S. 161, 14 L. T. N. S. 411, 14 Week. Rep. 771, 4 Hurlst. & C. 388, that a four-year-old boy was a trespasser under the circumstances of that case, and there are numerous cases cited in this opinion where liability is denied upon that, and no other, ground. The assertion that the weight of authority supports the plaintiff's contention in this case seems to us incorrect. It may be true that, in cases involving turntables, a majority of the cases, which are necessarily few, have followed the case of *Sioux City & P. R. Co. v. Stout*, supra, but there should be a legal principle underlying the rule laid down in that case, and that principle has been assiduously sought for by some of the courts, without success, as we have seen."

In the case of *Wheeling & L. E. R. Co. v. Harvey*, 77 Ohio St. 235, 19 L.R.A. (N.S.) 1136, 122 Am. St. Rep. 503, 83 N. E. 66, 11 Ann. Cas. 981, 21 Am. Neg. Rep. 272, decided in 1907, where much of the case law upon the doctrine is very ably reviewed, and the doctrine condemned by the Ohio court, in speaking of the opinion of Judge Hooker in *Ryan v. Towar*, supra, it is said: "Of the case of *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257, in

which the opinion is by Judge Cooley, and which is quoted from at some length in *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619, as approving the turntable doctrine, he says: 'Clearly this does not adopt the rule of *Sioux City & P. R. Co. v. Stout*.'

In *Powers v. Harlow*, supra, Judge Cooley said: "A man of ordinary prudence, if told that so dangerous an article was so carelessly stored, might well have deemed the statement incredible,"—and, although it is not expressly so stated in the opinion, the act for which a recovery was there allowed appears to have been wanton in its reckless indifference to the safety of others.

In the case of *Ritz v. Wheeling*, 45 W. Va. 262, 43 L.R.A. 148, 31 S. E. 993, the court, in speaking of the original turntable case, said: It, "if carried to the length to which it is sought to be carried, would exact of every property owner the utmost watchfulness, vigilance, and expenditure to guard against hurt to children, else he would be every moment in danger of ruinous damages. It attacks the right of free use of one's property in lawful business. A railroad liable because it happened to leave a turntable unlocked, as turntables often are, on its own track,—a necessary appliance in a lawful business! Ought a farmer to be liable for failing to put a picket fence around his pond necessary for his cattle? If he does not, some little boy will climb the fence into the farmer's field, drown in the pond, and the farmer is sued on the same principle. The dam that contains water to turn the mill wheel, having a path around it shaded with willows, is very alluring to the child and the man. Must the miller inclose it? The canal, with its towpath and frogs, is very attractive to the little boy or girl, and dangerous, too. If a child drown in it, is the company liable? How many more instances of things useful in lawful business, and withal very attractive to children, and very dangerous, might be put? And the rule contended for says that, if the thing causing the injury be attractive or seductive, the liability attends it. How many things are, or may be, so to children? 'A child's will is the wind's will.' Almost everything will attract some child. The pretty horse, or the bright red mowing machine, or the pond in the farmer's field, the millpond, the canal, the railroad cars, the moving carriage in the street, electric works, and infinite other things attract the child, as well as the city's reservoir. To what things is the rule to be limited? And where will not the curiosity, the thoughtlessness, and the agile feet of the truant boy carry him? He climbs into the high barn and the high cherry tree. Are they,

too, to be watched and guarded against him?"

The authorities are, we believe, agreed that a landowner is in duty bound to abstain from intentionally harming a trespasser, unless in the lawful exercise of the right of defense or expulsion, and, in a very able, if not entirely satisfactory, criticism of the doctrine, to which there has been complimentary reference by several courts, Judge Jeremiah Smith, in an article published in 11 *Harvard L. Rev.* 349, says: "He is also, by the better view, under a duty to avoid harming the trespasser by negligent acts which result in actively bringing force to bear upon the trespasser."

... It is a mooted question whether this duty is confined to cases where the presence of the trespasser is known to the landowner. Some authorities hold that the owner may, in special circumstances, be under a duty to use care to ascertain whether trespassers are present before he sets in motion a force which would be likely to endanger any such persons if within reach. But the alleged duty, if admitted, is material only when it is sought to make the landowner liable for actively bringing force to bear upon the trespasser."

In the Smith article, supra, it is further said: "Upon the crucial inquiry whether the law should impose such a duty upon the landowner, there are considerations of undoubted weight to be urged in favor of either view. A balance must be struck between the benefit to the community of the unfettered freedom of owners to make a beneficial use of their land, and the harm which may be done in particular instances by the use of that freedom. The true ground for the decision is policy, i. e., expediency, in the Benthamic sense of 'the greatest good to the greatest number,' and the advantages to the community on one side and the other are the only matters really entitled to be weighed.' On the one hand, it is the policy of the law to establish rules tending to preserve life, and to protect human beings from serious bodily harm. And this laudable purpose seems frustrated *pro tanto* by permitting a landowner to pursue with impunity a mode of user which he knows, or ought to know, is likely to occasionally result in the suffering of great harm on the part of some of his neighbor's children. The fact that a defendant neither desired nor intended to bring about a particular result does not necessarily exonerate him. The law not unfrequently holds defendants liable irrespective of their intention to do harm, and in some extreme cases may even hold them liable irrespective of the utmost care on their part, practically making them in-

surers against all harm resulting from certain classes of acts. 'When a responsible defendant seeks to escape from liability for an act which he had notice was likely to cause temporal damage to another, and which has caused such damage in fact, he must show a justification.' And this doctrine may be assumed to apply even though he had no notice that his act was likely to cause damage to a specific person at a particular moment, but knew only that it was likely to cause damage to some unspecified person at some indefinite time. To escape liability, he must show that there are considerations equal or paramount to those urged in behalf of the plaintiff which justify his conduct notwithstanding the known risk of damage to others therefrom. He must sustain 'a claim of privilege.' On the other hand, the defendant justifies under his right or privilege to make a beneficial use of his own land in methods which will do no harm to persons remaining outside his boundary. The beneficial use of land is a primal necessity, not only to those individual landowners who happen to be defendants in lawsuits, but to the entire human race. 'The business of life must go forward, and the fruits of industry must be protected.' 'It is impossible to carry on the common affairs of life without doing various things which are more or less likely to cause loss or inconvenience to others, or even which obviously tend that way, and this in such a manner that their tendency cannot be remedied by any means short of not acting at all. . . . To say that a man shall not seek profit in business at the expense of others is to say that he shall not do business at all, or that the whole constitution of society shall be altered. Like reasons apply to a man's use of his own land in the common way of husbandry, or otherwise for ordinary and lawful purposes.' It is true that the right of user is never literally absolute, and is always restricted to some extent 'by rights residing in others, and by duties incumbent on the owner.' But it is also true that every restriction diminishes *pro tanto* the beneficial character of the use, and hence the law imposes restrictions as seldom as possible, and never except upon the strongest grounds. If an opposite policy were pursued, it is easily conceivable that the improvement and beneficial occupation of land might become in fact impossible, and property in the soil for nearly all useful purposes might be annihilated. To say, for instance, that B must keep his land in safe condition to be trespassed upon would often result in practically depriving B of certain modes of beneficial enjoyment, unless he takes precautions which are incompatible

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with profitable user, and might in effect amount to a confiscation of his land for the benefit of trespassers. The difficulty of restricting the owner without practically destroying his interest is fully recognized by the law. It has been an important factor in inducing courts to refuse to impose restrictions in various instances where the case in behalf of the landowner is not so strong as in the matter now under consideration. We refer to the class of cases where the use of land, instead of harming only those persons who come upon the land, exerts a damaging influence upon persons and property situated beyond the border of the defendant's land. While there are, of course, many acts thus harmfully operating beyond the limits of his land for which an owner is held liable, there are also various acts of user which confessedly have a damaging effect upon persons and things outside the boundary of the land, and which, nevertheless, the law does not prohibit or punish. . . . The courts do not consider it for the interests of the community that the landowner who does not go beyond certain common and generally beneficial acts of user should be called upon to answer for damage thereby done, even where the thing damaged is outside the limits of his land."

Judge Thompson, in his *Law of Negligence*, vol. 1, § 1031, said: "In respect of the . . . cases . . . of attractive nuisances, it is to be observed that it would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instincts, might run into it, and be killed, and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with commendation the few decisions which thereby be killed, or maimed for life. In view of what has preceded, the author regrets that he cannot say, as he said in his first edition, that such is not the law. He limits himself to expressing the opinion that it ought [not] to be the law, and to citing with commendation the few decisions which hold that it is [not] the law. Nevertheless, a few decisions of enlightened and humane courts are found more or less tending to the conclusion that the owner of any machine or other things which, from its nature, is especially attractive to children, who are likely to attempt to play with it in obedience to their childish instincts, and yet which is especially dangerous to them, —is under the duty of exercising reasonable care to the end of keeping it fastened,

guarded, or protected so as to prevent them from injuring themselves while playing or coming in contact with it."

In *Shearman & Redfield* on the law of Negligence, § 98, it is said: "The overwhelming weight of authority, both in number of decisions and in soundness of reasoning, by which is established the right of little children to recover damages for injuries suffered while trespassing, should alone be sufficient to settle this question. Innocence and mistake are no excuse for a trespass, and therefore one committed by a child is just as truly a trespass as if committed by an adult. The owner of premises has precisely the same right to eject a child therefrom as he has to eject a full-grown man. He has the same right to recover nominal damages in each case. But, when he is sued for damages caused by his negligence towards a trespasser, he finds that there is a wonderful difference between the probable result of the suit if the plaintiff is a child, and the probable result of a like suit by an adult. Is there any intelligible ground of distinction to account for this difference, except that the child is presumably not guilty of conscious negligence, while the man presumably is? When the man proves that he was ignorant of the fact that he was trespassing, or shows that his trespass was only technical, and such as he might reasonably suppose would not be objected to by the defendant, and did not in fact produce any appreciable injury or annoyance, his right to recover is just as good as that of an infant. All this is well settled. And what inference can possibly be drawn from such decisions, if not that the plaintiff's trespass is only a circumstance tending to prove contributory fault upon his part, and not in and of itself such fault or attended with the usual effects of such fault?"

In *Whittaker's Smith on Negligence*, § 77, it is stated, in the editorial notes, that the rule that a licensee or trespasser ordinarily enters land at his own risk is subject to an exception where the danger is exposed, and such as might be reasonably apprehended, and, in the text, at page 513, in discussing contributory negligence of children, it is said: "The doctrine of contributory negligence is applied to children, and to those having the control of them. In one case, *Channell, B.*, at nisi prius is reported to have said: 'The doctrine of contributory negligence does not apply to an infant of tender age.' This rule is scarcely satisfactory, because it is difficult to say what is or is not a tender age; but a better rule which would probably excuse the negligence of a child of tender age is that a child is only bound to exercise such a degree of care

as children of his particular age may be presumed capable of exercising."

In *id.* p. 66, it is said: "If A digs a hole in his land, and B, who has a right to personal security (but no right to be on the land), falls into it, A's right is paramount to B's, and no question of negligence arises; but, if A had permitted B to come upon his land, the rights would be equal, and questions of negligence would arise, *viz.*: Whether the pit was negligently left unguarded, and whether B was using his right of being there with care."

And in *id.* pp. 79-81, it is said: "But such owner will be liable for anything in the nature of a trap upon the premises, known to him, and as to which he gives no warning to the licensee. He must not do anything to alter the premises, so as to be likely to cause injury, without notice to the licensee. Upon the whole I incline to think, with *Mr. Campbell*, that the owner is bound to take ordinary care with respect to a bare licensee. The question is, as I think, one of great difficulty. It is said that the licensee, being there merely for his own advantage, can only demand that slight care which a gratuitous bailee is bound to display, and so far the proposition is correct; but I am not sure, if a gratuitous bailee were to indicate a place of deposit, whether he would not be undertaking that that particular place was reasonably fit for the deposit; and, if so, a similar agreement would apply to an owner who gives leave to come upon his property, *viz.*: That he has undertaken that his property is in some degree fit for the licensee to use. If this be so, it seems that he ought to take ordinary care. The courts, however, have distinctly held that the owner is only liable for 'gross' negligence, because he is in the same position as a gratuitous bailee; but I am inclined to think the assumption is not accurate. I think that the question is only further obscured by insisting that the owner must be guilty of an act of commission to render him liable to the licensee. It may be very frequently the case that omissions are slighter neglects than acts of commission; but they may very well be the contrary, and sometimes are so. If the neglect be of a grave and obvious character, it would matter nothing whether it was an omission or commission. For instance, it would matter nothing whether a signalman omitted by grave and obvious negligence to pull the handle to direct an express upon its proper line, or whether he negligently pulled the wrong handle. Where there is something done by the owner which is in the nature of a . . . wanton injury, he will be liable to an action for negligence even by a trespasser, as if an

owner of premises with great recklessness shot a trespasser, or if the owner set spring guns upon his premises and injured a trespasser. But where a trespasser took shelter from a storm in a ruinous house not fenced off from the road, and a wall fell upon him and injured him, it was held that he could not recover. Upon this principle it has been held that, where an owner or occupier of lands makes an excavation upon his land so near to a public highway as to be dangerous under ordinary circumstances to persons passing by, it is his duty to take reasonable care to guard such excavation, and he is liable for injuries caused, even if such persons are consciously or unconsciously straying from the way. Where the excavation is at a considerable distance, no such care need be taken. What is a considerable distance, it is impossible to say, and, in truth, each case depends upon its own facts."

We agree with the view of this author that the landowner is bound to take ordinary care with respect to a bare licensee; but, we do so upon the assumption that he uses the expression "ordinary care" as meaning such care as a person of ordinary prudence would usually exercise under the facts and circumstances in such case, although such care be slight in comparison with the care such persons would usually exercise about their own affairs of more than slight importance; and, indeed, §§ 2689 and 2691, Stat. 1890 (§§ 2917 and 2919, Rev. Laws 1910), make it clear that the degrees of care (§ 2688, Stat. 1890, same being § 2916, Rev. Laws 1910) and the degrees of negligence (§ 2690, Stat. 1890 same being § 2918, Rev. Laws 1910) refer to the differences in the degrees such persons usually exercise in their own affairs of different degrees of importance, and not to any difference in degrees of care in the same case or under the same state of facts, — the rule of three such degrees being thus not inconsistent with the rule that the measure of duty and test of negligence and liability is that one degree of care which a person of ordinary prudence would usually exercise under the facts and circumstances of the particular case.

We also agree with the view of this author that, although not usually so, an omission may constitute a greater neglect of duty than an act of commission, so that the rule holding a landowner liable for acts of commission, and not liable for mere omissions, resulting in harm to a bare licensee, is not sound, and is indefensible, and that, "where there is something done" (and we would add, "or omitted") "by the landowner which is in the nature of . . . a wanton injury, he will be liable 51 L.R.A. (N.S.)

to an action for injury even to a trespasser." In our opinion what omission or act of commission, free from intent to injure, will amount to wantonness and render the landowner liable to a trespasser, must depend upon the facts and circumstances of each case. The character of the danger and the position of the landowner in respect to his actual knowledge or thoughtlessness of the dangerous condition of his premises, and of its attractiveness and accessibility to merely technical trespassers, especially such as children of tender age, as well as of every other fact and circumstance bearing upon the probability of such trespasses, and the probability of injury to trespassers from contact with such dangerous condition, together with the smallness of the expense or effort required to eliminate such danger, bear upon the question of wantonness, and it is not difficult to conceive of a great variety of instances in which a landowner, indifferent and thoughtless of the safety of other persons, might, without intent to injure, be guilty of unquestionable wantonness.

There appears to be no denial of the doctrine of liability to injured trespassers for wanton acts of a landowner; but a great many of the cases, with which we are unable to agree, in effect, limit such liability to acts of commission, thus holding, in effect, that there can be no wantonness in an omission, or, if so, that it creates no liability to a trespasser, even though the trespass be merely technical and even unconscious. It is no doubt true that wantonness should not be inferred from the mere omission to make safe a dangerous place upon one's premises, in the absence of sufficient evidence to show a reckless disregard for the life, limb, body, or health of another or others; but, if wantonness be proven, we are of opinion that it is immaterial whether it consists of an act of commission or a mere omission.

A principle that appears to be deducible from much of the case law on the subject allowing recovery is that it is not only the duty of a landowner to a trespasser to not injure him intentionally or wantonly, but that an act or omission involving a reckless indifference to the safety of reasonably anticipated technical trespassers, such as children of tender years, although without intent to injure, may be wanton. It is undoubtedly the general rule that a landowner does not owe a trespasser any further or greater duty than this; but his duty to an invited person upon his premises is quite different, and requires of him reasonable care for the safety of such person.

As used in this opinion, the words "wanton," "wantonly," and "wantonness" mean,

and are applicable to, acts or omissions of a landowner involving reckless disregard for the safety of such, if any, merely technical trespassers as should in reason have been anticipated by a person of ordinary prudence, and such acts or omissions may be "wanton," "wantonly" done, or the result of "wantonness," although merely thoughtless or heedless in their superficial character, and free from intent to injure.

As stated in book 1, Lewis's Blackstone's Commentaries, p. 117: "The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health," etc.

In view of the great value and vital importance of this right, and the well-known disposition and lack of self-control in children, we see no sufficient reason why a landowner should not, at least, be deemed in duty bound to make reasonably safe any obviously dangerous, artificial, and attractive condition on his premises, which in character is clearly different from common and well-known dangerous natural conditions, especially when he is able to do so at little or no cost, and without appreciable impairment of his beneficial use of the same, in all cases in which his failure to do so involves reckless disregard for the safety of children of tender years, especially children under seven years of age, or, in the absence of evidence of capacity to be guilty of contributory negligence, under fourteen years of age, as a person of ordinary prudence must anticipate will probably be attracted to, and may come in contact with and be injured by, such dangerous conditions. Is it anything less than wantonness for a landowner, with actual knowledge of such dangerous, artificial, and attractive conditions of his premises, and of facts from which, as a reasonably thoughtful person, he must know that merely technical, if not unconscious, trespassers, in the persons of children living or accustomed to congregate or be near by, may come in contact with and be seriously injured by such dangerous conditions, to abstain from removing the danger of such conditions, especially if he is able to do so at little or no cost, and without appreciable impairment of his beneficial use of the premises?

It may be that parents, by proper example and correctly enforced precepts, can greatly reduce the number of injuries resulting from the trespassing of children and their contact with the dangerous condition of the premises upon which such trespasses are made, especially if the parents have correct and positive convictions, with which the child may be indoctrinated in many ways; but the senses of sight, taste, hearing, touch, and smell in children of tender

years are particularly eager for gratification, and their instinctive desire to examine and explore, to them, strange, mysterious and wonderful things and places, generally accentuated by much surplus energy, is often stronger than the influence of even the best and highest degree of parental effort to instruct and restrain.

These are matters of common knowledge, and the moral duty of landowners to supplement the duty of parents in respect to trespassing by children should certainly become a legal one when, under all the facts and circumstances in the case, a failure to do so amounts to wantonness, i. e., a reckless disregard or heedlessness for their safety.

The greater and farther removed from the natural and common in character the danger, and the greater the probability of contact therewith and injury therefrom by persons, especially children of tender years, who are merely technical, if not unconscious, trespassers, and the smaller the expense and inconvenience of eliminating the danger, the clearer appears to be the wantonness.

In the light of the known danger in turntables, high explosives, electric currents, and the like, and the disposition of children, was the act or omission of the landowner in most, if not all, the cases in which recovery for injuries to children has been allowed to stand, anything less than wantonness? We think there is, at least, evidence reasonably tending to prove wantonness in, at least, most of them.

The walls and spaces of a deserted building such as this, where children may play hide and seek, and hunt hens' nests, as the evidence shows they did do about this building, and otherwise gratify their childish instincts, are undoubtedly exceptionally attractive places to children, and an intrusion by children of the age of the deceased child should be presumed, in the absence of evidence to the contrary, to be not merely a technical, but an unconscious, trespass.

In *Chicago, R. I. & P. R. Co. v. Baroni*, 32 Okla. 540, 122 Pac. 926, it was held proper to submit to the jury the question of contributory negligence, permitting the jury to take into consideration the age, experience, and maturity of the child, and the general rule appears to be that a child under seven years of age is incapable as a matter of law, and one between the age of seven and fourteen may or may not be capable, of contributory negligence, depending upon the age, experience, and capacity to understand, to appreciate, and avoid the danger to which the child is exposed under all circumstances of the case, the care required being the same care that a person

of the same age, education, and mental and physical capacity uses under like circumstances, and the contributory negligence of such child is usually held to be a question for the jury. See notes to *Schoonover v. Baltimore & O. R. Co.* Ann. Cas. 1913B, 969; 1 Ann. Cas. 895; 17 Ann. Cas. 353, 14 Am. St. Rep. 590; 49 Am. St. Rep. 408.

In deference to the fact that this is the first time the doctrine of the "turntable cases" has been presented for the consideration of this court, we have quoted quite extensively from authorities touching and illustrating some of the variant views upon the same; but, in respect to such quotations, we do not desire to be understood as approving or disapproving further than expressly shown in this opinion.

In brief for defendant it is urged that it was not in duty bound to keep its unused pump station securely locked and barred from the entrance of children, and that the doctrine of the so-called "turntable" cases is not sound; but the question of wantonness as a ground for recovery is not discussed.

We deem it unnecessary to more specifically point out the logical sequence of the foregoing views touching any question presented by defendant, in view of the necessity of a reversal of this case upon a distinct ground hereinafter shown, except that it appears that the demurrer to the petition should have been sustained, in view of the fact that the allegations do not show a reckless disregard for the safety of such technical trespassers as the deceased boy, and wantonness is not expressly nor by necessary implication alleged.

It is true that the petition alleges facts from which wantonness might be inferred, if the court was at liberty to indulge such inference in favor of the pleader; but, "in the construction of a pleading challenged by demurrer before trial, nothing will be assumed in favor of the pleader which has not been averred, as the law does not presume that a party's pleadings are less strong than the facts of the case warrant." *Atwood v. Rose*, 32 Okla. 355, 122 Pac. 929.

It is urged by the defendant that the right of action for the death of Thompkins Cheek was personal to and expired with the original plaintiff, the father of the decedent; that it was not susceptible of revival for the reason that it did not exist after the death of the original plaintiff.

Section 4312, Stat. 1893 (§ 5280, Rev. Laws 1910), reads: "No action pending in any court shall abate by the death of either or both of the parties thereto. . . ."

But we do not understand this section to impart the quality of survivability to causes of action which do not have that 51 L.R.A.(N.S.)

quality under the next preceding section (§ 4311, Stat. 1893, same being § 5279, Rev. Laws 1910), which reads: "In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, shall also survive; and the action may be brought, notwithstanding the death of the person entitled or liable to the same."

These sections of our statutes were adopted from Kansas, and, in two cases decided by the courts of that state before such adoption, language is used which gives some color to the contention that an action for pecuniary loss resulting from death wrongfully caused under § 4313, Stat. 1893 (§ 5281, Rev. Laws 1910), is not within any provision of § 4311, *supra*; but due examination of these cases will show that this precise question should be regarded as not settled thereby, and as still open.

In *Atchison, T. & S. F. R. Co. v. Rowe*, 56 Kan. 411, 43 Pac. 683, the latest of those cases, where a person wrongfully injured commenced action, and, while same was pending, died from another and independent cause, the court held that his entire cause of action for the injury survived, and did not abate under §§ 4311 and 4312, *supra*; the arguments therein as to the nature of the cause of action given by § 4313, *supra*, being inapplicable.

In *Eureka v. Merrifield*, 53 Kan. 794, 37 Pac. 113, the other one of these cases, it is held that § 4311, *supra*, construed with §§ 4312 and 4313, *supra*, "only permits actions to survive for injury to the person when death does not result from injury," but, in that case, the only question was as to the sufficiency of the petition of the parents, as next of kin, suing for their own pecuniary loss sustained by reason of the wrongfully caused death of their child, in the absence of any allegation that the child, at the time of such death, was a nonresident of the state, or that no administrator had been appointed for his estate. The action was for "death" under § 4313, *supra*, and § 4314, Stat. 1893 (§ 5282, Rev. Laws 1910), and not for the personal injury for which he might have sued had he lived, the survivability of their cause of action was in nowise involved, the quoted holding of the court was apparently foreign to any question before it, and this language no doubt was merely intended to give expression to the indisputable view that the language "or for injury to the person," used in § 4311, *supra*, does not impart the quality of survivability to the cause of action for death given by § 4313, *supra*; these two causes of action being separate and distinct.

Section 4311, *supra*, however, apparently stamps with the quality of survivability every cause of action which would survive at common law, and every cause of action for injury to "personal estate," and, if the cause of action in this case survived the death of James Cheek, the original plaintiff, it must do so because § 4313, *supra*, does not give a right of action merely for a wrong to a domestic relation or to the person of the beneficiary, but stamps with the character of "estate" or property right the pecuniary interest of the father in the life of the child, at the time of the wrongfully caused death of the latter, which the former is allowed to recover.

Section 4313, *supra*, reads as follows: "When the death of one is caused by the wrongful act or omission of another the personal representatives of the former, may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages . . . must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

Section 4314, *supra*, reads as follows: "In all cases where the residence of the party whose death has been caused as set forth in the preceding section, is at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in the said section may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

The death for which this action was brought occurred prior to the amendment of § 6893 (6261) Stat. 1890, by Sess. Laws 1909, p. 548 (Comp. Laws 1909, § 8985), which went into effect June 10, 1909 (see § 8418, Rev. Laws 1910, for history of act), and, under the provisions of § 6893, *supra*, the father was the sole heir, and therefore the only "next of kin" of the deceased child.

Section 4067, Stat. 1890 (§ 6586, Rev. Laws 1910), declares all things susceptible of ownership to be property within the meaning of the chapter relating to the nature of property, and § 4068, Stat. 1890 (§ 6587, Rev. Laws 1910), includes among its specifications of what may be owned "rights created, or granted by statute."

In *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, an action founded upon the employers' liability act of Congress of 1908 (act April 22, 1908, chap. 149, 35 Stat. at L. 65, U. S. 51 L.R.A. (N.S.)

Comp. Stat. Supp. 1911, p. 1322), it is said: "The statute, in giving an action for the benefit of certain members of the family of the decedent, is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being,—that of 9 and 10 Vict. [chap. 93] known as Lord Campbell's act. This act has been, in its distinguishing features, re-enacted in many of the states, and both in the courts of the states and of England has been construed, not as operating as a continuance of any right of action which the injured person would have had but for his death, but as a new or independent cause of action for the purpose of compensating certain . . . members of the family for the deprivation, pecuniarily, resulting to them from his wrongful death."

In the same case *Patterson, Railway Accident Law*, § 401, is appropriately quoted as stating that the term "pecuniary loss or damage" is judicially employed, in cases arising under such statutes, as follows: "Not only to express the character of that loss to the beneficial plaintiffs which is the foundation of their right of recovery, but also to discriminate between a material loss which is susceptible of a pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation."

The measure of damages recoverable under § 4313, *supra*, as held under similar statutes in other jurisdictions, is limited to the pecuniary loss sustained by the beneficiaries therein specified (*Missouri, K. & T. R. Co. v. West*, 38 Okla. 581, 134 Pac. 655; *St. Louis & S. F. R. Co. v. Long*, — Okla. —, 137 Pac. 1156; *Missouri, K. & T. R. Co. v. Lenahan*, 39 Okla. 283, 135 Pac. 383; and *Kansas P. R. Co. v. Cutter*, 19 Kan. 83, 9 Am. Neg. Cas. 355), and this tends to show that a species of estate, a property right, was conferred upon the father, as next of kin, by this statute.

A recent case holding that a right of action for death under the statutes of Illinois, which do not appear materially different from our own in this respect, accrues immediately upon death, becomes an asset of the estate of the beneficiary, and survives the death of the beneficiary, is that of *Union S. B. Co. v. Chaffin*, 122 C. C. A. 598, 204 Fed. 412, and in that case the case of *Pitkin v. New York C. & H. R. R. Co.* 94 App. Div. 31, 87 N. Y. Supp. 906, which is to the same effect, is cited and quoted.

In notes to *Gilkeson v. Missouri P. R. Co.* 17 Ann. Cas. 763-776, several cases holding that the action does survive, as well as others holding that the action does

not survive, are cited and reviewed, and the following excerpt from that note seems worthy of quotation here: "In other of the foregoing decisions adhering to the view that the action survives, the right of the beneficiary in the action has been considered a property right which is survivable, and passes to his representatives upon his death. In such cases the statute creating the cause of action is construed to create a new cause of action in favor of the beneficiaries for the damages sustained by them, and not as continuing the cause of action which the original deceased might have had if he had survived the injury. *Cooper v. Shore Electric Co.* 63 N. J. L. 558, 44 Atl. 633; *Re Meekin*, 164 N. Y. 145, 51 L.R.A. 235, 79 Am. St. Rep. 635, 58 N. E. 50, 8 Am. Neg. Rep. 490; *Mundt v. Glokner*, 24 App. Div. 110, 48 N. Y. Supp. 940, appeal dismissed in 160 N. Y. 571, 55 N. E. 297; *Pitkin v. New York C. & H. R. R. Co.* 94 App. Div. 31, 87 N. Y. Supp. 906. In *Re Meekin*, 164 N. Y. 145, 51 L.R.A. 235, 79 Am. St. Rep. 635, 58 N. E. 50, 8 Am. Neg. Rep. 490, supra, the court said: 'Thus it appears, both from the statute and the authorities, that the damages awarded for the negligent act are such as result to the property rights of the person or persons for whose benefit the cause of action was created. Nothing is allowed for a personal injury to the personal representatives or to the beneficiaries; but the allowance is simply for injuries to the estate of the latter caused by the wrongful act. The statute, as it has been held, is not simply remedial, but creates a new cause of action in favor of the personal representatives of the deceased, which is wholly distinct from, and not a revivor of, the cause of action, which, if he had survived, he would have had for his bodily injury.' In *Cooper v. Shore Electric Co.* 63 N. J. L. 558, 44 Atl. 633, the court said: 'The controlling feature in this legislation is that damages are made recoverable for causing death as compensation for the pecuniary injury the designated beneficiaries have sustained by reason of the death. If there be no widow or next of kin at the time of the death of the deceased, the pecuniary injury contemplated by the statute does not exist, and the action cannot be maintained. It is also clear that the pecuniary injury to be compensated for is that of the widow or persons who are next of kin at the time of the death of the deceased, and that the cause of action created by the statute inures to such persons as a vested right. By this statute a property right is created in the beneficiary of such a nature as . . . would give the action the quality of survivorship, and take it out of the 51 L.R.A.(N.S.)

maxim, *Actio personalis moritur cum persona.*' In *Haggerty v. Pittston*, 17 Pa. Super. Ct. 151, an action by a father for the death of his daughter was continued, upon the father's decease, in the name of his administrator; the court considering the value of the life lost as a species of property which vested in the father. In *Thomas v. Maysville Gas Co.* 112 Ky. 569, 66 S. W. 308, the survival of an action brought by an administrator for the benefit of a sole beneficiary was sustained; the court holding that the action should be continued by the administrator, and the funds, when collected, held for the estate of the beneficiary. The court said: 'The fact that the defendant to the action succeeded in defeating a recovery until one or more of the beneficiaries died had no effect upon its liability to the administrator.'

But this Kentucky case cannot be regarded as of great weight as authority here, as the Kentucky statutes are materially different from our own.

The New York death statute does not appear unlike our own in any material respect, and in the *Meekin* Case cited, supra, it is further said in the opinion: "In *Quin v. Moore*, 15 N. Y. 432, it was held that the interest of the beneficiary was capable of assignment, which is a test of the right to revive. In deciding the case, the court said: 'The interest of Mrs. Kerns was also assignable. In respect to purely personal torts, it is true that at common law the right of action ceases with the life of the injured party. But in this case, although the tort was personal to the child who died, the statute comes in and declares that a right of action shall survive to the administrator. The theory of the statute is that the next of kin have a pecuniary interest in the life of the person killed, and the value of this interest is the amount for which the jury are to give their verdict. Neither the personal wrong or outrage to the decedent, nor the pain and suffering he may have endured, are to be taken into the account. . . . But the claim of the administrator, and through him of the next of kin, is altogether different. The statute imputes to them a direct pecuniary loss in being deprived of a life to them of greater or less value. . . . The interest which a person has in the life of another on whom he is dependent, or to whose services he is entitled, the legislature has chosen to regard as a pecuniary right, a right having the essential attributes of property, so that when it is taken away compensation is due.'"

The Pennsylvania and New Jersey statutes likewise appear substantially the same as our own in every respect material to

this question, and in the New Jersey case cited, *supra*, it is said in the opinion: "The pecuniary injury of the beneficiary begins immediately on the death of the deceased, and is a continuing injury until compensated for under the conditions expressed in the act. Suit must be brought within one year after the death of the deceased; but how long the litigation may be protracted is problematical. If the death of the beneficiary before the end of the litigation discharges the liability of the wrongdoer, the legislative purpose that the wrongdoer should make compensation to the beneficiary for the pecuniary injury sustained by him would be defeated. Such a construction would be contrary to the policy of this legislation, and would thrust into the administration of a statutory proceeding, which our courts have declared should be beneficially construed, a technical rule of the common law of harsh injustice. The death of the beneficiary pending suit will have a controlling influence over the quantum of recovery. The personal injury sustained would be limited in duration and extent to his lifetime. But the death of the beneficiary pending suit cannot be made available to abrogate the liability of the wrongdoer incurred for the pecuniary injury already sustained. The right to compensation vested in the beneficiary immediately upon the death of the deceased. By the death of the beneficiary pending suit, there was neither an abatement of the action in the common-law sense, nor was the cause of action to be compensated for, discharged. It is contended, however, that, inasmuch as the statute does not provide for an executor or administrator for the beneficiary in case of his death before the suit is determined, the action, therefore, abates; but no purpose would be accomplished by introducing such a personal representative into the record. The legislature selected the personal representative of the original deceased as the party by whom the action should be brought, to whom the control of the suit was committed, to conduct it for the benefit of the next of kin."

It follows from what has been said that defendant's contention that the cause of action by the statutes given James Cheek, the father, as next kin of the deceased child, expired upon the death of the said James Cheek about ten months after the death of the child, cannot be sustained, and this action, originally begun by said James Cheek, was, upon his death, properly revived in the name of the mother, Fannie W. Cheek, as administratrix of the estate of James Cheek, upon a stipulation, duly signed and filed, which reads as follows: "It is hereby stipulated and agreed, and consent of

the defendant is hereby given, that the above-entitled action may be revived in the name of Fannie W. Cheek, administratrix of the estate of James Cheek, deceased, and that said action may proceed in favor of the said Fannie W. Cheek, as administratrix of the said estate, and it is further agreed that an order to revive the same as above stated may be made by the court, or the judge thereof, on the 24th day of January, 1910, or at any time within five days thereafter, as it may suit the convenience of the court to hear the same."

It is also urged, and we hold, that the trial court erred in so instructing the jury as to allow recovery for the value of the child's services beyond the time of the death of James Cheek, the sole beneficiary under the statute, and in refusing to give the following requested instruction, to wit: "If you find a verdict for the plaintiff under the evidence and instructions, the amount of your verdict should be the actual pecuniary loss which James Cheek, the father of Thompkins Cheek, sustained during his lifetime on account of the death of his son, not exceeding the amount claimed in the petition, \$10,000."

This follows necessarily from the limitations of the right given by § 4313, *supra*, to the pecuniary loss or damage suffered by the beneficiary, James Cheek, and there are decided cases to this effect. See *Pitkin v. New York C. & H. R. R. Co.* 94 App. Div. 31, 87 N. Y. Supp. 906; *Cooper v. Shore Electric Co.* *supra*.

This case should be reversed and remanded for proceedings in accord with the views herein expressed.

Per Curiam:

Adopted in whole.

WASHINGTON SUPREME COURT. (In Banc.)

C. E. MALETTE, Appt.,

v.

CITY OF SPOKANE, Resp't.

(77 Wash. 205, 137 Pac. 496.)

Constitutional law — minimum wage for public improvements — right of taxpayer.

1. No constitutional rights of the tax-

Note. — Validity of statute, ordinance, or contract fixing minimum wage for person employed upon public work.

I. As affecting public employees.

a. Of state, 687.

b. Of municipality, 687.

II. As affecting private employees.

a. In general, 688.

b. Specific constitutional objections, 691.

payer are infringed by requiring a payment of a minimum wage for work done on public improvements the cost of which is to be paid by special assessment, in excess of the prevailing wage for similar labor at the time and place when and where the improvement is made, although it results in an increase in the cost of the improvement and the rate of assessment.

Municipal corporations — ordinance prescribing minimum wage — validity.

2. An ordinance prescribing a minimum wage for all public work, which is within the general powers conferred upon the municipality, cannot be held invalid as contrary to public policy for increasing the cost of public work, where the legislature itself has passed a law limiting the hours of labor on such work.

Same — contract for public improvement — agency for taxpayer.

3. A city is not, in contracting for the

construction of a sewer to be paid for by special assessment upon property benefited, thereby the agent of the property owner within the rule that it must do the work for the lowest price possible, and cannot stipulate for a minimum wage for common labor in excess of the prevailing wage for similar labor on private contracts, at least, where it is not required to let the contract to the lowest bidder.

Same — reasonableness of ordinance — pronouncement by court.

4. The court will not pronounce an ordinance fixing a minimum wage of \$2.75 per day for common labor on public contracts unreasonable in the absence of evidence showing it to be so, although such wage is 25 per cent higher than the prevailing price for such labor.

(Gose, Mount, and Chadwick, JJ., dissent.)

(December 31, 1913.)

The constitutionality of the minimum wage laws as applied to private employers generally has been sustained by the supreme court of Oregon in *Stettler v. O'Hara*, — Or. —, — L.R.A.(N.S.) —, 139 Pac. 743. An appeal from this decision is pending in the United States Supreme Court at the date of the present note.

As to the constitutionality of a statute forbidding an employer to impose a fine upon or to withhold wages from an employee engaged in weaving, for any imperfections in the weaving, see *Com. v. Perry*, 14 L.R.A. 325, and note appended on statutory restrictions on contracts between master and servant.

See note to *Winchester & L. Turnp. Road Co. v. Croxton*, 33 L.R.A. 177, as to legislative power to fix tolls, rates, or prices, and also that to *State v. Loomis*, 21 L.R.A. 789, as to the constitutionality of statutes restricting contracts and business.

See also *Arnett v. State*, 8 L.R.A.(N.S.) 1192, and note appended thereto.

I. As affecting public employees.

a. Of state.

The right of the legislature to fix a minimum wage for state employees has been sustained in the absence of express or implied constitutional restrictions.

Thus, in the absence of an express or implied constitutional restriction upon the power of the legislature to fix and declare the rate of compensation to be paid for labor or services performed upon the public works of the state, the legislature may enact a law prescribing a minimum wage for day laborers employed by the state or any officer thereof. *Clark v. State*, 142 N. Y. 101, 36 N. E. 817. No specific constitutional objections are mentioned in this opinion.

The case involved a canal laborer, and it is expressly found that he was not under an express contract, fixing his compensation. It is stated that the statute would have no application to a case in which the

compensation had been thus fixed prior to the taking effect of the statute.

The superintendent of public works, upon whom the Constitution conferred certain power, and who had charge of the canals, was held not to be independent of the legislature, so as to render such a statute beyond the legislative power.

As to the constitutionality of statutes fixing minimum wages for teachers, see *Bopp v. Clark*, — L.R.A.(N.S.) —, and note appended thereto, dealing with employees of like character.

b. Of municipality.

So, the power of the legislature to prescribe a minimum wage for the employees of a municipality has been upheld.

The New York labor law, in so far as it provided that the employees of the several municipalities of the state shall receive not less than the prevailing rate of wages in the locality, was upheld as to its constitutionality in *Ryan v. New York*, 177 N. Y. 271, 69 N. E. 599. It was held, however, in that case, that an employee of the city who had continued to receive without protest for a period of six years the wages at a rate less than the prevailing rate waived any claim that he might have had at the time to insist that the wages should be fixed at a rate greater than that paid him. The court in the *Ryan Case* takes a different view of the power of the legislature over the municipalities of the state than is taken in the earlier case of *People ex rel. Rodgers v. Coler*, *infra*. In discussing the power of the legislature over municipalities, the court states that in the administration of the affairs of those subdivisions (municipalities) as well as in those of the state at large, the legislature is unrestrained unless by express provisions of the Constitution. Then, after referring to the local officers of the municipalities, the broad and general statement is made that "all of these agencies and employees of the several municipalities are doing the work of the state,

APPEAL by plaintiff from a judgment of the Superior Court for Spokane County overruling his objections to the confirmation of a special assessment for the construction of a sewer. Affirmed.

The facts are stated in the opinion.

Messrs. Voorhees & Canfield, for appellant:

The ordinance is not a reasonable exercise of corporate power.

1 Dill. Mun. Corp. 4th ed. § 329, p. 405; Pittsburgh, C. C. & St. L. R. Co. v. Crown Point, 146 Ind. 421, 35 L.R.A. 684, 45 N. E. 687; Hawes v. Chicago, 158 Ill. 653, 30 L.R.A. 225, 42 N. E. 373; People v. Armstrong, 73 Mich. 292, 2 L.R.A. 721, 16 Am. St. Rep. 578, 41 N. W. 275; Ex parte Chin Yan, 60 Cal. 78; Chicago v.

Gunning System, 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035, 2 Ann. Cas. 892; Cleveland, C. C. & St. L. R. Co. v. Connersville, 147 Ind. 277, 37 L.R.A. 175, 62 Am. St. Rep. 418, 46 N. E. 579; Ex parte Battis, 40 Tex. Crim. Rep. 112, 43 L.R.A. 863, 76 Am. St. Rep. 708, 48 S. W. 513; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

The action of the city council in confirming the assessment roll was violative of the constitutional rights of plaintiff in that it operated to take his property without due process of law.

People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; Ryan v. New York, 177 N. Y. 271, 69 N. E. 599; People ex rel. Cossey v.

which is the sovereign and master;" while in the Rodgers Case it is stated that "a municipal officer directing a local improvement is not the agent of the state." The prevailing opinion in the Ryan Case was written by Parker, Ch. J., who wrote the dissenting opinion in the Rodgers Case, and the Ryan Case is decided in accordance with Parker's view as expressed in the Rodgers Case. As pointed out in the prevailing opinion in the Ryan Case, there is a distinction between the cases, so that the actual decision in the one does not necessarily control that in the other, but the theory of the two cases cannot be reconciled.

II. As affecting private employees.

a. In general.

The power of enacting minimum wage legislation affecting employees of a private employer while engaged upon public works has been quite generally denied in cases prior to *MALETTE v. SPOKANE*. The fact that the wage is fixed without reference to the actual value of the work, or to that paid by others, is emphasized, as well as the increased cost of the work to the public.

A statute undertaking to fix the minimum rate of compensation to be paid to a particular and limited class of laborers employed upon any public work of the state, counties, cities, and towns, without regard to the actual value of such labor or the rate paid by other persons, natural or artificial, for the same kind of labor in the same vicinity, is unconstitutional. *Street v. Varney Electrical Supply Co.* 160 Ind. 338, 61 L.R.A. 154, 98 Am. St. Rep. 325, 66 N. E. 895. The contest in this case was between a contractor on a public work of a municipality and a laborer employed thereon.

So, a statute providing that the wages paid upon public works shall be not less than the prevailing rate for a day's work in the same trade or occupation in the locality where such public work is being done, and providing also that each contract for public work shall contain a provision that the

same shall be void and of no effect unless the person or corporation making or performing it shall comply with the provisions of the act as to wages, and no such person or corporation shall be entitled to receive any sum, nor shall any officer, agent, or employee of the state or of a municipal corporation pay the same or authorize its payment to any person or corporation for public work where the provisions of the statute are violated, was held void in *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716, in so far as it relieved the city from the obligation of paying the money due a contractor who has violated the provision of the statute. In the course of the prevailing opinion the right to fix a minimum wage is denied, it being stated by the court that the legislature cannot fix by statute the price which a municipal corporation must pay for labor or other services that it may be obliged to employ; at least, not when such regulations increase the cost beyond that which it would be obliged to pay in the ordinary course of business. "If it could do all these things," says the court, "it could virtually dispose of all the revenues of the city for such purposes as it thought best, and local self-government would be nothing but a sham and a delusion."

It will be noticed that the foregoing cases involve the power of the legislature over municipalities.

In answer to the argument that counties, cities, and towns are mere political and municipal subdivisions of the state through which the government is administered, therefore, since the state has power to fix the salaries of its officers and the wages it will pay to its agents and employees, it has the right to declare what rate of wages shall be paid the agent and employees of a county, city, or town, employed upon any public work, it is stated by the court in *Street v. Varney Electrical Supply Co.* 160 Ind. 338, 61 L.R.A. 154, 98 Am. St. Rep. 325, 66 N. E. 895, that while counties, cities, and towns are political and municipal subdivisions of the state, they are not govern-

Grout, 179 N. Y. 417, 72 N. E. 464, 1 Ann. Cas. 39; Street v. Varney Electrical Supply Co. 160 Ind. 338, 61 L.R.A. 154, 98 Am. St. Rep. 325, 66 N. E. 895; Cleveland v. Clements Bros. Constr. Co. 67 Ohio St. 197, 59 L.R.A. 775, 93 Am. St. Rep. 670, 65 N. E. 885; Adams v. Brennan, 177 Ill. 194, 42 L.R.A. 718, 69 Am. St. Rep. 222, 52 N. E. 314; Fiske v. People, 188 Ill. 206, 52 L.R.A. 291, 58 N. E. 985; Atlanta v. Stein, 111 Ga. 789, 51 L.R.A. 335, 36 S. E. 932; James v. Seattle, 49 Wash. 347, 95 Pac. 273; Times Pub. Co. v. Everett, 9 Wash. 518, 43 Am. St. Rep. 865, 37 Pac. 695; Ex parte Kuback, 85 Cal. 274, 9 L.R.A. 482, 20 Am. St. Rep. 226, 24 Pac. 737; Low v. Rees Printing Co. 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362.

Messrs. H. M. Stephens, A. M. Craven and William E. Richardson, and E. E. Sargent for respondent.

Mr. Alex M. Winston, *amicus curiae*.

Ellis, J., delivered the opinion of the court:

The facts out of which this controversy arose are stated in the opinion on the first hearing (68 Wash. 578, 123 Pac. 1005, Ann. Cas. 1913E, 986); but, in order to present a single, comprehensive review of the case, we deem it not amiss to restate them.

The legislature, in 1899, passed an act declaring that "hereafter, eight hours in any calendar day shall constitute a day's work on any work done for the state or any county or municipality within the

mental agencies in such sense as to subject the management of their local affairs, involving the making of contracts for labor and material to be used upon local improvements, and the payment of the same out of the revenues of the counties, cities, or towns, to the arbitrary and unlimited control of the legislature. Such municipal subdivisions are corporations as well as political and governmental subdivisions, and as such corporations have the power to make contracts by which the rate of compensation for property sold to them is fixed, and they cannot be compelled by an act of the legislature to pay for any species of property more than it is worth, or more than its market value at the time and in the place where it is contracted for. That the power to confiscate the property of the citizens and taxpayers of the county, city, or town by forcing them to pay for any commodity, whether it be merchandise or labor, an arbitrary price in excess of the market value, is not one of the powers of the legislature over the municipal corporation, nor the legitimate use of such corporation as an agency of the state. Continuing, the court states that if an act compelled counties, cities, and towns to pay a certain minimum price for stone or brick, or to a merchant a minimum price for merchandise, when such stone, brick, or merchandise could be purchased at a less price, such legislation would shock every reasonable mind and would be universally condemned as unwarranted and unconstitutional; and for the same reason an act fixing the price of unskilled labor on all public works at a certain minimum price is a legislative interference with the liberty of contract by counties, cities, or towns.

In *People ex rel. Rodgers v. Coler*, supra, it is stated by the court that it is not entirely true that such a statute is a mere direction for the sovereign authority to one of his own agencies to contract in certain cases in a particular way. That it is all that and very much more, since it affects personal and municipal rights in many directions that are of vastly more importance than the mere form of a contract to per-

form municipal work. Continuing, the court states that it is true enough that a city is an agency of the state to discharge some of the functions of government, but these terms are not adequate to describe its true relations to the state or the people. It is further stated that a municipal officer directing a local improvement is not the agent of the state, but is the agent of the city, and the city alone is responsible for his negligence or misconduct.

Another view of the relation existing between the state and its municipalities is taken in the later New York case of *Ryan v. New York*, supra.

The power of the municipality to fix a minimum wage has also been denied.

Thus, where municipal contracts are required to be open to competitive bidding and to be let to the lowest bidder, an ordinance fixing the minimum wage for common labor on any public work or improvement let by contract has been held to be an unlawful attempt to limit and destroy the inalienable right possessed by every citizen to make any sort of a contract desired by him concerning the proper use and disposal of either his labor or his property. "The fundamental law of both state and nation," says the court, "gives every citizen the inalienable right to dispose of his labor in the wage market for whatever he deems best; and therefore a despotic, arbitrary, vicious, and utterly defenseless ordinance, depriving him from so doing, is an infringement on his constitutional privileges, and consequently absolutely null and void." *State ex rel. Bramley v. Norton*, 7 Ohio S. & C. P. Dec. 354, 5 Ohio N. P. 183. The contract in this case had not been entered into, the action being one to compel the corporation counsel to approve the contract. The ordinance provided that all specifications for doing work for the municipality should have a provision inserted therein fixing a minimum wage for common labor.

So it has been held under a provision requiring the submission of contracts for municipal work to competitive bidding, and the awarding of them to the lowest respon-

state" (Rem. & Bal. Code, § 6572), and provided that "all work done by contract or subcontract on any building or improvements or works on roads, bridges, streets, alleys, or buildings for the state, or any county or municipality within the state, shall be done under the provisions of this act: Provided, that in cases of extraordinary emergency such as danger to life or property, the hours for work may be extended, but in such case the rate of pay for time employed in excess of eight hours of each calendar day, shall be one and one-half times the rate of pay allowed for the same amount of time during eight hours' service. And for this purpose, this act is made a part of all contracts, subcontracts or agreements for work done for the state

or any county or municipality within the state." Rem. & Bal. Code, § 6573. The act further declared anyone violating its provisions guilty of a misdemeanor, and, upon conviction, subject to a prescribed punishment. Rem. & Bal. Code, § 6574.

In 1903, another act was passed, declaring that "it is a part of the public policy of the state of Washington that all work 'by contract or day labor done' for it, or any political subdivision created by its laws, shall be performed in work days of not more than eight hours each, except in cases of extraordinary emergency" (Rem. & Bal. Code, § 6575), and that all contracts for such work should provide that they might be canceled by the officers of the state, county, or city having supervision

sible bidder, that it is not lawful to fix in the specifications, on the basis of which the proposals are invited, a minimum wage for common labor; and the fixing of such sum for any part or item of such work renders illegal the entire proceedings and the contract to which it leads. *Frame v. Felix*, 167 Pa. 47, 27 L.R.A. 802, 31 Atl. 375. Nor is it material whether the sum so fixed be or be not in point of fact in excess of what it is likely the competition among bidders would have made it. The contract involved was one let by the board of municipal water commissioners in its department, but this board was held subject to the same rules as the city.

A statute fixing the minimum wage at the current rate of *per diem* wages in the locality where the work is performed, and the maximum hours of labor at eight, was sustained in *Re Dalton*, 61 Kan. 257, 47 L.R.A. 380, 59 Pac. 336, in the prosecution of a contractor constructing a county courthouse and jail, for employing laborers for more than eight hours, and paying them the current rate of wages for said work for the longer days. The stress of this decision, however, is placed upon the right to limit the hours of labor, and nothing is said as to a minimum wage.

A similar holding appears in *State v. Atkin*, 64 Kan. 174, 97 Am. St. Rep. 343, 67 Pac. 519, and this holding was approved by the United States Supreme Court in 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124.

The court in *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716, does not have for decision nor does it decide the question as to the right of an employee of the contractor to recover the difference between what has been paid him and the minimum wage provided by law, but this right seems to be negated from the view taken of the statute by the court. Unless, however, such an employee may recover, it is difficult to see how either the city or the assessed property owner is benefited by allowing a contract to be let under a statute which requires a minimum wage, and which is 61 L.R.A. (N.S.)

stated in the opinion to greatly increase the price at which such contracts are let, and then allow the contractor to repudiate the payment of the minimum wage and pocket the excess. Whatever may be the price at which such contracts will be let in the future, in the particular case before the court, the sympathy that is expressed for the city and the assessed property owner is wasted.

After the decision in *People ex rel. Rodgers v. Coler*, the Constitution of New York was amended by providing that the legislature may regulate and fix the wages or salaries, the hours of work or labor, and make provisions for the protection, welfare, and safety of persons employed by the state or by any county, city, town, village, or any other civil divisions of the state, or by any contractor or subcontractor performing work, labor, or services for the state or for any county, city, town, village, or any other civil division thereof. That part of this provision relating to the hours of labor came up for discussion in *People ex rel. Williams Engineering & Contracting Co. v. Metz*, 193 N. Y. 148, 24 L.R.A. (N.S.) 201, 85 N. E. 1070, but not that relating to wages. For a discussion of the validity of limitation of hours of labor on public works, see note to *Keefe v. People*, 8 L.R.A. (N.S.) 131, and continuation thereof attached to the report of the Metz Case in 24 L.R.A. (N.S.) 201.

In the following cases in this subdivision the constitutionality of minimum wage laws is not involved, but the cases are interesting in this regard and are included; without, however, attempting to be exhaustive of this class.

In *McAvoy v. New York*, 52 App. Div. 485, 65 N. Y. Supp. 274, an action by a laborer who had been employed by the city of New York at a less rate of wages than that directed by the statute, to recover the difference, the judgment of the trial court sustaining the defendant's demurrer to the complaint was reversed in the appellate division, and the reversal sustained by the court of appeals in 166 N. Y. 588, 59 N. E. 1125. The constitutionality of the

of the work, in case of a violation of the statute (Rem. & Bal. Code, § 6576), and making it the duty of such officers to incorporate in all such contracts stipulations "as provided for in this act," and "to declare any contract canceled, the execution of which is not in accordance with the public policy of this state as herein declared." Rem. & Bal. Code, § 6577.

In pursuance of the public policy of the state so declared, the city of Spokane, on August 24, 1909, by ordinance No. A4422, so far as here material, provided that:

"Section 1. Hereafter eight (8) hours in any calendar day shall constitute a day's work on any work done for the city of Spokane, subject to the conditions hereinafter provided.

"Sec. 2. Hereafter all laborers employed by the day on municipal work, either directly by the city or by contractors, subcontractors, individuals, partnerships, associations or corporations, on all work for the city, shall receive and be paid not less than \$2.75 for a calendar day's work of eight (8) hours. The provisions of this section shall apply to, and govern all work done for the city of Spokane and all work for any individual, firm, partnership, association or corporation which is done under the direction or under the supervision of, or which is to be accepted by the city of Spokane or any officer or agent thereof."

The ordinance further provided that, in cases of emergency, the hours for work might be extended, but that the rate of

legislation was not raised in this case, and the only question discussed was whether the legislation applied to laborers employed directly by the municipality. It was held to so apply.

In *People ex rel. North v. Featherstonhaugh*, 172 N. Y. 112, 60 L.R.A. 768, 64 N. E. 802, where bids upon a public improvement had been received after the law had been declared unconstitutional and the improvement commissioners had announced that the requirement with reference to it would not be in force, it was held that the abutting owners who were assessed for the improvement could not complain of the specifications which required compliance with the labor law as to hours and wages. The successful bidder testified in this case that no item was included in his bid by reason of the specification providing for an observance of the provision of the labor law, and the contract entered into provided only that the contractor should faithfully comply with all provisions of the labor law of the state which "may now be in force."

In *Knowles v. New York*, 37 Misc. 195, 75 N. Y. Supp. 189, affirmed in 74 App. Div. 632, 77 N. Y. Supp. 1130, the right of a taxpayer to question the legality of a contract the bidding on which was done and the contract entered into before the New York labor law was declared unconstitutional, and which provided that the contractor should pay the prevailing rate of wages, was denied, and in the course of the opinion the court, in referring to the *Rodgers Case*, states that the decision held on the one hand that "the contractor was not bound to carry out the provision for the reason that it was imposed on him only because of such void statute, and, on the other, that the contract was legal and binding on the city in all respects and in full . . . it was held that a peremptory writ of mandamus should issue to compel the comptroller of the city to pay the contractor the entire contract price, without any deduction for the amount he had profited by refusing to carry out the said provision."

A contractor employed to erect a municipal building, who had contracted that

he would not permit any laborer in the employ of himself or subcontractor or other persons doing or contracting to do a whole or a part of the work embraced in his contract to work more than eight hours in a day, and that he would pay the rate of wages prevailing in the locality, and that the contract should be void unless he should fully comply with such provisions of the labor law, does not forfeit his right under the contract because, in the course of construction, doors, windows, and other manufactured woodwork required for the building and used in it were manufactured for the special purpose and at the request of the contractor by a manufacturer within the state, who employed workmen and mechanics, and paid them less than the prevailing rate of wages in the city of New York. *Bohnen v. Metz*, 126 App. Div. 807, 111 N. Y. Supp. 196, affirmed in 193 N. Y. 676, 87 N. E. 1115.

Nor does the contractor for the construction of a municipal building forfeit his rights under the contract by reason of the fact that he sublets the granite work to a corporation in another state where the work of quarrying, cutting, dressing, and trimming the granite is done, and the workmen paid at the prevailing rate of wages there, but at a less rate than the prevailing rate of wages for the same class of work in the city of New York. *Ewen v. Thompson-Starratt Co.* 208 N. Y. 245, 101 N. E. 894. The contractor and the subcontractor both agreed to comply with the provisions of the labor law.

b. Specific constitutional objections.

It is stated in *Street v. Varney Electrical Supply Co.* 160 Ind. 338, 61 L.R.A. 154, 98 Am. St. Rep. 325, 66 N. E. 895, that even if there were no express provision of any constitution, such legislative interference with the right of contract would be void for the reason that the authority to fix by contract the price to be paid for property, including human labor, is not ordinarily within the domain of legislation.

Very frequently, however, specific con-

pay for excess time should be 1½ times the rate allowed for the same amount of time during the eight hours' service, and that the ordinance be made a part of all contracts thereafter made. By express stipulation and reference thereto, this ordinance was made a part of the contract for the public work the assessment for which is contested in this action.

On March 10, 1910, the city passed another ordinance, No. A5016, providing "that hereafter all work done by common laborers for the city of Spokane or for any contractor, subcontractor or other person doing work by contract or otherwise for the city of Spokane, shall receive the sum of three dollars (\$3) per day for eight hours' labor," and that the ordinance should be in force from and after April 1, 1910.

On March 25, 1910, the city council, by ordinance, provided for the improvement of Sixteenth avenue by constructing therein a sewer, to be paid for by special assessments against the property benefited, and created an assessment district. The contract for the work was thereafter let to one Broad, and, when he had completed the work thereunder, an assessment roll was prepared, and notice of the time and place for hearing objections was given. The appellant, an owner of property in the district, appeared and objected to the confirmation of the roll. His objections were overruled, and he appealed to the superior court.

stitutional objections are raised to such legislation.

Such a statute is held to be a violation of a constitutional provision that no citizen may be deprived of his property without due process of law, in *Street v. Varney Electrical Supply Co. supra*. It is stated that if the minimum price to be paid by municipal subdivisions of the state for unskilled labor on public works exceeds the rate at which such labor can be obtained by other persons at the same place, the excess so paid for labor is taken from the citizens assessed for such work, not by due process of law, but by mere legislative fiat; that the citizens of the state who must, through assessments made upon their property, pay for public works of counties, cities, and towns, are entitled to have such work done at such rate of wages as the local agents and official representatives of such municipal subdivisions of the state may be able to secure by contract, and they cannot be required arbitrarily to pay higher wages than laborers employed on private work or improvements in their particular districts demand, any more than they can be compelled by similar legislation to pay a minimum rate of wages to laborers employed by them in their private business.

So, in *People ex rel. Rodgers v. Coler*, 51 L.R.A. (N.S.)

From an adverse decision of that court, he prosecutes this appeal.

The evidence showed that the contractor, in the performance of his contract, paid \$2.75 a day for each common laborer employed in the work, as required by the ordinance first above mentioned and by his contract. The court refused to hear testimony as to whether he paid \$3 a day, as required by the second ordinance above mentioned. The evidence showed that the prevailing wage for common laborers in the city of Spokane and vicinity, at the time of the performance of the contract in August, 1910, was \$2.25 a day, whether for a ten-hour, nine-hour, or an eight-hour day, and that in March, when the improvement ordinance was passed, the prevailing wage was \$1.85 for a ten, nine, or eight-hour day. There was no evidence whatever as to any distinction in pay by reason of shorter hours, nor any evidence whatever that compensation for employment was ever computed by the hour. The contractor testified that 59 per cent of the cost of the work was paid out for common labor, and that, but for the ordinance, his bid would have been materially less.

The position taken by the appellant, as stated in the original opinion, and as adhered to in the briefs and argument on rehearing, is admirably summarized as follows: "That the legislature may fix the hours of labor upon all public works and for public work even in cities is now well

166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716, it is stated that local property owners who must bear the expense of an improvement are entitled to the benefit of the best judgment and discretion of the city officers in making a contract for the work, and to the extent that such judgment and discretion are taken away by arbitrary enactment not in their interest, but in favor of opposing interests, their constitutional rights of liberty and property are invaded; and when the expense of the improvement is enlarged beyond actual and reasonable costs under ordinary business conditions, as it may be under a statute fixing the minimum wage at the prevailing rate of wages, the property of such owner is taken without due process of law.

Such a statute is also held to be a violation of the liberty to contract secured by the state Constitution, and undoubtedly within the protection of the Federal Constitution, and covered by the 14th Amendment thereof, providing that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law. *Street v. Varney Electrical Supply Co. supra*.

So, in *State ex rel. Bramley v. Norton*, 7 Ohio S. & C. P. Dec. 354, 5 Ohio N. P.

settled, and no allusion to sustaining authority will be made. Indeed, that feature of the case is not challenged by appellant; but it is contended that, where the city is acting merely as an agent of the property owner, it is bound to do its work to his best advantage, and cannot empirically fix a wage and compel its payment by an independent contractor. Appellant bases his argument on two propositions: (1) That the ordinance is unreasonable, contrary to public policy, and oppressive; (2) that the assessment is in contravention of the Constitution of this state and of the Constitution of the United States, in that it takes the property of this appellant without compensation and without due process of law. Abandoning legal phraseology, the concrete question, put in plain English, is whether a city can improve the property of a citizen, either upon his petition or against his will, and tax an arbitrary sum therefor that puts the cost unreasonably above the cost of like work if done through the instrumentality of a private agency." *Malette v. Spokane*, 68 Wash. 578, 580, 123 Pac. 1005, 1006, Ann. Cas. 1913E, 986. The last sentence quoted seems to beg, rather than state, the real question. Of course, if the minimum wage is assumed to be unreasonably high, it would be indefensible on any theory, whether fixed by general statute or by ordinance, and whether paid out of a fund raised by general taxation or by special assessment.

The real questions are: (1) Is it within the power of any legislative body, whether of the state or city, to fix a minimum wage for common labor as applied to public work paid for by special assessment? In other words, is such legislation void as in contravention of the state and Federal Constitutions, in that it takes property without compensation and without due process of law? (2) Is the ordinance in question contrary to any public policy of the state, either expressed in, or implied from, state legislation? (3) Is the ordinance an unreasonable exercise of the right to prescribe the terms of contract by one of the parties, or is the amount prescribed an unreasonable wage? We will endeavor to discuss these questions, so far as may be, separately.

1. Is it within the legislative power, either of state or city, to prescribe a higher rate of wages than the prevailing rate as a minimum of wages to be paid for common labor in the doing of a public work to be paid for by special assessments against the property specially benefited thereby? The principal argument directed against such laws, when enacted by the state itself, is the claim that they necessarily increase the cost of the work. If, therefore, laws having exactly the same tendency have been upheld, such decisions furnish direct authority for upholding a frank and undisguised minimum wage law. As stated in the original opinion, it is now

183, a minimum wage fixed by a municipal ordinance is held to destroy the right of a citizen to contract as he desires.

And in *People ex rel. Rodgers v. Coler*, a minimum wage law is stated to be an interference with liberty and property.

In the case of *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124, it is stated that no employee is entitled of absolute right, and as a part of his liberty, to perform labor for the state, and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do. Further, it is stated that the proposition that the statute involved in this case denies to the contractor or his employee the equal protection of the laws is equally without any foundation, since the rule of conduct prescribed by it applies alike to all who contract to do work on behalf of either the state or of its municipal subdivisions, and alike to all employed to perform labor on such work. The statute here provided that not less than the current rate of *per diem* wages in the locality where the work is performed should be paid to laborers, and the contractor required his laborers to work more than the statute allowed, in order to obtain the current rate of wages in the locality where the work

was performed. The decision dwells altogether on the limitation of hours of labor.

So it has been held unconstitutional as being class legislation. *Street v. Varney Electrical Supply Co.* supra.

And in *People ex rel. Rodgers v. Coler*, supra, it is stated that a statute requiring the payment of minimum wage at the prevailing rate diverts money or property of the city, or that of local property owners, from strictly city purposes, and devotes it to private interests, or to the interests of a class of citizens.

A statute fixing the minimum wage of common laborers on public works is in violation of a constitutional provision procuring to every citizen of a state the inalienable right to personal liberty and the pursuit of happiness. *Street v. Varney Electrical Supply Co.* 160 Ind. 338, 61 L.R.A. 154, 98 Am. St. Rep. 325, 66 N. E. 895.

It is stated in *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716, that a statute which requires a municipality to pay a minimum wage which is greater than that provided under its contract with its employees requires a payment for other than a city purpose, and violates a constitutional provision limiting payment to payment for city purposes.

W. A. E.

too well settled to require citation of authority that the legislature may fix the hours of labor upon all public work and for public work, even in cities. It is also true, as there stated, that "laws fixing the hours of labor, and providing that no less than the going rate of wages shall be paid under contracts such as we have before us, have been generally upheld." To put the matter more exactly, we add that laws fixing the hours of labor have been generally upheld by the courts, even when coupled with the provision that the laborer shall receive for the shorter day prescribed a minimum of wages "not less than the current rate of *per diem* wages in the locality where the work is performed." Obviously this is a provision for pay above the "going rate of wages" for the same amount of time. *Re Dalton*, 61 Kan. 257, 47 L.R.A. 380, 59 Pac. 336; *State v. Atkin*, 64 Kan. 174, 97 Am. St. Rep. 343, 67 Pac. 519; *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; *Byars v. State*, 2 Okla. Crim. Rep. 481, 102 Pac. 804, Ann. Cas. 1912A, 765. As said in *Atkin v. Kansas*, supra, quoting from *Re Ashby*, 60 Kan. 101, 55 Pac. 336: "When the eight-hour law was passed, the legislature had under consideration the general subject of the length of a day's labor, for those engaged in public works at manual labor, without special reference to the purpose or occasion of their employment. The leading idea clearly was to limit the hours of toil of laborers, workmen, mechanics, and other persons in like employments, to eight hours, without reduction of compensation for the day's services." The case so quoted by the United States Supreme Court, *Re Ashby*, is in itself a clear demonstration that the maximum hours law there under consideration had the necessary effect of fixing a minimum daily wage above the current rate for the same class of work. Moreover, it seems to have been overlooked that the eight-hour law of this state, so far as overtime is concerned, expressly provides a minimum wage which would necessarily be above the going rate for the same amount of time. In § 6573, above quoted, it is provided that in cases of emergency the hours of work may be extended; "but in such case the rate of pay for time employed in excess of eight hours of each calendar day, shall be one and one-half times the rate of pay allowed for the same amount of time during eight hours' service." A similar provision is found in the eight-hour law of Kansas, and it was for the violation of that provision, as well as the eight-hour provision, that the defendant in *Atkin v. Kansas*, was convicted (see stipulated facts, 191 U. S. page 210). The 51 L.R.A. (N.S.)

same provision is also found in an eight-hour law contained in a legislative charter of the city of Buffalo, and was upheld as constitutional and valid, and a contractor was held criminally liable for its violation. *People v. Warren*, 77 Hun, 120, 28 N. Y. Supp. 303; *People ex rel. Warren v. Beck*, 10 Misc. 77, 30 N. Y. Supp. 473.

Assuming, as seems to be assumed both in argument and in the original opinion in the case before us, that any minimum of wages fixed above the current rate necessarily increases the cost of the work (a thing by no means certain), then it cannot be denied that a provision such as above quoted from the Kansas law would have precisely the same effect. If the one would increase the cost of the work, so, also, would the other, as a simple example will demonstrate. Assuming the current rate of *per diem* wages to be \$2 for a ten-hour day, and assuming, also, a uniform efficiency in the work of a given laborer, then it follows that the minimum wage of \$2 a day for, let us say, an eight-hour day, is just exactly 40 cents more for the same work than it would cost but for the minimum wage provision. As another illustration, the evidence in the case before us shows that the observance of our own eight-hour law alone would have had precisely the same effect on the contract here in question. The contractor himself testified in effect that, but for the minimum wage ordinance, the labor on this work would have cost him \$2.25 a day for an eight-hour day, while the number of hours constituting a day's work customary at the time and place was ten hours. It is too plain for argument that every maximum hours law prescribing less than the number of hours usually constituting a day's labor, when coupled with a provision for minimum pay not less than the current rate for a day's labor, is a minimum wage law pure and simple, prescribing a wage above the current rate for the same class of labor. Every objection, therefore, which can be logically or legally raised against an undisguised minimum wage law, can be advanced, just as logically and just as legally, against the usual eight-hour law. The appellant seems to recognize this fact, since he argues that there are only two grounds upon which courts have held valid laws limiting the hours of labor; that one applies to work hazardous to the health of the employees, as working in mines, mills, and the like, which, of course, rests upon the police power of the state (*Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383) or where the employee is a child or woman, which also rests upon the same power (*State v. Buchanan*, 29 Wash. 602, 59 L.R.A. 342, 92 Am. St. Rep.

930, 70 Pac. 52; *State v. Somerville*, 67 Wash. 638, 122 Pac. 324), and that the other exception is based upon the principle that, when the state or any of its municipalities performs public work, it then, as an employer, has the right to fix the terms upon which it will permit labor to be done for it.

As examples of the last-mentioned class decisions, appellant cites *Atkin v. Kansas*, supra; *Curtice v. Schmidt*, 202 Mo. 703, 101 S. W. 61, 66, 10 Ann. Cas. 702; and our own decisions, *Re Broad*, 36 Wash. 449, 70 L.R.A. 1011, 78 Pac. 1004, 2 Ann. Cas. 212, and *Gies v. Broad*, 41 Wash. 448, 83 Pac. 1025. It is true that the cases cited and also the *Oklahoma case*, *Byars v. State*, 2 Okla. Crim. Rep. 481, 102 Pac. 804, Ann. Cas. 1912A, 765, were based upon the latter ground, which is clearly and logically expressed in *Atkin v. Kansas*, supra, by the late Justice Harlan, speaking for the Federal Supreme Court, as follows: "The improvement of the boulevard in question was a work of which the state, if it had deemed it proper to do so, could have taken immediate charge by its own agents; for it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the state invested one of its governmental agencies with power to care for it. Whether done by the state directly or by one of its instrumentalities, the work was of a public, not private, character. If, then, the work upon which the defendant employed Reese was of a public character, it necessarily follows that the statute in question, in its application to those undertaking work for or on behalf of a municipal corporation of the state, does not infringe the personal liberty of anyone. It may be that the state, in enacting the statute, intended to give its sanction to the view held by many that, all things considered, the general welfare of employees, mechanics, and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen, and enable them the better to discharge the duties appertaining to citizenship. We have no occasion here to consider these questions, or to determine upon which side is the sounder reason; for, whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the state to declare that 51 L.R.A. (N.S.)

no one undertaking work for it or for one of its municipal agencies should permit or require an employee on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern." While, as shown by this quotation, the Supreme Court did not deem it necessary to place the decision on any other ground than the power of the state to prescribe the terms upon which contracts with it or its agent, the municipality, might be made, it is significant that it also suggests another ground, namely, the promotion of the "general welfare of employees, mechanics, and workmen, upon whom rests a portion of the burdens of government," and as tending to the production of better citizenship, thus unmistakably intimating that the act might also be soundly sustained as an exercise of the police power.

The appellant argues, and seems to have impressed the members of Department 1 of this court, save the late Chief Justice Dunbar, with the view that though this court and other courts have held the eight-hour law sufficiently valid and constitutional to sustain a criminal prosecution, and though an exactly parallel ordinance to the one here in question was held by this court sufficiently valid to sustain an action by a laborer for the collection of a part of the minimum wage above the current rate for overtime, which was withheld by the contractor (*Gies v. Broad*, 41 Wash. 448, 83 Pac. 1025), still those cases do not sustain, as constitutional, either the eight-hour law or the minimum wage ordinance as applied to contracts for public work to be paid for by special assessment, nor the minimum wage ordinance as to any work, since in the original opinion it is said: "So far as we have been able to find, laws fixing a minimum of wages for unskilled labor have been uniformly condemned."

The case of *Clark v. State*, 142 N. Y. 101, 36 N. E. 817, was not cited on the first hearing, and was hence excusably overlooked. In that case a statute of the state

of New York fixing minimum wages for day laborers on public works of the state was upheld by the court of last resort of that state, using the following language: "It must be assumed that the legislature, and all other public bodies intrusted with the functions of government, general or local, will use the power conferred by the Constitution or the law fairly, and in the public interests. There is no express or implied restriction to be found in the Constitution upon the power of the legislature to fix and declare the rate of compensation to be paid for labor or services performed upon the public works of the state. That legislation is doubtless open to criticism, from the standpoint of sound policy and expediency; but the courts have nothing to do with these questions, so long as it is not in conflict with the Constitution; and we think that a general law regulating the compensation of laborers employed by the state, or by officers under its authority, which disturbs no vested right or contract, was within the power of the legislature to enact, whatever may be said as to its wisdom or policy."

We are persuaded that the view expressed in the original opinion that, in *Gies v. Broad*, supra, this court did not, in fact, hold the minimum wage ordinance of Spokane there involved constitutional, and the statement that "the sum of the court's holding" in that case was "that the contractor could not take a wage from a property owner and convert it, or any part of it, to his own use," must be modified. As a matter of fact, that was one result of the holding in that case, but was far from its sum. As shown by the opinion itself, the court could not have held that, nor anything else touching the merits of the case, until it first decided that the ordinance was constitutional and valid. The amount involved was only \$15.91, and the only thing which gave the court jurisdiction of the appeal for any purpose was the question of the constitutionality of the ordinance. As pointed out by the court: "The appeal is brought within the jurisdiction of this court by reason of the fact that the action involves the validity of the ordinance above mentioned; the appellant contending that that part of the ordinance which fixes the minimum sum to be paid as wages for a day's labor on any public improvement undertaken by the city of Spokane is unconstitutional and void." The court then held that, under the rule announced in *Henry v. Thurston County*, 31 Wash. 638, 72 Pac. 488, no other question save that of the validity of the ordinance could be reviewed, adding: "If we find the ordinance valid, the inquiry is ended; if invalid, the judg-

ment fails because founded on the ordinance." The following language used by Department 1, touching the opinion in *Gies v. Broad*, seems, therefore, hardly justified: "In this opinion there is an expression which, although not necessary to the decision, may, if taken without qualification, seem to support the contentions of the respondent. It follows: 'The principle involved in that case [*Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124] is not distinguishable from the principle involved in the case now before us. For, surely, if it be within the power of the state to limit the number of hours a laborer may be permitted to labor in one calendar day on any public work undertaken by it, it can fix the minimum sum that shall be paid him as wages for such labor. The power to do either must rest on the principle that 'it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities.''" The language was not only "necessary to the decision," but must be "taken without qualification," since it decided the only question in the case of which this court had jurisdiction. The matter of estoppel as against the contractor to dispute a \$15 debt could not give this court jurisdiction in the absence of the constitutional question. Since no member of this court has yet expressed a readiness to frankly overrule the decision in *Gies v. Broad*, the conclusion seems irresistible that the ordinance here in question must be held valid.

But it is argued that *Gies v. Broad* and *Atkin v. Kansas*, and, by parity of reason, *State v. Atkin*, 64 Kan. 174, 97 Am. St. Rep. 343, 67 Pac. 519 (which was affirmed by the last-mentioned case), and *Byars v. State*, 2 Okla. Crim. Rep. 481, 102 Pac. 804, Ann. Cas. 1912A, 765, do not determine the constitutional question because they did not arise at the instance of a taxpayer or of a protesting property owner. To the writer of this opinion, however, it seems hardly probable that the supreme courts of three states and the Supreme Court of the United States would have overlooked a phase of the question which, if counsel's contention be correct, must have made the decision of each of those courts different, since no court will be presumed to hold a man liable criminally, or even financially, for violating a void law. As pointed out in *Re Broad*, 36 Wash. 449, 70 L.R.A. 1011, 78 Pac. 1004, 2 Ann. Cas. 212, the unconscionable conduct of the contractor would not be a pertinent argument in such a case. As a

matter of fact, the very contention now made appears to have been made in *State v. Atkin*, supra, which arose out of a contract for work paid for by special assessments. At any rate, the point was considered. The supreme court of Kansas said (see opinion, 64 Kan. page 175): "The law which appellant violated must have its application in the light of the fact that municipal corporations are the creatures of the state. The legislature gives them being. They let contracts for the improvement of streets under express authorization of the legislature, and cannot do so in the absence of such authority. In this instance the lawmaking power provided that the cost of the paving which the appellant was constructing should be paid by assessment against the abutting property. It might have provided a different method of payment, or withheld entirely from the city the right to improve its streets." And again (see opinion, 64 Kan. page 179): "The fact that the abutting property owners are charged more for the improvement by the application of the restrictive provisions of the law reducing the hours of labor may be admitted; yet if the work had been done by the state itself, which, as we have shown, has supreme authority in such matters, the property owners could not complain that it employed and paid its servants conformably to the statute in question. There can be no distinguishing difference between the acts of the contractor in the employ of the county, passed upon in the case of *Re Dalton*, 61 Kan. 257, 47 L.R.A. 380, 59 Pac. 336, and those of the appellant here. Both were proceeding under contracts made with them by the agents of the state, and the principal had power to direct that eight hours should constitute a day's work for all persons laboring in its behalf." With these facts and this holding before it, the Supreme Court of the United States affirmed the judgment of the supreme court of Kansas without reservation, on the ground that the work was of a public character, saying of the act, "indeed, its constitutionality is beyond all question." This, notwithstanding the fact that the contractor's conduct, as shown by the agreed facts (191 U. S. page 210), was attempted to be excused by the fact that his contract with the laborer was for pay by the hour at the current hour rate, apparently in order to evade the minimum wage provision of the Kansas eight-hour law to which we have referred. Moreover, the brief for the plaintiff in error printed in the report of the case shows that the fact that the work was paid for by special assessments was called to the attention of the United States Su-

preme Court. It seems plain, therefore, when the actual facts involved and the opinion of the Kansas court, affirmed by the Supreme Court of the United States, are considered, that it does sustain the decision in *Gies v. Broad*, supra, and that when Department 1 of this court, in the first opinion in this case, reaffirmed allegiance to the doctrine laid down in *Atkin v. Kansas*, it was mistaken either in its view of the actual bearing of that case or in its reaffirmation of allegiance.

The case of *Byars v. State*, supra, a well-considered case, arose out of the violation of the Oklahoma eight-hour law also in connection with a contract for public work to be paid for by special assessments against the property benefited, and the same contention was made against the constitutionality of the law as is made in this case. That the court acted advisedly and did not overlook that point is shown by the following language: "Counsel for the defendant contend: That under the terms of this statute, under the guise of a police regulation when it is not so in fact, the right of the employer and employee to contract is abridged in such a manner as to be an infringement upon the constitutional rights of both parties. That said statute is invalid because it contravenes the 14th Amendment to the Constitution of the United States, and that 'the contract for paving is not "entered into by and on behalf of the city of Guthrie." The city of Guthrie as a municipality is acting simply as an agent of the property owner, whose property abuts on the streets along the proposed improvement. While the city has supervisory power over the streets, the improvement, as shown by the statement of fact, is to be paid for solely by the property owners. Work of the kind mentioned therein does not come within the purview of the statute. Work in behalf of the city would be work for which the city was liable, and which was to be paid for by the city, and not abutting property owners.' We believe the contention of counsel for defendant is without merit, and is unsupported by reason or authority. We see in this law no infringement of constitutional rights." The opinion discusses, approves, and follows the decision of the United States Supreme Court in the *Atkin* Case, construes the Oklahoma statute as similar to that of Kansas, and closes as follows: "The opening, construction, and maintenance of public highways is purely a governmental function, whether done by the state directly or by one of its municipalities, for which the state is primarily responsible. And it is immaterial whether such public work is paid for by the state, the county, the city,

or by the benefited property owners. It is a work of a public, not private, character. The manner of payment does not change the character of work."

In *Curtice v. Schmidt*, 202 Mo. 703, 101 S. W. 61, 66, 10 Ann. Cas. 702, the supreme court of Missouri held valid an eight-hour labor ordinance of Kansas City incorporated in a contract where the work was to be paid for by special assessment and where the objection was raised by the property owner in contesting the assessment. The court expressly refused to base its holding upon the ground that such work was always done at so much an hour, but placed it on the ground that the ordinance was, in any event, constitutional, citing, among others, the cases of *State v. Atkin* and *Atkin v. Kansas*, *supra*.

It is thus plain that there is ample authority to be found, both in state and Federal decisions, to sustain the power of the legislative body, either of the state or of the city, to prescribe a reasonable minimum of wages even above the going rate for common labor performed on public work, and even when the work is to be paid for by special assessments against the property benefited thereby, and the courts have no power to pass upon the wisdom of the measure. We quote again from *Atkin v. Kansas*: "No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution. It cannot be affirmed of the statute of Kansas that it is plainly inconsistent with that instrument; indeed, its constitutionality is beyond all question." The true friends of constitutional government should be the last to counsel a departure from this rule, since its strict observance seems the only antidote for a growing sentiment in favor of pure parliamentary government. Since the question is one involving the Federal Constitution, it would seem that the *Atkin* decision ought

to have more weight than that of the supreme court of Indiana in *Street v. Varney Electrical Supply Co.* 160 Ind. 338, 61 L.R.A. 154, 98 Am. St. Rep. 325, 66 N. E. 895, announced only a few months earlier than that in the *Atkin* Case. The two cases present precisely the same constitutional questions, and the decision of the United States Supreme Court is diametrically opposed to that of the Indiana court, as quoted from at length in the former decision in this case.

The foregoing authorities make it clear that, if street improvement work paid for by special assessments is public work performed under authority conferred by the sovereign power of the state, no constitutional guaranty is impaired by the ordinance in question. That such work is public work cannot be questioned. The power of the city to levy special assessments to pay for public work is referable solely to the sovereign power of taxation delegated to it by the state under direction of the Constitution, art. 7, § 9; Rem. & Bal. Code, § 7507, subdivs. 10 and 13; Hamilton, *Special Assessments*, § 47. "It is axiomatic that private property may be taken for public use under the right of taxation, the power of police, or that of eminent domain. In the latter case, compensation must be made to the owner, while under the police power it is principally a matter of legislative discretion. Under the power of taxation for general governmental purposes, private property may in effect be confiscated, but, under the power of special assessment, the limitation is the extent of the benefit conferred, as we shall see later. However, it is now settled in the Federal courts, and in the courts of last resort of practically every state of the Union which recognizes the power of special assessment, except Colorado, that all such assessments are laid under the taxing power." Hamilton, *Special Assessments*, § 49. It is neither an exercise of the power of eminent domain nor of the police power. Hamilton, *Special Assessments*, §§ 39, 40, 44. We must not confuse the mode of payment for public work with the character of the work. We must not confound the mode of payment with an ownership or property interest in the subject-matter to which the work is applied. We must not confound the mode of taxation with the purpose of taxation. The work of improving a public street is public work and the street is a public street. The special tax is to pay for public work. The right to levy a special tax to pay for public work rests not in the citizen's property interest in the work itself, but only in the special benefit of the work to his property. The work is none

the less public work done by the city as an agency of the state, though done also in a quasi corporate or administrative capacity, as distinguished from its purely governmental functions. The property owner cannot be assessed beyond his benefit, no matter what elements enter into the cost of the work. The language above quoted from the supreme courts of Oklahoma and Kansas and from the United States Supreme Court thus becomes directly pertinent and determinative of the question here presented.

While cogent reasons might be advanced for sustaining legislation of this character as a proper exercise of the police power of the state delegated by our Constitution to cities of the state, we find it unnecessary to place the decision on that ground or to discuss that question, since the state courts to which we have referred and the Supreme Court of the United States have sustained legislation which cannot be distinguished either in principle or in effect from the ordinance here in question, upon the simple ground that "it belongs to the state as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; *Gies v. Broad*, 41 Wash. 448, 83 Pac. 1025.

2. It is contended that, even conceding the power of the state to adopt a minimum of wages to be paid to laborers on public works carried on through the agency of its municipalities, still the city has no such power. It is argued that the ordinance is void because it seeks to declare a matter of public policy, and it is asserted that neither this court nor the city council has any power to define a question of policy.

As far as this court is concerned, the truth of the claim is so elementary that it may be passed with a simple admission. As to the power of the council, the question can hardly be so summarily dismissed. It is the clear intention of the Constitution to give to cities of the first class, of which the city of Spokane is one, the largest measure of local self-government compatible with the general authority of the state. Const. art. 11, § 10. It can "make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." Const. art. 11, § 11. By virtue of the general law, it has "all the powers which are now or may hereafter be conferred upon incorporated towns and cities by the laws of this state, and all such powers as are usually exercised by municipal corporations of like char-

acter and degree, whether the same shall be specifically enumerated in this act or not." Rem. & Bal. Code, § 7518. It can make "all regulations necessary for the preservation of public morality, health, peace, and good order within its limits." Rem. & Bal. Code, § 7507, subdiv. 36. All of these powers it assumed in its charter adopted pursuant to the general law. As to matters of local concern, wider powers than those conferred upon cities of the first class by the Constitution and laws of this state can hardly be conceived. It seems plain, therefore that, unless the ordinance in question is contrary to some public policy of the state, either expressed by statute or implied therefrom, it must be held valid.

It is not claimed that it contravenes the policy of the state as declared in any express statutory enactment, but it is urged that it is contrary to public policy in that it increases the cost of public work. As we have seen, the state eight-hour law contains in itself a minimum wage provision as to emergency overtime, which is in excess of the prevailing wage. Rem. & Bal. Code, § 6572. Even exclusive of this provision, it has the effect of a minimum wage law. The prevailing daily wage in Spokane was shown to be the same for an eight, a nine, or a ten-hour day. Hence, assuming no increased efficiency by reason of fewer hours of work, the law would either increase the number of men simultaneously employed at the same rate of pay as for ten-hour days, or would increase the number of days of employment for the same number at the same rate. It follows that it tends to increase the cost of work in exact proportion to the fewer hours in the working day. The eight-hour law manifests a public policy on the part of the state to better the condition of laborers employed upon public work. The purpose of the minimum wage ordinance is precisely the same, and the policy which sustains the one warrants the other. We fail to find wherein the ordinance in question is contrary to any public policy of the state, either as declared or implied in any statutory enactment. On the contrary, it is in accord with the policy which underlies the eight-hour law.

But it may be remarked, in passing, that it is by no means the general consensus of informed opinion that either maximum time or minimum wage laws, not exceeding a reasonable living wage, when fairly tried out, will have the necessary effect of increasing the cost of work to any material extent, especially when applied only to public work. The evidence shows that there is no scarcity of laborers in Spokane, and

it would seem that the shorter hours of labor and higher daily pay would necessarily attract many of them. The city and those doing its work by contract would thus have the choice, and could select the mere efficient laborers. This would unquestionably tend to counteract in efficiency the added cost caused by shorter hours and higher pay. Contractors would, in time, learn this fact, and make their calculations and bids accordingly. For a thoughtful discussion of this phase of the law, see an article in *Atlantic Monthly* for September, 1913, by James Bates Clark, professor of economics in Columbia University, by no means an appreciation, also an article by Sidney Webb in the *Journal of Political Economy* for December, 1912, page 979.

It is also asserted in the original opinion that, in its control and improvement of streets, "the city acts in its proprietary capacity," and that, where the work is paid for by special assessment, "its council is the agent of the property owner;" the argument apparently being that the power of the council is limited by the strict rules of a private agency. It is true that the expressions to the effect of the first above quotation are found in many of the adjudicated cases, some of them our own; but these expressions are always stated in a qualified way. No well-considered case goes farther than to say that the city's power to improve streets is not a purely governmental function "in the strict sense." The cases usually related to the liability of the city for injuries by reason of defective streets and the like, and the liability is the same whether the improvement of the streets was paid for out of the general fund or by special assessment against the property benefited. *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273. It is obvious that the mode of payment does not impress a character upon the work as public or private. No distinction has ever been made between the two classes of streets so far as their public character is concerned, or so far as the quality of the city's ownership is concerned. In neither is the city's ownership of that purely private quality which is found in its ownership of public utilities built and operated by it for hire or profit, such as waterworks or municipal lighting plants. It is only where the work is "of private advantage and emolument" to the corporation that the city "*quo ad hoc* is to be regarded as a private company" in the strict sense. *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669; 28 Cyc. p. 125. On the other hand, "public duties are, in general, those which are exercised by the state as a part of its sovereignty, for the benefit

of the whole public, and the discharge of which is delegated or imposed by the state upon the municipal corporation. They are not exercised either by the state or the corporation for its own emolument or benefit, but for the benefit and protection of the entire population. Familiar examples of such governmental duties are the duty of preserving the peace, and the protection of property from wrongdoers, the construction of highways, the protection of health, and the prevention of nuisances." *Hart v. Bridgeport*, 13 Blatchf. 289, 293, Fed. Cas. No. 6,149. These authorities are cited with apparent approval in *Seattle v. Stirrat*, 55 Wash. 560, 24 L.R.A.(N.S.) 1275, 104 Pac. 834. That case can therefore hardly be considered as authority for the claim that street work, however paid for, is not public work. It would seem that, as to the control and improvement of its streets, the functions of the city partake of both the governmental and corporate qualities; governmental in that the power and duty to open and improve the highways rests primarily in the state as an attribute of sovereignty, and is delegated by it to the city as a governmental agency of the state; corporate in that the streets of the city, in addition to being a matter of public concern to the people of the whole state, like other highways, are also of more intimate concern to the corporate community as such. But the discussion of this phase of the question would seem to be largely academic, since, even if the work be considered purely a matter of private concern to the city, it, like any other person, can prescribe the terms upon which it will contract.

It is true, also, that it is sometimes stated that the city, in making improvements and levying special assessments to pay therefor, is the agent of the property owner. "These statements are, however, mere *dicta*, representing an analogy but not a principle. The municipality is the superior imposing a tax, not an agent binding a principal by contract. Whenever the question becomes a practical one, it is held that the public corporation or quasi corporation is not the agent." 1 Page & Jones, *Taxation by Assessment*, § 16, p. 32. It is obvious that the agency is merely conventional and lacks nearly all of the elements of an ordinary agency. The authority does not emanate from the supposed principal. The work is not that of the supposed principal. He cannot discharge the supposed agent, nor direct the agent in the performance of the work. He pays for the work by an enforced, involuntary charge as he pays other taxes. "While the general theory of assessments for benefits presents some points of resemblance to quasi contract,

assessment is not a form of quasi contract other than as taxes generally are." 1 Page & Jones, Taxation by Assessments, § 18, p. 35. It seems more exact to say that the council is the agent of the law, both in letting the contract and in levying the assessment. Hamilton, Special Assessments, p. 400; 1 Page & Jones, Taxation by Assessment, § 19. As we have seen, the power to levy the special assessment is traceable solely to the taxing power of the state. In the absence of constitutional or statutory restraint, this power is subject to no other fundamental limitations than these: "It must be for a public purpose, as taxation can be exercised for none other; the property upon which the charge is laid must be peculiarly and specially benefited by the work; and the charge must be apportioned according to the benefits by some reasonable rule, and must not exceed such benefits." Hamilton, Special Assessments, § 54. In the absence of some special provision that the work must be let to the lowest bidder, it would seem that the property owner whose property is assessed for a special improvement, but only to the amount in which it is benefited thereby, would have no more right to complain of the effect of a maximum hours law or a minimum wage law, as increasing the cost of the work, than would a general taxpayer where the work is to be paid for out of the general fund. Indeed, it would seem that he has less reason to complain, since, in theory at least, he gets a direct *quid pro quo* for the expenditure, while the general taxpayer does not. It will be noted that the quotation from Hamilton in the original opinion is guarded in this respect. We quote again the part stating the condition upon which such provisions have been held to invalidate the assessment: "Where contracts for local improvements are required by law to be awarded to the responsible bidder offering to do the work for the lowest sum, any provision in the specifications tending to increase the cost and make the bids less favorable to the property owners is illegal and void. Such provisions are commonly restrictive of the hours of daily labor that men employed by the contractor may work, or forbidding the employment of Chinese or alien labor, or fixing the minimum rate of wages. Whatever form this restriction assumes will be disregarded by the courts, if the conditions increase the cost of the work to the taxpayers." Hamilton, Special Assessments, § 452. Obviously, if it is left to the discretion of the council to determine what elements of cost shall enter into the work, and whether the work shall be done by contract at all, or whether by the city itself and the cost assessed to the prop-

erty benefited, and, if done by contract, there is no requirement that it be let to the lowest bidder, then the rule stated by Hamilton would have no application. So long as the council acted in good faith, a general law or a general ordinance not unreasonably increasing the cost of the work would not invalidate the assessment.

But it is claimed that "the charter of the city of Spokane provides that contracts for work of the kind here undertaken shall be let upon competitive bids. It is also the policy of the state, as declared by the legislature, that all contracts for local improvements shall be done by contract upon like bids." *Malette v. Spokane*, 68 Wash. 578, 123 Pac. 1005, Ann. Cas. 1913E, 986. As to the second statement above quoted, we have been cited to no statute of this state or legislative declaration of any kind requiring work by cities of the first class on local improvements such as here undertaken to be done by contract upon competitive bids, or directing that it must be done by contract at all; and diligent search has failed to reveal any such statute. On the contrary, the statutes (Rem. & Bal. Code, § 7507, subdvs. 10 and 13) declare: "Any such city shall have power . . . (10) To provide for making local improvements, and to levy and collect special assessments on property benefited thereby, and for paying for the same or any portion thereof. . . . (13) To determine what work shall be done or improvements made at the expense, in whole or in part, of the owners of the adjoining, contiguous, or proximate property, or others specially benefited thereby, and to provide for the manner of making and collecting assessments therefor." And that (Rem. & Bal. Code, § 7560): "Any city of the first class having authority to provide for making local improvements and to levy and collect special assessments on property benefited thereby, and for paying for the same or any portion thereof; and to determine what work shall be done or improvements made at the expense, in whole or in part, of the owners of the adjoining, contiguous, or proximate property, or others specially benefited thereby, and to provide for the manner of making and collecting assessments therefor, may exercise such authority by general or special ordinance jointly." And that (Rem. & Bal. Code, § 7567): "Cities of the first class shall by ordinance prescribe the method by which this act shall be put into operation, and any provisions herein which may be made applicable to existing delinquent assessments may be extended by ordinance to them." See, also, the following sections of the statute: 5802, 7518, 7529, 7530, 7531,

7570, 7572, 7578, and 7894. These statutory provisions all indicate a clear intention to leave the whole matter of making such improvements in cities of the first class to the discretion of the city, subject to its charter provisions. In the absence of some statute directing that the work shall be done by contract, any city may do it either by contract or through its own officers, and assess the cost against the abutting property in proportion to the benefits. "It was not essential that the town should let any contract at all for doing the work. We see no reason why it could not have made the entire improvement through its own officers and assessed the cost thereof on the property fronting upon the street in proportion to benefits. We find nothing in the statute which forbids it." *Tumwater v. Pix*, 18 Wash. 156, 51 Pac. 354. The right of a city to include in assessments items not fixed by competition has been sustained by this court. For example, interest in case of reassessment (*Northwestern & P. Hypotheek Bank v. Spokane*, 18 Wash. 456, 51 Pac. 1070; *Philadelphia Mortg. & T. Co. v. New Whatcom*, 19 Wash. 225, 52 Pac. 1063; *Young v. Tacoma*, 31 Wash. 153, 164, 71 Pac. 742); engineering expenses and the like (*Re Jackson Street*, 62 Wash. 432, 435, 113 Pac. 1112; *Re South Shilshole Place*, 61 Wash. 246, 251, 112 Pac. 228). It would seem that the discretion of the city, in so far as not controlled by its charter, and, so long as it is exercised in good faith, and not in such manner as unreasonably to increase the cost of the work, will not be interfered with.

As to the second claim, we fail to find any provision in the charter of Spokane providing that such work must be done by contract. That matter is left to the discretion of the city council or board of public works, and, when it is decided to do the work by contract, there is no provision that it shall be let to the lowest bidder. The provisions applicable are as follows:

"Sec. 97. The board of public works shall have exclusive charge of the improvement and extension of all streets and alleys. They shall have charge of improving or altering all sewers. They shall have charge of the waterworks and all improvements and changes in the same. They shall have charge of laying all water pipes and doing everything that pertains to the conduct of the waterworks and the water supply system of the city. They shall also have charge of all things pertaining to the drainage of the city. They shall have charge of all bridges and the erection and improvement of the same. They shall have charge of the employing of all persons in discharge of the duties herein mentioned. They shall

have charge of the erection and improvement of public buildings and the inspection of private buildings.

"Sec. 98. When it shall be decided to do work by contract, they shall advertise at least ten days in two daily newspapers of the city for bids, accompanied by a certified check to an amount to be fixed by the board and named in said advertisement, not exceeding 10 per cent of the estimated cost of the work, reserving the right to reject any and all bids; provided, that in all contracts awarded, in which the probable amount of expenditure would exceed \$1,000, the publication shall be made for a period not less than twenty days. If the mayor and city council shall by resolution declare an emergency to exist, the publication herein provided for may be dispensed with.

"Sec. 99. The board shall have charge of all public works of every kind, where not otherwise provided for in this charter, and charge of furnishing all material and supplies for such work, and shall report to the city council such work, as it shall deem necessary and proper to be performed for the city, and if the council shall concur with the board, the board shall have power to enter into contracts therefor and for the performance of such other public works, as may be authorized or directed by the city council.

"Whenever proposals for supplies for work shall be advertised to be let to the lowest bidder, a specified day and hour shall be named, when such bids shall be opened. Such bids shall be made in duplicate, one to be furnished to the mayor and one to the clerk of the city commissioners, and such bids shall be accompanied by an affidavit of the bidder, that the same is made in good faith, and there is no collusion or understanding between him and any other bidder on such work. Such bids may be handed in any time before the hour designated for opening the same; and all bids, original and duplicate, shall be opened at the hour named, in public and in the presence of such persons as may see fit to attend such opening of bids. As soon as the bids are opened, the clerk or other officer with whom the same are filed, shall, in the presence of the board or officer opening them, record the same in a book kept for that purpose; provided, nothing herein shall be construed to prevent the rejection of any or all bids tendered when so deemed to be proper."

It will be noted that the board has the power to reject any and all bids, and that it is only in connection with proposals for supplies that the lowest bidder is mentioned at all. There is apparently a discretion even in that case as to whether the adver-

tisement shall be for letting to the lowest bidder or not. These charter provisions are far from being of that mandatory character which would override the general statutes of the state or general ordinances of the city, applicable alike to all work whether done by contract or not. Since the work might be done without letting a contract at all, it is plain that the competitive principle would have no such drastic application as to prevent the city from providing reasonable conditions under which the work might be done, even though such conditions tended in some degree to modify competition in some particular.

3. Finally, it is urged that the ordinance is unreasonable, and, in its last analysis, the opinion on the first hearing rests upon the initial assumption that any minimum of wages materially above the prevailing rate is unreasonable *per se*. With this we cannot agree. The reasonableness of an ordinance is always open to review by the court where it is passed under the general powers of the city, and not in direct response to a statutory direction; but, even in such cases, the ordinance is entitled to a presumption of reasonableness until the contrary is made to appear to the court in some manner. Judge Dillon lays down the following rule: "But the power of the court to declare an ordinance void because it is unreasonable is one which must be carefully exercised. When the ordinance is within the grant of power conferred upon the municipality, the presumption is that it is reasonable, unless its unreasonable character appears upon its face. But the courts will declare an ordinance to be void because unreasonable upon a state of facts being shown which makes it unreasonable. If the ordinance is not inherently unfair, unreasonable, or oppressive, the person attacking it must assume the burden of affirmatively showing that, as applied to him, it is unreasonable, unfair, and oppressive." 2 Dill. Mun. Corp. 5th ed. § 591. The court, in such cases, will take notice of existing conditions and circumstances, and, if it cannot say that the ordinance is, on its face, unreasonable in view of all of the conditions, it will not declare the ordinance void for that reason. 1 Dill. Mun. Corp. 4th ed. § 327. "Courts, in passing upon the reasonableness or unreasonableness of a statute, and deciding whether the legislature has exceeded its powers to such an extent as to render the act invalid, must look at the terms of the act itself, and bring to their assistance such scientific, economic, physical, and other pertinent facts as are common knowledge and of which they can take judicial notice." State v. Somerville, 67 Wash. 638, 641, 122 Pac. 324, 326; 51 L.R.A. (N.S.)

Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957.

We will take notice of the fact that the cost of living, even as contributed to by the actual necessities of life, has greatly increased within the past few years, and that this increase has been out of proportion to the increase in the prevailing wages of common laborers. It is admitted that, if the ordinance was reasonable, it is valid; but counsel insists that, as there exists no direct statutory enactment authorizing its passage, the ordinance must be shown to be "reasonable within the meaning of that term as applied to the judicial mind." It would be more exact to say that the burden is even then upon those attacking the ordinance to show that it is unreasonable. Aside from its recognition of constitutional and statutory inhibitions, the judicial mind is not different from any other mind. It must consider the circumstances, the purposes, and the reasonable tendency of the ordinance to meet such purposes. If the purpose is lawful, and the means reasonable, the ordinance cannot be declared invalid. The seventh biennial report of the commissioner of labor of this state, for 1909-10, presents a table bearing on the cost of living, which was cited at the second but not at the first hearing of this case. The commissioner, on pages 39 and 40, referring to this table, says: "Prices for 1900 are given as a base, and increases or decreases in the cost of the different commodities considered are shown for a period of years terminating with 1910. For the latter year, a final comparison is presented with prices quoted in 1900. An analysis of the tabulations supplies abundant evidence in support of the common conviction that the cost of living is advancing out of proportion to increases in compensation paid to wage earners. Moreover, it is important to note that in the list of commodities which have advanced most rapidly are included such staples as rye, graham and wheat flour, rice, eggs, lard, beans, ham, bacon, and fresh meats; the average increase in cost of the above commodities for the period mentioned being 72 per cent." The commissioner also states (biennial report for 1909-10, p. 6) that from all of the assembled facts, and as a result of the investigations of the bureau, it is evident that wages have failed to keep pace with the advance in living expenses. This is also a matter of common knowledge. There is no testimony to the contrary. In view of these conditions, can anyone say that a wage of \$2.75 a day is, as a matter of law, more than a reasonable living wage? The unit, as applied to the problem of living,

is the family, not the individual, and \$2.75 or even \$3 a day can hardly be complacently pronounced as an unreasonable sum for supporting such a unit. (It may be remarked in passing, however, that a comparison of the later with the earlier ordinance, which it does not repeal, indicates that it was probably never intended to apply to work done on the local improvement plan.) To hold that the payment of any sum which we cannot say is above a reasonable living wage, though it may be above the prevailing rate of wages, is a mere gratuity, would be to sacrifice the fact to a mere term. Such a holding would be an indictment of our civilization.

The judgment of the lower court is affirmed.

It is but fair to the members of Department 1 to say that the controlling questions in this case were much more thoroughly briefed and discussed on the rehearing than on the first presentation.

Main, Morris, and Fullerton, JJ., concur.

Parker, J.:

Upon more mature consideration, I am constrained to concur in the foregoing opinion, though it overrules the decision rendered by Department No. 1, in which I concurred. I was led to entertain the views expressed in the former decision because it then seemed to me that there was a distinction to be drawn between work done by the city, to be paid for out of its general funds, and work done under the supervision of the city officers, to be paid for by special assessment against the benefited property, in that the former constituted an act of the city in its own behalf without any element of agency being involved, while the latter constituted an act of the city officers as agents of the property owners who were to pay for the improvement by special assessment against their property. However, a review of the authorities cited in Judge Ellis' opinion convinces me that no such distinction can be rested upon sound legal grounds. The notion of agency on the part of municipal officers for the property owners in the making of local improvements, somewhat loosely expressed in the decisions of the courts, I apprehend, for the most part, arose from the fact that, in the early history of local improvements and assessments, they were not made save by consent of the property owners or some considerable majority of them. This, not for want of legislative power to provide otherwise, but because of legislative restrictions against forcing such improvements and assessments upon property owners except by consent of some specified majority of the owners of the property within the

particular district involved. Under existing laws in this state, such improvements and assessments can be lawfully made even against the will of all of the property owners of the district involved. This being true, I am now of the opinion that the officers of the city, so far as their powers are concerned, do not represent the owners of property to be assessed for local improvements in any different capacity than they represent the general taxpayer when carrying on a public work for the city, to be paid for by general taxation, and that the former is as purely public work as the latter.

The review of the statutory and charter powers of Spokane relative to the making of local improvements and assessments, made by Judge Ellis, seems to render it plain that such improvements are not required to be done by contract, nor to be awarded to the lowest bidder when done by contract, so far, at least, as labor is concerned; so that the element of competition in that regard is not, by law or charter, required in the making of such improvements any more than when the city employs a servant in any capacity. This problem, it seems to me, in its last analysis, is simply a question of the power of the city, through its duly constituted officers, to contract for public work involving the discretion of such officers to pay or cause to be paid reasonable compensation for such work. Viewed in this light, I am of the opinion that it was not an abuse of discretion on the part of the city authorities to fix the minimum compensation of laborers employed upon public work of the city at the amount they did by the ordinance here involved.

At the former hearing, having in view a distinction between work done by the city at the expense of the general taxpayers and work done by the city officers at the expense of special assessment payers, and that the latter partook of the nature of private work between employer and employee, which I now concede to be erroneous, and the argument of counsel being then directed largely to the city's police power, I was convinced that the city possessed no such police power as would enable it to fix a minimum wage as between private employer and employee. Whether the state, by legislative enactment, may not fix a minimum wage as between private employer and employee, is quite a different question, as to which I refrain from expressing an opinion at this time. But I do not think the question of police power is involved in this case at all,—no more than it is when the city employs a servant and fixes his compensation. Should the compensation so fixed be clearly excessive, a taxpayer may have the right to interfere by proper pro-

ceedings in court just as he would have the right to so complain were the city buying supplies and paying a clearly excessive and unwarranted price therefor. I am not able to see that the property owner paying a local assessment would have any different or higher right to complain. I apprehend, however, that such unwarranted use of public funds by the city authorities would have to be of such a flagrant character that reasonable minds could not differ relative thereto, before the courts could be induced to interfere. We have no such case here.

I am free to say that upon the former hearing I was as fully convinced of the correctness of the views expressed by the writer of the opinion as he was himself, but more mature consideration of the real question involved has led me to the views I here express, and I therefore concur in the foregoing opinion.

Grow, Ch. J.:

I concur with Judge Parker. Although I signed the former opinion, I am now convinced that the judgment of the trial court should be affirmed.

Gose, J.:

I still adhere to the conclusion reached by the court at the first hearing. 68 Wash. 578, 123 Pac. 1005, Ann. Cas. 1913E, 986. The concrete question presented is: Can a city arbitrarily fix a minimum wage, approximately 25 per cent in excess of the current wage, and assess the same against the property benefited by the improvement upon which the labor has been performed, in the absence of express or clearly implied authority from the state? In my opinion it cannot do so. "Courts will review the question as to reasonableness of ordinances passed under a grant of power general in its nature, or under incidental or implied municipal powers, and if any given ordinance is found unreasonable will declare it void as a matter of law." McQuillin, Mun. Ord. § 182. The power of the state itself to fix a minimum wage is not before us, for it has not as yet legislated upon that subject, nor has it expressly delegated the power to cities to do so. The needs of the laborer resulting from the higher cost of living are beside the question. Upon that subject I raise no issue. The question is: Shall the reasonableness of the ordinance be measured by the current wage, or by what the court conceives the current wage ought to be? I think the former must be the test until the state itself has definitely spoken. Up to the present it has never been held to my knowledge that a city may make a donation to a citizen under color of law, and assess the bounty against the

property of an objecting owner. I cannot escape the conclusion that a payment for a public work, 25 per cent in excess of the price at which other citizens stand ready to do the work, where the work is done by the city upon the assessment plan, is, in the absence of clear statutory warrant, in the nature of a bounty. If the city may fix a minimum wage largely in excess of the current wage, it may with a like consistency fix a minimum price for all material that enters into a public work, for the larger part of the cost of most material is human labor; and the man behind the brick and cement—that is, the man who furnishes the labor to put in into usable form—is as worthy of legislative protection as the man who puts it down. Whether the council is the agent of the property owner, as Judge Chadwick concluded, or the "agent of the law," as Judge Ellis concludes, where it acts under a general grant of power, its acts must be subject to the test of reasonableness. Until the state has definitely declared a policy fixing a minimum wage upon all work done for it and its members, whether paid for by general taxation or by assessment upon the property benefited, I feel constrained to take the view that an ordinance like the one in question is unreasonable.

I have contented myself with a brief statement of my view because the subject was fully treated by Judge Chadwick following the first hearing. I therefore dissent.

Mount, J.:

I concur in the view expressed by Judge Gose.

Chadwick, J.:

I concur in what is said by Judge Gose. The result of the court's decision is that a city council can, in order to meet what it conceives to be the living expenses of a citizen, arbitrarily take from the substance of one man and give it as a bounty to another, and that without measuring or even considering the ability of the subject of its impressment to pay the tax. The opinion of the court has taken a wide range, but it should be borne in mind that we did not in our former opinion hold the ordinance to be unconstitutional.

We did not hold that the legislature might not by general law authorize a city to pass the ordinance in question.

We did not hold that a city could not by charter amendment provide for the payment of a minimum wage higher than or even unreasonably higher than the current or going wages.

We did not hold that a city could not

fix a wage scale to be paid its employees out of the general fund, or that it could not fix the hours of labor. Our holding was in its essence no more than this: That an agent is bound to do for his principal when pursuing the trust relation as well as he could have done for himself. Until the decision in this case was pronounced, this principle had been regarded as fundamental.

It may be inferred from what is said in the majority opinion that we held the ordinances of the city of Spokane fixing a minimum wage to be unconstitutional. In the former opinion the constitutionality of the ordinances was not questioned. The judges who participated in that decision, with one exception, had no doubt that such ordinances, if properly passed, would do no violence to any constitutional guaranty of personal or property rights.

There is and there can be but one question for solution; that is, whether an ordinance passed without the sanction of a general law passed by the legislature and approved by the governor, which fixes a wage from 25 to 40 per cent higher than the current wages for like labor in the same place, can be taxed against an unwilling citizen without violating that fundamental principle of the law that municipal ordinances must be reasonable. We held under the facts of the case before us that the difference was so great that the ordinance was in its operation unreasonable. We did not hold or preclude ourselves from holding under a different state of facts that the wages fixed by the ordinance might not be reasonable. The majority opinion seems to me to be an endeavor to meet a sociological problem with which this court can have nothing to do, for it is a legislative and political question, and the argument of the majority does not touch the premise of the question before us. If approached at all, it is lost sight of in the assertion of those beneficent principles which are at the present time engaging the attention of thoughtful persons all over the world and which will be in time taken care of by appropriate legislation. In the absence of the authority to which Judge Gose has adverted, courts cannot and should not be influenced by the opinions of political propagandists, however engaging and however reasonable they may seem to be. Humanitarian impulses are the wellsprings of social progress, but to define them and to put them into the forms of law is not the work of the courts. Their work is limited by narrower bounds, and wisely so, for people of this and all English speaking countries have undertaken by express limitation and by the strongest

implications to keep the lawmaking powers in the people themselves. The duty of a court is to follow the law as made by the people, and not to create a rule to meet a situation however urgent, for the power to frame a humanitarian impulse into law (judge-made) implies a power to frame a law that will usurp and cripple the rights of the people.

We have the law before us; Judge Gose has said in his dissenting opinion what it is; that is, that the power to do these things is in the legislature, and, until it has spoken, it is the duty of the court to follow the law as it finds it. In this case the court has followed a humanitarian impulse, and to that extent its action is to be applauded, but in doing so it has violated principles and commands that may invite those whose petitions should be more properly addressed to the lawmaking powers, to go to the courts and invoke the sympathy of the judges to the end that it will meet conditions not theretofore recognized by the people or by their representatives. This means but one thing,—judicial legislation, which is judicial tyranny. This is especially so in this case. After the original decision was pronounced, the legislature convened in regular session. Bills were introduced in both the house and senate, and an attempt was made to pass a law legalizing that which this court had held to be invalid. The bills were killed. The idea of taking from one and giving to another found no favor with the legislature. This fact, coupled with the decision previously rendered, would in itself be sufficient under the hitherto accepted canons of statutory construction to warrant a reaffirmation of our previous decision. To hold otherwise makes this case *sui generis*.

I want to take exception to the concluding clause of the majority opinion: "It is but fair to the members of Department 1 to say that the controlling questions in this case were much more thoroughly briefed and discussed on the rehearing than on the first presentation." I deny that the real question before the court was more thoroughly briefed and discussed on the rehearing. Every question that was properly before the court was briefed and orally argued. The former opinion of the court was given the mature consideration of every member of the court and was sanctioned by all with two exceptions, one dissented and the other was uncertain at the time. The briefs submitted on rehearing were longer. They quoted from the words and works of political economists and humanitarians, but they nowhere touched the law any closer than did the original briefs. In fact they went beyond the law and in some par-

ticalars, as it seems to me, are open to the criticism that they are coercive or, at least, an invitation to the court to subscribe to the political side of the controversy. In this sense they were offensive and should have been stricken. Personally, I would be glad to see every man who labors paid a fair wage, more than a going wage, for I know that wages are too often hammered down to meet the bare necessities of the wage earner; but I have not the means to pay those who should be paid more, nor have I the right, when sitting in judgment on the affairs of my fellow men, to say that my neighbor shall pay more, and that by judicial mandate.

The humanitarian or economic phase of the question is not properly before the court, as I have undertaken to demonstrate; but, since it has been discussed, I have this to say:

In considering the necessity of the man who works upon a paving job, it is possible that the court has overlooked the rights and necessities of the small home owner whose property is improved against his will and who is really unable to meet an arbitrarily added cost. He may be no less a laboring man than the man who works upon a street contract. The fact that a man works for a paving contractor has not hitherto, either in law, equity, or morals, given him a right to be considered over the man who is working in some shop or factory, or in some store or printing office, and who is undertaking to build for himself and his family a comfortable home. To this man who labors the rule of the majority may mean loss and confiscation. A question of ethics might arise if the court had looked at both sides of the question and had been willing to see the necessities, the struggles, of the wage earner who is also the small home owner, and who is, in virtue of a court-made law, made to bear a burden he had no reason to expect, and which he must have assumed to be beyond the power of the court to declare.

By what right the majority assumes to disregard the testimony in this case, and upon the report of the commissioner of labor say what is a reasonable wage, I am at a loss to know; courts have hitherto based their conclusions upon testimony; but, assuming that the court is right, I could, if it were proper to do so, furnish documents and opinions of equal merit and of equal force to sustain the proposition that the modern tendency of our municipalities to create assessment districts, to issue bonds, to put charges upon property, to buy prosperity on credit, must in the end inevitably force the one who now owns a home to give it up, and at the same time

deter the one who desires to put into realization the home instinct which is dominant in the heart of every normal man. Let it be remembered that in compelling the home owner to pay from 25 to 40 per cent more for the workman the city furnishes him than he would have to pay if he had employed the same man, and this to meet the increased cost of living, the money collected for that purpose comes in the main from those who are equally deserving and whose necessities are equally as great. The court has made the necessities of the one his fortune. It has made the helplessness of the other his misfortune.

WASHINGTON SUPREME COURT.
(Department No. 2.)

H. A. RASER, Appt.,

v.

GEORGE A. MOOMAW and Wife, Resp'ts.

(78 Wash. 653, 139 Pac. 622.)

Fraud — Introducing impostor to broker — Liability for loss.

One who, with knowledge of the fraud, introduces to a money broker without knowledge of or means of knowing the facts, a person impersonating the owner of real estate, stating that he desires to borrow money on the property, and thereby enables him to secure a loan which cannot be recovered because the borrower is an impostor and insolvent, is liable to make good the loss resulting to the broker from the transaction.

(March 26, 1914.)

APPEAL by plaintiff from a judgment of the Superior Court for King County in defendant's favor in an action brought to recover damages for alleged fraud and deceit in aiding an impostor in securing money from plaintiff. Reversed.

The facts are stated in the opinion.

Messrs. Clise & Poe, for appellant:

If a person states as true, as of his own knowledge, material facts susceptible of knowledge, to one who relies and acts thereon to his injury, he cannot defeat recovery by showing that he did not know that his representations were false, or that he believed them to be true.

Note. — *Liability of one who introduces or identifies an impostor, for fraud perpetrated by him.*

Research has disclosed no case similar to RASER v. MOOMAW, passing upon the above question, except Lahay v. City Nat. Bank, 15 Colo. 339, 22 Am. St. Rep. 407, 25 Pac. 704, the opinion of which is quoted in the RASER CASE. It should be observed,

Lawson v. Vernon, 38 Wash. 424, 107 Am. St. Rep. 880, 80 Pac. 559; *West v. Carter*, 54 Wash. 236, 103 Pac. 21.

Mr. O. E. Sauter, for respondents:

The complaint does not state a cause of action against the defendants, or either of them.

20 Cyc. 32; *Northwestern S. S. Co. v. Dexter Horton & Co.* 29 Wash. 565, 70 Pac. 59; 14 Am. & Eng. Enc. Law, 2d ed. 89, 103; *Pasley v. Freeman*, 3 T. R. 51, 1 Revised Rep. 634, 2 Smith, Lead. Cas. 166, 12 Eng. Rul. Cas. 235; 8 Enc. Pl. & Pr. 901, 902; *Lord v. Goddard*, 13 How. 198, 14 L. ed. 111; *Einstein v. Marshall*, 58 Ala. 153, 29 Am. Rep. 729; *Lord v. Colley*, 6 N. H. 99, 25 Am. Dec. 445; *Hall v. Bradbury*, 40 Conn. 32; *Fooks v. Waples*, 1 Harr. (Del.) 131, 25 Am. Dec. 64; *Meyer v. Amidon*, 45 N. Y. 169; *Wakeman v. Dalley*, 51 N. Y. 27, 10 Am. Rep. 551; *Kroenert v. Johnston*, 19 Wash. 104, 52 Pac. 605; *Washington Cent. Improv. Co. v. Newlands*, 11 Wash. 214, 39 Pac. 367; *Tacoma v. Tacoma Light & Water Co.* 16 Wash. 296, 47 Pac. 738, 17 Wash. 467, 50 Pac. 55; *Pigott v. Graham*, 48 Wash. 351, 14 L.R.A.(N.S.) 1176, 93 Pac. 435; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613.

Fullerton, J., delivered the opinion of the court:

In this action the appellant sought to recover from the respondents for fraud and deceit. In his complaint the appellant stated his cause of action as follows:

"Plaintiff complaining against defendants alleges:

"I. That plaintiff is now and at all times herein mentioned was engaged as a real estate broker in the city of Seattle.

"II. That at all the dates and times herein mentioned, the defendants were husband and wife, and as such constituted a community under the laws of the state of Washington.

"III. That during the month of November, 1910, the defendant George A. Moomaw,

acting on behalf of said community, for the purpose of inducing plaintiff to procure the loan hereinafter described, introduced him to a woman whose true name is to plaintiff unknown, and then and there represented her to be Annie L. Knowles, of Seattle, Washington, and also the owner of lot 10, block 3, Noah Fleckinger's Town Plat Cove addition to Seattle.

"IV. That at the time of said introduction, said defendant further represented to plaintiff that said woman desired to borrow the sum of \$1,500 secured by a note and mortgage upon said premises, and that in the event said loan were made, she would pay to plaintiff and the defendants a broker's commission.

"V. That relying upon said introduction and the representations made by said defendant, plaintiff, on the 2d day of December, 1910, in the ordinary course of business, induced one of his clients, S. M. Obradovich, to loan said woman the sum of \$1,500 upon her note and mortgage covering said premises, bearing interest at 7 per cent per annum, which said note and mortgage were wrongfully made, executed, and delivered by said woman as Annie L. Knowles, and by reason of the representations of defendants to him made, plaintiff informed his said client that said woman was Annie L. Knowles.

"VI. That said defendants knew, or in the exercise of reasonable prudence and caution should have known, that said woman was an impostor, and that her true name was not Annie L. Knowles, but that she assumed the same for the purpose of cheating and defrauding this plaintiff.

"VII. That plaintiff did not know, and had no means of knowing, that said woman was not the person whom said defendant represented her to be, or that she was not the owner of said property and entitled to make, execute, and deliver said note and mortgage thereupon, but wholly relied, and was expected by defendants to rely, upon said introduction and representations of

however, that the Lahay Case not only supports the conclusion reached in *RASER v. MOOMAW*, but seems to go farther as respects the proof necessary to show knowledge of the falsity of the identification, the court in the Lahay Case apparently approving the rule that one who introduces an impostor, making a positive statement as to identity, when in fact he has no positive knowledge on the matter, and the other party does not know its falsity, is liable to such other party for the damages sustained in consequence of reliance upon the false statement, without further proof that the one making the statement knew that it was false.

As to who must bear loss when check or 51 L.R.A.(N.S.)

bill is issued or indorsed to impostor, see notes to *Land Title & T. Co. v. Northwestern Nat. Bank*, 50 L.R.A. 75; *Harmon v. Old Detroit Nat. Bank*, 17 L.R.A.(N.S.) 514; and *McHenry v. Old Citizens' Nat. Bank*, 38 L.R.A.(N.S.) 1111; and later cases, *Goodfellow v. First Nat. Bank*, 44 L.R.A.(N.S.) 580, and *Simpson v. Denver & R. G. R. Co.* 46 L.R.A.(N.S.) 1164.

As to who must bear loss where check or draft is purchased or paid upon the spurious indorsement of one who bears the same name as the payee or indorsee, see note to *S. Weisberger Co. v. Barberton Sav. Bank Co.* 34 L.R.A.(N.S.) 1100; and later case *Thomas v. First Nat. Bank*, 39 L.R.A.(N.S.) 355.

R. E. H.

defendants as to her identity and authority to execute and deliver said note and mortgage.

"VIII. That it subsequently developed and is a matter of fact that said woman was not Annie L. Knowles, but was some other person, and has since been convicted and sentenced to prison for frauds similar to the one practised by her upon plaintiff, by reason of which the note and mortgage given to S. M. Obradovich are worthless, and plaintiff was compelled to pay him the amount thereof, to wit, the sum of \$1,500, together with interest upon said sum from the 2d day of December, 1910, at the rate of 7 per cent per annum.

"Wherefore plaintiff demands judgment against the defendants and each of them in the sum of \$1,500, together with interest thereupon from the 2d day of December, 1910, until paid, and for costs and disbursements herein laid out and expended to be taxed."

To the complaint a general demurrer was interposed by the respondents, which the trial court sustained. The appellant thereupon declined to plead further, and a judgment of dismissal was entered, from which he appeals.

The essential elements necessary to constitute actionable fraud and deceit are in the main well settled. These elements are correctly set forth in 20 Cyc. 13. It is there said that "it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury."

Tested by these principles it seems to us clear that the complaint states a cause of action. The element of materiality is found in the allegation that the representation was made for the purpose of inducing the appellant to procure a loan for the woman introduced, and the allegation that the appellant did not know, and had no means of knowing, that the woman was not the person whom he represented her to be; the element of false representation, in the third, sixth, seventh, and eighth paragraphs of the complaint; the element of knowledge, from the general tenor of the complaint, and from the sixth paragraph particularly; the element of intention, from the third paragraph, which avers that the introduction was made for the purpose of inducing the appellant to procure a loan for the woman introduced, and from the seventh paragraph, to the effect that the appellant wholly re-

lied, and was expected by the defendants to rely, upon the introduction and representation of the respondents as to the woman's identity; the element of reliance on the representations, in the fifth and seventh paragraphs of the complaint; and the element of injury, from the allegation that he induced his client to make the loan and was afterwards compelled to repay the money loaned to his client. It may be true that the complaint is not as full as could be desired; and it may be true, also, that certain of its paragraphs are subject to a motion to make more definite and certain, but we are clear that that complaint contains the elements of a good cause of action, and is sufficient as against a general demurrer.

We shall not notice in detail the objections the respondents urge against the complaint. The principal one is that the complaint shows on its face that the appellant did not act with ordinary care or business prudence in ascertaining the identity of the woman claiming herself to be Annie L. Knowles; in support of which it is argued that the appellant should not have relied upon the respondents' representations, but should have inquired elsewhere concerning her identity. But, overlooking the moral side to such an argument,—coming as it does from the very persons who made the false representations,—the argument itself is not sound, in view of the allegation in the complaint to the effect that the appellant did not know, and had no means of knowing, that the woman introduced was not the person whom the respondents represented her to be, or the owner of the property she offered to mortgage; there being nothing on the face of the record or the subject-matter of the controversy, which indicates that the allegation is not true. The allegations may be subject to dispute after issue is joined upon them, but they are sufficient in the respect questioned until they are put in issue.

The respondents cite and quote at length from the case of *Pigott v. Graham*, 48 Wash. 348, 14 L.R.A.(N.S.) 1176, 93 Pac. 435, claiming it to be controlling of the question at bar. That case, it is true, was an action for deceit in which the court held that the plaintiff had no right to rely upon the representations of the defendant. But the decision was rested on the fact that the subject-matter of the controversy was before the very eyes of the complaining party when the false representations concerning it were claimed to have been made, and the court held this fact estopped the plaintiff to complain of the false representations. But the facts in the case before us are different. Here, as we say, it is alleged that the appellant did not know, and had no

means of knowing, the representations were false, and the surrounding conditions do not belie the allegation.

The case at bar is novel in the respect that on the facts presented it seems to have no exact counterpart in the reported cases. At least none has been called to our attention, and our own research has discovered none. The case most nearly approaching it upon the facts is, perhaps, the case of *Lahay v. City Nat. Bank*, 15 Colo. 339, 22 Am. St. Rep. 407, 25 Pac. 704. In that case Lahay had falsely identified to the bank the holder of a certificate calling for the payment of money as the person who was named in the certificate. The bank officers did not know either the person holding the certificate or the person named therein, and on the faith of the representations made by Lahay paid the money due thereon to the holder. It afterwards developed that the person identified was not entitled to cash the certificate, and the bank was compelled to pay the money a second time at the suit of the true owner. After doing so it brought an action against Lahay to recover as for deceit upon his false representation, and recovered in the trial court. On the appeal of Lahay the judgment was affirmed in the reported case. Passing upon the questions urged for reversal, the court said: "The action is founded upon the deceit practised upon appellee by appellant, by means of which appellee was induced to pay the amount of the certificate to D'Armenthal, who had no claim to the money, instead of to John Phillipe, who alone was entitled to receive the same. Counsel contend, however, that appellant is not liable on account of his false statement, because he is not shown to have had knowledge of its falsity at the time of making the same. The question thus presented was before the court, and carefully considered in an early case. See *Sellar v. Clelland*, 2 Colo. 532. It was then held that the intention of one party to deceive and defraud another was sufficiently made out by showing that a false affirmation had in fact been made by the party, concerning a matter about which he had no actual knowledge, under circumstances showing that the matter spoken about was better known to the party making the representations than to the other party. And to the general rule requiring a party relying upon false representations to show, not only that they were false, but that the party making the same knew such to be the case, some exceptions were pointed out; as when one, as in this case, positively assures another that a certain statement is true, professing at the time to speak of his own knowledge, and about a matter not known to the party to whom the representations are made, 51 L.R.A. (N.S.)

he cannot be allowed to complain because another has placed too much reliance upon the truth of what he himself has stated. In the language of the learned judge writing the opinion in the case of *Sellar v. Clelland*, supra: 'In such a case the proof would seem to be complete when it was shown that the defendants made the representations; that they were made to induce plaintiffs to enter into the contract; that, relying upon the same, they did enter into the contract; that the representations were false; that the plaintiffs sustained damage; and that such damage was occasioned by reason of the falsity of such representations'. The statute of frauds and perjuries cannot be invoked in this case to shield appellant. His liability does not grow out of any special promise to answer for the debt, default, or miscarriage of another; nor is he sought to be held upon any agreement required to be in writing. Appellant is shown to have stated as of his own knowledge that Paul D'Armenthal was in fact John Phillipe, and that this representation was made for the express purpose of inducing appellee to pay over the money. It is also shown that the bank, relying upon such representation, did pay the money to D'Armenthal, supposing him to be John Phillipe entitled to receive the same. The representations were in fact false, and damages were sustained thereby. Every element necessary to a recovery under the decision in *Sellar v. Clelland* was here made out. The correctness of the decision in that case is not questioned. It is well supported by authority, and must control here." This case in principle is the same as the case at bar, and is authority for the conclusion that false representations as to the identity of a person are actionable, if made to induce another to act thereon, and such other does so act thereon to his prejudice.

The judgment appealed from is reversed, and the cause remanded, with instructions to overrule the demurrer and permit the case to proceed in due course.

Crow, Ch. J., and Mount, Parker, and Morris, JJ., concur.

Petition for rehearing denied.

MICHIGAN SUPREME COURT.

LANSING E. LINCOLN, Admr., etc., of Ion
Lincoln, Deceased, Plff. in Err.,

v.

DETROIT & MACKINAC RAILWAY COMPANY.

(— Mich. —, 146 N. W. 405.)

Death — minor — action by parent.

1. An action for the benefit of a parent

for the instantaneous death of his minor son through another's negligence is not precluded under a statute providing that if the negligence is such as would, if death had not ensued, have entitled the person injured to maintain an action to recover damages in respect thereof, an action may be maintained for the benefit of his next of kin, by the fact that recovery is limited to the loss of the child's earnings during minority and that the child could not have recovered for loss of such earnings.

Evidence — death — presumption of care.

2. The presumption of due care on the part of one drowned while using an unsafe boat will support a recovery for his death against the one who let the boat to him, and is shown to have been guilty of negligence in so doing.

(March 26, 1914.)

ERROR to the Circuit Court for Arenac County to review a judgment in defendant's favor in an action brought to recover damages for the death of plaintiff's

Note. — Nature of right of action in favor of injured person, which will satisfy the condition of the death statute in the event of his death.

But one case in addition to **LINCOLN v. DETROIT & M. R. Co.** has been found to discuss the precise question indicated by the above title. That case, **Johnson v. Eau Claire**, 149 Wis. 194, 135 N. W. 481, involves a statute giving a right of action for the benefit of relatives of the deceased whenever death is caused by wrongful act or neglect such as would have entitled the party injured to recover if death had not ensued. In harmony with the **LINCOLN** CASE the court said in effect that, although the damages recoverable under the statute were different from those that could have been recovered by the deceased if death had not ensued, still the right of action under the death statute was not affected, since the question whether the deceased, had he survived, could have maintained an action, is the test of the right to maintain the statutory action and recover.

There are other cases which refer to the difference between the damages recoverable by an injured person, and those which his representatives may recover if the injuries result in death, but none of them have been found even to intimate that this in any way affected the right of action under the death statute. Those cases therefore are of no value in the present connection. No attempt has been made to present the cases of instantaneous death, or the decisions in which the deceased, if he had survived, would have been denied recovery under defenses of release, compromise, assignment, contributory negligence, imputed negligence, assumption of risk, fellow servants, or want of notice to the defendant where notice

intestate, for which defendant was alleged to be responsible. Reversed.

The facts are stated in the opinion.

Messrs. William C. Cook and Tom Bechraft for plaintiff in error.

Mr. James McNamara, with Messrs. Henry, Henry, & Henry, for defendant in error:

There can be no recovery because if death had not ensued, "the party injured," Ion Lincoln, could not have sued the defendant for the recovery of his earning power, for that belonged to his parents.

Within the confines of the "death act," must be found the right to claim damages against defendant, if it exists, and if this statute does not give the right for recovery, then no right exists.

Verlinde v. Michigan C. R. Co. 165 Mich. 371, 130 N. W. 317; 8 Am. & Eng. Enc. Law, 2d ed. 854, 855, 858, 864, 887; **Walker v. Lansing & Suburban Traction Co.** 156 Mich. 516, 121 N. W. 271; **Stevenson v. W. M. Ritter Lumber Co.** 108 Va. 575, 18

is required, as in the case of a municipal corporation.

So, also, as to cases which turn upon the fact that, although the defendant's conduct was such as is ordinarily actionable, the deceased, had he survived, could have maintained no action because of some personal disability, or because of some other technical reason. As an example of such cases, reference may be had to **Wilson v. Brown**, — Tex. Civ. App. —, 154 S. W. 322, holding that a statute giving a right of action for death from a wrongful act of such a character as would, if death had not ensued, have entitled the party injured to maintain an action, — did not authorize an action by a guardian in behalf of his wards for the killing of their mother by her husband, where, as in Texas, a married woman cannot maintain an action against her husband for a tort committed against her by him.

Generally, as to parents' common-law right of action for loss of services of child whose death is caused by negligence, see the notes to **Gulf, C. & S. F. R. Co. v. Beall**, 41 L.R.A. 807, and **Stevenson v. Ritter Lumber Co.** 18 L.R.A. (N.S.) 316.

As to how many distinct causes of action arise from injuries resulting in death, see the note to **Louisville & N. R. Co. v. McElwain**, 34 L.R.A. 788. This note is supplemented by the note to **Stewart v. United Electric Light & P. Co.** 8 L.R.A. (N.S.) 384, entitled, *Several actions for wrongful death*; the note to **Mahoning Valley R. Co. v. VanAlstine**, 14 L.R.A. (N.S.) 893, dealing with the right to maintain both an action for the beneficiary, and an action for injury suffered by one killed by another's negligence; and the note to **Hendricks v. American Exp. Co.** 32 L.R.A. (N.S.) 867, on the point as to the right to recover in one action for the death of a person and for his suffering before death.

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L.R.A.(N.S.) 316, 62 S. E. 351; Lubrano v. Atlantic Mills, 19 R. I. 129, 34 L.R.A. 797, 32 Atl. 205; Gulf, C. & S. F. R. Co. v. Beall, 91 Tex. 310, 41 L.R.A. 807, 66 Am. St. Rep. 892, 42 S. W. 1054; Mobile L. Ins. Co. v. Brame, 95 U. S. 756, 24 L. ed. 582; Baker v. Bolton, 1 Campb. 493, 10 Revised Rep. 734; Osborn v. Gillett, L. R. 8 Exch. 88, 42 L. J. Exch. N. S. 53; Olivier v. Houghton County Street R. Co. 134 Mich. 367, 104 Am. St. Rep. 607, 96 N. W. 434, 3 Ann. Cas. 53; West v. Detroit United R. Co. 159 Mich. 269, 123 N. W. 1101.

Stone, J., delivered the opinion of the court:

The defendant owns and operates a railway system running from Pinconning, Bay County, to Linwood, in said county, and elsewhere. It owns, in connection with its railway system, a pleasure resort located along its right of way at its station at Linwood, which resort is contiguous to the waters of Saginaw bay. In connection with this summer resort, it operates and controls certain amusement features, to wit, stands, bathing, boating, and other devices for the amusement of the public, for profit.

On June 17, 1912, plaintiff's intestate, a boy sixteen years of age, was a passenger for hire on excursion rates from his home in Pinconning to said summer resort, to attend a school children's picnic thereat. Upon his arrival at said resort he secured a ticket from the defendant's ticket agent for the use of one of defendant's rowboats. He presented the ticket to another agent of defendant, who had the boats in charge, and obtained a certain boat known as "D. & M. Ry. Co. 22" from the boat tender, which was a 14-foot steel rowboat. The boat was obtained by plaintiff's decedent for the purpose of taking a row on the waters of the bay, in company with three companions of about the same age. Soon after leaving the landing the children were lost sight of, and it was afterwards discovered that they had been drowned. The action was brought under what is termed the "death act," to recover the pecuniary damages which it is claimed the father and mother have sustained by the death.

The declaration, after averring the duty of the defendant, alleges that it failed to provide plaintiff's intestate and his three companions a reasonably safe and seaworthy boat; that it failed to provide for a careful and prudent inspection of said boat as to its repair before leasing the same as aforesaid; that it failed to maintain the ends, side, and bottom of said boat free from holes and leaks so that water could not enter to the inside of said boat when in use by plaintiff's intestate and his companions for row-

ing purposes upon said water; that it failed to maintain the strip of wood around the inner side of said boat, to which were attached the prow and stern seats, to which seats were attached the air bulkheads or tanks, free from rot and other defects, etc., and alleging that it failed in some six other particulars, including that of permitting said boat to be overloaded, and that said boat was a two passenger boat, etc.

The trial court having directed a verdict for the defendant upon the opening statement of plaintiff's counsel, without receiving any evidence, it becomes necessary to refer to such statement. In such statement plaintiff's counsel stated, in substance, that he would show upon the trial that the strip which went around the inner side of the boat, to which was attached the seats, was of wood; that at the time the defendant's agent permitted decedent to get into the boat to go upon the water for a boat ride, he permitted decedent to load into what was really a two passenger boat four people, although decedent asked for a larger boat, but was told that the boat was large enough; that this was the first day of the year that the rowboats were placed for the use of the public; that they had not been inspected to determine whether or not they were in a seaworthy condition, and safe repair; that decedent and his companions left the dock at said resort between 11 and 12 o'clock a. m. and that a watch found in the pocket of one of the decedents had stopped between 12 and 1 p. m.; that when last seen the boat and party were about three quarters of a mile out from shore; that at the time the boat left the dock in charge of said party, it was in bad condition, and water was entering into the boat through seams in the rusting metal, it being an old boat, and had not been repainted or overhauled; that there were lying upon the beach and at hand larger boats of sufficient capacity to carry four and six passengers; that the hull of the boat furnished by defendant to decedent was constructed of steel; that the boat was not found, but that there were found floating on the surface, supported by the rear seat, the stern bulkhead and the boat mark, "Boat No. 22 D. & M.;" that the bulkhead under the seat was an oblong can, which should have been air-tight; that around the edge of this seat, when it was found, there were several screw nails still sticking through the wood of the seat board; that on the ends of these screw nails were particles of decomposed rotten wood still adhering, the screw nails having pulled loose from the boat; that the air tank, which should have been nonsinkable, was full of water, and only floated by reason of the board's buoyancy; that al-

though the inspector was there, he had received from defendant no orders to inspect said boat; that it had been the custom of defendant in prior years to furnish a beach patrol with a field glass, but that no patrol was provided by defendant at this time; that the bay or water adjacent to this resort was very dangerous, and subject to sudden wind squalls,—all of which was known to defendant, but not to decedent, and that defendant paid no attention to the safety of the plaintiff's decedent and his companions. Damages were claimed under §§ 6308 and 6309, Compiled Laws, relating to railroad companies, and §§ 10427 and 10428, Compiled Laws.

It was the claim of the defendant that by a proper construction of the statutes, above cited, there could be no recovery in the case, because if death had not ensued, the "party injured," Ion Lincoln, could not have sued the defendant for the recovery of his earning power, for that belonged to his parents, and also for the further reason that the cause of death was wholly conjectural.

The trial court, after a lengthy argument by counsel, but without stating any reasons therefor, directed a verdict and judgment for the defendant. The plaintiff has brought the case here by writ of error, and by proper assignments of error he claims: (1) That under the statutes above cited, the plaintiff may maintain an action for the drowning of his intestate, who was a minor sixteen years of age, occasioned by the wrongful act, neglect, and default of defendant, in having furnished plaintiff's intestate with an unsafe and unseaworthy boat; (2) that death by drowning is an instantaneous death; (3) that the measure of damages would be the amount found by the jury that they should deem fair and just with reference to the pecuniary injury resulting from such death, to the persons who may be entitled to such damages when recovered, to wit, the earning power of decedent from the time of his death until he became twenty one years of age, less what it would cost for his maintenance, under the rule as stated in *Black v. Michigan C. R. Co.* 146 Mich. 568, 109 N. W. 1052; (4) that damages recoverable under the statutes cited are held to be assets of decedent's estate, and should be so considered, even before recovery had thereunder; (5) that the case as stated by counsel did not leave the cause of death conjectural.

We quote the following from the brief of defendant and appellee: "In the statements made by plaintiff's counsel in the circuit court and in his brief filed in this court, the following admissions are made, which to some extent limit the scope of discussion on the questions of law: (1) That

plaintiff's decedent, Ion Lincoln, was a minor, sixteen years of age at the time of his death; (2) that plaintiff's decedent came to his death on the 17th day of June, 1912, by drowning; that no one was a witness to the occasion of this death; (3) that the death of plaintiff's decedent was instantaneous; (4) that the measure of damages recoverable in this case was plaintiff's decedent's earning powers up to the time he became of age, less what it would cost for his maintenance," also quoting plaintiff's third proposition as above set forth; "(5) that no damages can be recovered under the common law for the death of an individual; (6) that no recovery can be had in this case, other than by virtue of the statute laws of this state, *viz.*," referring to the statutes cited by plaintiff. . . . "We shall assume that each and every one of the above allegations is agreed upon and conceded to be true, and from such premises we shall briefly consider the law which must control."

1. We summarize the following from the American authorities: The death loss act of the English statute of 1846 (Stat. 9 & 10 Vict. 93), commonly called "Lord Campbell's act," and the various laws of a similar kind that have been modeled after it, gave a new cause of action unknown to the common law, for the benefit of certain designated classes of surviving relatives. Such relatives do not take the cause of action for damages to the deceased by transfer to them by operation of law, or otherwise, but are enabled by the statute to recover the pecuniary loss to themselves caused by the wrongful taking off of the decedent, the continuation of whose life would have been beneficial to them. The action accrues to the surviving beneficiary mentioned in the statute by reason of the death of the injured person caused by the wrongful act of another. It is strictly not proper to say that it is a cause of action which survives; it is rather a new action given by §§ 10427 and 10428, Compiled Laws, which can be brought, not for the benefit of the estate, but solely for the benefit of the beneficiaries named in the statute. The above sections, when compared with § 10117, Compiled Laws, are made plain. They refer to entirely distinct losses recoverable in different rights. Section 10117 refers to the right of the deceased for the loss and injury occasioned to him. Sections 10427 and 10428 refer to the right of the surviving relatives as beneficiaries for the loss to them. Both are dependent on the injury. The language of one provision is that "actions for personal injuries shall survive," and of the other "in case of the death of a person by the wrongful act of another." Section 10117 creates no new lia-

bility, but prevents the lapsing by death of an old one, while §§ 10427 and 10428 create a new liability, one not known to the common law.

The case of *Read v. Great Eastern R. Co.* L. R. 3 Q. B. 555, 9 Best & S. 714, 37 L. J. Q. B. N. S. 278, 18 L. T. N. S. 82, 16 Week. Rep. 1040, is often referred to. The decision there is only to the effect that if an injured person have satisfaction of his claim before death, subsequent death from the injuries does not confer a right of action upon surviving relatives; that such right exists only where there is an existing claim for damages therefor at the time of his death. Justice Blackburn, who delivered the opinion, said, in substance, that the proper construction of the statute is that it gives a right of action to certain surviving relatives of a person when death was caused by the wrongful act of another, where he had not received satisfaction in his lifetime, and that to go further would be straining the language of the law. The language of our statute (§ 10427) is that liability of the wrongdoer exists where the deceased could have recovered if death had not ensued. That clearly excludes the idea that where the decedent receives satisfaction for his injuries, the conditions requisite to the right of surviving relatives may exist notwithstanding. There is nothing in *Read v. Great Eastern R. Co.* in conflict with *Blake v. Midland R. Co.* 10 Eng. L. & Eq. Rep. 443, where, in a very instructive opinion by Coleridge, J., it is said that Lord Campbell's act does not transfer to the surviving relatives mentioned the claim for damages previously possessed by the deceased, but gives to them an independent cause of action for damages peculiarly incident to their relations to the deceased. As was well said by Marshall, J., in *Brown v. Chicago & N. W. R. Co.* 102 Wis. 146, 44 L.R.A. 579, 77 N. W. 761, 5 Am. Neg. Rep. 255, in speaking of the last two cited cases: "The two cases are often cited to opposite views but are in fact, when correctly understood, in perfect harmony. The one holds that the right of the relatives named in the statutes is separate and distinct from that possessed by the deceased; the other, that the right of the relatives is contingent on the death of the injured person without having satisfied his claim for damages." See *Id.* 102 Wis. 137.

In *Cooley on Torts*, at page 263, that eminent author, in speaking of Lord Campbell's act, says: "It is seen, on a perusal of this statute, that it gives an action only when the deceased himself, if the injury had not resulted in his death, might have maintained one. In other words, it continues for the benefit of the wife, husband, etc., a right

of action which, at the common law, would have terminated at the death, and enlarges its scope to embrace the injury resulting from the death. . . . If, therefore, the party injured had compromised for the injury, and accepted satisfaction previous to the death, there could have been no further right of action, and consequently no suit under the statute. It is a logical conclusion, also, that if the negligence of the person killed contributed proximately to the fatal injury, no action can be maintained on the statute, because he himself could have brought none had the injury not proved fatal. So, if the injury was caused by the negligence of a fellow servant, no action will lie under the statute against the master, unless the statute, by construction, appears to give it in such case. A question has also been made in some states whether suit could be maintained where the death was instantaneous; and in Massachusetts, under a somewhat nice and technical construction of the statute, it was decided that the action would not lie in such a case. But probably under no existing statute would it be so held now." In speaking of the measure of damages in such action, at page 272, the same author says: "If a parent sues for the killing of a minor child, who is yet too young to render services, it is manifest that for the time being there could be no pecuniary loss whatever, and whether the child, if living, would ever become serviceable, must be matter for speculation only. Yet, as the statutes plainly give the right of action for the benefit of the parent without restriction to circumstances, but manifestly assume that there is some injury in every case, the right to recover in these cases must be deemed unquestionable,"—citing cases.

The act known as "Lord Campbell's act," and frequently referred to as the "death act," was adopted by the legislature of this state in 1848. With a slight amendment in § 2, indicated below, the act is now embraced in §§ 10427 and 10428, Compiled Laws.

As originally enacted it was as follows: "Section 1. Be it enacted by the senate and house of representatives of the state of Michigan, whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages, in respect thereof, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have

been caused under such circumstances as amount in law to felony."

"Sec. 2. Every such action shall be brought by, and in the names of the personal representatives of such deceased person, and the amount recovered in every such action, shall be *for the exclusive benefit of the widow and next of kin of such deceased person and shall be distributed to such widow and next of kin* in the proportions provided by law in relation to the distribution of personal property, left by persons dying intestate; and in every such action, the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to the wife and next of kin of such deceased person."

In § 2 amendment was by striking out words in italics and inserting "distributed to the persons and."

Counsel for defendant contend that the clause of the statute which must control is the following: "And the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof,"—and the claim is asserted that, had not death ensued, Ion Lincoln could not have maintained an action for the recovery of his earning power, for that would belong to his parents. We do not agree with counsel's construction of this language. We have already shown, by quotation from Cooley on Torts, what that author understood by the words in parentheses in the above quotation. He says: "It is seen, on a perusal of this statute, that it gives an action only when the deceased himself, if the injury had not resulted in his death, might have maintained one." The author then illustrates by showing that if the injured party had compromised for the injury, and accepted satisfaction previous to his death, there could be no further right of action, or if he had been guilty of contributory negligence, no action could be maintained on the statute, because he himself could have brought none had the injury not proved fatal. He then proceeds to show that if the injury was caused by the negligence of a fellow servant, the result would be the same. Let us suppose that instead of having been drowned, the decedent had, by the wrongful act of the defendant, lost a leg or an arm. Would it be contended that he, although a minor, could not, in such case, maintain an action for the injury, including his pain and suffering? True, his measure of damages in such a case would be different from that of the plaintiff in this case. But that fact does not meet or answer the question. The statute does not say that he must be able to main-

tain the same action and recover the same damages, but "an action and recover damages in respect thereof." In respect of what? Manifestly, for the same wrongful act, neglect, or default. So we say that, although the measure of damages may differ, the cause of action is the same; that is, the wrongful act, neglect, or default. We are of opinion that counsel place a wrong interpretation upon the language of the statute.

It is also claimed by defendant that the case of Verlinde v. Michigan C. R. Co. 165 Mich. 371, 130 N. W. 317, disposes of the question in favor of the contention of the defendant. That action was brought under the "survival act," so called, the boy having lived two hours after his injury. The declaration contained one count, and averred the right of the father and mother to recover damages for pecuniary loss and injury, and the deprivation "of the value of the services, assistance, aid, comfort, society, and prospective earnings of intestate until he would have arrived at the age of twenty-one years," to the amount of \$5,000, and also that intestate would after becoming twenty-one years old, have earned \$40 a month, and, in consequence of his injuries, he suffered great pain, and his estate had suffered a loss thereby through pain and suffering, and what he would have earned after he became twenty one years old during his expectancy of life, etc. At the beginning of the testimony, defendant's counsel objected to the reception of any testimony, for the reason that there was a misjoinder of causes of action in one count. The objection was overruled and exception taken. Later in the course of the trial, the following paper, executed by the parents, was received in evidence, against the objection and exception of counsel for defendant: "We, the parents of Peter Verlinde, formerly of Waters, Michigan, now deceased, hereby severally surrender to the estate of said Peter Verlinde, all right of action for damages for the injuries sustained by him and his consequent death on June 20, 1908, through the claimed negligence of the Michigan Central Railroad Company, and all loss of earnings and earning capacity during his minority, which otherwise would have existed in us, or either of us, hereby granting such rights and claims to the said estate, and severally releasing such company from all such rights and claims upon our several parts." The language of Justice Blair, who wrote the opinion, upon the points here involved, was as follows: "We are of the opinion that the defendant's objections to the declaration and charge based thereon are well founded. The plaintiff could not combine

in one count a claim for loss of his son's services with his claim as administrator under the survival act, and recover for both in the same action. *Walker v. Lansing & Suburban Traction Co.* 144 Mich. 685, 108 N. W. 90; *id.*, 156 Mich. 514, 121 N. W. 271; *Fournier v. Detroit United R. Co.* 157 Mich. 589, 122 N. W. 299. Neither could the administrator combine in one count a claim under the death act, so called and a claim under the survival act, and recover both classes of damages. *Dolson v. Lake Shore & M. S. R. Co.* 128 Mich. 444, 87 N. W. 629; *Carbary v. Detroit United R. Co.* 157 Mich. 683, 122 N. W. 367. Independent of statute, the father could only recover for the loss of services accruing between the injury and the death. *Hyatt v. Adams*, 16 Mich. 180; *Merkle v. Bennington Twp.* 58 Mich. 156, 55 Am. Rep. 666, 24 N. W. 776. No cause of action survived for loss of services, which belonged to the father. *Walker v. Lansing & Suburban Traction Co.* *supra*. And the father could not confer upon the administrator a cause of action for loss of services subsequent to death which he himself did not possess."

We cannot agree with the contention of defendant relating to the *Verlinde* and *Walker* Cases, for they should be view together. In the *Walker* Case, suit was brought under the "survival act," and the damages which the administrator could recover were those which Mrs. Walker could have recovered in her lifetime had she lived to prosecute the suit. Inasmuch as her services belonged to her husband, she not having been emancipated, her personal representative, under that act, could not recover for the loss of the services. The court properly said, therefore: "No action survived for the loss of services, which belonged to the husband." In the *Verlinde* Case, the father claimed the right to recover for the loss of his minor son's services in an action brought under the "survival act," and the court very properly, we think, said: "No cause of action survived for loss of services, which belonged to the father." In other words, this court said that, inasmuch as the case was brought under the "survival act," the only damages which the administrator could recover were such as the boy could have recovered, and as his services belonged to the father, he could not recover for those. We think that when the distinction between the two causes of action is kept in mind, the difficulty disappears.

We are here dealing with the "death act," as all agree, and we think that the instant case is readily distinguished from the cases above referred to.

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Counsel for defendant have called our attention to *Osborn v. Gillett*, decided in the court of exchequer of England in 1873, and reported in L. R. 8 Exch. 88, 42 L. J. Exch. N. S. 53. In that case the declaration was for injuries caused to E., plaintiff's "daughter and servant," by the negligent driving of defendant's servant, by reason whereof she afterwards died; claiming as special damages the loss of E.'s services and her burial expenses. There was a special plea that E. was killed "on the spot." This plea was demurred to, and by a divided court the defendant was given judgment on the plea, and it was held that a master cannot maintain an action for injuries which cause the immediate death of his servant. Conceding, what does not appear in the case, that the daughter was a minor, this should be said of the decision: That it was not by a court of last resort, but by a court inferior to the King's bench and the common pleas. It was rendered twenty-five years after Michigan had adopted Lord Campbell's act, and after this court had construed that act in *Hyatt v. Adams*, 16 Mich. 180. Where a foreign statute has been construed by the courts of the state or county where first enacted, and subsequently such statute is adopted here, the general rule is that such construction will be followed by the courts of the adopting state, upon the principle of comity; but to this rule there are exceptions.

Our attention has also been called to *Griffiths v. Dudley*, L. R. 9 Q. B. Div. 357, decided in 1882, where Field, J., said: "*Read v. Great Eastern R. Co.* is a clear decision that Lord Campbell's act did not give any new cause of action, but only substituted the right of the representative to sue in the place of the right which deceased himself would have had if he had survived." We need only say that this language is opposed to the weight of authority in this country, as evidenced by the decisions and by text writers. *Cooley, Torts*, 264.

In *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, at page 69, 57 L. ed. 417, 421, 33 Sup. Ct. Rep. 192, Justice Lurton, in speaking of Lord Campbell's act, said: "This act has been, in its distinguishing features, re-enacted in many of the states, and both in the courts of the states and of England has been construed, not as operating as a continuance of any right of action which the injured person would have had but for his death, but as a new or independent cause of action for the purpose of compensating certain dependent members of the family for the deprivation pecuniarily resulting to them from his wrongful death. . . . In one of the earliest cases which

arose under the act, Coleridge, J., said: 'It will be evident that this act does not transfer this right of action to his representative, but gives to the representative a totally new right of action, on different principles.' *Blake v. Midland R. Co.* 18 Q. B. 93, 109. In *Seward v. The Vera Cruz*, L. R. 10 App. Cas. 59, Lord Blackburn said: 'A totally new action is given against the person who would have been responsible to the deceased if the deceased had lived, an action which . . . is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who under such circumstances suffers pecuniary loss.' But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury. *Tiffany, Death by Wrongful Act*, § 124; *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 230, 38 L. ed. 422, 14 Sup. Ct. Rep. 579; *Read v. Great Eastern R. Co.* L. R. 3 Q. B. 555, 9 Best & S. 714, 37 L. J. Q. B. N. S. 278, 18 L. T. N. S. 82, 16 Week. Rep. 1040; *Hecht v. Ohio & M. R. Co.* 132 Ind. 507, 32 N. E. 302; *Fowlkes v. Nashville & D. R. Co.* 9 Heisk. 829; *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271; *Southern Bell Teleph. & Teleg. Co. v. Cassin*, 111 Ga. 575, 50 L.R.A. 694, 36 S. E. 881." See also *Hurst v. Detroit City R. Co.* 84 Mich. 539, 48 N. W. 44. By the great weight of American authority, the right to recover in such a case is maintained. *St. Louis Southwestern R. Co. v. Henson*, 7 C. C. A. 349, 19 U. S. App. 169, 58 Fed. 531; *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553; *Cleveland, C. C. & St. L. R. Co. v. Baddeley*, 150 Ill. 328, 36 N. E. 965; *Atchison, T. & S. F. R. Co. v. Townsend*, 71 Kan. 524, 81 Pac. 205, 6 Ann. Cas. 191.

In *Watson v. St. Paul City R. Co.* 70 Minn. 514, 73 N. W. 400, the right is recognized, but as the statute of that state specially names the recipients, and does not include the husband, it was held that he could not recover; and the court calls attention to the feature that distinguishes their statute from ours. This distinguishing feature controls the decisions of a number of the states. *Steel v. Kurtz*, 28 Ohio St. 191; *Davis v. Guarnier*, 45 Ohio St. 470, 4 Am. St. Rep. 548, 15 N. E. 350; *Bream v. Brown*, 5 Coldw. 168; *Trafford v. Adams Exp. Co.* 8 Lea, 96; *East Tennessee V. & G. R. Co. v. Lilly*, 90 Tenn. 503, 18 51 L.R.A.(N.S.)

S. W. 243. There are states, notably Virginia, holding a different doctrine.

We think that the profession in this state would be surprised were we to hold, at this late day, that the father and mother of a minor child who had been instantaneously killed by the wrongful act of a defendant could not, through an administrator, maintain a suit for damages, or a husband for the wrongful death of a wife. Such right has been recognized in many cases in this state. *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205, 16 Am. Neg. Cas. 87; *Cooper v. Lake Shore & M. S. R. Co.* 66 Mich. 261, 11 Am. St. Rep. 482, 33 N. W. 306; *Rajnowski v. Detroit, B. C. & A. R. Co.* 74 Mich. 20, 41 N. W. 847; *Nelson v. Lake Shore & M. S. R. Co.* 104 Mich. 582, 62 N. W. 993; *Miller v. Meade Twp.* 128 Mich. 98, 87 N. W. 131; *Black v. Michigan C. R. Co.* 146 Mich. 568, 109 N. W. 1052; *Gorton v. Harmon*, 152 Mich. 473, 116 N. W. 443, 15 Ann. Cas. 461. Many other cases might be added to this list. It is true that the precise question here discussed was not raised in those cases, but the right to maintain the action under the death act was determined. The latest case to which our attention has been called is that of *Grand Trunk Western R. Co. v. Gilpin* (U. S. circuit court of appeals, seventh circuit) — C. C. A. —, 208 Fed. 126. It was there held that under our statute an action may be maintained by a husband against a railroad company for the wrongful killing of his wife, by which he lost her services, though death was instantaneous.

That the right of action under the death act constitutes assets of the estate of deceased was held in *Findlay v. Chicago & G. T. R. Co.* 106 Mich. 700, 64 N. W. 732.

2. This brings us to the second question discussed: Was the cause of death conjectural? It should be borne in mind that there is no living witness to the drowning, and that decedent is not here to give his testimony. In the absence of such testimony the presumption is that he and his companions were in the exercise of due care, which presumption is sufficient to permit recovery if negligence is shown on the part of the defendant. *Gilbert v. Ann Arbor R. Co.* 161 Mich. 73, 79, 125 N. W. 745; *Gates v. Beebe*, 170 Mich. 107, 135 N. W. 934; *Richardson v. Detroit & M. R. Co.* 176 Mich. 413, 142 N. W. 832. We cannot say, as matter of law, that the defendant was not guilty of any of the alleged negligence.

In *La Fernier v. Soo River Lighter & Wrecking Co.* 129 Mich. 596, at page 604, 89 N. W. 353, this court said: "While it is true that, simply because an accident has occurred, negligence is not to be pre-

sumed, still, in determining the question of negligence, the fact that an accident has occurred may be and should be taken into consideration, in connection with all other facts and circumstances of the case, for the purpose of determining whether in fact there was negligence."

The judgment of the Circuit Court is reversed, and a new trial granted.

OKLAHOMA SUPREME COURT.

JAMES K. PERRINE, Plff. in Err.,
v.

JARASALOV HANACEK.

(40 Okla. 359, 138 Pac. 148.)

Assault — liability of aider.

If one present at a quarrel encourages a battery, he assumes the consequences of the

Headnote by TURNER, J.

Note. — Civil liability of one who encourages an assault without physically participating therein.

The scope of this note is limited strictly to cases of encouragement, and therefore, does not include cases of assaults made in pursuance of requests of third persons or in execution of the orders of superiors. It is further limited to encouragement offered at the scene of the assault, either during the assault or immediately preceding.

General rule.

One who is present at the commission of an assault, encouraging it by words, gestures, looks, signs, or any other means, is liable for the damage as a principal. *Abney v. Mize*, 155 Ala. 391, 46 So. 230; *Hildreth v. Hancock*, 156 Ill. 618, 41 N. E. 155; *Phillips v. Phillips*, 7 B. Mon. 268; *Miller v. Shaw*, 4 Allen, 500; *Kuney v. Dutcher*, 56 Mich. 308, 22 N. W. 866; *Brouster v. Fox*, 117 Mo. App. 711, 93 S. W. 318 (*obiter*); *Newman v. Marshall*, 20 Jones & S. 202; *Daingerfield v. Thompson*, 33 Gratt. 136, 36 Am. Rep. 783; *Hilmes v. Stroebel*, 59 Wis. 74, 17 N. W. 539.

"If men present at a quarrel encourage a battery, by doing so they assume upon themselves the consequences of the acts done to the full extent, as much so as the party who does the beating. Often they are more culpable. It is not necessary that the encouragement should consist of appeals to the ruffian engaged in committing the battery, or that he should know what they are so doing. It is enough if they encourage and sanction what is being done, and manifest this by demonstrations of resistance to any who might desire to interfere to prevent it; or by words, gestures, or acts, indicating an approval of what is going on." *Frantz v. Lenhart*, 56 Pa. 365. 51 L.R.A. (N.S.)

act to its full extent as much as the party who does the beating; and where the evidence reasonably tends to connect defendant therewith as an aider and abetter, this court will not disturb a verdict against him.

(December 9, 1913.)

ERROR to the Superior Court for Oklahoma County to review a judgment in plaintiff's favor in an action brought to recover damages for an alleged assault and battery. Affirmed.

The facts are stated in the opinion.

Messrs. Burwell, Crockett, & Johnson, for plaintiff in error:

A party is bound by the theory on which the case was tried in the court below.

Bullen v. Arkansas Valley & W. R. Co. 20 Okla. 819, 95 Pac. 476; *Harris v. First Nat. Bank*, 21 Okla. 189, 95 Pac. 781; *Border v. Carrabine*, 24 Okla. 609, 104 Pac. 906; *Coyle v. Baum*, 3 Okla. 695, 41 Pac.

And although a party may not be actually present, if he is near enough to afford aid, and encourages the trespass, he is jointly guilty as a principal with the perpetrator of the assault. *Phillips v. Phillips*, 7 B. Mon. 268.

Although one is not present when an arrest occurs, if he sees the person in the custody of the officers and encourages them in their proceeding, he is, as a matter of law, aiding and abetting them, and, where the arrest amounts to an assault, must be held to the same liability as if actually present offering encouragement when the arrest occurred. *Cooper v. Johnson*, 81 Mo. 483.

Where several engage in baiting a peddler without any intention of inflicting injury upon him, and one act induces another until the peddler is injured by an intoxicated member of the company, the jury is warranted in finding that those who do not inflict the injury encourage it by their conduct. *Hirschman v. Emme*, 81 Minn. 99, 83 N. W. 482.

So, in *Haycraft v. Grigsby*, 88 Mo. App. 354, it is said that "if excessive flogging or other punishment is inflicted, the teacher, and all who encourage, aid, or abet him, are answerable therefor, regardless of whether the motive which prompted him or them was malicious or not."

Generally, as to liability of teacher for personal injury to pupil, see note in 65 L.R.A. 891.

Gronan v. Kukkuck, 59 Iowa, 18, 12 N. W. 748, upholds an instruction to the effect that one who, with knowledge of another's intention to commit an assault, acts in concert with him, and is present and encourages the assault, is liable therefor.

Oral encouragement.

In *Little v. Tingle*, 26 Ind. 168, the court held proper an instruction to the effect that:

389; *Morrison v. Atkinson*, 16 Okla. 571, 85 Pac. 472, 8 Ann. Cas. 486; *Blackwell, E. & S. W. R. Co. v. Gist*, 18 Okla. 516, 90 Pac. 889; *Dodder v. Moberly*, 28 Okla. 334, 114 Pac. 714.

Messrs. Pruett & Sniggs and Selwyn Douglas for defendant in error.

Turner, J., delivered the opinion of the court:

This is an action in damages for an assault and battery brought by Hanacek, defendant in error, against Jas. K. Perrine, plaintiff in error, in the district court of Oklahoma county. The last amended petition substantially states that on August 23, 1909, defendant and his son, Walter, were owning and operating a livery stable in Oklahoma City; that on said date one Halas hired a buggy from defendant, and, when the same was returned, the son committed an assault and battery upon plaintiff, a companion of Halas, with a club; and

if the defendant came up after the assault was commenced, and encouraged its continuance, and it was continued in pursuance of his counsel, he was equally liable with the principal therefor.

So, where the evidence in an action for assault and battery shows that the defendant, during the assault, expressed his interest in the cause of the principal, and his readiness to take part in the trouble, in an angry and excited manner, the jury is authorized in finding that the defendant aided or encouraged the assault. *Cleveland v. Stilwell*, 75 Iowa, 466, 39 N. W. 711.

One who curses another and directs a third person to throw him out is jointly liable with the third person, for the assault committed in pursuance of the direction. *Sellman v. Wheeler*, 95 Md. 751, 54 Atl. 612.

And it is held in *Daingerfield v. Thompson*, 33 Gratt. 136, 36 Am. Rep. 783, that a person who directs another to fire a pistol in the street, where it is an unlawful act, is responsible for the consequences of the act, and, although he expects the other to fire into the air, he is liable for damage done by firing through a door and hitting a person inside a building.

Where a husband who is in an adjoining room during an assault by his wife says that the assaulted is "not getting a lick amiss," he is jointly guilty of the assault. *Phillips v. Phillips*, 7 B. Mon. 268.

Brink v. Purnell, 162 Mich. 147, 127 N. W. 322, Ann. Cas. 1912A, 829, holds that it is not error to instruct a jury in an action for assault and battery that the defendant, who did not strike plaintiff, could be held liable if he instigated or encouraged the assault by such words as "kill him" uttered during the progress of the affray.

Where a person by his presence, words, and by actually holding a third person who is coming to the rescue, encourages, aids, and abets an assault, he is liable as a principal. *L.R.A.(N.S.)*

that defendant was then and there present aiding and abetting to his damage, etc. After answer filed in effect of a general denial, there was trial to a jury and judgment for plaintiff for \$2,939, and defendant brings the case here.

It is contended that there is no evidence reasonably tending to prove that defendant aided and abetted by telling his son to strike plaintiff, and hence the court erred in overruling the demurrer to the evidence. The evidence discloses that defendant and his son, Walter, were, on that day, keeping a livery stable in Oklahoma City; that on said date the plaintiff and one Halas, who had been fellow students at the university of Prague, and who were Bohemians, with a very imperfect knowledge of the English language, went to the stable where Halas hired a horse and buggy from defendant, paying \$2 in full therefor, and drove to the country. On their return to the stable they drove in, and Halas, who was a surveyor,

principal therefor. *Cooney v. Burke*, 11 Neb. 258, 9 N. W. 57.

And where the evidence shows that one defendant in an action for assault and battery took off his coat and "wanted to go at" the person threatened with assault; that another defendant said he could "lick" the one threatened, and that a third defendant held off assistance during the assault, it should go to a jury upon the question whether the three defendants were present encouraging, aiding, or exciting the assault. *Hilmes v. Stroebel*, 59 Wis. 74, 17 N. W. 539.

Persons who are present taking pleasure in an assault upon an aged drunken man, holding off assistance by their appearance of force, encouraging the assault by cries and words, and interfering only to prevent murder, are responsible for the consequences of the assault. *Gillon v. Wilson*, 3 T. B. Mon. 216.

Limitations of rule.

Mere presence at the commission of an assault, without encouraging it by word, act, or gesture, will not render one liable therefor. *Lister v. McKee*, 79 Ill. App. 210; *Cooper v. Johnson*, 81 Mo. 483; *Daingerfield v. Thompson* and *Hilmes v. Stroebel*, supra; *Rhinehart v. Whitehead*, 64 Wis. 42, 24 N. W. 401.

And silent approbation of or pleasure in an assault will not render one liable for the consequences thereof. *Blue v. Christ*, 4 Ill. App. 351, where the court says: "One is not responsible for a beating inflicted by another, however wrongful it may be, simply because he thinks the punishment deserved, or is pleased with it, or thinks well of it;" *Ryan v. Quinn*, 24 Ky. L. Rep. 1513, 71 S. W. 872, where the court says that "a man is not responsible for a beating inflicted by another because he thinks the

got out and took his tripod, photograph machine, and field glasses from the buggy. As he did so, Walter Perrine stepped up and said, "Give me a dollar more." Halas asked him why, whereupon young Perrine got mad and grabbed his tripod and called for defendant, who came out and laid hold of the machine, which Halas had in his hand, whereupon the latter called, in Bohemian, to plaintiff, who was on the sidewalk in front of the stable, to come and explain to him what they wanted; that, as he joined them, defendant, who had taken the machine away from Halas, said to his son, "God damn, God damn, get him," whereupon his son, who had a club in his hand, struck plaintiff a savage blow with it over the head, cutting it frightfully, causing him to bleed profusely, and the permanent loss of an eye. While there is no evidence that defendant struck the plaintiff with a club, the foregoing was abundant evidence tending to prove that he incited and encouraged his son to the commission of the violence complained of. That being true, whether he aided or abetted the assault was a question of fact properly sent to the jury. 28 Am. & Eng. Enc. Law, 566, says: "One who aids, abets, or incites, or encourages or directs by conduct or words, in the perpetration of a trespass, is liable equally with the actual perpetrator."

In *Frantz v. Lenhart*, 56 Pa. 365, several defendants were joined in an action of trespass for an assault and battery upon the plaintiff. The trial judge charged that any of them might be liable, although they did not put a finger on the plaintiff, provided they aided, encouraged, or abetted the act. The court, in reviewing on the charge, said: "If men present at a quarrel encourage a battery, by doing so they assume upon themselves the consequences of the acts done to the full extent, as much so as the party who does the beating. Often they are more culpable. It is not necessary that the encouragement should consist of appeals to the ruffian engaged in committing the battery, or that he should know what they are so doing. It is enough if they encourage and sanction what is being done,

and manifest this by demonstrations of resistance to any who might desire to interfere to prevent it; or by words, gestures, or acts, indicating an approval of what is going on. It is contrary to law—contrary to duty—and the law will not weigh very nicely the acts of particular individuals, to ascertain whether what was said or done by them has enhanced the injury, more or less than the acts of others. All so engaged are answerable for all the injury, and, had the judge charged the opposite of this, he would have committed a great error." In that case it seems the only evidence of defendants' participation was that, while standing on the pavement in front of a certain house with his wife and children, he stretched out his arms to catch plaintiff and said, "Here he is, kill him," as he came running down the street, and the verdict of the jury for \$1,000 was sustained after a remittitur down to \$700.

In *Donovan v. Consolidated Coal Co.* 88 Ill. App. 589, in the syllabus it is said: "One who in any manner indicates his desire that an act be done may be said to request it, and one who does anything in furtherance of an act may be said to aid or abet it."

In *Clark v. Bales*, 15 Ark. 452, in the syllabus it is said: "The defendant will be made liable for trespass, if it is proved that he came in aid of the person who committed it, . . . and where there are circumstances in proof, connecting a defendant with the trespass, and the jury finds a verdict against him, and the judge who heard the testimony refused to grant a new trial, this court will not disturb the verdict."

See also *McMannus v. Lee*, 43 Mo. 206, 97 Am. Dec. 386; *Welsh v. Cooper*, 8 Pa. 217; *Shepherd v. McQuilkin*, 2 W. Va. 90; *Sharpe v. Williams*, 41 Kan. 56, 20 Pac. 497.

There is no merit in the remaining assignments of error.

Affirmed.

All the Justices concur.

Petition for rehearing denied.

punishment deserved, or is secretly pleased to see it go on;" *Com. v. Middleby*, 187 Mass. 342, 73 N. E. 208.

However, proof that a person was present at the commission of an assault, without disapproving it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance, and approved it, and was thereby aiding or abetting it. *Mack v. Kelsey*, 61 Vt. 399, 17 Atl. 780; *Miller v. Shaw*, 4 Allen, 500; *Kuney v. Dutcher*, 56 Mich. 308, 22 N. W. 866.

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In *Kuney v. Dutcher*, the court says that such a statement of the law does not "countenance any idea that actual complicity need not appear. It is the other circumstances proved which must determine the intent, and not merely the absence of disapproval or opposition."

In *Swinfin v. Lowry*, 37 Minn. 345, 34 N. W. 22, it is held that where an intoxicated person commits an assault, those who furnish him with the liquor, but take no part in the assault, cannot be held liable therefor, on the ground that they encourage it.

E. L. D.

UNITED STATES CIRCUIT COURT OF
APPEALS, EIGHTH CIRCUIT.

LEWIS P. PARTEE, Admr., etc., of William McCain, Deceased, Plff. in Err.,
v.
ST. LOUIS & SAN FRANCISCO RAIL-
ROAD COMPANY.

(123 C. C. A. 292, 204 Fed. 970.)

Limitation of action — wrongful death
— failure of first action.

1. Section 5945, art. 17, chap. 87, Statutes of Oklahoma 1909, creates a cause of action unknown to the common law for death caused by the wrongful act of another, and requires such action to be commenced

Headnotes by SANBORN, Circuit Judge.

Note. — Limitation of actions: applicability of general provision giving additional time for bringing new action after failure of a previous suit, to cause of action created by a statute which prescribes a special limitation period.

As to the applicability of a tolling provision in a general statute, when the defendant is absent from the state, to a special limitation imposed by a statute creating a cause of action for wrongful death, see note to *Casey v. American Bridge Co.* 38 L.R.A. (N.S.) 521.

As to fault of plaintiff causing failure of suit as affecting his right to additional time allowed by statute for bringing new action, see note to *Minton v. LaFollette Coal, Iron & R. Co.* 11 L.R.A. (N.S.) 479.

As to the relation of new pleadings to statutes of limitation, generally, see notes to *Missouri, K. & T. R. Co. v. Bagley*, 3 L.R.A. (N.S.) 259, and *Bourdreaux v. Tucson Gas, E. L. & P. Co.* 33 L.R.A. (N.S.) 196.

As to the amendment of pleadings after the limitation period, by changing from common law to statute, or *vice versa*, or from a statute of one jurisdiction to a statute of another, see note to *Allen v. Tuscarora Valley R. Co.* 30 L.R.A. (N.S.) 1096.

The rule is well settled in a majority of the jurisdictions where the question has arisen, that, as a statute which creates a cause of action not known to the common law, and fixes the time within which an action must be commenced thereunder, is not a statute of limitation, but the right given thereby is a conditional one, and the commencement of the action within the time fixed is a condition precedent to any liability under the statute,—a general provision of the limitation statutes for additional time within which to bring a new suit after the failure of a previous action for the same cause, notwithstanding the new suit would otherwise be barred, has no application to a purely statutory cause of action upon which the statute creating it 51 L.R.A. (N.S.)

within two years. Section 5547, art. 3, of that chapter, provides that civil actions may be brought within the times limited in that article only, but that where in special cases a different limitation is prescribed by statute, the action shall be governed by such limitation. Section 5555 of article 3 declares that if any action be commenced within due time, and a judgment for the plaintiff therein be reversed, or he fail otherwise than on the merits after the time limited has expired, he may commence a new action within one year after the reversal or failure.

Held, § 5555 is inapplicable to actions created or permitted by § 5945, and the former section neither modifies nor extends the condition of the liability and action imposed by the latter section, that the action must be commenced within two years after the wrongful act or death.

provides that action must be brought within a certain time.

Thus, it has been held, as in *PARTEE v. ST. LOUIS & S. F. R. Co.* that a general provision of limitation statutes, for an extension of the time within which to sue, where there has been a failure, otherwise than upon the merits, of a previous action brought for the same cause, has no application to a cause of action for damages for wrongful death, created by a statute which expressly limits the time within which an action thereunder may be commenced. *Lake Shore & M. S. R. Co. v. Dylinski*, 67 Ill. App. 114; *Rodman v. Missouri P. R. Co.* 65 Kan. 645, 59 L.R.A. 704, 70 Pac. 642; *Cavanagh v. Ocean Steam Nav. Co.* 19 N. Y. Civ. Proc. Rep. 391, 13 N. Y. Supp. 540.

And a statute concerning general limitations, which permits the commencement of a new action within one year after a judgment is reversed or given against the plaintiff in certain contingencies, although the time limited for bringing such action has expired during the pendency of the first suit, does not apply to the filing of a bill in chancery to test the validity of a will, which is authorized solely by a statute which gives only three years after the probate of the will within which to file the bill,—such latter statute being not a statute of limitations, but a jurisdictional or enabling statute, and the court having no power to entertain the bill after the three years have passed. *Peacock v. Churchill*, 38 Ill. App. 634.

Likewise, a statute which provides for the renewal of an action after a dismissal thereof within six months does not apply to an action against a railroad company to recover an excess of money paid for freight, over and above the sum allowed by the railroad commission, brought under a statute giving a right of action and recovery against any railroad company for any wrong or injury inflicted on any person in violation of any rule or regulation provided by the railroad commissioners, which statute provides that all suits brought thereunder shall be brought within twelve months after

Same — statutory period — condition of action.

2. The time fixed for the commencement of an action unknown to the common law, by act of Congress or statute which creates or permits the action, is a condition of the liability and action thus created, and not a statute of limitations.

Statutes — general and special — harmonizing.

3. A special statute upon a particular subject and a general law must stand together, the one as the law of the specific subject and the other as the general rule, unless it clearly appears that it was the intention of the legislature to modify or repeal one or the other.

(April 25, 1913.)

the commission of the alleged wrong or injury. *Parmelee v. Savannah, F. & W. R. Co.* 78 Ga. 239, 2 S. E. 686.

And a section of the Code of Civil Procedure providing "that where an action is commenced within the time limited therefor, and it is terminated by a reversal of a judgment without awarding a new trial, or in any other manner than by voluntary discontinuance, dismissal for neglect to proceed, or a final judgment on the merits, the plaintiff may commence a new action for the same cause within one year after such reversal or termination," does not apply to a cause of action against a county, for compensation for the destruction of property in consequence of a mob or riot, which cause of action is created by a special law which fixes a special limitation period within which an action thereunder must be brought,—especially where, by another section of the Code, the chapter on limitations does not apply in "a case where a different limitation is specially prescribed by law." *Hill v. Rensselaer County*, 119 N. Y. 344, 23 N. E. 921, affirming 53 Hun, 194, 6 N. Y. Supp. 716.

Nor does a provision of the general statute of limitations, that a new action may be commenced within one year after a non-suit suffered in a previous action duly commenced for the same cause, apply to an action against a railroad company to recover damages for the killing of stock on the railroad at a point where it was not fenced, brought under a statute creating a cause of action for such killing, without proof of negligence, which statute provides a special limitation period for all actions instituted by virtue thereof (*Gerren v. Hannibal & St. J. R. Co.* 60 Mo. 405); or to an action against a mining corporation for personal injuries, brought under a statute "relating to safety and inspection of mines," which provides a special limitation as to the time within which actions shall be brought thereunder (*De Both v. Rich Hill Coal & Min. Co.* 141 Mo. 497, 42 S. W. 1081),—where the general limitation law also provides that the provisions thereof "shall not extend to any action which is,

ERROR to the District Court of the United States for the Eastern District of Oklahoma to review a judgment in defendant's favor in an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by the wrongful act of defendant. Affirmed.

The facts are stated in the opinion.

Argued before Sanborn, Circuit Judge, and William H. Munger and Trieber, District Judges.

Messrs. J. J. Henderson and G. W. Hutchins, for plaintiff in error:

Statutes of limitation must be construed strictly.

Angell, Limitations, § 485; *Re James*, 4 Okla. Crim. Rep. 94, 111 Pac. 947.

Where the legislature makes no excep-

or shall be, otherwise limited by any statute; but such action shall be brought within the time limited by such statutes."

A state statute which permits the commencement of a new action for the same cause within one year after the determination against the plaintiff, in certain cases, of a prior suit which was duly commenced, does not apply to a cause of action created by a Federal statute which fixes the limitation period within which an action must be commenced, in favor of a private individual, upon a contractor's bond given to the United States. *United States use of Gibson Lumber Co. v. Boomer*, 106 C. C. A. 164, 183 Fed. 726; *United States use of Tom J. Gardner Lumber Co. v. Boomer*, 106 C. C. A. 168, 183 Fed. 730.

And in the former case the court said: "We are also of the opinion that the limitation prescribed . . . is not merely a limitation on the remedy, but on the liability itself. The statute created a new legal liability, with a right to a suit for its enforcement, provided the suit was brought within one year after the performance and final settlement of the contract, and not later. The time within which the suit must be brought operates as a limitation of the liability itself, and not of the remedy alone. It is a condition attached to the right to sue at all. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute, and the limitation of the remedy is therefore to be treated as a limitation of the right."

But a statute allowing the bringing of a new action within one year after a reversal of the judgment, or a failure otherwise than upon the merits, in a previous action, duly commenced, notwithstanding the time limited for the action has expired, does apply to an action to foreclose a mechanics' lien, which is required by the mechanics' lien law to be brought within one year after the building has been completed, where such law also provides that "the practice, pleadings, and proceedings in such action shall be in conformity with the rules prescribed

tions in the statutes of limitations, the courts can make none.

Erwin v. Turner, 6 Ark. 14; State Bank v. Morris, 13 Ark. 291; Sedgw. Stat. & Const. Law, p. 41; Coffin v. Cottle, 16 Pick. 385.

A new suit brought is a continuation of the first as to statutes of limitation.

Clark v. Stevens, 55 Iowa, 361, 7 N. W. 591; Archer v. Chicago, B. & Q. R. Co. 65 Iowa, 611, 22 N. W. 894.

The commencement of the suit within due time is the saving clause, and entitles the plaintiff to the extension.

Martin v. Archer, Riley, L. 195.

Section 5555, Snyder's Compiled Laws of Oklahoma, should be construed to include actions for wrongful acts resulting in death.

Baltimore & O. R. Co. v. Collins, 11 Ohio C. D. 334; Meekins v. Norfolk & S. R. Co. 131 N. C. 1, 42 S. E. 333; Kenney v. Parks, 137 Cal. 527, 70 Pac. 557; Swift & Co. v. Hoblawetz, 10 Kan. App. 48, 61 Pac. 969; Trull v. Seaboard Air Line R. Co. 151 N. C. 545, 66 S. E. 586.

For every possible injury there is a right at common law, and where the remedy is withheld there must be one provided.

Bl. Com. p. 103; Osborn v. Gillett, L. R. 8 Exch. 98, 42 L. J. Exch. N. S. 53; Holmes v. Oregon & C. R. Co. 6 Sawy. 262, 5 Fed. 75; The Garland, 5 Fed. 924; Cutting v. Seabury, 1 Sprague, 522; Fed. Cas. No. 3,521.

The allegations in plaintiff's amended petition bring him within the statute, and

by the Code of Civil Procedure, so far as the same are applicable." Seaton v. Hixon, 35 Kan. 663, 12 Pac. 22; Hobbs v. Spencer, 49 Kan. 769, 31 Pac. 702.

And in North Carolina it is held that a Code provision that "if any action shall be commenced within the time prescribed therefor, and the plaintiff be nonsuited . . . the plaintiff . . . may commence a new action within one year after such nonsuit," does apply to an action for damages for wrongful death under another section of the Code, which prescribes the time within which such an action must be brought. Meekins v. Norfolk & S. R. Co. 131 N. C. 1, 42 S. E. 333; Trull v. Seaboard Air Line R. Co. 151 N. C. 545, 66 S. E. 586.

So, in Meisse v. McCoy, 17 Ohio St. 225, it was held that a section of the Code giving the right to commence a new action within one year after a failure of the plaintiff, otherwise than upon the merits, in an action duly commenced, notwithstanding the time limited for the action should have expired, applied to the plaintiff's case, which was in fact an action for wrongful death under a statute which prescribed a special limitation period,—of which fact, however, no point was made, the only question here having been as to whether or not the summons in the original action was so served that the action could be said to have been "commenced" within the meaning of the statute giving the additional time after failure otherwise than upon the merits.

And in Hoffman v. Delaware & H. Co. 85 Misc. 535, 147 N. Y. Supp. 475, it is held that a Code provision (§ 405) that, "if an action be commenced within the time limited therefor, and be terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment on the merits, the plaintiff may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such reversal or termination," does apply to a right of action for damages for wrongful death, given by another section (1902) of the Code, which provides that "such an action must

be commenced within two years after the decedent's death,"—notwithstanding the provision of another section (414), that the provisions of the chapter containing it and the first provision above quoted apply, and constitute the only rules of limitation applicable to a civil action or special proceeding, "except in a case where a different limitation is specially prescribed by law;" the provisions of § 414 having been held not to apply to or affect those of § 405, which is not one of the sections which relate to and prescribe rules of limitation, so that the benefits thereby conferred are in no wise diminished or affected by § 414.

In the Meekins Case, supra, the court said: "The defendant contends that this [general] provision is under the title in the Code applying to limitations, and that the time prescribed under § 1498 [giving the cause of action] is not strictly a statute of limitations. . . . But the original action was brought within the time prescribed in § 1498, and therefore it does not here matter what the nature of that prescription is. On the other hand, the time within which a new action may be commenced after a nonsuit, etc., is a statute of limitation, and applies to all cases where a nonsuit, etc., has been sustained. This statute . . . contains no exception of cases under § 1498, or of any other cases where the time prescribed for bringing the original action might not be strictly a statute of limitation. We know no cause why the privilege to commence a new action within a year after nonsuit should not apply equally to all cases of nonsuit. The statute makes no distinction, and there is certainly none in the reason of the thing, which is the same as to that class of cases as in any others."

And in the Trull Case, supra, the court said: "True, we have held in several well-considered decisions that the requirement of the statute . . . giving a right of action for death caused by the wrongful act, neglect, or default of another, that such action shall be 'brought within one year after such death,' is not in strictness a statute of limitation, but is a condition affecting

the defendant's demurrer confessed the allegations as being true, and such allegations are sufficient to remove the bar of the statute of limitation.

De Roberts v. Cross, 23 Okla. 888, 101 Pac. 1114.

Messrs. W. F. Evans, R. A. Kleinschmidt, and Fred E. Suits, for defendant in error:

Plaintiff's cause of action, being purely statutory, and one which did not exist at common law, is controlled by the limitation of two years prescribed in § 5945, and such limitation is a condition imposed upon the exercise of the right of action granted, and said cause of action is not affected by the saving clause contained in § 5555.

Archer v. Chicago, B. & Q. R. Co. 65 Iowa, 611, 22 N. W. 894; *Pardey v. Mechanicsville*, 101 Iowa, 266, 70 N. W. 189; *Cumming v. Jacobs*, 130 Mass. 420; *Rodman v. Missouri P. R. Co.* 65 Kan. 645, 59 L.R.A. 704, 70 Pac. 642; *Kansas City Hydraulic Press Brick Co. v. National Surety Co.* 93 C. C. A. 132, 167 Fed. 505; *Tiffany, Death by Wrongful Act*, § 121; 8 Am. & Eng. Law, 2d ed. 875; *The Harrisburg*, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140; *Webb v. Southern Cotton Oil Co.* 131 Ga. 682, 63 S. E. 135; *Gerren v. Hannibal & St. J. R. Co.* 60 Mo. 405; *Williams v. Quebec S. S. Co.* 126 Fed. 591; *Gregory v. Southern P. Co.* 157 Fed. 113; *Pittsburg, C. & St. L. R. Co. v. Hine*, 25 Ohio St. 629; *Dennis v. Atlantic Coast Line R. Co.* 70 S. C. 254, 106 Am. St. Rep. 746, 49 S. E. 869; *International Nav. Co. v. Lindstrom*, 60 C. C. A. 649, 123 Fed. 475; *Theroux v. Northern P. R. Co.* 12 C. C. A. 52, 27 U. S. App. 508, 64 Fed. 84.

Sanborn, Circuit Judge, delivered the opinion of the court:

This is an action for the death of William McCain, which is alleged to have been

caused by the wrongful act of the St. Louis & San Francisco Railroad Company. The action was not commenced within two years after the wrongful act or the death; but the plaintiff had commenced a similar action within the two years, had failed in that action otherwise than upon the merits, and had commenced this action within one year after the failure. He set forth these facts in his pleading, and the court below sustained a demurrer to it, and dismissed the action. This ruling is assigned as error.

Article 3, which is entitled, "Time of Commencing Civil Actions," of chapter 87 of Snyder's Compiled Laws of Oklahoma of 1909, contains these provisions:

"Section 5547. Limitations.—Civil actions can only be commenced within the periods prescribed in this article, after the cause of action shall have accrued; but where, in special cases, a different limitation is prescribed by statute, the action shall be governed by such limitation."

"Section 5555. New Action—Limitation.—If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die, and the cause of action survive, his representatives, may commence a new action within one year after the reversal or failure."

Article 17, which is entitled, "Causes of Action Which Survive, and Abatement of Actions," contains this provision:

"Section 5945. Action for Death—Limitation, etc.—When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act

the cause of action itself. . . . But in *Meekins's Case*, supra, the court held that when an action has been originally instituted within one year from the death, this requirement of the statute was complied with, and thereafter the action was subject to the provisions of the Code, § 166, now § 370, Revision, to the effect that if an action shall be commenced within the time prescribed therefor, and the plaintiff be nonsuited, etc., the plaintiff, etc., may commence a new action within one year after such nonsuit, etc. . . . Not only is this the primary significance of the language of the statute, giving a right of action in case of wrongful conduct causing death, and its true meaning, as established by these authoritative interpretations, but this construction is in accord with right, reason, and justice. No doubt the chief consideration for this 51 L.R.A. (N.S.)

requirement of the statute was to notify defendants, frequently the employers of labor in large numbers, that their attention might be drawn to the occurrence, and the evidence bearing upon it noted and in some way secured and preserved, and this purpose is reasonably met by the original institution of the action within the time specified. On the contrary, after action is commenced, a trial can rarely ever be had within the year. A deserving plaintiff is sometimes unavoidably interrupted in the preparation of his case. At times he may be presently surprised on the trial; and to hold that a nonsuit, rendered necessary in some such way, should bar any further action, would in many cases work grave injustice and amount to denial of a substantial right."

A. C. W.

or omission. The action must be commenced within two years. The damages cannot exceed \$10,000, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

The complaint in this court is that the court below held that § 5555 was inapplicable to this action, and that it could not be sustained because the plaintiff failed to comply with the condition of its maintenance fixed by § 5945, which created it,—failed to commence his action within two years of the wrongful act or death. In support of this complaint counsel argue that § 5555 is general in its terms and without exception, and that it should be held to apply to this and every action which is commenced within due time, wherein a judgment is reversed or the plaintiff fails on the merits after the time limited has expired, and he brings a new action within one year after the reversal or failure. In support of this contention they cite, and we have carefully read and considered, the opinions of the courts in *Meekins v. Norfolk & S. R. Co.* 131 N. C. 1, 42 S. E. 333; *Kenney v. Parks*, 137 Cal. 527, 70 Pac. 556; *Swift & Co. v. Hoblawetz*, 10 Kan. App. 48, 61 Pac. 969, and *Trull v. Seaboard Air Line R. Co.* 151 N. C. 545, 66 S. E. 586, 587. But by the common law no civil action lies for an injury which results in death. *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754, 757, 24 L. ed. 580, 582. The only foundation for this action is § 5945. In the absence of that section the plaintiff could have no action, and the defendant would have been exempt from liability for the death of McCain.

A statute which in itself creates a new liability gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. Such a statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability. *The Harrisburg*, 119 U. S. 199, 214, 30 L. ed. 358, 362, 7 Sup. Ct. Rep. 140; *Pollard v. Bailey*, 20 51 L.R.A. (N.S.)

Wall. 520, 526, 527, 22 L. ed. 376, 378; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 756, 30 L. ed. 825, 829, 7 Sup. Ct. Rep. 757; *Brunswick Terminal Co. v. National Bank*, 48 L.R.A. 625, 40 C. C. A. 22, 25, 26, 99 Fed. 635, 638, 639; *Pittsburg, C. & St. L. R. Co. v. Hine*, 25 Ohio St. 629, 634; *Dennis v. Atlantic Coast Line R. Co.* 70 S. C. 254, 106 Am. St. Rep. 746, 49 S. E. 869, 870; *International Nav. Co. v. Lindstrom*, 60 C. C. A. 649, 651, 123 Fed. 475, 477.

Because a special act and a general law must stand together, the one as the law of its particular subject and the other as the general rule, unless it clearly appears that it was the intention of the legislative body to modify or repeal one of them, because it does not appear that the legislature of Oklahoma intended by § 5555 to annul or to modify the specific conditions on which new actions were created or permitted by special statutes, but that body seems to have enacted this section to extend the time fixed by the general statutes of limitation of the state for the commencement of the ordinary actions governed by that statute, and because it is expressly provided by § 5547, which is found in the same article as § 5555, that where in special cases a different limitation from those fixed in that article is prescribed by statute, as there is in this case, the action shall be governed by such limitation, and not by those prescribed in that article, the provisions of § 5555 are inapplicable to actions for death by wrongful acts, and neither modify nor extend the condition of these liabilities and actions fixed by § 5945, that they must be commenced within two years after the respective injuries or deaths. *Rodman v. Missouri P. R. Co.* 65 Kan. 645, 649-653, 59 L.R.A. 704, 70 Pac. 642; *Gerren v. Hannibal & St. J. R. Co.* 60 Mo. 405, 411; *Theroux v. Northern P. R. Co.* 12 C. C. A. 52, 53, 27 U. S. App. 508, 64 Fed. 84, 85; *Anglo-American Land, Mortg. & Agency Co. v. Lombard*, 68 C. C. A. 89, 119, 132 Fed. 721, 751; *Atchison, T. & S. F. R. Co. v. Sowers*, 213 U. S. 55, 70, 53 L. ed. 695, 702, 29 Sup. Ct. Rep. 397; *Boston & M. R. Co. v. Hard*, 56 L.R.A. 193, 47 C. C. A. 615, 624, 108 Fed. 116, 125.

As this action was not commenced within the two years, it cannot be maintained, and the judgment below must be affirmed.

It is so ordered.

Petition for rehearing denied September 26, 1913.

ILLINOIS SUPREME COURT.

SOPHIA DUENSER, Admr., etc., of Mary Anne Bandlion, Deceased, Appt.,
v.
SUPREME COUNCIL OF THE ROYAL ARCANUM.

(262 Ill. 475, 104 N. E. 801.)

Insurance — certificate in favor of bigamous wife — validity.

A benefit society which issues a certificate in favor of a woman who married assured with knowledge that he had a wife living, under the belief that she was his lawful wife, cannot, as against the claim of the lawful wife, justify payment of the benefit to her upon his death, on the theory that she was dependent on him for support, since, although he had supported her, he was not obliged to do so, either legally or morally.

(February 21, 1914.)

APPEAL by plaintiff from a judgment of the Appellate Court, First District, reversing a judgment of the Circuit Court for Cook County in her favor in an action brought to recover the amount alleged to be due on a benefit certificate. Reversed.

The facts are stated in the opinion.

Messrs. Tinsman & Blocki and Rankin, Howard, & Donnelly, for appellant:

Where the person designated as beneficiary in the certificate is not within any eligible class, and there are persons living who are eligible, the fund does not lapse, but is held by the insurance order in trust for the eligible who then stands first in the order of eligibles.

Royal League v. Shields, 251 Ill. 250, 36 L.R.A.(N.S.) 208, 96 N. E. 45; Supreme Lodge, K. L. H. v. Menkhause, 209 Ill. 277, 65 L.R.A. 508, 101 Am. St. Rep. 239, 70 N. E. 567; Baldwin v. Begley, 185 Ill.

Note. — Who is a "dependent" within statute or rules defining beneficiaries of mutual benefit societies.

This note supplements notes on the same subject appended to Caldwell v. Grand Lodge, A. O. U. W. 2 L.R.A.(N.S.) 653; Royal League v. Shields, 36 L.R.A.(N.S.) 208; and Goff v. Supreme Lodge, R. A. 37 L.R.A.(N.S.) 1191.

In a recent case it was held that where the constitution and by laws of a fraternal benefit association, and the statute under which its charter is obtained, each authorize the issuance of beneficiary insurance certificates to members of the family, heirs, blood relations, or persons dependent upon the member, the term "dependent" as therein used is intended to include persons other than members of the family, heirs, or persons related by blood. Sovereign Camp, W. 51 L.R.A.(N.S.)

180, 56 N. E. 1065; Palmer v. Welch, 132 Ill. 141, 23 N. E. 412; Alexander v. Parker, 144 Ill. 355, 19 L.R.A. 187, 33 N. E. 183; Supreme Council, A. L. H. v. Perry, 140 Mass. 580, 5 N. E. 634; Bishop v. Grand Lodge, E. O. M. A. 112 N. Y. 627, 20 N. E. 562; Schmidt v. Northern Life Asso. 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800; Jewell v. Grand Lodge, A. O. U. W. 41 Minn. 405, 43 N. W. 88; Michigan Mut. Ben. Asso. v. Rolfe, 76 Mich. 146, 42 N. W. 1094.

A woman living with a man as his concubine, mistress, or paramour is not a member of his family within the meaning of the statutes and the constitution and by-laws of the defendant order, nor is she a dependent.

Miller v. Prella, 122 Ill. App. 380; Keener v. Grand Lodge, A. O. U. W. 38 Mo. App. 543; Royal League v. Shields, 251 Ill. 250, 36 L.R.A.(N.S.) 208, 96 N. E. 45.

If Mary Eva Roth, the person designated as beneficiary in the certificate, was neither the wife of nor a dependent on William Bandlion, then she cannot take under the benefit certificate.

Royal League v. Shields and Miller v. Prella, supra; Tyler v. Odd Fellows' Mut. Relief Asso. 145 Mass. 134, 13 N. E. 360.

Dependency cannot be founded on an immoral or illegal relationship existing between a man and a woman.

Royal League v. Shields and Miller v. Prella, supra; Keener v. Grand Lodge, A. O. U. W. 38 Mo. App. 543.

A woman who lives with a member of an insurance order in a state of adultery, and who enters into such relationship with knowledge of the fact that the member then had a wife living and children borne him by that wife, though afterward such woman causes a ceremony of marriage to be performed with her and the member as parties

W. v. Noel, 34 Okla. 506, 41 L.R.A.(N.S.) 648, 126 Pac. 787.

It was further held that the law does not undertake to prescribe just what degree of dependence is necessary, but that the test in each case is good faith, purity of purpose, material dependence, and material support. Ibid.

And in this case, it appearing that the benefit was payable to a woman who had nursed the insured, and to whose support he had contributed and to whom he was engaged to be married, the question whether she was a dependent was held to be for the jury. Ibid.

In Finch v. Bond, 158 Ky. 389, 165 S. W. 400, it was held that while a creditor has an insurable interest in the life of his debtor, he cannot be said to be a dependent upon the debtor merely because of the relationship of debtor and creditor.

J. T. W.

thereto, has not acted in good faith, and cannot, therefore, claim dependency, on account of such illicit relationship.

Royal League v. Shields, 251 Ill. 250, 36 L.R.A.(N.S.) 208, 96 N. E. 45; Alexander v. Parker, 144 Ill. 355, 19 L.R.A. 187, 33 N. E. 183; Lavigne v. Ligue des Patriotes, 178 Mass. 25, 54 L.R.A. 814, 86 Am. St. Rep. 460, 59 N. E. 674; Supreme Tent, K. M. v. McAllister, 132 Mich. 69, 102 Am. St. Rep. 382, 92 N. W. 770; James v. Supreme Council, R. A. 130 Fed. 1014; McCarthy v. Supreme Lodge, N. E. O. P. 153 Mass. 314, 11 L.R.A. 144, 25 Am. St. Rep. 637, 26 N. E. 866; Keener v. Grand Lodge, A. O. U. W. 38 Mo. App. 543.

Mary Eva Roth was not a dependent, either under the by-laws of the order or the statutes, hence could not take as such.

Royal League v. Shields, 251 Ill. 250, 36 L.R.A.(N.S.) 208, 96 N. E. 45; Supreme Council, A. L. H. v. Perry, 140 Mass. 580, 5 N. E. 634; Miller v. Prella, 122 Ill. App. 380; Alexander v. Parker, 144 Ill. 355, 19 L.R.A. 187, 33 N. E. 183.

There is no written evidence in this case to show the dependency of Mary Eva Roth upon William Bandlion, as required by the by-laws. When a party fails to produce evidence in his possession or under his control, the law presumes that if such evidence had been produced, it would be against the party so failing to produce it.

Central Stock & Grain Exch. v. Board of Trade, 196 Ill. 396, 63 N. E. 740; Flannery v. People, 127 Ill. App. 526; Princeville v. Hitchcock, 101 Ill. App. 588.

No person can be eligible to receive or participate in the benefit fund who did not bear to the deceased member some one of the relations provided for in the constitution and by-laws of the society, and who did not come within the scope provided for or permitted by the statutes of the state where the society was incorporated.

Kirkpatrick v. Modern Woodmen, 103 Ill. App. 468; Faxon v. Grand Lodge, B. L. F. 87 Ill. App. 262; Baldwin v. Begley, 185 Ill. 180, 56 N. E. 1065; Norwegian Old People's Home Soc. v. Wilson, 176 Ill. 94, 52 N. E. 41; Alexander v. Parker, 144 Ill. 355, 19 L.R.A. 187, 33 N. E. 183.

Neither the act of a member of a benefit society, in naming a person who is not within the classes of eligibles to be benefited, nor the act of the corporation making the certificate which is issued to such person, can deprive the beneficiaries designated by the by-laws of the order of their right to or interest in the funds under the certificate.

Alexander v. Parker, 144 Ill. 355, 19 L.R.A. 187, 33 N. E. 183; Faxon v. Grand Lodge, B. L. F. 87 Ill. App. 262; Palmer 51 L.R.A.(N.S.)

v. Welch, 132 Ill. 141, 23 N. E. 412; Supreme Council, A. L. H. v. Perry, 140 Mass. 580, 5 N. E. 634; Britton v. Supreme Council, R. A. 46 N. J. Eq. 102, 19 Am. St. Rep. 376, 18 Atl. 675.

The act of a member of a benefit society in naming an ineligible beneficiary, or the act of the society in issuing a certificate payable to such beneficiary, cannot defeat the right of the beneficiaries designated by law to claim the fund, as courts can control the payment of such fund in accordance with the rules of law.

Royal League v. Shields, 251 Ill. 250, 36 L.R.A.(N.S.) 208, 96 N. E. 45.

Mr. George H. Miller, with Messrs. Musgrave, Oppenheim & Lee, for appellee:

Where a benefit society issues a certificate to a member upon his representation that the beneficiary is his wife, and upon his death it pays to such beneficiary the amount mentioned in the benefit certificate, believing such person to be the widow of the member, it is relieved from any further liability thereon.

James v. Supreme Council, R. A. 130 Fed. 1014; Story v. Williamsburgh Masonic Mut. Ben. Assn. 95 N. Y. 474; Supreme Tent, K. M. v. McAllister, 132 Mich. 69, 102 Am. St. Rep. 382, 92 N. W. 770; Senge v. Senge, 106 Ill. App. 140; Wojanski v. Wojanski, 136 Ill. App. 614.

Where a false representation made by a member as to the relationship of the beneficiary to him induces a benevolent association to issue a benefit certificate naming such person as beneficiary, and where the association thereafter pays such benefit upon the member's death to such beneficiary without knowledge of the falsity of the representation, the true widow of such member is estopped from maintaining an action on such certificate against the association.

Koerts v. Grand Lodge, W. O. H. S. 119 Wis. 520, 97 N. W. 163; Supreme Council, A. L. H. v. Green, 71 Md. 263, 17 Am. St. Rep. 527, 17 Atl. 1048; Kotek v. Court of Honor, 152 Ill. App. 92.

Craig, J., delivered the opinion of the court:

This is an action of assumpsit originally brought in the circuit court of Cook county by Mary Anne Bandlion against the Supreme Council of the Royal Arcanum, to recover a benefit of \$3,000, which the appellee undertook by its constitution and by-laws to pay to the person, within certain classes, who should be designated by William Bandlion, and this suit is brought upon the obligation of appellee as evidenced by its constitution and by-laws. Subse-

quent to the institution of this suit, Mary Anne Bandlion died, and her daughter, Sophia Duenser, was appointed administratrix of her estate, and, by order of court, she, as such administratrix, was substituted as plaintiff.

The declaration in this case consists of three counts. The first count alleged the issuance to William Bandlion of a benefit certificate for \$3,000 on the 5th day of October, 1880, by appellee, and the designation therein as beneficiary of Mary Eva (Roth) Bandlion, his wife; that the defendant was a fraternal mutual benefit association organized under the laws of the state of Massachusetts; that on the 14th day of May, 1906, William Bandlion departed this life intestate, a member of the appellee order in good standing, and that due proof of his death was furnished to appellee; that, at the time of the issuance of the certificate, Mary Anne Bandlion was the lawful wife of William Bandlion, and so remained until his death, which facts were known to Mary Eva (Roth) Bandlion; that, under the statutes of Massachusetts, benefits could be payable only to the husband, wife, betrothed, child by legal adoption, parent by legal adoption, or relative of or a person dependent upon the member named in the certificate, and that the benefit was payable to Mary Anne Bandlion, as she was the only person in the line of eligibles entitled thereto; that, under the constitution, by-laws, and regulations of the defendant, in the event that the person designated as beneficiary was unable to take under the laws of the order, then the benefit should be payable, first, to the wife of the member. The second count alleges, among other things, that, under the statutes of Massachusetts and the by-laws and rules and regulations of the defendant, the beneficiaries are limited to certain classes, and that, Mary Eva (Roth) Bandlion not being within those classes, her designation as beneficiary was void. The third count consists of the common counts.

The plaintiff filed an amendment to the first and second counts of her declaration, in which she averred that the common law relating to what is known as common-law marriages was in full force in the state of Pennsylvania in the years 1853 and 1854, and that said common law was also in existence and in full force and effect in the state of Iowa in the year 1858, and for several years thereafter.

The evidence sufficiently shows the foregoing facts charged in the declaration, and further shows, and the appellate court so found as a fact, that William Bandlion, the assured, married Mary Anne Schiel, plain-

tiff's intestate, in the state of Pennsylvania in the year 1853 or 1854. In 1858 said William Bandlion and said Mary Anne, his wife, with their children, removed to Dubuque, Iowa. Five children were born to them in Pennsylvania and Iowa. He left his family and came to Chicago in April, 1864. His wife, Mary Anne, lived in Dubuque until after his death. Mary Eva (Roth) Bandlion, the beneficiary designated in the benefit sued on, lived in the city of Dubuque in the same block with and a few doors from William Bandlion and his family for several years prior to 1864, and there knew the Bandlions, visited at their home, and knew that they were living together as husband and wife, and there is evidence that William Bandlion was in the habit of going to see her. In 1864 she came to Chicago and there met the assured. On March 12, 1868, they were married in Chicago by the pastor of the German Lutheran church, and lived together as husband and wife from the time of their marriage until the death of the assured, May 14, 1906. In 1871 a daughter was born to them and lived with them as their child until her marriage, in 1890. On the death of the assured, Mary Eva (Roth) Bandlion submitted proofs of the death of the assured, and the defendant society paid the amount of the benefit certificate to her on July 5, 1906. Thereafter the attorneys for Mary Anne Bandlion wrote to the supreme secretary of the appellee company demanding payment of the amount provided in the benefit certificate, which the appellee refused. On November 19, 1906, Mary Anne Bandlion brought this suit. She died on August 11, 1907, and her daughter, Sophia Duenser, her administratrix, as stated above, was substituted as plaintiff. There was a verdict and judgment for plaintiff for \$3,000 in the circuit court, from which the defendant prosecuted an appeal to the appellate court for the first district, where the judgment of the circuit court was reversed, but the case was not remanded. The case is brought to this court by appeal, a certificate of importance having been granted.

The constitution and by-laws of the appellee order, from the record in the case, show the object of the order was to establish a widows' and orphans' benefit fund, which, on satisfactory evidence of death, should be paid to the wife, children, relatives, or other persons dependent upon such member, as limited and described in the laws of said order. Section 323 provides that each applicant shall enter upon his application the name, residence, relation, or dependence of the person or class to

whom he desires his benefit paid. Section 324 is as follows:

"Section 324. A benefit may be made payable to any one or more persons of any of the following classes only: Class First, Grade 1.—Member's wife. Grade 2.—Member's children, and children of deceased children, and member's children by legal adoption. In either of which cases no proof of dependency of the beneficiary designated shall be required. . . . Class Second:

(1) To affianced wife, or to any person who is dependent upon the member for maintenance (food, clothing, lodging, or education), in either of which cases written evidence of the affianced relation or dependency, within the requirements of the laws of the order, must be furnished to the satisfaction of the supreme secretary before the benefit certificate can be issued.

(2) Neither the decision of the supreme secretary nor the issuance of the benefit certificate shall be conclusive as to the facts of the affianced relation or dependency.

(3) If such satisfactory evidence, either of the affianced relation, dependency, or legal adoption, is not furnished, as hereinbefore provided, prior to the decease of the member, no benefit shall be paid unless such evidence is furnished satisfactory to the supreme secretary and the examiner of claims."

It is further provided, under the heading "Failure of designation and the death of beneficiaries," that the dependency must exist at death. Sections 329 and 330 read as follows:

"Section 329. No benefit shall be payable to a person or persons of class second, mentioned in § No. 324, unless the dependency therein required to be shown exists at the time of the member's death, in which case proof of such dependency at the member's death shall be furnished in writing, to the satisfaction of the supreme regent, whose decision thereon shall be final and conclusive upon all parties in interest before payment of the benefit shall be made.

"Section 330. If, at the time of the death of a member who has designated as beneficiary a person of class second, the dependency required by the laws of the order have ceased or shall be found not to have existed, or if the designated beneficiary is his wife and they shall be divorced upon the application of either party, or if any designation shall fail for illegality or otherwise, then the benefit shall be payable to the person or persons mentioned in class first, if living, in the shares and order of precedence, by grades, as therein enumerated, the persons living of each precedent grade taking in equal shares, *per capita*, to the exclusion 51 L.R.A. (N.S.)

of all persons living of subsequently enumerated grades."

The appellate court found, in substance, that, notwithstanding the fact found by it and herein set out, that appellant's intestate, at the time of bringing suit, was the lawful wife of the assured, the appellee company was justified in paying the amount of the benefit certificate, as it did, to Mary Eva (Roth) Bandlion, on the grounds that the constitution of the defendant society gives express power to provide that on the death of a member a sum not exceeding \$3,000 be paid to "persons dependent upon such member," and the by-laws provide that a benefit may be made payable "to any person who is dependent upon the member for maintenance (food, clothing, lodging, or education)." Section 1 of our statute relating to fraternal benefit societies provides that death benefits shall be paid only to the families "or to persons dependent on the member." Such finding of the appellate court is the principal error assigned by appellant and relied on for reversal.

There is no doubt but that the appellee company could, under proper circumstances, issue a policy of insurance or benefit certificate payable, in the event of death, to someone dependent on the assured. But the benefit certificate in this case was not so issued. It was issued supposedly to the wife of the assured, and for the reason that she stood in the relation of wife to the assured, and not because of the fact—even if such were the fact—that, by reason of living with the assured as his wife, she was a person dependent for food, clothing, etc., upon him. It is also apparent that the policy was paid by the appellee company for the same reason, namely, that the company supposed it was paying to one who had been the wife, and was then the lawful widow, of the assured, and there is nothing in the record to show that any evidence of such dependency was given or required, either at the time of the issuance of the benefit certificate or at the time of its payment, which under the rules of the society would be necessary in the case of issuing or paying benefit certificates to those who were dependent. This being true, can the appellee company now justify the payment it made by establishing the fact, or assuming, that the person to whom payment was made was, in fact, a dependent, under the meaning of the constitution and by-laws of the said society?

The assured was a married man, living with his wife and children in Dubuque, Iowa, at the time he first became acquainted with Mary Eva Roth, and she knew that. The evidence shows that, after the assured

left Dubuque, Mary Eva Roth was not seen there. It is certain that he came to Chicago, and that she came there about the same time he did, and that shortly after her arrival in Chicago they met, and a few years afterwards a marriage ceremony was performed between them. At that time, as shown by the record, she was twenty-four years old. She admitted that prior to the marriage she saw him frequently. Her testimony was as follows: "He asked me if I would marry him. I asked him, 'What's the matter with them out there?' He said he didn't know anybody had any right on him. Then he asked me to write my father, and they objected, and I wrote him." Her marriage was bigamous and void, for the reason that the assured then had a living wife. *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Schmisseur v. Beatrie*, 147 Ill. 210, 35 N. E. 525. She was never the legal wife of William Bandler. Her family were still living in Dubuque, Iowa. It appears from the evidence that she was in correspondence with them, and she could easily have ascertained whether the assured was in a position to make her his legal wife. It would be different if he had met her as a stranger, claiming to be single, and she had married him in entire good faith, believing him to be a single man, and was without any means of learning otherwise, and had no reason to suspect that he was not free to contract with her a lawful marriage. Under the circumstances, she was not one who was, in law, dependent upon him. She could not have compelled him to support her under the laws of this state. *Alexander v. Parker*, 144 Ill. 355, 19 L.R.A. 187, 33 N. E. 183; *Palmer v. Welch*, 132 Ill. 141, 23 N. E. 412; *Supreme Council, A. L. H. v. Perry*, 140 Mass. 580, 5 N. E. 634; *Britton v. Supreme Council, R. A.* 46 N. J. Eq. 102, 19 Am. St. Rep. 376, 18 Atl. 675; *Royal League v. Shields*, 251 Ill. 250, 36 L.R.A.(N.S.) 208, 96 N. E. 45. Besides, there is no evidence in this case to show that she was dependent upon the assured at the time of his death, or that the proof of such dependency at the time of his death was furnished in writing, which was required by the by-laws of the appellee company before she was entitled to take as a dependent.

In the case of *Story v. Williamsburgh Masonic Mut. Ben. Asso.* 95 N. Y. 474, it was held that Mary Story, who had married the assured in good faith and lived with him for sixteen years prior to his death, believing herself to be his lawful wife, could recover against the defendant company, and that it was unnecessary to examine the evidence and determine whether the assured

was the husband of another woman whom he had previously married in England, and who was living and undivorced at the time of his death; that, while the society had a by-law which prescribed the object and duty of the association on the death of a member, and contemplated a payment to the person who should be his lawful widow, this was not such a limitation of the power of the company as to prevent it from requiring as the beneficiary a person who might be designated by the member as holding to him the relation of wife. The rules and by-laws of the defendant company were different from those of appellee here, as appears from the opinion in that case, and it was not a question whether the lawful wife should recover, or one who in good faith supposed she was the lawful wife. The action was by the beneficiary named in the policy, against the association, which was attempting to defeat recovery.

In *James v. Supreme Council, R. A. (C. C.)* 130 Fed. 1014, the court held that the defendant association had the power to insure the life of its member for the benefit of any person who occupied a relation of dependency to such member, and that the question of dependency was not determined solely by the legality of the marriage relation.

It is true that there might be cases where a valid policy of insurance could be issued in favor of some person who was dependent upon the assured, and there might be cases where the question of dependency would be the controlling fact, and not the relationship of the assured or the legality of such relationship as stated in the policy, but those cases are distinguishable from the case at bar. We are referred to no case which holds that a woman can live with a man under a void marriage, with a knowledge of the facts such as Mary Eva Roth possessed in this case, and bring herself within the class of those who are dependent for support, legally or morally, upon the man whom she so lived with. The fact, if such be the fact, that he did live with her and support her for many years, does not in any way make the so-called dependency binding upon him as against his lawful wife.

We do not think that, under the facts of this case, Mary Eva Roth was a dependent upon the assured, or that the amount of this benefit was paid to her by the appellee association as such dependent, or could have been legally paid to her as such dependent. The by-laws of the association provide that, where the person designated as beneficiary in the certificate is not within any eligible class, and there are persons living who are eligible, the fund does not

lapse, but is held by the insurance order in trust for the eligible who then stands first in the order of eligibles. The appellee, then, was liable, in the event of the death of the assured, to pay the amount of said benefit certificate to Mary Anne Bandlion, his lawful widow. *Royal League v. Shields*, 251 Ill. 250, 36 L.R.A.(N.S.) 208, 96 N. E. 45; *Supreme Lodge, K. L. H. v. Menkhausen*, 209 Ill. 277, 65 L.R.A. 508, 101 Am. St. Rep. 239, 70 N. E. 567; *Baldwin v. Begley*, 185 Ill. 180, 56 N. E. 1065; *Palmer v. Welch*, 132 Ill. 141, 23 N. E. 412; *Alexander v. Parker*, 144 Ill. 355, 19 L.R.A. 187, 33 N. E. 183.

For the reasons given, the judgment of the Appellate Court will be reversed, and the judgment of the Circuit Court will be affirmed.

Judgment reversed.

Petition for rehearing denied April 14, 1914.

OKLAHOMA SUPREME COURT.

J. F. TAYLOR, Plff. in Err.,
v.

F. E. ANDERSON et al.

(40 Okla. 316, 137 Pac. 1183.)

Sale — official weigher — constitutionality.

Act approved March 7, 1913 (Sess. Laws 1913, chap 24, p. 41), providing that, where lists of baled cotton are purchased from local buyers and stored in cotton yards owned and operated by cotton weighers, they shall reweigh the same before it is removed from their yard; that the purchasers may be pres-

Headnote by TURNER, J.

Note. — Validity of statute or ordinance for the settlement of weights as between buyer and seller by public weigher.

As to the power of a municipality to regulate the use of scales by merchants, as distinguished from the power to require that articles be weighed by public weighers, see *Parker v. Austin*, 23 L.R.A.(N.S.) 266, and the note thereto.

The validity of regulations as to the weight of a loaf of bread is discussed in a note to *Chicago v. Schmidinger*, 44 L.R.A.(N.S.) 632.

Statutes or ordinances requiring that certain articles when bought or sold be weighed upon public scales by official weighers, fees therefor to be paid by the parties, appear to be common, and are generally upheld as valid police regulations. *Petty v. State*, 102 Ark. 170, 143 S. W. 1067; *O'Maley v. Freeporf*, 96 Pa. 24, 42 Am. 51 L.R.A.(N.S.)

ent, and (§ 4), "when any cotton shall be reweighed in their presence, they shall accept the weights as being correct and make final settlement on the same;" and (§ 5) that when the same is reweighed according to the provision of said act "the transaction between the buyer and seller as to weights shall be at an end, and neither party shall have any recourse on the other,"—held to be a legislative attempt to make conclusive, between the parties to a sale, the finding of the fact of the weight of the cotton by the weigher, and hence is unconstitutional as denying the buyer or seller, when sued by the other, due process of law.

(January 13, 1914.)

ERROR to the District Court for Cleveland County to review a judgment in plaintiffs' favor in a suit to enjoin defendant from reweighing baled cotton pursuant to an alleged unconstitutional act. Affirmed.

The facts are stated in the opinion.

Mr. Ralph C. Hardle for plaintiff in error.

Messrs. Burwell, Crockett, & Johnson for defendants in error.

Turner, J., delivered the opinion of the court:

On October 8, 1913, defendants in error brought suit in the district court of Cleveland county against J. F. Taylor, plaintiff in error, the object of which is to test the constitutionality of an act approved March 7, 1913 (senate bill 77, chap. 24, Sess. Laws 1913). The petition substantially states that one of the plaintiffs, Wm. Morgan, Jr., is a local cotton dealer at Norman, and, as such, had, together with other cotton owned by him, twenty bales of cotton stored in the cotton yard operated by defendant at that place; that his coplaintiff,

Rep. 527; *Davidson v. Sadler*, 23 Tex. Civ. App. 600, 57 S. W. 54, and other cases infra this note.

However, in *Cincinnati v. Broadwell*, 3 Ohio Dec. Reprint, 286, it was held that an ordinance providing for a penalty for anyone following the business of weighing other than the city weigher and his deputies was unconstitutional.

In *Dawson v. Thornton*, 134 Ga. 476, 68 S. E. 73, an ordinance creating the office of public weigher and making it his duty "in all cases of disagreement between seller and buyer, to weigh all cotton and other products sold by weight when requested to do so, and give his certificate for the same," was held to be valid, inasmuch as it does not compel all persons buying or selling cotton to have it weighed by the public weigher, but provides for his weighing only when there is a dispute and he is requested to do so.

And in *Barfield v. Stevens Mercantile Co.*

Anderson, Clayton, & Company, of Oklahoma City, are dealers in cotton, which they buy from local dealers for resale and export; that said Morgan, as the owner of the twenty bales aforesaid, theretofore sold the same to said Anderson, Clayton, & Company, and agreed to deliver the same to them f. o. b. Norman, with weights guaranteed at the compress at Oklahoma City; that said Taylor, whose yard is the only one in Norman, refused and still refuses to surrender possession of said twenty bales of cotton to plaintiffs on demand, and refuses to permit them to remove the same, except after the same are reweighed and 10 cents

per bale paid him therefor as weigher, which plaintiffs refused to pay; that defendant threatens to and will reweigh not only that but all cotton belonging to plaintiffs which may be stored in his said yard from time to time, and will claim and charge such fee for reweighing, and will not deliver said cotton except upon the payment of the fee aforesaid. It is further charged that defendant in so doing pursuant to said act, which is alleged to be unconstitutional for certain reasons set forth in the petition. The prayer is that the defendant be enjoined from so doing, and for general relief. After answer filed, in effect a general admission and a

85 S. C. 186, 67 S. E. 158, a statute providing for a public cotton weigher at certain places was held invalid as being a special law where a general law could be made applicable, and the contention that such a statute unduly abridges the constitutional right of a citizen in the conduct of his private business of buying and selling cotton, by private weighing satisfactory to seller and buyer, is discussed, but not decided.

But while the legislature has power to authorize cities to appoint a weighmaster, and to require all coal sold in the city to be first weighed by him, an ordinance making such provision will not be sustained unless power to pass it is clearly given by statute. *Savanna v. Robinson*, 81 Ill. App. 471.

Thus, authority to a municipality to establish public scales and weights to be the standard to which all others in the town should conform did not authorize it to require that all cotton be weighed by the public weigher before sale. *Sumter v. Deschamps*, 4 S. C. 297.

So, without special statutory authority, a municipality cannot apply its ordinance requiring coal sold within the city to be weighed by the public weighmaster, to coal purchased by a state institution which is located within the municipality. *Fulton v. Sims*, 127 Mo. App. 677, 106 S. W. 1094.

Such ordinances should provide reasonable facilities for the accommodation of the public. *Davis v. Anita*, 73 Iowa, 325, 35 N. W. 244.

They are not invalid as in restraint of trade. *Raleigh v. Sorrell*, 46 N. C. (1 Jones, L.) 49; *State v. Tyson*, 111 N. C. 687, 16 S. E. 238; *State v. Smith*, 123 Iowa, 654, 96 N. W. 899; *Stokes v. New York*, 14 Wend. 87; *Yates v. Milwaukee*, 12 Wis. 673; *Gaines v. Coates*, 51 Miss. 335.

Nor as creating a monopoly. *Re Miller*, 16 Manitoba, L. Rep. 479.

Nor as a tax on interstate or foreign commerce. *Charleston v. Rogers*, 2 McCord, L. 495, 13 Am. Dec. 751; *State v. Pittsburg & S. Coal Co.* 41 La. Ann. 465, 6 So. 220, affirmed in 158 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459.

It is only the idea that articles are to be exposed for sale in the city that makes their weighing the subject of police regulation, and a provision prohibiting any person from weighing any article and charging a fee 51 L.R.A. (N.S.)

therefor, whether such article is to be offered for sale in the city or not, is invalid. *Lamar v. Weidman*, 57 Mo. App. 507.

An ordinance requiring coal and certain other products to be weighed by the city weigher is not arbitrary or unfair because sales under a certain weight are excluded from its provisions. *State ex rel. Stone v. Eck*, 121 Minn. 202, 141 N. W. 106; *St. Charles v. Elsner*, 155 Mo. 671, 56 S. W. 291.

The fees charged must be for purposes of regulation only. If they are so large as to make it apparent that they are intended for revenue purposes, they are unlawful. *Taylor, C. & Co. v. Pine Bluff*, 34 Ark. 603; *Logan v. Logan*, 2 B. Mon. 143.

But inasmuch as the exact fee necessary to cover the cost of maintaining a city scale could not be determined in advance, the courts will not declare such an ordinance, providing for the weighing of coal, to be invalid unless the fee is plainly unreasonable and excessive. *Wills v. Ft. Smith*, 70 Ark. 221, 66 S. W. 922.

And in *Yates v. Milwaukee*, 12 Wis. 673, it was held that the fact that the official weigher was appointed on condition that he pay \$500 per annum to the municipality for the privilege of weighing, and collecting the fees provided for, did not render the ordinance invalid.

In accord with *Taylor v. Anderson* is *Vega S. S. Co. v. Consolidated Elevator Co.* 75 Minn. 308, 43 L.R.A. 843, 74 Am. St. Rep. 484, 77 N. W. 973, in which it was held that a statute making the weight of wheat as found by the state weighmaster conclusive is unconstitutional, as in effect depriving the party of his day in court.

As in *State ex rel. Hadley v. Goffee*, 192 Mo. 670, 91 So. 486, the court said (*dictum*) that a statute could not give the certificates of a state weigher the force of conclusive evidence, but could make them *prima facie* evidence.

However, in *Vega S. S. Co. v. Consolidated Elevator Co.* supra, it was further held that the constitutionality of the statute can be impeached only when the party complaining is free from fault or negligence, and the evidence is strong and clear that there was in fact a substantial mistake.

R. L. S.

plea of justification under the act, there was judgment for plaintiffs upon the pleadings, the act was declared unconstitutional, the injunction granted as prayed, and defendant brings the case here.

The act assailed is entitled: "An Act to Require the Reweighing of Baled Cotton Before Removing the Same from Any Local Cotton Yard, and Fixing the Penalty for the Violation Thereof."

It provides:

"Section 1. Every person, firm, or corporation in the state of Oklahoma, engaged in the business of cotton buying, where lists of baled cotton are purchased from local buyers, and the said cotton stored in cotton yards or cotton warehouses owned or operated by cotton weighers, shall, before removing same, have said cotton reweighed.

"Sec. 2. Every owner or operator of a cotton yard or warehouse in the state of Oklahoma shall be required, before allowing any cotton to be removed from his yard or warehouse, to reweigh same in the presence of the owner or purchaser, or some agent of said purchaser or owner of same; and, with indelible ink, mark on the bale, in figures, the weight of the bale."

Section 3 provides for testing the scales and a second weighing.

"Sec. 4. Persons, firms, or corporations engaged in the cotton business, coming under the provisions of this act, shall have the right to be present at the reweighing of any cotton they may purchase or desire to purchase, and when any cotton shall be reweighed in their presence, they shall accept the weights as being correct and make final settlement on the same.

"Sec. 5. When a list of cotton has been reweighed before leaving the cotton yard, according to the provisions of this act, the transaction between the buyer and seller as to the weights shall be at an end, and neither party shall have any recourse on the other."

Section 6 provides the penalty for a violation of the act. Which means (§ 1) that when Morgan bought this cotton and had it stored in this yard, before he can deliver it to the purchasers, his coplaintiffs, he must have it reweighed by the weighmaster of the yard. Not only that, but § 2 makes it the duty of the weighmaster to reweigh it, before it is removed, in the presence of one of the contracting parties or his agent, and to mark the weight of the bale thereon. After § 3 makes provision for any person in interest not satisfied with the weights to require a reweighing, § 4 provides that the purchasers may be present at the reweighing, and that when they are, and the cotton is reweighed in their presence, "they shall accept the weights as being correct and 51 L.R.A. (N.S.)

make final settlement on the same." Not only that, but, whether the purchaser is present or not, § 5 provides that, when the cotton is reweighed as provided, "the transaction between the buyer and seller as to weights shall be at an end, and neither party shall have any recourse on the other." Which means that such finding of the weights by the weigher is conclusive as to that fact, and, should either buyer or seller sue the other and base his claim on over or under weights resulting from fraud, accident, mistake, or anything else, the other has the right to plead the weights, as found by the weighmaster, in bar of the action, and the same will be conclusive evidence of the weight of the cotton. Whether the act is an attempt to confer upon the weighmaster the exercise of judicial power, or denies to either party to the sale the equal protection of the law, or whether it interferes with plaintiffs' right to contract, or whether it constitutes a taking of private property for private use (and it seems to be open to objection on any of these grounds), and for any of the reasons stated is unconstitutional, we need not say, for true it is it was beyond the power of the legislature to make the finding of the weighmaster conclusive evidence of that fact, and hence the act must fall, as denying to the party sued, whether buyer or seller, due process of law.

Cooley's Const. Lim. 7th ed. p. 526, says: "Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon the like reasons, it would not, we apprehend, be in the power of the legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land requires an opportunity for a trial; and there can be no trial if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob the citizen of his property; witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law,"—citing Blackwell, Tax Titles, pp. 100 et seq.

In McCready v. Sexton, 29 Iowa, 356, 4 Am. Rep. 214, the court said: "Wantlan v. White, 19 Ind. 470, which was a proceeding by habeas corpus in behalf of an enlisted minor who had taken the usual oath of his age. His discharge was resisted on the ground that the act of Congress provided that 'the oath of enlistment taken by the re-

cruit shall be conclusive as to his age.' The court held 'that it is not competent for the legislative power to declare what shall be conclusive evidence of a fact.' . . . In *Groesbeck v. Seeley*, 13 Mich. 329, *Quinlon v. Rogers*, 12 Mich. 169, and *Case v. Dean*, 16 Mich. 12, a statute making the tax deeds conclusive evidence of title was held absolutely void, as being in conflict with the constitutional provision guarantying due process of law for the protection of life, liberty, and property."

In *Wilson v. Wood*, 10 Okla. 279, 61 Pac. 1045, the court, in the syllabus, said: "The legislature has no power to declare a tax deed or the recitals therein conclusive evidence of a compliance with those matters which are essential to the exercise of the taxing power, or to those matters which are necessary to be done in order to divest the title of the former owner or those claiming through him, and to execute a valid deed of conveyance. In judicial investigations the law of the land requires an opportunity for trial, and there can be no trial if only one party is suffered to produce his proofs. Except in those cases which fall within the established doctrine of estoppel at the common law, or cases resting on like reasons, it is not within the power of the legislature to declare that a particular item of evidence shall preclude a party from establishing his rights in opposition to it,"—and after quoting approvingly from Judge Cooley, as we have done, cited *Weeks v. Merkle*, 6 Okla. 714, 52 Pac. 929.

In *Graves v. Northern P. R. Co.* 5 Mont. 556, 51 Am. Rep. 81, 6 Pac. 16, it was held that a statute rendering a railroad company liable for cattle killed by it, at a valuation to be conclusively fixed by appraisers, was unconstitutional as denying a right to trial by jury.

In *Vega S. S. Co. v. Consolidated Elevator Co.* 75 Minn. 308, 43 L.R.A. 843, 74 Am. St. Rep. 484, 77 N. W. 973, plaintiff was a common carrier of freight on the Great Lakes between two certain points; defendant owned and operated a public grain elevator at one of them. On a certain day S. M. & Co. proceeded to transport, on one of plaintiff's ships, a certain number of bushels of wheat stored in said elevator, to the other point. The wheat, while being delivered from the elevator to the ship, was weighed out by the assistant state weighmaster, under the laws of Minnesota. Gen. Stat. 1894, § 7675, after prescribing the duties of the weighmaster, one of which was to weigh said grain, provided that "the action and certificates of such weighmaster

and his assistants in the discharge of their aforesaid duties shall be conclusive upon all parties either in interest or otherwise, as to the matters contained in said certificates." When the grain was delivered to consignee, there was a shortage, which was paid for by the carrier pursuant to the terms of the bill of lading, who thereupon, becoming subrogated to his rights, brought suit against the elevator company for the amount of the shortage. On the trial the court directed a verdict for defendant, and in effect held that the statute in question made the finding of the weighmaster as to the weights conclusive of that fact as between the parties. In passing, speaking to the statute, the court said: "But is it competent for the legislature to make the weight thus ascertained absolutely conclusive? We are of the opinion that it is not. The legislature cannot in this manner provide for the arbitrary exercise of power, so as to deprive a person of his day in court to vindicate his rights. And the law which closes his mouth absolutely when he comes into court is the same, in effect, as the law which deprives him of his day in court. See *Cooley*, Const. Lim. 6th ed. p. 452; 6 Am. & Eng. Enc. Law, 2d ed. p. 1050; *Graves v. Northern P. R. Co.* supra; *Johns v. State*, 55 Md. 350; *Wantlan v. White*, 19 Ind. 470."

Missouri, K. & T. R. Co. v. Simonson, 64 Kan. 802, 57 L.R.A. 765, 91 Am. St. Rep. 248, 68 Pac. 653, was a suit against the railway company for a shortage of hay shipped over its lines. There was judgment for plaintiff and the company appealed. The action was brought under Gen. Stat. 1901, §§ 5938-5947, which among other things provided that the railway company should furnish track scales for weighing hay and issue duplicate bills of lading, and concluded one of the sections thus: "And in any action hereafter brought against any railway company, for or on account of any failure or neglect to deliver any such grain, seed or hay to the consignee, or his heirs or assigns, either duplicate of such bill of lading shall be conclusive proof of the amount of such grain, seed or hay so received by such railway company." To escape liability the railway company offered to prove that the full amount of hay receipted for in the bills of lading had not in fact been received by it. In passing upon the admissibility of the evidence, the court held that part of the statute quoted to be unconstitutional, admitted the evidence, and said: "Is it in the power of the legislature thus to create a conclusive presumption" of evidence "in a matter of private contract? We are constrained to

believe that it is not. Every suitor is entitled to his day in court, and to have his case determined on such evidence as legal policy will allow. It is doubtless competent for the legislature to prescribe many of the rules of evidence. The subjects of the competency of witnesses, the order of trial, the burden of proof, the effect of public records, the certification of copies of official documents, the prima facie character of certain evidence, and other like matters which pertain to the practice rather than the right of proving causes, are lawfully within the sphere of legislative regulation; but it is not within the power of the legislature to exclude from the courts that which proves the truth of a case, nor, on the other hand, to compel them to receive that which is false in character." And in the syllabus: "The provision of chapter 100 of the Laws of 1893 (Gen. Stat. 1901, §§ 5938-5947) which makes the specification of weights in bills of lading issued by railroad companies for hay, grain, etc., shipped over their lines, conclusive evidence of the correctness of such weights, is unconstitutional because denying to the companies due process of law, and because wrongfully depriving the courts of the judicial power to determine the weight and sufficiency of evidence." See also *People ex rel. Hillel Lodge No. 72 I. O. B. B. v. Rose*, 207 Ill. 352, 69 N. E. 762; *McNulty v. Toof*, 116 Ky. 202-210, 75 S. W. 258; *State v. Schlenker*, 112 Iowa, 642, 51 L.R.A. 347, 84 Am. St. Rep. 360, 84 N. W. 698; *Southern P. Co. v. Railroad Comrs. (C. C.)* 78 Fed. 236; *Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920; *Chicago, M. & St. P. R. Co. v. Minnesota* 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Little Rock & Ft. S. R. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55; *Corbin v. Hill*, 21 Iowa, 70; *Weeks v. Merkle*, 6 Okla. 714, 52 Pac. 929; *White v. Flynn*, 23 Ind. 46; *Groesbeck v. Seeley*, 13 Mich. 329; *Wantlan v. White*, 19 Ind. 470; *Marx v. Hanthorn*, 148 U. S. 172, 37 L. ed. 410, 13 Sup. Ct. Rep. 508; *Abbott v. Lindenbower*, 42 Mo. 162.

We are therefore of the opinion that the whole act is unconstitutional and must fall. We say the whole act for the reason that the purpose of the act was to accomplish one object only, which was to make the determination of the weights by the weighmaster conclusive evidence of that fact. Where such is the case, the whole act must fall, for it is impossible to suppose that the legislature would have passed the act with its ultimate object eliminated therefrom.

No other question being raised, the judgment of the trial court is affirmed.
51 L.R.A.(N.S.)

IOWA SUPREME COURT.

S. H. PATE, Appt.,

v.

T. H. RALSTON.

(— Iowa, —, 139 N. W. 906.)

Sale — repudiation of contract — right to recover purchase price.

1. To enable the seller to recover the purchase price when a contract for personalty is repudiated before time for delivery arrives, he must so far perform his part of the contract as to vest title in the purchaser.

Same — notice not to ship — effect.

2. That a purchaser of personal property notifies the seller that he will not receive it, and that shipment will be at seller's risk, does not obviate the necessity of delivery or tender to entitle the seller to recover the purchase price of the property.

(February 12, 1913.)

Note. — Right to recover purchase price where purchaser wrongfully repudiates his contract.

- I. Executed contracts, 736.
- II. General rule as to executory contracts, 738.
- III. Necessity of delivery, tender, or appropriation.
 - a. In general, 740.
 - b. Where contract contemplates some act by purchaser, 742.
 - c. As affected by terms of contract.
 1. Necessity of complying with contract, 743.
 2. Delivery to carrier, 744.
 - d. Where contract does not require delivery, 745.
 - e. Waiver of delivery or tender, 745.
- IV. Refusal of buyer to accept property when tendered.
 - a. In general, 746.
 - b. Where article is manufactured for the buyer, 749.
- V. Repudiation of contract by buyer before tender or appropriation.
 - a. In general, 751.
 - b. Articles to be manufactured, 754.
 - c. Other articles, 756.
- VI. Repudiation by buyer before article is completed, 758.
- VII. Where title is expressly reserved by seller until purchase price is paid, 759.
- VIII. Pleadings, 760.

Scope.

Attention is called to a distinction between a wrongful repudiation and a mere breach of the contract, by the purchaser. While, of course, a wrongful repudiation of a contract constitutes a breach of it, the purchaser may breach the contract with-

APPEAL by plaintiff from a judgment of the District Court for Woodbury County in defendant's favor in an action brought to recover the purchase price of nursery stock alleged to have been sold by plaintiff to defendant. Affirmed.

Statement by Ladd, J.:

Action for the purchase price of fruit shrubs and trees resulted in a verdict being directed for defendant and judgment entered thereon. The plaintiff appeals.

Messrs. J. W. Hallam and C. H. Rinker, for appellant:

Defendant had no right to rescind the contract without the consent of the nursery company.

out repudiating it. Indeed, he may breach the contract and at the time be insisting upon its performance. It is intended to include herein only cases where the purchaser repudiates the contract. This excludes cases where the purchaser denies liability on the contract of sale, on the ground that the property has not been delivered to him, as where it has been destroyed in transit; also cases where the purchaser refuses to accept property tendered to him, where he bases his refusal on the claim that the property tendered does not conform to the contract, either because of defects existing in it originally or injuries to it during transportation. It is, of course, impracticable to point out all the different classes of cases excluded, but the foregoing are sufficient to illustrate where the line of exclusion is drawn.

A case illustrative of one type of cases excluded is *United States v. Andrews*, 207 U. S. 229, 52 L. ed. 185, 28 Sup. Ct. Rep. 100, construing a contract of sale to intend delivery to a carrier for transportation, and holding that the risk of transportation was on the buyer, and he could not lawfully refuse to receive the goods on the ground that they were injured during transportation, and that notwithstanding such injury the seller was entitled to recover the purchase price.

I. Executed contracts.

The authorities are agreed that a contract of sale of goods, executed to the extent at least that title has passed to the buyer, will entitle the seller to recover the purchase price, where he has fully performed upon his part, although he still retains possession of the goods, and although the buyer has refused to accept and settle for them. Upon this point the cases are so harmonious that no attempt has been made to gather them. The following, while by no means exhaustive of such authorities, are sufficient to illustrate the rule:

—*Bullock v. Finley*, 28 Fed. 514, holding that an action may be maintained for the purchase price of articles which had been

McAlister v. Safley, 65 Iowa, 719, 23 N. W. 139; *Connor v. Bennke*, 100 Iowa, 743, 69 N. W. 414; *McCormick Harvesting Mach. Co. v. Markert*, 107 Iowa, 340, 78 N. W. 33; *John A. Roebling's Sons Co. v. Lock Stitch Fence Co.* 130 Ill. 660, 22 N. E. 518; *Redhead Bros. v. Wyoming Cattle Invest. Co.* 126 Iowa, 410, 102 N. W. 144.

No tender or inspection was necessary after the defendant had signified his determination to refuse to receive the goods.

Williams v. Triplett, 3 Iowa, 518; *McCormick Harvesting Mach. Co. v. Markert*, 107 Iowa, 340, 78 N. W. 33; 28 Am. & Eng. Enc. Law, 6; 24 Am. & Eng. Enc. Law, 1086; 15 Am. & Eng. Enc. Law, 937, 938; 35 Am. & Eng. Enc. Law, 171; *Loftus v. Riley*, 83 Iowa, 503, 50 N. W. 17; *Roberts*

tendered to the purchaser, although the latter refused to receive them;

—*Browning v. McNear*, 145 Cal. 277, 78 Pac. 722, holding that delivery or tender is unnecessary where the contract amounts to an actual sale;

—*Lassing v. James*, 107 Cal. 348, 40 Pac. 534, sustaining an action for the purchase price of hay in fields, sold to be fed to cattle from the stack, the contract being regarded as having passed title;

—*Pusey & J. Co. v. Dodge*, 3 Penn. (Del.) 63, 49 Atl. 248, holding that where title has passed, the seller may maintain an action for the purchase price although there has been no delivery;

—*Bagley v. Findlay*, 82 Ill. 524, stating the rule that where the purchaser of goods at a specific contract price refuses to take and pay for them, the seller may store the goods for the purchaser and give him notice that he has done so, and then recover the full contract price;

—*International Filter Co. v. Hartman*, 141 Ill. App. 239, holding that upon the refusal of the purchaser to accept and pay for a certain described machine, the seller may store it by giving notice thereof to the purchaser, and sue for the purchase price;

—*Smith v. Eitel*, 121 Ill. App. 464, holding that where there has been a completed sale of property, although there has been no delivery thereof, if the purchaser, upon tender, refuses to accept it, the seller may maintain an action for the purchase price;

—*Wells v. Maley*, 6 Ky. L. Rep. 77 (sale of specific property);

—*Middlesex Co. v. Osgood*, 4 Gray, 447; *Nichols v. Morse*, 100 Mass. 523, 1 Am. Rep. 139; *Morse v. Sherman*, 106 Mass. 430; *Turner v. Langdon*, 112 Mass. 265; *Frazier v. Simmons*, 139 Mass. 531, 2 N. E. 112; *Putnam v. Glidden*, 159 Mass. 47, 38 Am. St. Rep. 394, 34 N. E. 81; *Mitchell v. Le Clair*, 165 Mass. 308, 43 N. E. 117;

(In Massachusetts the court regards as executed every contract, where the article is set aside for the purchaser, or in some way designated as the subject-matter of the contract, although delivery is yet to be made and the purchase price paid, and it is held

v. Mazeppa Mill Co. 30 Minn. 413, 15 N. W. 680; Lapham v. Bossemeyer Bros. 5 Neb. (Unof.) 343, 98 N. W. 699; Windmiller v. Pope, 107 N. Y. 674, 14 N. E. 436; Gleckler v. Slavens, 5 S. D. 364, 59 N. W. 323; John A. Roebbling's Sons Co. v. Lock Stitch Fence Co. 130 Ill. 680, 22 N. E. 518; Scribner v. Schenkel, 128 Cal. 250, 60 Pac. 860.

The contract was complete when accepted at Bloomington, Illinois, the home of the nursery company.

Tegler v. Shipman, 33 Iowa, 194, 11 Am. Rep. 118; Sachs v. Garner, 111 Iowa, 425, 82 N. W. 1007; Wind v. Iler, 93 Iowa, 316, 27 L.R.A. 219, 61 N. W. 1001; Hamilton v. Jos. Schlits Brewing Co. 129 Iowa, 172, 2 L.R.A. (N.S.) 1078, 105 N. W. 438.

that the purchase price for property sold under such contracts may be recovered, although the purchaser refuses to accept the property when tendered him.)

—Backes v. Black, 5 Neb. (Unof.) 74, 97 N. W. 321, distinguishing between an executory and executed contract of sale, and holding that in the former case, for the refusal of the purchaser to accept the property tendered thereof, the seller's remedy is an action at law for damages, which ordinarily are the difference between the market value and the contract price; and that on the other hand, where the contract was executed, that is where, by the terms of the contract, the title passes although the seller is to deliver the property if the purchaser refuses to accept it when tendered, this refusal does not preclude the seller from recovering the purchase price;

—Clark v. Greeley, 62 N. H. 394, holding that as a general rule under a contract for the sale of specific chattels at a stated price, where nothing remains to be done to designate the property sold or the price to be paid, title immediately vests in the buyer, and the seller has the right to recover the purchase price;

—Hunter v. Wetsell, 84 N. Y. 549, 38 Am. Rep. 544, holding that on the sale of a designated lot of hops at a stipulated price per pound, it was a sufficient offer of performance to support an action for the purchase price, for the seller to offer to deliver the hops, which by the terms of the contract were to be delivered at a place to be designated by the purchaser, where the latter refused to designate any place of delivery, since in such case the seller did all he could do, and stood in such a capacity of complete performance as to entitle him to recover the purchase price. It is said that such a case was not one of merely an executory contract, in which the title did not pass;

—Heiser v. Mears, 120 N. C. 443, 27 S. E. 117, stating the rule that in a contract for the sale of specified articles then in existence and ready for delivery, if the purchaser refuses compliance with the contract, the seller has three remedies, one of which

Messrs. H. B. Walling and Griffin & Page, for appellee:

A delivery of the nursery stock in question, or at least a tender of delivery, was absolutely necessary to maintain an action for the contract price of the goods.

3 Page, Contr. §§ 1435, 1441; Oklahoma Vinegar Co. v. Carter, 116 Ga. 140, 59 L.R.A. 122, 94 Am. St. Rep. 112, 42 S. E. 378; Unexcelled Fire-Works Co. v. Polites, 130 Pa. 536, 17 Am. St. Rep. 788, 18 Atl. 1058; Thomson v. Kyle, 39 Fla. 582, 63 Am. St. Rep. 193, 23 So. 12; Davis v. Bronson, 2 N. D. 300, 16 L.R.A. 655, 33 Am. St. Rep. 783, 50 N. W. 836; Moline Scale Co. v. Beed, 52 Iowa, 307, 35 Am. Rep. 272, 3 N. W. 96; First Nat. Bank v. Reno, 73 Iowa, 145, 34 N. W. 796; Snyder

is the right to treat the property as that of the buyer and sue for the contract price;

—Henderson v. Jennings, 228 Pa. 188, 30 L.R.A. (N.S.) 827, 77 Atl. 453, holding, upon the theory that the right of property in a real estate mortgage not then in existence passed to the purchaser upon his execution of an agreement to purchase the same at a designated time in the future, that upon his refusal to receive the mortgage and pay for it, he could not defeat an action by the seller for the purchase price;

—Edson v. Magee, 43 Pa. Super. Ct. 207, holding that title to butter, when set apart and stored for the purchaser, passed to the latter, and he could not defeat an action for the purchase price by subsequently refusing to receive it;

—Graham v. Burgiss, 78 S. C. 404, 59 S. E. 29 (sale of shares of stock);

—McClure v. Williams, 5 Sneed, 718 (rule stated);

—Ogburn-Dalchau Lumber Co. v. Taylor, — Tex. Civ. App. —, 126 S. W. 48, holding that the seller may maintain an action for the purchase price of specific property, although when tendered to the purchaser, the latter refused to receive it;

—Sour Lake Townsite Co. v. B. Deutser Furniture Co. 39 Tex. Civ. App. 86, 94 S. W. 188 (sale of specific articles).

Delivery is not essential where the sale is complete and there is a manifest intention of the parties to pass the title without it. Bradley v. Wheeler, 44 N. Y. 495.

And it is held that there may be a bargain and sale of goods sufficient to transfer title and thus to support an action for goods bargained and sold, without any such delivery as will amount to a transfer of possession. Frazier v. Simmons, 139 Mass. 531, 2 N. E. 112; Turner v. Langdon, 112 Mass. 265; Morse v. Sherman, 106 Mass. 430; Middlesex Co. v. Osgood, 4 Gray, 447.

And it has been held that upon a sale of an animal at auction upon credit, after the expiration of the credit period, the seller may recover from the purchaser the contract price without delivering or offering to deliver the animal, the purchaser having failed and refused to take it away.

v. Tibbals, 32 Iowa, 447; McClung v. Kelley, 21 Iowa, 508; Cook v. Logan, 7 Iowa, 142; Courtright v. Leonard, 11 Iowa, 32; Harwick v. Weddington, 73 Iowa, 300, 34 N. W. 868; Hambel v. Tower, 14 Iowa, 530; Rosenthal v. Risley, 11 Iowa, 541; Davis v. Budd, 60 Iowa, 144, 14 N. W. 211; Mellinger v. Hunt, 94 Iowa, 351, 62 N. W. 813; Augustine v. McDowell, 120 Iowa, 401, 94 N. W. 918; Martin Bros. v. Lesan, 129 Iowa, 573, 105 N. W. 996; Allen v. Elmore, 121 Iowa, 241, 96 N. W. 769; McAlister v. Safley, 65 Iowa, 719, 23 N. W. 139; Hamilton v. Finnegan, 117 Iowa, 623, 91 N. W. 1039; Loftus v. Riley, 83 Iowa, 503, 50 N. W. 17; Minneapolis Threshing Mach. Co. v. Zemanek, 130 Iowa, 120, 106 N. W. 512; Tuttle-Chapman Coal Co. v. Coaldale Fuel

Co. 136 Iowa, 382, 113 N. W. 827; Ridgeway Dynamo & Engine Co. v. Pennsylvania Cement Co. 221 Pa. 160, 18 L.R.A.(N.S.) 613, 70 Atl. 557; Gardner v. Deeds, 116 Tenn. 128, 4 L.R.A.(N.S.) 740, 92 S. W. 518, 7 Ann. Cas. 1172; Welch v. Spies, 103 Iowa, 389, 72 N. W. 548.

Ladd, J., delivered the opinion of the court.

The defendant, at the solicitation of one Shearer, an agent of plaintiff, purchased fruit shrubs and trees. The order therefor read:

No 49.

December 6, 1909.

I, Thomas H. Ralston, have this day bought of Saddler Bros. Nurseries, Bloom-

The ground of this decision is that the seller had a lien upon the animal for the purchase price, and would not be required to waive this lien by a tender in order to maintain an action to recover the purchase price. Wade v. Moffett, 21 Ill. 110, 74 Am. Dec. 79.

II. General rule as to executory contracts.

While there is much confusion and more or less conflict among the authorities as to when the seller of goods may maintain an action for the purchase price where the purchaser refuses to receive the goods, the cases are practically uniform in holding or recognizing that an action to recover the purchase price of an article cannot be maintained if, at the time of the commencement of the action, the contract is still executory in the sense that title has neither actually nor constructively passed to the purchaser. See upon this point notes to *Acme Food Co. v. Older*, 17 L.R.A.(N.S.) 808, and *Fairbanks, M. & Co. v. Heltsley*, 28 L.R.A.(N.S.) 248.

This doctrine is either expressly held or clearly recognized by substantially all the cases considering the question, including the cases asserting in general terms, that one of the remedies of a seller of goods by executory contract, where the contract is breached by the buyer, is to retain the goods for the latter and recover the purchase price; for the very assertion of the rule includes, as a condition of recovering the purchase price, the appropriation of the goods to the contract, thereby vesting the title in the purchaser, the seller simply retaining a lien on the property to secure the purchase price. Hence, it is fair to presume that the cases asserting the right of the seller under an executory contract to recover the purchase price, where the purchaser refuses to perform, in characterizing the contract as executory, refer to it either as of the date of its execution or as of the time of its breach by the purchaser, or at least as of some time prior to the commencement of the action.

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Many of the cases which deny the right of the seller of goods by executory contract to perform on his part and thereafter recover the purchase price, on the ground that his performance had vested title in the purchaser, are inconsistent in that they at the same time sustain the right of the seller of goods by executory contract to sell the goods for and in behalf of the purchaser, and recover the difference between the proceeds of such sale and the contract price, where the purchaser refuses to perform. For this remedy can be sustained only on the theory that title has vested in the purchaser. If the title has not vested in him, it is of course clear that the sale would be by the seller of his own goods. This distinction is pointed out in *Lincoln v. Charles Alshuler Mfg. Co.* 142 Wis. 475, 28 L.R.A.(N.S.) 780, 125 N. W. 908, holding that where an executory contract of sale has never been completed by the seller, he cannot treat the goods as property of the purchaser and sell them as the latter's goods; hence he cannot base a cause of action on the theory of a resale and recover the difference due between the proceeds of the resale and the original contract price, but in such case his action is for damages for breach of contract, determinable as of the time of the breach, and limited according to the familiar rule that the damages can be only such as may be reasonably considered to have been in mutual contemplation by both parties at the time of making the contract, as the natural result of the breach.

The really important question therefore, and the question herein considered, is whether the seller of personal property by executory contract may recover the purchase price where he has appropriated the goods to the purchaser at the time of or before he brings his action. Upon this question the courts are at variance, owing largely to different views as to the specific application of very general rules, which frequently result in the creation of some very arbitrary distinctions not required by expository law or demanded by expediency. Indeed, some of these distinctions are in-

ington, Illinois, the following bill of trees, etc., to be forwarded in the spring of 1910, which I agree to pay for in cash, value received, when they arrive at Anthon, Iowa. [Here follows list.] Total amount of my order is \$2,215. I will not countermand this order. The articles are to be delivered in good condition.

[Signed] T. H. Ralston,
P. O. Anthon, Iowa,
R. R. No. 1, Residence 1½ N. W.
J. C. Shearer, Canvasser.

The defendant wrote plaintiff February 15, 1910: "I withdraw the order for trees, etc., given Dec. 6th, 1909." To this plaintiff responded two days later: "Kindly read copy of your contract for nursery stock

and you will note that the contracts read that you will not countermand the order, therefore your trees will be shipped in proper time for planting, next spring." The defendant, on February 19, 1910, answered: "I decline to receive the trees, and, if you ship them, you will do so at your own risk." A member of plaintiff's firm testified on cross-examination that "the stock was taken from the ground somewhere between the 10th or 15th of December. We sold no other stock of that grade that year except some pear trees, but sold a great deal of other stock and put it away until the next season whether we have orders for it or not." In the spring following the goods were shipped from Bloomington, Illinois, into Iowa, but there was no showing that

expedient in that their application occasions confusion and uncertainty in the law relating to the seller's remedy upon breach of an executory contract of sale. This is particularly true as to the distinction between executed and executory contracts as affecting the remedy of the seller for breach thereof by the buyer. This distinction is largely arbitrary, and raises an issue frequently difficult to determine, as to whether the particular contract is executory or executed. In each case the result must be more or less uncertain, since the intention of the parties is the controlling factor.

It is needless to say that a party's remedy should not be made to depend on an arbitrary distinction, wholly disassociated from the wrongful act complained of. It is not in keeping with twentieth century standards of justice to make the right to recover for an alleged wrongful act depend in the particular case, not upon the finding of the issue as to the wrong complained of in favor of the plaintiff, but upon so uncertain a thing as the finding of a court or jury upon the question of fact as to the character of the contract, whether executed or executory. Under such a rule the first issue, as to the wrongful breach of the contract of sale, may be found in favor of the seller, but he may nevertheless be defeated in an action to recover the purchase price, because the second issue, as to the character of the contract, is found against him, and this too where he has so clearly and unequivocally appropriated and set apart to the buyer the goods called for by the contract, as to preclude him from subsequently asserting ownership over them, should the purchaser, either before or after judgment, discharge his lien for the purchase price.

To illustrate, where a purchaser of a car of grain before the delivery thereof breaches his contract to purchase, if the distinction between executory and executed contracts is applied, the seller must not only assume the burden of establishing the breach, but at his peril must also determine the character of the contract, whether executory or executed, in order to determine the remedy 51 L.R.A.(N.S.)

he is entitled to pursue. If the car was a specifically designated car, *prima facie* the contract was an executed one; if it was a car of grain from a larger mass, the contract was *prima facie* executory. But these are presumptions merely, and not conclusive. The ultimate question is one of fact as to the intention of the parties. See note in 28 L.R.A.(N.S.) 1.

That this distinction is an important one, having a vital effect upon the seller's rights, is made apparent by an examination of *Acme Food Co. v. Older*, 64 W. Va. 255, 17 L.R.A.(N.S.) 807, 61 S. E. 235. In this case the seller of a designated quantity of poultry food was denied the right to recover the purchase price on the ground that the contract was executory and the purchaser had repudiated it before the seller had tendered the goods, although from a letter of the seller accepting the purchaser's order for the food, it appears that before the purchaser repudiated the contract, the seller had manufactured the food for the purchaser, and marked and set the same aside for him in the seller's warehouse, to be held until the arrival of the date of shipment. This decision is based upon the ground that an action for the purchase price cannot be sustained where based upon an executory contract of sale, and the purchaser, by repudiating the contract before tender or attempted delivery by the seller, thereby precludes him from completing the contract by vesting title in the buyer, and hence the latter cannot be held for the purchase money.

As will hereafter appear, the courts are in conflict upon this point. A rule more promotive of justice as well as certainty in the law is that which makes the right of the seller to recover the purchase price, where the purchaser refuses to receive the goods, depend not upon the question whether or not the contract is executed, but rather upon the question whether at the time of the breach the situation of the seller with reference to the property is such that by his own act he can, constructively at least, transfer to the buyer the title thereto, without doing anything which will have the

these ever reached Anthon or were ever delivered or tendered to the defendant. The same witness testified that plaintiff "always stood ready to deliver the goods called for by the order, . . . to do so at any time in the shipping season." The state of facts as thus recited was held not to entitle plaintiff to the recovery of the purchase price, and, as no evidence of market value was adduced as a basis for the measure of damages recoverable on a breach of the contract, verdict was directed to be returned for the defendant.

1. As the order for the fruit trees and shrubs had been accepted, the contract was complete long before the letters were sent to plaintiff, undertaking to repudiate the order. Ordinarily in these circumstances

effect of unnecessarily increasing the damage, viewed from the situation of the parties at the time of the breach. That is to say, if, at the time of the breach of the contract, the property is owned by the seller and is substantially in deliverable condition according to the terms of the contract, then the purchaser, by repudiating the contract, cannot prevent the seller from completing performance sufficient to transfer the title, thereby entitling himself to recover the purchase price; while on the other hand, if, at the time the purchaser repudiates the contract, the property is not in deliverable condition, and to put it in such condition will require either the acquirement of the property by the seller or the expenditure of substantial labor and material in its completion, the rule requiring the injured party to make his damages from the breach of a contract as light as possible forbids the seller from acquiring or completing the property in order to put it in a deliverable state, and requires him to cease his efforts in this regard, and limits him in his recovery to the loss sustained by him, considered with reference to the condition of the property at the time of the repudiation. This statement as to the measure of damages is intended to be very general, as that question is not discussed herein.

This general rule as to the right of the seller is the conclusion of the writer based upon all the authorities hereafter considered; it cannot, however, be said that the rule receives full support from any individual case, and, as pointed out, it is clearly denied by some cases.

III. Necessity of delivery, tender, or appropriation.

a. In general.

Upon the general question of necessity of tender or delivery, see note to *Stewart v. Henningsen Produce Co.* 50 L.R.A.(N.S.) 111; also note to *Barber v. Andrews*, 26 L.R.A.(N.S.) 1. As to the effect of the character of the pleadings upon the necessity of a tender or delivery, see the sub-

ject, "Pleading," *infra*, VIII. It is settled law that there must be a delivery, actual or constructive, of the property sold, or an appropriation of it to the contract, in order to entitle the seller to recover the purchase price: —*Burnham v. Roberts*, 70 Ill. 24, holding that, to warrant an action to recover the purchase price of an article sold, there must be a delivery sufficient to pass title to the purchaser. In *Barrow v. Window*, 71 Ill. 214, *Noy's Maxims*, chap. 42, is quoted to the effect that "if I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he is delivered; yet the property of the horse is, by the bargain, in the bargain-or or buyer. But if he do presently tender me my money, and I do refuse it, he may take the horse and have an action of detainer. And if the horse die in my stable, between the bargain and the delivery, I may have an action of debt for my money, because, by the bargain, the property was in the buyer." Applying this maxim, it is held that if the horse is still living and capable of delivery, the seller cannot maintain an action for his money before delivery or tender of delivery, unless discharged in this regard by the act of the buyer; —*Pate v. Ralston*, holding that, in order to recover the purchase price where the buyer has repudiated the contract before delivery, everything required of the seller to pass title must be performed by him; —*F. C. Austin Mfg. Co. v. Colfax County*, 67 Neb. 101, 93 N. W. 145, holding that delivery or proffer of delivery is essential to the right to recover the purchase price; —*Gordon v. Norris*, 49 N. H. 382, holding that an action to recover the purchase price of hay cannot be maintained where the seller has not parted with the possession or title to the property, and there has been no delivery or effort to deliver. *Bailey v. Smith*, 43 N. H. 143 (stating rule); —*Indianapolis, P. & C. R. Co. v. Maguire*, 62 Ind. 140, holding that there can be no

any of three remedies is available to the vendor: (1) He may retain the property for the vendee and recover the purchase price; or (2) keep it as his own and sue for the difference between the market value and the contract price; or (3) he may sell the property for the highest price he can get and recover the balance of the purchase price. *Hamilton v. Finnegan*, 117 Iowa, 623, 91 N. W. 1039. It does not appear that plaintiff sold the property, and, as no evidence of market value was adduced, it is evident that neither of the methods last mentioned was contemplated. The remedy first named then must have been relied on, and it has been repeatedly recognized as available in this state. *McAlister v. Saffley*, 65 Iowa, 719, 23 N. W. 139; *McCormick*

city of a tender or delivery, see the subject, "Pleading," *infra*, VIII.

Harvesting Mach. Co. v. Markert, 107 Iowa, 340, 78 N. W. 33.

In order to recover the purchase price, however, everything required of the vendor to pass title must have been performed. *Moline Scale Co. v. Beed*, 52 Iowa 307, 35 Am. Rep. 272, 3 N. W. 96. As said by Cole, J., in *McClung v. Kelley*, 21 Iowa, 508: "No sale is complete so as to vest in the vendee an immediate right of property so long as anything remains to be done between the buyer and seller in relation to the thing sold." *Snyder v. Tibbals*, 32 Iowa, 447; *Augustine v. McDowell*, 120 Iowa, 401, 94 N. W. 918. The theory on which recovery of the purchase price is allowed notwithstanding the vendee's repudiation of the contract is that by performance on his part

the vendor has vested title in the vendee, possession being retained by the vendor for him; and for this reason the latter is entitled to the purchase price. *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140, 59 L.R.A. 122, 94 Am. St. Rep. 112, 42 S. E. 378; *Unexcelled Fireworks Co. v. Polites*, 130 Pa. 531, 17 Am. St. Rep. 788, 18 Atl. 1058; *Ganson v. Madigan*, 13 Wis. 67; *Pusey & J. Co. v. Dodge*, 3 Penn. (Del.) 63, 49 Atl. 248; 35 Cyc. 5311; 24 Am. & Eng. Enc. Law, 2d ed. 1118. "In all cases of contracts for the sale of personal property, where it has any market value, the vendor, before he can recover of the vendee, . . . must have delivered the property to the vendee, or have done such acts as vested the title in the vendee, or would have vested the

recovery of the purchase price of articles, in the absence of proof of something done on the part of the seller to vest the buyer with title to the property, or to restrict the former in any manner in his control over it;

—*Hamilton v. Finnegan*, 117 Iowa, 623, 91 N. W. 1039, stating rule that, in order to recover the purchase price for shares of stock under a contract to purchase the same, the specific property must have been appropriated to the contract by the seller, and everything done except actual acceptance under the terms of the sale by the purchaser;

—*Price v. Weisner*, 83 Kan. 343, 31 L.R.A.(N.S.) 927, 111 Pac. 439, stating the rule that until delivery the seller cannot maintain an action for the purchase price, except in those cases where the contract contemplates that he shall retain possession;

—*Blish Mill Co. v. Detherage*, 155 Ky. 319, 159 S. W. 816, holding that where a contract of sale is executory, to entitle the seller to recover the purchase price, he must tender the property to the purchaser or offer to ship it to him;

—*Gross v. Ajello*, 132 App. Div. 25, 116 N. Y. Supp. 380, stating the rule that where a contract of sale is executory, the obligation of the purchaser to pay, and of the seller to deliver, is mutual and dependent, and in the absence of delivery, the seller can recover the purchase price only by showing a readiness to perform and a tender of performance;

—*Kelley v. Upton*, supra, holding that where a contract for the sale of stock is executory, the seller cannot maintain an action for the purchase price without showing either delivery or tender of the stock, or that such delivery or tender has been waived by the purchaser. But a tender is not necessary in order to entitle the seller to maintain an action for the purchase price, where the purchaser refuses to receive the property. *Hagar v. King*, 38 Barb. 200, *Holmes & G. Mfg. Co. v. Morse*, 53 Hun. 58, 5 N. Y. Supp. 940;

—*Haynes v. Brown*, 18 Okla. 389, 80 Pac. 51 L.R.A.(N.S.)

1124, holding that the seller of shares of stock must prove a delivery or tender thereof, and the refusal of the purchaser to accept the same, in order to be entitled to recover the purchase price;

—*Jenner v. Smith*, L. R. 4 C. P. 270, holding that under a contract for the sale of unascertained hops, the price depending upon the weight, and the quality to be according to the sample furnished the buyer, the seller, by designating the hops and setting them apart for the buyer in a warehouse, did not thereby entitle himself to recover the purchase price, where the warehouseman continued to hold them at his risk.

It has been held that to be effectual, and sufficient to pass title to the purchaser of property, and entitle the seller to treat the property as sold and delivered and recover the purchase price thereof in an action for goods sold and delivered, the delivery must be such as will amount to a waiver or discharge of any right of lien in the seller. *Messer v. Woodman*, 22 N. H. 172, 53 Am. Dec. 241.

Hughes v. United States, 4 Ct. Cl. 64, holds that, under a contract for the sale of grain to be delivered at a certain place, it is not necessary that the seller shall make a tender at the place of delivery of all the grain, but it is sufficient to have tendered part within the time fixed by the contract, and to have been in possession of, and ready to supply, the balance within the prescribed time; and where the buyer fails to take the grain within the time agreed upon, the seller has the right to deliver the grain to the purchaser and sue for the contract price. In this case, however, the seller did not elect to follow this remedy.

Under any circumstances an action cannot be maintained for the price where the seller has not the possession of the property sold, and never had the possession thereof, and hence was never in a position to transfer the title to the purchaser. *Brown v. McCaffrey*, 40 W. N. C. 69.

But the title to goods may pass so as to support an action for the purchase price,

title in him if he had consented to accept it, for the law will not tolerate the palpable injustice of permitting the vendor to hold the property, and also to recover the price of it." *Shippa v. Atkinson*, 8 Ind. App. 505, 36 N. E. 375; *Dwiggins v. Clark*, 94 Ind. 49, 48 Am. Rep. 140. To permit the vendor to retain title and recover the purchase price would be intolerable, but this is precisely the situation of plaintiff. The fruit trees and shrubs had not been set apart for

defendant as had the butter for the vendee in *Mitchell v. Le Clair*, 165 Mass. 308, 43 N. E. 117. Nor had delivery been effected or even tendered.

That defendant, in countermanding the order, said he declined to receive the trees, and that shipping would be at plaintiff's risk, would not obviate the necessity of delivery at the time stipulated, if plaintiff insisted on performance of the contract. Of course, the rule would be otherwise were

although the possession thereof remains in the seller. *Bristol Mfg. Corp. v. Arkwright Mills*, 213 Mass. 172, 100 N. E. 55. Actual delivery is not always essential to pass title to goods sold; it may pass even though something remains to be done to determine the price to be paid. *Scotten v. Sutter*, 37 Mich. 526.

In *Bement v. Smith*, 15 Wend. 493, it is said that there are many cases in which an offer to perform an executory contract is tantamount to performance.

Where the contract is for the sale of a part of a mass or large parcel of goods, or some of a larger number of articles, to be selected by the seller, he cannot recover the purchase price therefor, until he has selected goods or articles complying with the contract and appropriated them thereto, so that the title has vested in the buyer:

—*New England Dressed Meat & Wool Co. v. Standard Worsted Co.* 165 Mass. 328, 52 Am. St. Rep. 516, 43 N. E. 112, holding that in a sale of a portion of a larger mass, the whole remaining in the possession of the seller with the right and power to make the separation, no title passes entitling him to recover the purchase price until this is done;

—*McCormick Harvesting Mach. Co. v. Balfany*, 78 Minn. 370, 79 Am. St. Rep. 393, 81 N. W. 10, holding that to be entitled to recover the purchase price, the seller must show the appropriation to the contract of the particular article out of a larger number of similar articles in his possession;

—*Rhode v. Thwaites*, 6 Barn. & C. 388, 9 Dowl. & R. 293, 5 L. J. K. B. 163, 30 Revised Rep. 363, 3 Phillpotts, Ev. 410, holding that the seller of a number of hogsheads of sugar out of a larger quantity was entitled to recover the purchase price where, some time subsequently to the sale, he appropriated to the contract and set apart for the purchaser the quantity of sugar designated, and the purchaser accepted a small portion thereof and agreed to accept the balance, but thereafter refused to do so; the rule being stated that where a man sells part of a large parcel of goods, and it is his option to select the goods for the purchaser, he cannot maintain an action for goods bargained and sold until he has made the selection, but as soon as he appropriates property for the benefit of the purchaser, the property in the article passes to the latter, although the seller is not bound to part with the possession until he has paid the price.

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In *Boswell v. Kilborn*, 8 Jur. N. S. 443, 6 L. T. N. S. 79, 15 Moore, P. C. C. 309, 10 Week. Rep. 517, following the old French law, it is held that under an executory contract for the sale of hops to be gathered, the seller cannot maintain an action for the purchase price where he tendered a quantity of hops in excess of the amount called for by the contract, and offered to permit the purchaser to select therefrom the quantity agreed upon, and the latter refused to accept the hops, and the seller then stored the entire quantity, and at no time prior to bringing suit set apart therefrom the exact quantity called for, unless a more complete delivery was waived by the purchaser. Referring to the English law on this point, it is said that under the English law an action cannot be maintained to recover the purchase price where some further acts are to be performed by the seller in order to identify the thing to be delivered. But see *infra*, III. a, "Waiver of delivery or tender."

b. Where contract contemplates some act by purchaser.

The courts are not in harmony on the question as to whether the seller can recover the purchase price of articles sold under a contract containing provisions contemplating some further act by the purchaser before acceptance by him, where he refuses to perform on his part.

It has been said that where one party has been prevented by the wrongful act or refusal of the other party from performing a condition precedent or completing his contract, he is entitled to recover as though the contract had been fully performed. *Dobbins v. Edmonds*, 18 Mo. App. 307, holding that where logs are sold to be delivered on the banks of a stream, there to be measured, scaled, and settled for by the purchaser, if the latter refuses to perform, the seller may have the logs measured and scaled, and may float them to the mill to the purchaser, and tender them to him, and upon the latter's declining to receive them, the seller may recover the purchase price, although most of the logs are lost after tender by reason of a flood.

In *Storm v. Rosenthal*, 156 App. Div. 544, 141 N. Y. Supp. 339, it is held that where the contract for the sale of a designated quantity of oak flooring of a brand to be specified by the buyer is repudiated by him, and he fails to exercise his op-

the countermand treated as a breach of the agreement and recovery of damages only sought. *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780. But in electing to stand on the contract, instead of treating it as breached, he undertook to perform the terms exacted of the seller, and these were not to be performed until spring, and not until performed was defendant required to pay the purchase price. In other words, nothing was then done to pass title

to the buyer, and, in the absence of any proof of delivery as stipulated, or tender or waiver thereof, the seller was not entitled to recover the purchase price. *Williams v. Triplett*, 3 Iowa, 518, and *McCormick Harvesting Mach. Co. v. Markert*, 107 Iowa, 340, 78 N. W. 33, are not inconsistent herewith.

The court rightly directed a verdict for defendant, and the judgment is affirmed.

tion to designate the flooring, the seller may exercise such option for him, and may store and hold the property for him and recover the purchase price thereof.

And in *Carlson v. Crescent Woodware & Box Mfg. Co.* 20 Idaho, 794, 120 Pac. 460, it is held that the seller of all of a certain kind of timber cut from designated lands was entitled to recover the purchase price of all of such timber that he sawed and delivered at the place designated in the contract, although the contract also provided that the buyer was to scale the logs when delivered, which he refused to do.

In *Outwater v. Dodge*, 7 Cow. 85, however, it is held that where, by the terms of the contract for the sale of an article, the purchaser is to have the right of inspection, until that right is exercised, nothing but absolute acceptance by the purchaser can be considered a delivery which will vest the property in him.

So, where by the terms of a contract for the sale of ties they are to be delivered at a certain place and there inspected by the buyer, the parties thereto agree upon the purchase price, title does not pass until such inspection, and a delivery of the ties at the place designated does not entitle the seller to recover the value thereof from the buyer, where the latter refuses to inspect or accept the ties. *Indiana Tie Co. v. Phelps*, — Ky. —, 124 S. W. 833.

In *Massman v. Steiger*, 79 N. J. L. 442, 75 Atl. 746, it is asserted that the purchase price cannot be recovered by the seller, where it is to be paid by notes of the purchaser, which, as to form and sufficiency of indorsement, are to be passed upon by the seller, and the purchaser refuses to perform.

And see *Manning Mfg. Co. v. Miller Bros.* — Vt. —, 89 Atl. 479, holding that where machinery was purchased to be installed by the seller upon the premises of the purchaser, the former cannot recover the purchase price in an action of assumpsit, where he has failed to install the machinery, although this failure was due to the conduct of the purchaser. In this case the machinery was shipped to the purchaser, but it did not appear that it was ever removed from the station.

Under a contract for the manufacture of an article according to a model to be furnished by the buyer, where the latter fails to furnish the model, the seller cannot furnish such a model as he believes the buyer would have furnished, and manufacture

the article according to such model, and upon its completion recover the contract price. *Savage Mfg. Co. v. Armstrong*, 19 Me. 147.

c. As affected by terms of contract.

1. Necessity of complying with contract.

If the contract stipulates as to the place and manner of delivery, delivery in accordance with such stipulation is sufficient to support an action for the purchase price:

—*Harris Mfg. Co. v. Marsh*, 49 Iowa, 11, holding that under an agreement to take at a certain price, all the grain delivered to the promisee by a third person, the promisor becomes liable for the purchase price when the grain is delivered to the promisee, and notice thereof given the promisor, providing the promisee retains the grain up to the time of trial;

—*Benton v. Bidault*, 6 La. Ann. 30, holding that to maintain an action for the purchase price of goods, the seller must show that he tendered delivery thereof at the place, if any, designated in the contract;

—*Obery v. Lander*, 179 Mass. 125, 60 N. E. 378, holding that the purchase price of shares of stock may be recovered where the seller deposits the same in escrow for the purchaser in accordance with the terms of the contract, although the latter refuses to pay for and receive them;

—*Jones v. Schneider*, 22 Minn. 279, holding that where the only delivery or tender claimed was not made in accordance with the terms of the contract, although the contract authorized the seller to select the article purchased and appropriate it to the purchaser, nevertheless no action can be maintained for the purchase price;

—*Barton v. McKelway*, 22 N. J. L. 165, holding that in the sale of a quantity of shrubbery, it is a sufficient delivery to entitle the seller to maintain an action for the purchase price, where the contract required the delivery of the articles purchased at a certain time and place, for the seller to leave the property at such place, since the purchaser, being aware of the time and place fixed for delivery, was under the duty of being there, either in person or by agent, to receive the articles when tendered. He could not avoid his contract by absenting himself on that occasion, so that no tender could be made to him personally.

B. Delivery to carrier.

While not pointed out in any of the cases considering the point, there is a distinction between the application of the general rule that in the ordinary contract of sale contemplating a shipment of goods by carrier, delivery to the carrier will be regarded as delivery to the buyer, and the rule that a delivery to the carrier is a sufficient appropriation of the goods to the buyer to entitle the seller to recover the purchase price, where the buyer repudiates the contract. For the first rule mentioned is based upon the ground that delivery to the carrier, under the ordinary contract of sale contemplating shipment by the carrier, *prima facie* at least, passes title to the buyer, unless title is expressly reserved by the seller. It is not necessary that the courts go to this extent, however, in order to hold that delivery to the carrier of goods sold by executory contract constitutes such an appropriation of the goods to the buyer as to entitle the seller to recover the purchase price, where the former wrongfully repudiates his contract of purchase. Under a case of the latter character, although the actual tender of the goods, in the absence of a repudiation of the contract by the buyer, might be held to be necessary to entitle the seller to recover the purchase price, yet the fact of repudiation, at least while the goods were in transit, would generally be a sufficient appropriation of the goods to the contract to entitle the seller to recover the purchase price. See, on this question, "Waiver of delivery or tender," III. e.

While the following cases do not specifically point out the distinction mentioned, they nevertheless hold where the seller of goods by executory contract delivers goods complying with the terms of the contract to a carrier for shipment, in accordance with the express or implied terms of the contract, that this constitutes a sufficient appropriation of the goods to the contract to entitle the seller to recover the purchase price, where, after delivery to the carrier, the buyer repudiates the contract.

Where, from extrinsic facts or the express provisions of the contract, it appears that a shipment of the goods by the seller to the buyer is contemplated, delivery to a carrier for transportation to the buyer is generally a sufficient delivery to support an action for the purchase price, although, as subsequently shown, the cases are not in harmony as to whether or not such a delivery is sufficient where the contract of sale is executory, and before such delivery it is repudiated by the buyer:

—*St. Louis Hay & Grain Co. v. American Cast Iron Pipe Co.* 167 Ala. 442, 52 So. 904, holding that where property purchased upon an executory contract is delivered to a carrier for shipment to the purchaser before the latter undertakes to repudiate the contract, an action may be maintained to recover the purchase price, although the 51 L.R.A.(N.S.)

purchaser refuses to accept and pay for the property;

—*Castlen v. Marshburn*, 8 Ga. App. 400, 69 S. E. 317, holding that where, before the purchaser of goods repudiates the contract, the seller delivers them to a carrier for shipment to the purchaser, such delivery passes title and entitles the seller to maintain an action for the purchase price, although the purchaser refuses to accept the goods from the carrier, and the latter sells the same in foreclosure of its lien;

—*Martyn v. Western P. R. Co.* 21 Cal. App. 589, 132 Pac. 602, holding where an order for goods is accepted and the goods shipped by carrier to the purchaser, that the latter cannot, by revoking the order, preclude the seller from recovering the purchase price, although the purchaser never received the goods;

—*Pittsburgh & I. Coal Co. v. Hostler Coal & Coke Co.* 147 Ill. App. 387, holding that the contract price for coal may be recovered by the seller where the coal was delivered to a common carrier to be forwarded to the purchaser;

—*Loftus v. Riley*, 83 Iowa, 503, 50 N. W. 17, sustaining the right to recover the purchase price of property delivered to a carrier for shipment to the purchaser, although the latter refused to accept it;

—*Barrie v. Quinby*, 206 Mass. 259, 92 N. E. 451, holding that where sets of books to be manufactured are to be delivered to a carrier for transportation, delivering them to the carrier will pass the title, and a refusal of the purchaser to give notes for the purchase price according to the terms of the contract will entitle the seller to sue for the price of each instalment, or hold them until the time of full performance has expired and then sue for the whole amount;

—*Meagher v. Cowing*, 149 Mich. 416, 112 N. W. 1074, holding that title passes by delivery to a carrier, where the purchaser afterward refuses to accept the property, and the seller may treat the contract as completed and sell the property for and in behalf of the former;

—*Pacific Iron Works v. Long Island R. Co.* 62 N. Y. 274, holding that where, by a contract of sale, the goods are to be shipped by steamer, and are to be delivered on board the steamer free of charge the purchase price may be recovered when such delivery is made, although the purchaser refuses to receive the goods;

—*Fountain City Drill Co. v. Peterson*, 126 Wis. 512, 106 N. W. 17, holding where the seller performs an executory contract for the sale of chattels by delivering them at the place, and in the manner, specified in the contract, that he is entitled to recover the stipulated price (delivery through common carrier).

The rule that when delivery is made to a common carrier according to the stipulations of the contract of sale, the carrier is thereby made the agent of the buyer, and such delivery implies an acceptance, and is *prima facie* sufficient to pass title, and enable the seller to maintain an action

for goods sold and delivered, amounts only to prima facie evidence, and does not apply where delivery is not according to contract, as where it is premature. *Arons v. Cummings*, 107 Me. 19, 31 L.R.A.(N.S.) 942, 78 Atl. 98.

In *Home Pattern Co. v. W. W. Mertz Co.* 86 Conn. 494, 86 Atl. 19, it is held that under a contract to manufacture patterns to be shipped to the purchaser when completed, the seller may ship the goods according to contract and recover the price, since the title thereby passes to the purchaser, although the latter, prior to the shipment, gave notice to the seller of his repudiation of the contract. The court said that a repudiation of the contract without the acquiescence of the seller did not put an end to it; the seller might still treat it as subsisting notwithstanding notice of repudiation, and assume that the purchaser would perform his part when the time for performance arrived. For there can be no anticipatory breach of a contract by one party without the acquiescence of the other; a breach by one party alone can occur only after the time for performance has arrived. Hence, the repudiation is not a breach of the contract, and the seller, having declined to acquiesce therein, is bound to tender performance when the time for delivery arrives. And delivery to the carrier, as designated in the contract, is a delivery to the purchaser, and the title passes to him. This decision apparently is based upon the sales of goods act.

But it has been held that where a purchaser of goods by executory contract countermands his order before the goods have been set apart or shipped to him, the repudiation of the contract or the direction not to ship is a revocation of the carrier's agency to receive for the purchaser, and a subsequent delivery of the goods to the carrier by the seller is therefore unauthorized, and does not constitute a delivery to the purchaser. *Unexcelled Fire-Works Co. v. Polites*, 130 Pa. 536, 17 Am. St. Rep. 788, 18 Atl. 1058.

d. Where contract does not require delivery.

The contract price for articles to be manufactured may be recovered without making a delivery thereof, where the contract is silent as to delivery. In such case it is sufficient if the seller notifies the purchaser of the completion of the article, and requests him to settle for and remove the same. *E. W. Bliss Co. v. United States Incandescent Gaslight Co.* 149 N. Y. 300, 43 N. E. 859.

So, where, by the terms of a contract of sale, the purchaser is to settle for and remove property to be manufactured for him, when it is completed, no tender of delivery by the seller is necessary to entitle him to recover the purchase price, where the purchaser fails or refuses to remove the property within a reasonable time after its completion and notice to him thereof: 51 L.R.A.(N.S.)

—*Barrie v. Quinby*, 206 Mass. 259, 92 N. E. 451, stating the rule that if the purchaser of sets of books to be manufactured was to have taken the sets as manufactured, at the seller's place of business, an appropriation by setting them apart as the buyer's goods would have passed the title, and a refusal to give notes for the purchase price according to the contract would have permitted the seller to sue for the price of each instalment, or, when the time for full performance had expired, to sue for the full amount;

—*Crookshank v. Burrell*, 18 Johns. 58, 9 Am. Dec. 187; *Muckey v. Howenstine*, 3 Thomp. & C. 28, holding, that a tender or delivery is not necessary where, by the terms of a contract for the manufacture of articles, upon completion, the purchaser is to remove the same;

—*Ballentine v. Robinson*, 46 Pa. 177, holding that a contract for the sale of a machine to be manufactured, and removed by the purchaser, vested the property in the purchaser when it was completed and notice of completion given him, and upon his failure to remove and settle for it, the seller was entitled to recover the purchase price.

And tender is unnecessary to entitle the seller to maintain an action for the purchase price where, by the terms of the contract, the purchaser agrees to tender a certain sum of money on or by a designated day, and if he fails to do so, to accept the property at a designated price. *Prest v. Cole*, 183 Mass. 283, 67 N. E. 246 (shares of stock).

And see *Dunlop v. Grote*, 2 Car. & K. 158, holding that where, by the terms of a contract for the sale of a quantity of iron, the purchaser agreed to pay therefor on a certain day, if prior thereto he had not required the seller to deliver the same, after the expiration of the agreed time the latter is entitled to recover the purchase price, although the purchaser has not asked for a delivery of the property.

e. Waiver of delivery or tender.

The cases are not agreed whether the purchaser, by unlawfully repudiating a contract to purchase, thereby relieves the seller from the necessity of delivering or tendering the property to him. If the buyer has clearly, unequivocally, and wrongfully repudiated the contract and notified the seller thereof, and of his intention to refuse to receive the goods or articles purchased if tendered to him, it would seem that no tender or offer to deliver or attempted delivery should be required from the seller as a condition to recovering the purchase price, provided he clearly and unequivocally appropriates the property to the contract, and thereafter holds it for the purchaser. And this is especially true where, to make a tender, the seller would be obliged to have the property transported a considerable distance by a carrier.

In New York it is held that a tender is

unnecessary where the purchaser wrongfully repudiates his contract to purchase prior thereto:

—*Stokes v. Mackay*, 147 N. Y. 223, 41 N. E. 496, holding that a tender is not necessary to entitle the seller to recover the purchase price, where, before the tender is made, the purchaser repudiates the contract and refuses to perform on his part (sales of shares of stock);

—*Gourd v. Healy*, 206 N. Y. 423, 90 N. E. 1099, in which case the purchaser wrongfully repudiated the contract to purchase a quantity of wine before the wine had been separated from a larger quantity, and the court said that his conduct in this regard was such as to relieve the seller from the duty of segregating the purchaser's wine, even if segregation was necessary to pass title thereto;

—*Lackawanna Mills v. Weil*, 21 App. Div. 492, 47 N. Y. Supp. 585, affirmed in 162 N. Y. 642, 57 N. E. 1114, holding that where goods are to be manufactured and furnished the purchaser in instalments, if he, after having accepted several instalments, refuses to accept subsequent instalments, such refusal renders it unnecessary for the seller to make a tender of further instalments as a condition to recovering the purchase price of all the articles sold;

—*Weil v. Unique Electric Device Co.* 39 Misc. 527, 80 N. Y. Supp. 484, holding that where the purchaser of goods, upon receiving a portion of them, notifies the seller that he will not accept the balance, if this refusal on his part is wrongful, the seller may recover the purchase price without making a tender of the balance of the goods;

—*Lekas v. Schwartz*, 56 Misc. 594, 107 N. Y. Supp. 145, stating the rule that where an executory contract for the sale of an article is repudiated by the purchaser before delivery, a tender or delivery by the seller is not necessary to entitle him to recover the purchase price.

In *Keppert v. Aultman, M. & Co.* 25 Tex. Civ. App. 495, 61 S. W. 410, the court said that if the purchase price may be recovered at all, in order to entitle the seller of a machine to maintain an action for the purchase price, tender of the property must be made, although the buyer has repudiated the contract.

In *Stewart v. Scott*, 54 Ark. 187, 15 S. W. 463, on the ground that the seller of articles under an executory contract did not make a tender after the purchaser refused to receive the property, it was held that the former's remedy was to recover for the damages sustained from the breach of the contract, and that he could not recover the purchase price.

And see *PATE v. RALSTON*, holding that the fact that the buyer countermanded the order given by him for fruit trees, and gave notice that he would refuse to receive the trees, and that the shipping thereof would be at the seller's risk, did not obviate the necessity of delivery at the time stipulated, if the seller insisted on perform-

ance of the contract. In this case, however, it does not appear that the seller in any manner, clearly and unequivocally, appropriated the property to the contract.

In *Fairbanks, M. & Co. v. Heltsley*, 135 Ky. 397, 26 L.R.A. (N.S.) 248, 122 S. W. 198, the right was denied the seller to recover the purchase price of a gasoline engine sold under a contract to make the same and deliver it on board cars at a designated place, where, before the engine had been shipped or before it had been seen, tendered, or delivered to the purchaser, he notified the seller that he would not take it, and at the time of the suit the engine remained at the seller's factory. The court said that the property was the seller's and was subject to its control, it having in no manner relinquished its control thereof, and that, in such a state of the case, an action for the price could not be maintained.

The foregoing case is not necessarily inconsistent with the New York doctrine, since in the *Fairbanks Case*, the seller had not so unequivocally appropriated the property to the buyer as, constructively at least, to transfer the title to him.

In *Webber v. Minor*, 6 Bush, 463, 99 Am. Dec. 688, where the purchaser of a quantity of wood refused to receive it, the seller was denied the right to recover the purchase price on the ground that he had not sufficiently appropriated the wood to the contract. The court points out that, although the evidence tends to show the seller's readiness and offer to deliver the wood, and the refusal of the purchaser to receive it, these facts do not, actually or constructively, constitute a complete performance of the contract. For, conceding that a substantial compliance did not require the seller to leave the wood upon the premises of the buyer against the will of the latter, nevertheless the seller should have set it apart for the buyer, and relinquished his own control of it at, or as near to, the place of delivery as was reasonably practicable. This, the court says, would have been a constructive delivery, not merely an offer or tender of delivery.

IV. Refusal of buyer to accept property when tendered.

a. In general.

Many of the foregoing cases, inferentially at least, hold the effect of a delivery or attempted delivery, where the property is appropriated to the contract, is to entitle the seller to recover the purchase price, although the buyer refuses to receive the property. It has been asserted, however, that an action for the purchase price of an article to be made by the seller cannot be maintained until the article has been appropriated to the purchaser, and he has assented to the appropriation. *Atkinson v. Bell*, 8 Barn. & C. 277, 6 L. J. K. B. 258, 2 Mann. & R. 292.

But where the matter of selection rests

with the seller, this is not the rule, although, as will subsequently appear, according to some cases such selection or appropriation cannot be made after the purchaser has repudiated the contract. (As to the general rule as to the necessity of acceptance by the purchaser to pass title to him to an article to be produced or manufactured, see note in 50 L.R.A.(N.S.) 111.)

And by the weight of authority, however, it is held that where the purchaser of goods by executory contract refuses to accept goods which comply with the contract, where tendered to him according to the terms thereof, the seller may treat the goods as the property of the purchaser, retain them in some safe and convenient place for him, and sue and recover the purchase price:

—Kinkead v. Lynch, 132 Fed. 692, stating the rule that where a purchaser wrongfully refuses to accept property which he had ordered under an executory contract of sale, the seller may avail himself of either of three remedies, one of which entitles him to retain the property for the purchaser and recover the purchase price;

—Cuthill v. Peabody, 19 Cal. App. 304, 125 Pac. 926, stating the rule that where the sale of shares of stock is completed, and title to the property, in contemplation of law, has passed to the buyer by reason of a tender thereof duly indorsed to him, the seller may recover the purchase price;

—Leeper v. Schroeder, 24 Colo. App. 164, 132 Pac. 701, stating the rule that upon breach by the purchaser of his executory contract to purchase property, by refusing to receive and pay for the same upon tender or delivery by the seller, in case title has not passed, he may store the goods for the purchaser, giving notice thereof, and thereupon sue and recover the full contract price (action to recover difference between contract price and amount received on resale);

—Commercial Register Co. v. Drew, 168 Ill. App. 347, asserting the rule that if there has been no actual delivery of personal property, the seller, who has offered performance on his part, may consider the property as the purchaser's, and may either sell it and sue for the unpaid balance of the purchase price, or he may hold it subject to the call or order of the purchaser, and recover the purchase price;

—Olson v. Wabash Coal Co. 126 Ill. App. 253 (rule stated);

—Dill v. Mumford, 19 Ind. App. 609, 49 N. E. 861, holding that where grain is purchased to be shipped to the buyer, and shipment is made according to the agreement, and all that remains to complete the contract is acceptance by the buyer and payment of the purchase money, the contract becomes so far executed that, if the buyer refuses to accept the grain, the seller may treat it as the former's property and maintain an action against him for the purchase price;

—Grant v. Pendery, 15 Kan. 236, sus- 51 L.R.A.(N.S.)

taining the right of the seller to recover the purchase price of mills, where he tendered a portion of the mills purchased, and the purchaser refused to receive them, and the former then stored them for the benefit of the latter. The court said that under these circumstances a tender of all the machines was not necessary;

—Cook v. Brandeis, 3 Met. (Ky.) 555; Webber v. Minor, 6 Bush, 463, 99 Am. Dec. 688; Bell v. Offutt, 10 Bush, 639, stating the rule that where a purchaser refuses to receive the thing bargained for, the seller may consider it as the property of the purchaser subject to his call or order, and recover the full purchase price. And in Zinsmeister v. Rock Island Canning Co. 145 Ky. 25, 139 S. W. 1068, this general rule is asserted as applicable to executory contracts of sale. In Webber v. Minor, 6 Bush, 463, 99 Am. Dec. 688, while the general rule is recognized, the right of the seller to recover the purchase price in that case is denied, on the ground that the seller did not set apart the article sold to the buyer, or relinquish his control over it at or as near the place of delivery as was reasonably practicable;

—American Cotton Co. v. Herring, 84 Miss. 693, 37 So. 117 (rule stated);

—Riley v. Stevenson, 118 Mo. App. 187, 94 S. W. 781, holding that an offer to deliver property purchased, on the purchaser's refusal to accept the same, entitles the seller to recover the purchase price (sale of telephone and stock in telephone company);

—Crown Vinegar & Spice Co. v. Wehra, 59 Mo. App. 493, holding that the seller of a quantity of vinegar from a larger quantity is entitled to recover the purchase price where he subsequently drew off and set apart for the purchaser the quantity purchased, but the latter refused to receive it. To the same effect is Campbell v. Woods, 122 Mo. App. 719, 99 S. W. 468;

—Ozark Lumber Co. v. Chicago Lumber Co. 51 Mo. App. 555, stating the rule that if the seller tenders the goods contracted for to the purchaser at the time and place agreed upon, then, although the latter may refuse to receive and pay for the goods, the seller may nevertheless store them for him at the place of delivery, or may hold them for his use, and recover the contract price;

—Lincoln Shoe Mfg. Co. v. Sheldon, 44 Neb. 279, 62 N. W. 480 (sale of shares of stock or subscription to shares of stock), disapproved in Funke v. Allen, 54 Neb. 407, 69 Am. St. Rep. 716, 74 N. W. 832;

—Ackerman v. Rubens, 167 N. Y. 405, 53 L.R.A. 867, 82 Am. St. Rep. 728, 60 N. E. 750, stating the rule that when a purchaser of personal property under an executory contract of sale refuses to complete his purchase, the seller may keep the article for him and sue for the entire purchase price;

—Van Brocklen v. Smeallie, 140 N. Y. 70, 35 N. E. 415, stating the general rule as applicable to executory contracts of sale;

—*Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190, holding that where, by the terms of the contract, the seller agrees to sell and the purchaser to buy shares of stock, the seller is entitled to recover the purchase price where he tenders performance on his part and demands payment, although the purchaser refuses to perform; his remedy being based upon the theory that title to the property, by the contract and tender, and assent of the seller, has become vested in the buyer;

—*Hayden v. Demets*, 53 N. Y. 426, holding that a tender of warehouse receipts for copper sold by executory contract entitled the seller to recover the purchase price, where the purchaser refused to receive the copper and the seller retained it for him. In this case the contract was for the sale of a part of a larger quantity of copper, and it was said that no title passed at the time of the execution of the contract, and not until the amount sold had been designated and set apart for the purchaser. The court said that the storing of the property in effect gave the purchaser the title, but not the right to possession until the purchase price was paid. And the rule is asserted that upon a valid sale of specific chattels, when nothing remains to be done by the vendor except delivery, whether contingent upon demand or not, the right of property passes to the purchaser, and the same consequences as to title result as where a valid tender is made under an executory contract of sale;

—*Dustan v. McAndrew*, 44 N. Y. 72, stating the general rule that, as one remedy for the failure of the purchaser to accept property sold by executory contract, the seller may store or retain the property for the purchaser, and recover the purchase price;

—*Merriam v. Kellogg*, 58 Barb. 445, holding that under a contract for the sale of shares of stock, where the seller tenders the stock and the purchaser refuses to receive it, the former may sue for the purchase price, treating the property as belonging to the latter;

—*Munn v. Barnum*, 24 Barb. 283, holding that the purchase price of shares of stock may be recovered where a tender thereof is made to the buyer, with a power of attorney to transfer the same indorsed upon the certificates, where he refuses the tender, but makes no objection as to the sufficiency thereof;

—*Ridden v. Lynch*, 133 N. Y. Supp. 468 (rule stated, sale of automobile); *Rusch v. Klausner*, 117 N. Y. Supp. 1074 (rule stated);

—*Heilbrunn v. Weislow*, 129 App. Div. 532, 114 N. Y. Supp. 50, holding that where the purchaser of goods refuses to pay for them when they are tendered to him according to the terms of the contract, the seller may retain the goods and recover the purchase price;

—*Cowan v. DeHart*, 84 N. Y. Supp. 576, holding that the seller of shares of stock, upon the purchaser refusing to accept the

same, may retain the property for him and recover the purchase price;

—*Stengel v. Hewitt*, 37 Misc. 670, 76 N. Y. Supp. 378 (rule stated);

—*Mackie v. Fgan*, 6 Misc. 95, 26 N. Y. Supp. 13, holding that under a contract for the sale of a large quantity of palms to be shipped from Florida to New York, a tender of delivery is sufficient to entitle the seller to maintain an action for goods sold and delivered;

—*Daniels v. Morris*, 65 Or. 298, 132 Pac. 958, affirming on rehearing 65 Or. 289, 130 Pac. 397, stating the rule that when the buyer refuses to take and pay for property offered by the seller in performance of an executory contract of sale, the latter may keep the property on hand subject to the order of the buyer, after making a tender thereof, and may maintain an action for the purchase price (sale of hops);

—*Mayberry v. Lilly Mill Co.* 112 Tenn. 564, 85 S. W. 401, holding that, although a contract for the sale of a quantity of corn was executory in the beginning, it became absolute and executed when the corn was measured, stacked, set apart, and delivered at the purchaser's mill, and there tendered to him, and upon his refusal to accept the same, the seller was entitled to retain the corn as the property of the purchaser and recover from him the purchase price;

—*Leventhal v. Hollamon*, — Tex. Civ. App. —, 165 S. W. 6, sustaining the right to recover the purchase price of a car of melons to be shipped to the purchaser, where he refused to accept them on the groundless claim that they did not comply with the contract;

—*Avant v. Watson*, 57 Tex. Civ. App. 304, 122 S. W. 586, stating the rule that where a purchaser refuses to receive personal property contracted for, the seller may hold the property for him and sue for the contract price, the contract under consideration in this case being a sale of a designated number of cattle out of certain specified brands. And see *Weathered v. Golden*, — Tex. Civ. App. —, 34 S. W. 761, holding that where cattle not specifically described, and forming a part of a larger herd, are sold by executory contract, and the purchaser refuses to receive and pay for them according to the terms of the contract, and the seller holds the cattle for him, they are at the risk of the purchaser.

It has been denied, however, that the purchaser of personal property by executory contract may be held for the purchase price where he refuses to receive the property when tendered to him by the seller in accordance with the requirements of the contract;

—*Star Brewery Co. v. Horst*, 58 C. C. A. 362, 120 Fed. 246, holding that under an agreement for the sale of a crop thereafter to be grown, the parties must mutually agree to an appropriation to the contract of the crop grown, and that hence the seller could not tender a crop to the purchaser and, upon his refusal to receive it, recover from him the purchase price;

—*Atwood v. Lucas*, 53 Me. 508, 89 Am. Dec. 713, holding that where title does not pass and the seller retains possession of the property sold, an action cannot be maintained to recover the purchase price, but the action must be to recover damages for a breach of the contract. It is, however, said that if the purchaser of goods refuses to accept and pay for them, the owner may resell them for the most he can get, and charge the first purchaser with the difference in the contract price and the price actually obtained;

—*Greenleaf v. Gallagher*, 93 Me. 549, 74 Am. St. Rep. 371, 45 Atl. 829, denying the right to maintain assumpsit for goods sold and delivered, to recover the purchase price of a book subscribed for by the defendant, which when completed was tendered to him, and which he refused to accept. It is said that actual delivery and acceptance must appear, and tender and refusal will not do. The test of the right of a seller to maintain an action in this form for the purchase price is said to be: "Where the vendee may not maintain trover against the vendor for the goods, he should not have an action for the price as goods sold and delivered, but damages only for the breach of the contract of bargain and sale;"

—*Greenleaf v. Hamilton*, 94 Me. 118, 46 Atl. 798, holding that, in order to maintain an action for goods sold and delivered, proof not only of an actual delivery, but of acceptance of the goods by the purchaser, is essential, and that where the seller left the property purchased, a set of books, at the buyer's place of business in his absence, under all the circumstances, the question whether this constituted a delivery was one for the jury;

—*Newport & S. Valley R. Co. v. Seager*, 19 Pa. Co. Ct. 465, holding that upon the refusal of the purchaser to accept bonds purchased by executory contract, the seller cannot recover the purchase price;

—*Jones v. Jennings Bros. & Co.* 168 Pa. 493, 32 Atl. 51, holding that a contract for the sale of a designated quantity of steel scrap was executory, and hence the seller, upon tender thereof to the purchaser and refusal of the latter to receive the same, was entitled to recover only the difference between the market value of the property and the contract price;

—*American Hide & Leather Co. v. Chalkley*, 101 Va. 458, 44 S. E. 705, stating the rule that where a contract of sale is executory, and title and possession still remain in the seller, his remedy against the buyer, who wrongfully refuses to accept and pay for the goods, is an action of assumpsit on a special count to recover damages for the breach of contract and the seller cannot maintain an action for the agreed price, as he could had the title passed, but he must sue for indemnity for the loss of his bargain.

b. Where article is manufactured for the buyer.

In some jurisdictions the foregoing doctrine

declaring the right of the seller of an article by executory contract, upon the refusal of the purchaser to accept the same when properly tendered, if the property meets the requirements of the contract, to treat the title thereto as having passed to the purchaser, and to hold it for him and recover the purchase price, is limited to cases where some specific article has been manufactured, produced, or procured for the purchaser, and where it has not an easily ascertained market value. And in view of these decisions, the cases have been classified with reference to the question whether the article was to be manufactured or procured for the purchaser, although a majority of the cases sustaining the right to recover assert the right as a general proposition, without limiting it to cases where the article has been manufactured, produced, or procured especially for the purchaser. In fact in the majority of the cases the article manufactured for the purchaser was an ordinary article having a fairly certain market value:

—*Morris v. Cuthbert*, 157 Ill. App. 175, holding that where a boat is manufactured according to contract, if the purchaser, upon tender thereof by the seller, refuses to accept it, the latter may nevertheless recover the purchase price;

—*Pittsburgh, C. & St. L. R. Co. v. Heck*, 50 Ind. 303, 19 Am. Rep. 713, holding that in all cases of contracts for the sale of personal property, where it has no market value, the seller, before he can recover of the purchaser the contract price, must have delivered the property or done such act as vested the title in the purchaser, or would have vested the title in him had he consented to accept it; and the same doctrine is asserted in *Rastetter v. Reynolds*, 160 Ind. 133, 66 N. E. 612, in sustaining the right of a seller of strips to be sawed, to recover the purchase price, where the purchaser refused to accept the same;

—*Akers v. Central Kentucky Lunatic Asylum*, 10 Ky. L. Rep. 817, holding that under a contract to manufacture and deliver a quantity of brick, the seller may tender the brick to the purchaser, and, upon the latter's refusal to receive the same, may set them apart for him at some reasonably safe place as near the place of delivery as can be, and may then maintain an action for the purchase price;

—*McIntyre v. Kline*, 30 Miss. 361, 64 Am. Dec. 163, holding that the seller of articles to be manufactured according to certain specifications, upon completion of the article, may entitle himself to recover the purchase price by delivering the article according to the contract, or preparing it for delivery and setting it apart for the purchaser;

—*Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210, holding that where the seller of a specific article to be manufactured tenders the completed article to the purchaser, and in every way fully performs the contract on his part, if the purchaser

refuses to accept the article, the seller may recover the purchase price, he holding the article as the property of the purchaser;

—Walker v. Nixon, 65 Mo. App. 326 (suit of clothes);

—Stumpf v. Mueller, 17 Mo. App. 283, holding that where the seller fails to deliver articles manufactured to the purchaser, such failure does not preclude him from recovering the contract price where the purchaser refuses to pay for or accept the article;

—Gordon v. Morris, 49 N. H. 382, recognizing the rule that where some specific article is made expressly for a person, and the article is not readily marketable, the purchase price thereof may be recovered although the purchaser refuses to receive it;

—Moore v. Potter, 155 N. Y. 481, 63 Am. St. Rep. 692, 50 N. E. 271; Donnell v. Hearn, 12 Daly, 230;

—Bement v. Smith, 15 Wend. 493, holding that where the purchaser fails to receive and pay for an article manufactured expressly for him, the seller is entitled to recover the purchase price;

—Mersereau v. L. K. Hirsch Co. 136 App. Div. 271, 121 N. Y. Supp. 11, affirmed without opinion in 204 N. Y. 564, 97 N. E. 1109; Wolfshiem v. Ammann Mfg. & Constr. Co. 110 N. Y. Supp. 943; Hass v. Pettin-gill, 29 Misc. 318, 60 N. Y. Supp. 495; Kaufman v. Canary, 21 Misc. 302, 47 N. Y. Supp. 152;

—Nicholson v. Paston, 33 N. Y. S. R. 496, 11 N. Y. Supp. 567, holding that the seller of a suit of clothes to be manufactured may recover the purchase price thereof upon the failure or refusal of the purchaser to receive the same. To the same effect are Walker v. Nixon, supra; Silver v. Connolly, 12 N. Y. S. R. 618;

—Marshall v. Macon County Sav. Bank, 108 N. C. 639, 13 S. E. 182, holding that in an action for damages for breach of contract to purchase a ledger, index, check book, and other stationary to be specially manufactured for the purchaser, which were worthless to anyone else, the contract price is the proper measure of damages, if the property is in fact worthless in the hands of the seller and the purchaser refused to receive it;

—Shawhan v. VanNest, 25 Ohio St. 490, 18 Am. Rep. 313, holding the seller entitled to recover the purchase price of a carriage manufactured upon a special order of the purchaser, where he tendered the completed article to the purchaser and the latter refused to accept it;

—Smith v. Wheeler, 7 Or. 49, 33 Am. Rep. 698, sustaining the right of the seller to recover the purchase price of an engine manufactured for the purchaser, where, after completion, the purchaser breached his contract and refused to receive and pay for it;

—Trenton Rubber Co. v. Small, 3 Pa. Super. Ct. 8;

—Gammage v. Alexander, 14 Tex. 414, holding that where property was manufactured in accordance with a contract for its sale, and it has been delivered or appropri-

ated to the purchaser, or he has accepted or refused it, an action can be maintained for the purchase price;

—Victor Safe & Lock Co. v. O'Neil, 48 Wash. 176, 93 Pac. 214;

—Fox v. Utter, 6 Wash. 299, 33 Pac. 354, holding that the tender of an article to be manufactured, when completed, if it conformed to the contract, was sufficient to entitle the seller to maintain an action for the purchase price, although there was no acceptance by the purchaser;

—Moore v. Perrott, 2 Wash. 1, 25 Pac. 906, holding the seller entitled to recover the purchase price of a boat constructed under a contract, although the purchaser refused to receive or pay for it;

—In Elliott v. Pybus, 10 Bing. 512, 4 Moore & S. 389, 3 L. J. C. P. N. S. 182, referring to Atkinson v. Bell, 8 Barn. & C. 277, 2 Mann. & R. 292, 6 L. J. K. B. 258, and Mucklow v. Mangles, 1 Taunt. 318, 9 Revised Rep. 784, and pointing out that in these cases which deny the right of the seller of goods to recover the purchase price where the purchaser refused to receive the goods, there was no agreement between the parties as to the price to be paid for the articles, and, since the purchase price was undetermined, title did not pass upon tender of delivery. And it is further pointed out that in the case under consideration, being the sale of a machine to be manufactured, the price was agreed upon, and the machine was tendered the purchaser, but the latter at that time refused to accept it on the ground that he was unable to furnish the money, and he never accepted the property. This transaction was held to be a sufficient delivery and acceptance to sustain an action for the purchase price.

In a few jurisdictions it is held that the seller of property to be manufactured is not entitled to recover the purchase price where the purchaser refuses to accept the goods, although they were made in accordance with the terms of the contract. These decisions rest upon the ground that the purchaser's assent to the appropriation of the goods to the contract is essential to passing the title thereto, and hence is essential to the recovery of the purchase price:

—River Spinning Co. v. Atlantic Mills, 155 Fed. 466, holding that where the goods are of a marketable character, an action for the contract price cannot be maintained, even where the goods are manufactured according to the contract, in the absence of the purchaser's consent to the appropriation to his contract of the particular goods;

—Grier v. Simpson, 8 Houst. (Del.) 7, 31 Atl. 587, holding that where there is a contract to make and deliver an article, the purchaser cannot be sued for the price unless he accepts it, that is, receives and appropriates it as his own. In this case, however, the article was sold on approval, and the claim was made that it did not work satisfactorily, and hence the purchaser refused to accept it;

—Moody v. Brown, 34 Me. 107, 56 Am. Dec. 640, holding that although the buyer

contracts for an article to be made for him, title thereto does not pass upon tender of the article to him by the seller upon its completion, where he refuses to accept it, since, for the title to pass, there must be proof of acceptance, or of acts or words respecting the property from which the acceptance of it may be inferred;

—*Tufts v. Grewer*, 83 Me. 407, 22 Atl. 382, holding where a soda water fountain is manufactured especially for a person and upon completion is tendered to him, that nevertheless the contract price cannot be recovered, where he refuses to receive the article. This decision is based upon the rule obtaining in Maine that a tender of personal property by the seller to the buyer does not transfer the title to the latter;

—*Maine Farmer Pub. Co. v. Rowe*, 108 Me. 194, 79 Atl. 471, holding that an offer of books to the defendant and his refusal to accept them, where the books were printed under a contract with him, will not entitle the seller to recover the purchase price, and the remedy in such case is an action for damages for the refusal of the purchaser to accept the property when tendered;

—*Thomas D. Murphy Co. v. Exchange Nat. Bank*, 76 Neb. 573, 107 N. W. 845, holding that where a contract to purchase goods to be manufactured was repudiated by the purchaser a few days after its execution, the seller cannot, upon arrival of the day fixed for delivery, tender a delivery of the articles and recover the purchase price. It does not appear whether or not the articles had been manufactured at the time the order for them was countermanded.

V. Repudiation of contract by buyer before tender or appropriation.

a. In general.

In some jurisdictions the rule prevails that where one party to a contract gives notice before the time of performance arrives that he does not intend to perform, the other party may treat such notice as a breach and bring his action, or he may decline to accept the notice as a breach and insist that the contract shall continue in force up to the time fixed for its final performance, holding the party refusing to perform responsible for the consequences of such refusal. And it is said that one party to a contract cannot, by simply refusing to carry out his part of it, compel the other party to rescind it. The latter has the right to keep it alive notwithstanding such refusal. *John A. Roebling's Sons' Co. v. Lock Stitch Fence Co.* 130 Ill. 660, 22 N. E. 518.

In *Ridgley v. Mooney*, 16 Ind. App. 362, 45 N. E. 349, the court says that although a contract of sale is executory at the time of its execution, it may subsequently become so far executed that the title to the property passes to the purchaser, although possession is still retained by the seller; and this is true although the contract is repudiated by the purchaser before the property is tendered to him.
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But see *Danforth v. Walker*, 37 Vt. 239, asserting the rule that where a contract of sale is executory, the purchaser has the power to stop performance by the seller by an explicit direction to that effect, thereby subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that particular point or stage in the execution of the contract. To the same effect are *Collins v. Delaporte*, 115 Mass. 159; *Wigent v. Marra*, 130 Mich. 609, 90 N. W. 423; *Lincoln v. Charles Alshuler Mfg. Co.* 142 Wis. 475, 28 L.R.A.(N.S.) 780, 125 N. W. 908; *Badger State Lumber Co. v. G. W. Jones Lumber Co.* 140 Wis. 73, 121 N. W. 933.

The soundness of the doctrine stated in the foregoing case, as a general or abstract proposition, is unquestionable. By the weight of authority, however, it is not applicable where the circumstances and the condition of the property are such that the seller may complete performance merely by appropriating the goods sold to the contract.

Massachusetts cases.

In *Barrie v. Quinby*, 206 Mass. 259, 92 N. E. 451, the rule is asserted that the purchaser of property has an unqualified right to abandon the contract at any stage of performance, and the seller, even if not in default, cannot insist upon proceeding under it by tendering the property, which the purchaser not only might be unable to dispose of, but did not want, and thereby compel him to pay the contract price for goods sold and delivered. This doctrine was asserted in denying the right of the seller of sets of books to be printed, to tender the books and recover the purchase price, where, after the books had been completed, but before the delivery thereof had been tendered, the purchaser repudiated the contract. It is pointed out that, although not specified in the contract, the parties mutually understood delivery was to be at the purchaser's place of business, where the sale would be completed. In this case a tender of a portion of the books was made, but not of the whole. But no point is apparently made of a failure to tender the balance, the court apparently distinguishing between a case where, under the contract, an article to be manufactured is to be received by the purchaser at the place of manufacture or to be delivered to him by the aid of a carrier. In the latter class of cases, it is said that the appropriation of the goods to the contract, or the delivery to a carrier for transportation, would pass title and entitle the seller to recover the purchase price. In this connection it is of interest to observe that in *Bristol Mfg. Corp. v. Arkwright Milla*, the goods were also to be delivered by the aid of a carrier, and while the contract was apparently repudiated before delivery, and the purchaser was held liable for the purchase price, it is, however, pointed out that nothing re-

maintained to be done by the seller under the contract except to appropriate the goods thereto.

On this point the rule in *Massachusetts* is involved in considerable doubt and it is not clear to just what extent is sustained the seller's right to recover the purchase price, where the buyer repudiates his contract of purchase.

In *Mitchell v. LeClair*, 165 Mass. 308, 43 N. E. 117, where, upon accepting by telegram an offer to sell a quantity of butter out of a larger mass, the seller weighed, set apart, and marked the butter for the purpose of designating it as the buyer's property, and at once sent him a bill for it marked "Cash on demand," and where a portion of the butter had been delivered and accepted, but, owing to a dispute as to the terms of payment, the seller had refused to deliver the balance, the seller was held entitled to recover the purchase price, on the ground that the buyer, on accepting the seller's offer to sell, impliedly at least, made the latter his agent to set apart and appropriate to him the goods called for by the contract, and when the seller did this act he completed the sale and passed the title.

And *New England Dressed Meat & Wool Co. v. Standard Worsted Co.* 165 Mass. 328, 52 Am. St. Rep. 516, 43 N. E. 112, while denying the right of the seller of wool to be manufactured, to recover the purchase price therefor, where the purchaser breached his contract of purchase, on the ground that the seller had not, at the time of the bringing the action, segregated or apportioned to the buyer the quantity of wool called for by the contract, nevertheless points out that the parties to the contract contemplated that the seller was to manufacture the wool, and in connection with the work of manufacture, to separate it from the mass then in its possession, and determine its weight, so that it would appear to be the property called for by the contract, and that its price would be ascertained; and *Benjamin on Sales* is approvingly referred to and quoted to the point that "in a sale of a portion of a larger mass, the whole remaining in the possession of the vendor, with a right and power in him to make a separation, both upon principle and the weight of authority, no title passes until that is done, so as to enable the vendor to recover the price." And it is said that this doctrine is well established in *Massachusetts*.

And *Bristol Mfg. Corp. v. Arkwright Mills*, 213 Mass. 172, 100 N. E. 55, sustains the right of the seller of a quantity of cloth to be manufactured, to recover the purchase price thereof, where the buyer refuses to accept and pay for the goods. In this case, after a portion of the goods had been delivered, the buyer wrongfully canceled the contract on the untenable ground that the goods did not in quality comply with the requirements thereof. The right to recover the purchase price under these circumstances was held to depend on the 51 L.T.A. (N.S.)

question whether there had been a separation and appropriation by the seller of the goods, so as to constitute a constructive delivery thereof. The court points out that the cloth was of a common grade, well known in the general market, and such as the buyer also manufactured, and it is said that it was not an unusual kind made upon special order. It is further pointed out that the manufacture was completed, and nothing remained in order to execute the contract on both sides, except for the buyer to take the goods and pay for them, and it is said that under these circumstances, as between the immediate parties, nothing was necessary in order to pass title to the buyer beyond setting apart the goods for him. "It might have been found that the seller was impliedly authorized to make such appropriation by the buyer. Title may pass although the goods remain in the actual possession of the vendor."

In *Collins v. Delaporte*, 115 Mass. 159, the rule is asserted that a party to an executory contract may stop its performance by an explicit order or repudiation thereof, and thereby subject himself only to such damages as will compensate the other party for being deprived of the benefits of the contract. The court, however, refused to commit itself upon the question whether the seller of lumber who receives notice from the purchaser, after the logs are partially sawed into lumber, that he will not receive the same, may nevertheless finish sawing the lumber, and, upon offering performance on his part, recover the purchase price.

It is held in this jurisdiction that an action may be maintained to recover the purchase price of shares of stock which the purchaser refused to accept upon their being tendered to him before suit was brought, the tender being renewed on the trial of the suit. *Pearson v. Mason*, 120 Mass. 53.

And in *Thompson v. Alger*, 12 Met. 428, it is held that the contract price of shares of stock is the proper measure of recovery, where, before the contract of purchase was repudiated, the seller caused the certificate to be transferred upon the books of the corporation to the purchaser.

And in *Thorndike v. Locke*, 98 Mass. 340, it is held that a purchaser of shares of stock, under a contract authorizing him to return them to the seller and receive back the purchase price, may maintain an action to recover the stipulated price, where he undertakes to exercise the option and tenders back the stock to the seller, and the latter refuses to accept it.

Wisconsin cases.

In Wisconsin the rule obtaining is to be gathered from several decisions on the subject, which, while apparently inconsistent, may nevertheless, in part at least, be reconciled. In *Ganson v. Madigan*, 13 Wis. 67, the court holds that before an action can be maintained for the purchase price

of a machine, it must have been so designated for, or appropriated to, the purchaser, as to vest title in him, thus apparently recognizing the rule that the seller, by appropriating the article to the purchaser, thereby vesting the title in him, may entitle himself to recover the purchase price.

In *Crawford v. Earl*, 38 Wis. 312, it is held that where the seller of fruit trees tendered the same to the purchaser, and upon the latter refusing to accept them, left them for him at a convenient place, and notified him thereof, he had done all that the contract of sale required him to do, to vest the title in the purchaser, and hence was entitled to recover the purchase price.

And in *Boyington v. Sweeney*, 77 Wis. 55, 45 N. W. 938, in holding that the risk of certain property was on the purchaser after tender and a lapse of a reasonable time to remove the same, the doctrine was asserted that in an action upon an executory contract for the sale and delivery of personal property, the seller may recover the value of the goods contracted for, if he tenders a delivery thereof in accordance with the terms of the contract.

And in *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368, the general rule is stated that where a buyer neglects or refuses to perform an executory contract of sale, one of the remedies of the seller is to retain the property for the buyer, and sue for and recover the purchase price.

In *Fountain City Drill Co. v. Peterson*, 126 Wis. 512, 106 N. W. 17, involving the sale of a machine out of a large number of machines which were shipped by a common carrier, it is held that, since the seller performed an executory contract of sale of chattels by delivering the same at the place and in the manner specified in the contract, he is entitled to recover the stipulated price. The question was also raised as to what would have been the effect upon the seller's right in this regard, had the purchaser repudiated the contract before performance; but the court refused to pass upon it. Reference, however, is made to *Woodman v. Blue Grass Land Co.* 125 Wis. 489, 103 N. W. 236, 104 N. W. 920, which is not in point as to the facts, but in which the doctrine is asserted that unless a contract is one in which a court of equity will decree a specific performance, either party may terminate it pending its performance, subject only to the payment of the damages which the other party sustained thereby. The court said that the effect of such termination is to stop the performance at the point then reached, subject to payment of damages. In a rehearing opinion, the court also refers to the rule with regard to an anticipatory breach of an executory contract, and it is said that the other party may treat it as a breach, and if he does not do so, but continues to demand performance, he will be held to have kept the contract alive for the benefit of both parties.

In *Lincoln v. Charles Alshuler Mfg. Co.* 142 Wis. 475, 28 L.R.A. (N.S.) 780, 125 N. 51 L.R.A. (N.S.)

W. 908, however, the doctrine is stated that it is an elementary principle that in case of a bargain and sale of goods not specific, before they are set aside for the purchaser, if he notifies the executory seller that he elects to and does cancel the contract, and will not receive the goods, he cannot be made liable for the purchase price as on a sale of goods, but only for damages for his breach of contract. This being upon the theory, often declared, that, ordinarily, any person has a right to breach his executory agreement and submit to damages therefor. This doctrine, however, is asserted in an action involving an executory contract for the sale of cloth to be manufactured, the purchaser to give shipping directions, where the goods were never tendered to the purchaser, owing to a disagreement between the parties with reference to time of payment, and they were sold by the seller as the goods of the purchaser, and he then undertook to recover the difference between the proceeds of this sale and the contract price.

And see *Tufts v. Weinfeld*, 88 Wis. 647, 60 N. W. 992, holding that where the purchaser of an article to be manufactured by the seller countermands the order before the seller has done anything toward the production of the article, the latter's legal right to perform the contract is terminated, and he is relegated to an action for damages sustained by reason of such breach.

And in *Badger State Lumber Co. v. G. W. Jones Lumber Co.* 140 Wis. 73, 121 N. W. 933, the doctrine is stated that the rule is well settled that in executory contracts, where a specific performance cannot be enforced, either party has the power to stop performance on the other side by an explicit order to that effect, by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that point or stage in the execution of the contract. In such case an action cannot be maintained to recover the contract price, but may be maintained to recover damages for a breach of the contract. But in this case the contract involved was a sale of lumber, and it contained a provision for the inspection of the lumber by inspectors of both parties, with a further provision that if the purchaser failed to furnish an inspector, inspection made by the seller should be final, and there was also a provision for the estimate of the lumber by joint action of the parties. Hence, the contract of sale was not of a character which could be entirely performed by the seller without affirmative action upon the part of the purchaser.

The broad statement of the rule denying the right of the executory seller to maintain an action for the purchase price is considerably qualified in *Haueter v. Marty*, 156 Wis. 208, 145 N. W. 775, involving an action for damages for breach of contract, where the court refers to the question under consideration and reviews the cases passing thereon. In this review the doctrine is declared that "in case of a person offering,

for a stipulated price, to sell and deliver to another at a particular place and at a time, depending upon circumstances determinable by such other, any specific article of personal property, and such other accepts the offer, and thereafter such person names the time when delivery will be made, but such other either notifies such person that he will not accept the property under the contract, except upon a material condition not named therein, or neglects to make any provision for duly accepting, thus manifesting a refusal to comply with the contract, a remediable wrong thereby accrues to the executory vendor, for which the law affords him a choice of three courses of action.

The three courses of action mentioned are these: (a) Hold the property in *personam* or by some appropriate agency for the executory vendee, and sue upon the contract for the purchase price and reasonable expenses incurred in caring for the same." This principle, however, is said to apply only "to sales of specific articles which are in possession of the seller, and can be, or articles which are before the breach, set aside for the executory vendee so title can actually or constructively vest in him. Where that is not the case, but the contract is for articles to be manufactured in the ordinary course of producing goods for the trade, and there is a notification before anything shall have been done to pass title; then the choice of options mentioned does not exist. That is, a party to an executory contract for the sale of personal property may, of right so to speak, commit the wrong of breaching it and become liable for damages actually suffered. . . . In such a case—where the contract does not relate to specific articles which can be treated as the property of the executory vendee before or at the time of the breach—he has but the one remedy, to recover the difference between the contract price and the fair market value at the time and place for delivery, . . . in case of such difference indicating a loss. If it does not so indicate, because of such fair market value being at least equal to the contract price, he has no remedy because of not suffering any damage."

b. Articles to be manufactured.

By the clear weight of authority it is held, at least as to goods to be manufactured by special order, which are out of the usual order and have not a readily ascertainable market value, that the purchaser, by repudiating the contract to purchase after the article has been completed, but before delivery, cannot relieve himself of liability for the purchase money, if the seller elects to treat the property as that of the purchaser and holds it for him. And although not making the foregoing conditions the test as to the right of the seller in this regard, it is held in many jurisdictions that the purchaser of an article by executory contract, by repudiating the contract before the seller has appropriated the

article to the contract or tendered a delivery thereof, cannot escape liability for the purchase price, if the seller treats the property as his and holds it for him, and this rule is applied to articles manufactured for a purchaser. The two classes of cases are included under this subdivision, but the particular holding of each case is indicated:

—Kinkead v. Lynch, 132 Fed. 692, holding that where articles are manufactured for a certain price upon order of the purchaser, and, under ordinary circumstances, they are of a character precluding their having a market value, although before the articles are shipped the purchaser notifies the seller that he will not receive them, the former without delivery may sue for the value of the articles;

—Bond v. Bourk, 54 Colo. 51, 43 L.R.A. (N.S.) 97, 129 Pac. 223, holding that where a purchaser refuses without legal justification, to accept, when tendered to him, an article manufactured on his order after a special and particular design, the seller at his election may hold the article for the purchaser and recover the purchase price, since the tender of delivery and election to sue for the contract price vest the title in the purchaser, at least to the extent of supporting the action;

—Illustrated Postal Card & Novelty Co. v. Holt, 85 Conn. 140, 81 Atl. 1061, holding that where a purchaser of goods to be manufactured countermanded his order before an attempt had been made to deliver the same, but after the goods were manufactured, and the seller thereafter tendered the goods to him, the former was entitled to maintain an action for the purchase price, although the latter refused to receive the goods. The court said that upon the seller's delivery to the carrier and notice to the purchaser that the carrier held the goods subject to his order, the property passed to the purchaser, and the fact that the seller shipped the goods to the purchaser after notice from the latter of his cancellation of the contract, instead of retaining them, did not change the character of the bailment, since the carrier's possession was the seller's possession, it holding the goods for the purchaser. This decision is based upon the sale of goods act. And see to same effect, Home Pattern Co. W. W. Mertz Co. 86 Conn. 494, 86 Atl. 19. Where the purchaser of articles to be manufactured revokes the contract before delivery or tender, but after the articles are completed, the seller, for his measure of damages, may recover the contract price of the articles. Allen v. Jarvis, 20 Conn. 38;

—Neal v. Shewalter, 5 Ind. App. 147, 31 N. E. 848, holding that where a purchaser of barrels to be manufactured, upon receiving notice from the seller of the completion of the barrels, notified him that he would not receive them, the seller is not entitled to recover the purchase price where the barrels still remain his property, and he does not place himself in the position of bailee for the purchaser. It is recognized,

however, that the seller, by appropriating the articles to the purchaser and retaining them as his agent, may entitle himself to recover the purchase price;

—*Bauman v. McManus*, 75 Kan. 106, 10 L.R.A.(N.S.) 1138, 89 Pac. 15, sustaining the right of the seller of goods to be manufactured, to recover the purchase price, although the purchaser refused to receive the goods, and gave notice to the seller before the goods were shipped, but after they were completed, that he would refuse to receive them;

—*Mass.* See *supra*, "Repudiation of contract by buyer before tender or appropriation," V. a. And also *Bristol Mfg. Corp. v. Arkwright Mills*, 213 Mass. 172, 100 N. E. 55, holding that the purchaser was entitled to recover the purchase price of goods sold to be manufactured, which were of the usual manufacture, and not manufactured especially for the buyer, although the buyer canceled the contract, where, however, the seller separated and apportioned the goods to the particular contract so that it constituted a constructive delivery thereof. It does not appear whether or not this appropriation was made before or after the contract was canceled by the buyer. It is, however, pointed out that, as between immediate parties, nothing was necessary in order to pass title to the buyer beyond setting apart the goods for him, and it is said that it may have been found that the seller was impliedly authorized to make such appropriation by the buyer. For title may pass although the goods may remain in the actual possession of the seller;

—*St. Louis Range Co. v. Kline-Drummond Mercantile Co.* 120 Mo. App. 438, 96 S. W. 1040, holding that where a contract to manufacture articles has so far been performed before the seller receives notice from the purchaser of his repudiation thereof, that the property is ready for delivery, the seller may treat the contract as completed, hold the property subject to the purchaser's order, and recover the purchase price. To the same effect, see *Koenig v. Truscott Boat Mfg. Co.* 155 Mo. App. 685, 135 S. W. 514;

—*Funke v. Allen*, 54 Neb. 407, 69 Am. St. Rep. 716, 74 N. W. 832, wherein it is said that there are many cases where the particular facts and circumstances will warrant a departure from the general rule as to damages for breach of contracts of sale, in which the seller may be entitled to recover the purchase price;

—*Atkinson v. Truesdell*, 127 N. Y. 230, 27 N. E. 844, holding the seller of bottles to be manufactured entitled to recover the purchase price, although after the goods were manufactured, but before delivery, the purchaser gave notice to the seller that he would not take any of the property, where, upon such refusal, the seller held the goods in storage for him;

—*Levy v. Glassburg*, 92 N. Y. Supp. 50, holding that where an executory contract for the sale of an article to be manufactured

is repudiated by the purchaser after the article has been manufactured, but before it is delivered or tender of delivery has been made, the seller may nevertheless offer to perform, and thereby entitle himself to recover the purchase price;

—*Wis.* See *supra*, "Repudiation of contract by buyer before tender or appropriation," V. a.

But it has been asserted that where goods have been ordered from the manufacturer, and during the process of manufacture or before the order has been made up, it is canceled, or where goods have been ordered from a wholesaler, and before the goods are delivered, either to the carrier or the purchaser, the latter countermands the order and notifies the seller that he will not comply with the contract or accept the goods, he renders himself liable only to respond in damages to the seller for whatever loss the latter has suffered thereby; but in such case no action can be maintained for the purchase price, although the seller thereafter completes the goods and tenders them to the purchaser. *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co.* 86 Neb. 623, 136 Am. St. Rep. 710, 126 N. W. 293. The article, the purchase price of which it was sought to recover in this case, was roofing to be manufactured, and it is pointed out that there were no special conditions or requirements in the order; it was for an article a sample of which had been shown to the buyer, and as to which it was a matter of indifference to him whether it was on hand or had to be manufactured. In this case the article was made up before the countermand, but was not delivered.

And see *Unexcelled Fire-Works Co. v. Polites*, 130 Pa. 536, 17 Am. St. Rep. 788, 18 Atl. 1058, holding that a contract for the sale of fireworks to be manufactured or procured by the seller might be countermanded by the purchaser at any time before the goods were separated from the bulk and set apart for him, although the goods were actually made up before the order was countermanded.

And see also *Acme Food Co. v. Older*, 64 W. Va. 255, 17 L.R.A.(N.S.) 807, 61 S. E. 235, holding the sellers of animal food not entitled to deliver the food and maintain an action for the purchase price, where, before delivery, the purchaser repudiated the contract, and although subsequently to the repudiation the sellers tendered a delivery. In this case the court treated the contract as executory, although the order was for a certain quantity of food specifically described, and the purchaser executed his note in payment thereof, and before notice of repudiation was given, the sellers wrote the purchaser that they were in receipt of his order for the food, and advised him that they had manufactured, marked, and set it aside for him in their warehouse, and that it would be shipped him on the day specified, and further advised him that they had accepted his note for the purchase price.

c. Other articles.

The cases are quite evenly divided upon the question as to the right of the purchaser of personal property by executory contract to escape liability for the purchase price by giving to the seller notice of his repudiation of the contract before the seller has appropriated the property to the contract or tendered a delivery thereof to the purchaser.

The following cases sustain the right of the seller to recover the purchase price under such circumstances, if he continues to hold the property for and as the property of the buyer:

—Habeler v. Rogers, 65 C. C. A. 281, 131 Fed. 43, asserting, in an action for a breach of contract, that upon refusal of the purchaser to perform an executory contract of purchase before delivery or tender, the seller may wholly perform on his part, and when he has done all that is necessary to effect a delivery of the goods so as to pass title to the purchaser, he may store or retain them for him, or give him notice and resell them;

—Oklahoma Vinegar Co. v. Carter, 116 Ga. 140, 59 L.R.A. 122, 84 Am. St. Rep. 112, 42 S. E. 378, holding that where, before delivery of goods purchased under an executory contract, the purchaser repudiates the contract and gives notice thereof to the seller, the latter cannot complete the contract by delivering or offering to deliver the goods, and maintain an action for the purchase price. Under the Georgia Code, however, he can retain the goods and sue for the purchase price. To the same effect are Mountain City Mill Co. v. Butler, 109 Ga. 469, 34 S. E. 585; Rounsaville v. Leonard Mfg. Co. 127 Ga. 735, 56 S. E. 1030; Maddox v. Washburn-Crosby Mill. Co. 135 Ga. 539, 69 S. E. 821; Georgia Agri. Works v. Price, 11 Ga. App. 80, 74 S. E. 718; Robson v. Hale, 139 Ga. 753, 78 S. E. 177; Dillman Bros. v. Patterson Produce & Commission Co. 2 Ga. App. 213, 58 S. E. 365; Linder v. Cole Bros. Lightning Rod Co. 10 Ga. App. 102, 72 S. E. 719; American Mfg. Co. v. Champion Mfg. Co. 13 Ga. App. 551, 79 S. E. 485;

—Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869, sustaining the right of the seller of shares of stock to maintain an action for the purchase price without making a delivery of the stock or a tender of delivery, where, before delivery, the purchaser repudiated the contract. The rule is asserted that if there is no delivery of personal property, the seller who has offered performance on his part may consider the property as the purchaser's, and may either sell it and sue for the unpaid balance of the purchase price, or hold it subject to the call or order of the purchaser and recover the purchase price;

—John A. Roebeling's Sons' Co. v. Lock Stitch Fence Co. 130 Ill. 660, 22 N. E. 518, holding that, notwithstanding the fact that a purchaser of goods gives notice to the seller before the time for shipment that he

will not accept the goods tendered to him, the seller may nevertheless disregard this notice, ship the goods and tender them to the purchaser, thereby keeping the contract alive for the benefit of both parties;

—Morris v. Wibaux, 159 Ill. 627, 43 N. E. 837, stating the rule in sustaining the right of the seller to resell as the property of the purchaser cattle purchased by the latter, after he had given the seller notice of his intention to refuse to receive them; Ridgley v. Mooney, 16 Ind. App. 362, 45 N. E. 348, holding that where the purchaser of bark by executory contract notified the seller that he would not receive, accept, or pay for any of the bark, the seller was not entitled to recover the difference between the amount received for the bark upon a resale and the purchase price, where he did not sell as agent of the purchaser. The court recognizes, however, the right of the seller under such circumstances to tender the goods and then sue for the purchase price;

—McCormick Harvesting Mach. Co. v. Markert, 107 Iowa, 340, 78 N. W. 33, holding that the seller, who is also the manufacturer of harvesting machinery to be delivered at a certain place, may recover the purchase price without making a delivery or tender, where, prior to the time fixed for delivery, the purchaser refused to recognize the contract or receive any machines under it. The court said that a judgment for the purchase price had the effect of vesting title in the purchaser;

—PATE v. RALSTON, holding that the purchaser of fruit trees cannot relieve himself from liability to take the trees and pay the purchase price therefor, by repudiating the contract before shipment, but after the seller had accepted the order which constituted the contract;

—Dudley A. Tyng & Co. v. Woodward, 121 Md. 422, 88 Atl. 243, holding that where the purchaser of shares of stock refused to receive them, and gave notice of such refusal to the seller before the stock was tendered to him, but after it had been purchased upon his account by the seller, the latter might resell for the account of the buyer; and the general rule is stated that the seller in such case is also entitled to store the goods for the buyer and sue for the contract price;

—Mass. See *supra*, "Repudiation of contract by buyer before tender or appropriation." V. a;

—Oehler v. Conrad Schopp Fruit Co. 162 Mo. App. 446, 142 S. W. 811, holding that the rule that where a purchaser refuses to accept the goods purchased by executory contract, the seller, after tender and refusal, may store and retain the property for the purchaser and recover the purchase price, applies where the purchaser repudiates the contract of sale before the property is tendered to him, and that in such case no actual tender need be made (sale of apples to be picked);

—Dehner v. Miller, 166 Mo. App. 504, 148 S. W. 953, sustaining the right of the

seller to recover the purchase price of baled straw, although no delivery thereof was made, where, before a delivery was attempted, the purchaser gave the seller notice that he would not accept the property if tendered;

—*Gourd v. Healy*, 206 N. Y. 423, 99 N. E. 1099, holding the rule that when the purchaser of personal property under an executory contract of sale refuses to complete his purchase at the time fixed, the seller may keep the property for the purchaser and sue for the purchase price, to apply to a quantity of wine sold, the delivery of most of which never was tendered to the purchaser, the latter having repudiated the contract when requested by the seller to fix the time for delivery, or at least to make a settlement for the wine. The court said that the dealings of the parties in this case were such as to relieve the seller from the duty of segregating the purchaser's wine, even if it was considered that such segregation was necessary in order to pass title thereto. It is, however, added that the property in question was a species of which there may be a transfer of title even where it remains an integral part of a larger bulk;

—*Mills v. Knickerbocker Hat Co.* 76 Misc. 446, 135 N. Y. Supp. 5, holding that where the buyer notifies the seller of groundless objections to articles already delivered under a contract of sale, and orders the cancellation of the contract, his action in this regard constitutes a repudiation thereof, and the seller need not tender the remaining articles to him in order to entitle himself to maintain an action for the purchase price thereof (sale of a large quantity of pollution);

—*Livesley v. Krebs Hop Co.* 57 Or. 352, 97 Pac. 718, 107 Pac. 460, 112 Pac. 1, sustaining the right of the seller of hops to be raised and delivered in instalments, to recover the purchase price of instalments when the same was due, where the hops had been duly tendered to the purchaser, although before the tender the latter had repudiated the contract;

—*Dowagiac Mfg. Co. v. Higinbotham*, 15 S. D. 547, 9 N. W. 330, holding that, by the statutes of South Dakota, title is transferred by an executory agreement for the sale of personal property when the buyer has accepted the property, or when the seller has appropriated it for delivery and offered it to the buyer with the intent to transfer the title; and that this rule applies to the sale of a number of grain drills to be shipped from another state by the seller to the buyer, and that a notice by the purchaser to the seller of his repudiation of the contract and of his intention to refuse to receive the drills if tendered him, although given before delivery, does not preclude the seller from performing by shipping the drills to the purchaser, thereby vesting the latter with the title thereto, with the liability to pay the contract price;

—*Wis.* See *supra*, "Repudiation of contract by buyer before tender or appropriation," V. a.

tract by buyer before tender or appropriation," V. a.

In *Roswell Nursery Co. v. Mielenz*, — N. M. —, 137 Pac. 579, it is held the rule that in case of a breach of an executory contract for the sale of goods before delivery, the seller cannot recover the contract price, does not apply to an executory sale of nursery stock which has been secured and prepared for shipment to the extent that stock was in the heeling ground ready for shipment when the order was repudiated by the purchaser, and which, if not taken by him, would result in a total loss to the seller. Under these circumstances the court holds the contract price may be recovered. Compare with *Mayo v. Latham*, *infra*.

The following cases, however, deny the right of the seller to appropriate or tender a delivery of the property to the purchaser, and thereby entitle himself to recover the purchase price, where, prior to such appropriation or tender, the purchaser has given to the seller notice that he cancels or repudiates the contract:

—*Mayo v. Latham*, 159 Mich. 136, 123 N. W. 561, holding that where the purchaser of shrubbery cancels the order therefor after the shrubbery has been dug and set aside for him by the seller, but before delivery or tender, the seller cannot recover the purchase price, although he thereafter ships the articles to the purchaser. Compare with *Roswell Nursery Co. v. Mielenz*, *supra*;

—*McCormick Harvesting Mach. Co. v. Balfany*, 78 Minn. 370, 79 Am. St. Rep. 393, 81 N. W. 10, holding that where there is no actual delivery of the article sold, the seller cannot recover the purchase price unless he shows a contract having the effect of passing title to the article. If the possession and title remain in the seller, and the purchaser repudiates his contract, the seller must treat the property as his own;

—*Sherman Nursery Co. v. Aughenbaugh*, 93 Minn. 201, 100 N. W. 1101, holding that where the purchase price of goods is to be paid upon delivery, and before delivery the purchaser repudiates the contract, and prevents the seller from making delivery, the latter cannot, by tendering the goods, entitle himself to recover the purchase price, and his only remedy in such case is an action for damages for a breach of the contract;

—*Funke v. Allen*, 54 Neb. 407, 69 Am. St. Rep. 716, 74 N. W. 832, denying the right to recover the purchase price where the purchaser of goods countermanded the order before the goods were shipped. It is said that on the breach of the contract by the purchaser by refusing to receive the property, the seller's damage in general is the extent of his actual injury, which ordinarily is the difference between the contract price and market value at the time and place of the breach. And the court disapproves the rule stated in *Lincoln Shoe Mfg. Co. v. Sheldon*, that the seller may tender the property to the purchaser, and on his refusal to accept it may recover the purchase

price, and it is said that the statement of this rule was not necessary to that decision, since the action was upon a stock subscription, which the court said was not a sale and purchase;

—*Massman v. Steiger*, 79 N. J. L. 442, 75 Atl. 746, containing language indicating the position of the court to be that the purchaser of property by executory contract can defeat the right of the seller to recover the purchase price where the title has not passed, by refusing to accept the property when tendered to him. Such a holding, however, was not necessary to the decision. In this case the attempt was to recover the purchase price of shares of stock sold under a contract executory in character, by the terms of which the title was not to pass until a time in the future, the purchase price to be represented by promissory notes with satisfactory indorsers. In an action based upon a refusal of the purchaser to accept the stock and execute notes, the declaration was framed in covenant for a breach of the contract, and was not in form a suit for the purchase price of the stock, treating the property as having passed, and the pleadings contained no allegation of any election by the seller to recover the purchase price and hold the property for the benefit of the purchaser. Under these circumstances it was held that the measure of the seller's recovery was the difference between the agreed price of the property and its market value at the time and place of delivery. Moreover, as pointed out by the court, the price was to be paid in notes, which, as to form and sufficiency of indorsement, were to be passed upon by the seller. Considering the contract and the pleadings, the court said that at its inception title did not pass thereunder, and that since then title had not passed as evinced by the intention of the parties;

—*Hooper, S. & Co. v. Bromley Bros. Carpet Co.* 11 Pa. Super. Ct. 634, denying the right of the seller of bales of cotton by executory contract to recover the purchase price of cotton not delivered, where, before a tender of all the cotton, but after a delivery of a portion thereof, the purchaser repudiated the contract;

—*McCall Co. v. Jennings*, 26 Utah, 459, 73 Pac. 639, involving an executory contract for the sale of a quantity of dress patterns, and stating the rule that a party to an executory contract may by his own act break and terminate it, rendering himself liable to the other party to the contract for all damages recoverable for the breach, and the measure of damages in such case is the difference between the price agreed upon and the market value of the goods contracted for.

VI. Repudiation by buyer before article is completed.

The cases are in harmony in denying to the seller of articles to be manufactured the right to complete the article, and, by ap- 51 L.R.A. (N.S.)

propriating it to the contract, entitle himself to the purchase price, when, before the article is substantially completed, the buyer repudiates it and gives notice thereof to the seller:

—*Thorn v. Danzinger*, 50 Ill. App. 306, holding that where shoes were ordered to be manufactured according to sample, and shortly thereafter the purchaser countermanded the order, but the seller made the shoes and shipped them to the purchaser, and the latter sent them back, and, the seller refusing to receive them, the carrier stored them in his own warehouse, there had been no delivery sufficient to entitle the seller to sue for the purchase price. The court remarked that contracts cannot be specifically enforced *vis et armis*;

—*Wigent v. Marrs*, 130 Mich. 609, 90 N. W. 423, holding that where a purchaser of a monument rescinded the contract of purchase before the monument was completed, the seller could not complete it and erect it at the place designated in the contract, and thereby entitle himself to recover the purchase price, since the rule is that a party to an executory contract may always stop performance by the other party by an explicit direction;

—*Baessetti v. Shenango Furnace Co.* 122 Minn. 335, 142 N. W. 322, holding that where an executory contract for the purchase of an article to be manufactured is repudiated before the article is completed, the seller cannot complete the article and thereby increase the purchaser's liability;

—*Gibbons v. Bente*, 51 Minn. 499, 22 L.R.A. 80, 53 N. W. 756, holding that where a contract to erect a factory was repudiated before any steps had been taken for the erection thereof, the seller cannot proceed in the erection, and upon completion hold the purchaser for the purchase price;

—*Heiser v. Mears*, 120 N. C. 443, 27 S. E. 117, holding that where an order for goods to be manufactured is countermanded by the purchaser before completion, the seller cannot, by completing the article and tendering it to the purchaser, entitle himself to recover the purchase price;

—*Woolf v. Hamburger*, 129 App. Div. 883, 114 N. Y. Supp. 186, holding that where a purchaser cancels a contract for the purchase of articles to be manufactured before the articles have been manufactured, the seller is not entitled to complete the articles, tender them to the purchaser, and recover the purchase price. Where an executory contract for the purchase of an article to be manufactured is repudiated before the seller has manufactured the article, he is not entitled to complete the same, and by tendering the article hold the purchaser for the purchase price. *Isaacs v. Terry & T. Co.* 125 App. Div. 532, 109 N. Y. Supp. 792;

—*Davis v. Bronson*, 2 N. D. 300, 16 L.R.A. 655, 33 Am. St. Rep. 783, 50 N. W. 830, holding that where a contract to erect a creamery was repudiated by the buyer before any steps had been taken toward the erection of the plant, the seller could not

perform the contract on his part and hold the purchaser for the contract price;

—*Sonka v. Chatham*, 2 Tex. Civ. App. 312, 21 S. W. 948, holding that on repudiation of a contract for the purchase of machines, the seller is not entitled to complete the machines, although at the time of receiving notice they were nearly completed. In such case the seller's only remedy is an action for the breach of the contract. He is, however, entitled to have the contract price taken as a standard by which to determine his loss;

—*Tufts v. Weinfeld*, 88 Wis. 647, 60 N. W. 992, holding that where the buyer of a soda water fountain to be specially manufactured for him countermanded the order before any steps to manufacture the fountain had been taken, the seller could not thereafter manufacture the article and recover the purchase price.

Compare with *Bookwalter v. Clark*, 11 Biss. 126, 10 Fed. 793, holding that where an article is ordered to be manufactured according to a certain measure, pattern, or style, after the manufacturer has completed the article and tendered it, he is entitled to recover the contract price, although before tendering the article or entirely completing it, the purchaser undertakes to repudiate the contract and gives notice thereof to the manufacturer.

VII. Where title is expressly reserved by seller until purchase price is paid.

Although the purchaser refuses to receive goods sold on conditional sale when tendered, if they are appropriated to the contract by the seller, the great weight of authority sustains the right of the latter to recover the purchase price, where the contract contemplates possession by the purchaser before payment, since, by a contract of this character, the purchaser agrees that the payment of the purchase price shall precede the vesting of the title to the property in him. It is worthy of note that some of the cases which sustain the right of the seller to recover the purchase price where the purchaser refuses to receive the goods sold under a contract of this character deny the right under the ordinary contract of sale:

—*Commercial Register Co. v. Drew*, 168 Ill. App. 347, holding that where an order for a cash register to be manufactured was canceled before shipment, but after it was about ready for shipment, and the machine was shipped to the purchaser and he refused to receive it, an action might be maintained on a note given for the purchase price, although the title was reserved in the seller until payment. The court said that an actual delivery or acceptance was unnecessary to a recovery of the purchase price, for if the contract was executory when repudiated, upon the shipment of the machine it became executed so far as concerned the seller's rights;

—*Gaar, S. & Co. v. Fleshman*, 38 Ind. App. 490, 77 N. E. 744, 78 N. E. 348, holding

the seller entitled to recover the purchase price where the purchaser refuses to perform a contract for the purchase of articles to which the seller retains title until full payment, since a suit for the purchase price constitutes a waiver of this provision, the title by the suit vesting in the purchaser;

—*Port Huron Machinery Co. v. Hurto*, 154 Iowa, 435, 135 N. W. 31, holding that a sale of a secondhand machine to be delivered at a designated place, and settled for by the notes of the purchaser, the seller retaining title until payment, cannot be rescinded by the purchaser giving notice of his repudiation to the seller before the machine is shipped, and in such case the seller may ship the machine to the place designated, tender the same to the purchaser, and upon his refusal to receive it recover the purchase price;

—*White v. Solomon*, 164 Mass. 516, 30 L.R.A. 537, 42 N. E. 104, holding that where an article is purchased, delivery to be made at a designated express office, and payment to be made in instalments in the future, the seller reserving the title until full payment, delivery at the express office is sufficient to entitle the seller to maintain an action for the purchase price, although the purchaser refused to accept the property. Compare with other Massachusetts cases, *supra*, under heading, "Repudiation of contract by buyer before tender or appropriation," V. a;

—*National Cash Register Co. v. Dehn*, 139 Mich. 406, 102 N. W. 965, wherein it is said that whether title passes or not is not material as affecting the seller's right to recover the purchase price, where, by the terms of the contract of sale, it is provided that title shall not pass to the subject-matter thereof until the article is paid for, and there is a provision that if the purchaser makes default in paying the purchase price, the full amount thereof shall be at once due and payable. Compare with *Mayo v. Latham*, 159 Mich. 136, 123 N. W. 561, referred to *supra*, V. c;

—*Cambridge Soc. v. Elliot*, 50 Misc. 159, 98 N. Y. Supp. 232, holding that where a purchaser after executing an order for the purchase of an article, title to which was to remain in the seller until payment, canceled the order and refused to receive the article when tendered, the seller might nevertheless recover the purchase price. To the same effect, see *Gray v. Booth*, 64 App. Div. 231, 71 N. Y. Supp. 1015;

—*Ideal Cash Register Co. v. Zunino*, 39 Misc. 311, 79 N. Y. Supp. 504, holding that a contract to purchase a cash register, the title to remain in the seller until payment of the purchase price, cannot be repudiated by the purchaser before delivery, and upon a subsequent tender by the seller and refusal to accept by the purchaser, the former is entitled to recover the purchase price. And it is said that the seller holds the property for the purchaser, and the latter is entitled to the same immediately upon paying the purchase price. But compare

with National Cash Register Co. v. Smith, 48 App. Div. 472, 62 N. Y. Supp. 952, holding that where, by the terms of the contract of sale, the title is reserved in the seller until payment of the purchase price, if the purchaser countermands the order and refuses to accept the article, the seller cannot maintain an action for the purchase price, but his remedy is an action for damages for the breach; and this is true although the contract of sale provides that upon breach by the purchaser, the seller may declare the entire purchase price due and payable;

—National Cash Register Co. v. Hill, 136 N. C. 272, 68 L.R.A. 100, 48 S. E. 637, approving and applying the rule of White v. Solomon, supra, under a very similar state of facts;

—Tufts v. Poness, 32 Ont. Rep. 51, holding that under a contract for the sale of a soda water apparatus with title reserved in the seller until payment, although the purchaser repudiates the contract before delivery by the seller to a common carrier for transportation to the purchaser, the seller may nevertheless continue to perform by making shipment to the purchaser, thereby transferring to him the right of possession, and he may thereupon recover the purchase price.

In the foregoing case it is asserted that a stipulation in the contract by which the property in the goods was to remain in the seller during the term of credit stipulated for, notwithstanding the delivery of possession to the purchaser, and the fact that the seller has given possession to the purchaser as far as he can, take the case out of the general rule preventing the seller from recovering the purchase price where he has not parted with the property in the goods.

But John Deere Plow Co. v. Gorman, 9 Kan. App. 675, 59 Pac. 177, holds that under a contract of sale with a reservation of title in the seller until payment of the purchase price, where the purchaser refuses to receive and pay for the goods, the seller cannot maintain an action for the purchase price, since the contract is executory.

VIII. Pleadings.

As a rule it is not intended to include in this note, or pay particular attention to, cases denying the right of the seller of personal property to recover the purchase price upon the ground that his pleadings are not in such form as to entitle him to maintain the action. Nor are the early cases taken which drew distinctions between counts for goods sold and delivered, and counts for goods bargained and sold, or special counts. It is not believed that these distinctions have much if any more than a mere historical interest at the present time, at least so far as concerns the question under consideration.

Tender of articles manufactured under a contract of sale, and leaving the same upon the premises of the purchaser without his

consent, have been held not to entitle the seller to maintain an action for goods sold and delivered, but the action should have been upon a special count. Hague v. Porter, 3 Hill, 141.

And see *Pedicaris v. Trenton City Bridge Co.* 29 N. J. L. 367, holding that a count for goods sold and delivered, or bargained and sold, cannot be maintained unless there has been a complete sale, and the title to the goods has become vested in the purchaser by the sale, and an actual acceptance of the goods.

In *Brand v. Henderson*, 107 Ill. 141, it is said that if there has been no delivery of the goods, a count for goods bargained and sold cannot be maintained unless it appears that there has been a completed sale, and the title to the goods has become vested in the purchaser. Under other circumstances tender of the goods or offer to deliver the same is not sufficient.

In *Butler Bros. v. Hirzel*, 87 App. Div. 462, 84 N. Y. Supp. 693, affirmed in 181 N. Y. 520, 73 N. E. 1120, the distinction between an action for goods sold and delivered, and a count for goods bargained and sold, is said to no more exist, and under the present practice the seller, upon tender of performance upon his part and demand for payment, and a refusal of the purchaser to perform, may treat the property as belonging to the latter, and sue for the recovery of the purchase price.

Where the question is raised and relied upon, the recovery of the purchase price cannot be had upon a count averring a sale and delivery, where the fact of delivery is not established. *Gross v. Ajello*, 132 App. Div. 25, 116 N. Y. Supp. 380. A. G. S.

NORTH DAKOTA SUPREME COURT.

EDWARD H. WILSON
v.
HENRY KRYGER.

(26 N. D. 77, 143 N. W. 764.)

Appeal — specification of errors.

1. Section 4, chap. 131, Laws 1913, requiring the service with the notice of appeal of a statement of the errors of law complained of and a specification of insufficiency of the evidence, when such insufficiency is

Headnotes by FISK, J.

Note. — Statute changing time allowed for appeal or writ of error as affecting pending action.

- I. Determination complained of rendered after statute took effect, 761.
- II. Determination complained of rendered before statute took effect.
 - a. Statute shortening time.
 1. In general, 761.
 2. As affected by reasonableness of time, 764.

relied on, is construed, and held not to be a jurisdictional prerequisite to such appeal.

Same — extension of time for service.

2. Upon respondent's motion to dismiss an appeal on the ground of appellant's failure to serve the statement and specifications with his notice of appeal, as required by § 4, chap. 131, Laws 1913, the court will, upon good cause shown and in furtherance of justice, enlarge the time for the service thereof pursuant to the provisions of § 7224, Rev. Codes 1905, following the rule announced in *Burger v. Sinclair*, 24 N. D. 315, and also pursuant to the express provisions of § 7 of such new practice act.

Same — delay — dismissal.

3. Mere delay in settling a statement of the case or in taking an appeal, where such appeal was taken within the statutory period allowed therefor, constitutes no ground for a dismissal of the appeal.

Same — shortening time — validity.

4. An amendatory act, shortening the time for appeals from one year to six months, will not, in the absence of express provisions to the contrary, apply to judgments rendered prior to the taking effect of the new act further than to limit the right of appeal to not more than six months after the taking effect of such new act in such cases as still had a right of appeal under the old law.

Applying such a rule of construction, § 14, chap. 131, Laws 1913, is held to apply only to those judgments entered, or notice of entry of which was served, less than six months prior to July 1, 1913. From such judgments appeals must be taken within six months after the taking effect of the new act, July 1, 1913; as to all other judgments the old statute governs.

(October 7, 1913.)

II.—continued.

b. Statute extending time.

1. Where time under former statute had not expired when new statute took effect, 767.
2. Where time under former statute had expired before new statute took effect, 768.

I. Determination complained of rendered after statute took effect.

While there is little authority as to the applicability to pending actions of statutes changing the time allowed for proceedings for appellate review, where the judgment, decree, or order complained of was rendered after the statute in question took effect, it seems to be generally well recognized that appellate proceedings, including the question as to the time allowed therefor, are governed primarily by the law applicable thereto in force at the time when the determination sought to have reviewed was rendered (*Lewis v. Kidd*, 33 Okla. 628, 127 Pac. 257); and accordingly, that a statute changing the time within which appellate proceedings must be taken governs such proceedings taken to review a determination rendered after the statute took effect, whether the action was commenced before or after that time. *New York v. Schermerhorn*, 1 N. Y. 423 (*obiter*; statute extending time).

So, it has been held that a statute shortening the time within which proceedings in error may be taken applies to an action commenced before, and pending at, the time when the statute took effect, but in which judgment has been rendered since that time. *Lewis v. Sittel*, 91 C. C. A. 191, 165 Fed. 157; *Wade v. Kimberley*, 5 Ohio C. C. 33, 3 Ohio C. D. 18; *Lewis v. Kidd*, *supra*.

And in *Saunders v. Moore*, 14 Bush, 97, involving a statute regulating "further proceedings in civil cases now pending," and reducing the time within which appeals may be taken, it is said that the cases to which the statute applies are only such as were pending and in which no final judgment had

been rendered when the statute took effect: as, "if there was a final judgment in the lower court in a case, and no appeal prayed to this court, then there was no 'civil case now pending' anywhere; and if the case had been tried, judgment rendered, and an appeal taken to this court, no limitation would have been effectual."

And so, in *Moss v. Hall*, 1 Ky. L. Rep. 280, it was held that "the provisions of the present Code as to the time in which to prosecute an appeal apply to cases pending [apparently in the sense above defined in the *Saunders Case*; i. e., commenced, but in which final judgment had not yet been rendered] at the time such Code went into effect."

II. Determination complained of rendered before statute took effect.

a. Statute shortening time.

1. In general.

It is a general rule of construction that statutes shortening the time within which appeals or proceedings in error can be taken do not, in the absence of language showing clearly a legislative intention to the contrary, apply to judgments, decrees, or orders rendered or entered before such statutes took effect. *Rankin v. Schofield*, 70 Ark. 83, 100 Am. St. Rep. 59, 66 S. W. 197, on final hearing, 71 Ark. 168, 100 Am. St. Rep. 59, 70 S. W. 306; *State v. St. Louis & S. F. R. Co.* 92 Ark. 74, 122 S. W. 627; *Pignaz v. Burnett*, 119 Cal. 157, 51 Pac. 28; *Melde v. Reynolds*, 120 Cal. 234, 52 Pac. 491; *Sammis v. Bennett*, 32 Fla. 458, 22 L.R.A. 48, 14 So. 90; *George v. George*, 250 Ill. 251, 95 N. E. 167; *Karolinsky v. Chicago*, 163 Ill. App. 33; *Schwartz v. Chicago, R. I. & P. R. Co.* 166 Ill. App. 536; *Kerlinger v. Barnes*, 14 Minn. 526, Gil. 398 (*obiter*); *Rolater v. Strain*, 31 Okla. 58, 119 Pac. 992; *Sipes v. Dickinson*, — Okla. —, 122 Pac. 216; *Bell v. Bearman*, 37 Okla. 645, 133 Pac. 188.

And a statute regulating "further pro-

MOTION by plaintiff to dismiss an appeal by defendant from a judgment of the District Court for Kidder County in plaintiff's favor. Denied.

The facts are stated in the opinion.

Messrs. Jesse Van Valkenberg and R. L. Phelps for the motion.

Messrs. Newton, Dullam, & Young, with Mr. Henry Kryger, opposed:

The service of specifications of error with the notice of appeal is not necessary to confer jurisdiction on appeal.

Revised Codes of 1905, § 7205.

If the specifications of error must be served before the appeal can be determined, the court may permit the appellant to amend its appeal by making service of the specifications.

Revised Codes of 1905, § 7224.

Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48; Jenson v. Frazer, 21 N. D. 267, 130 N. W. 832; 36 Cyc. 1219, 1220.

The act, chapter 131, Laws of 1913, is prospective, and not retroactive, in its operation. It does not cut off the right to appeal from judgments rendered prior to the taking effect of the act. At any rate, where the period in which an appeal might be taken under the former law is less than six months.

The only effect which the new law can have upon the right to appeal under the former law is to limit the time of appeal to the period prescribed by the new act where otherwise it would be greater.

36 Cyc. 1220 and authorities cited.

ceedings in civil cases now pending," and reducing the time within which appeals may be taken, does not apply to a case in which final judgment had been rendered before the statute took effect, as, "if there was a final judgment in the lower court, in a case, and no appeal prayed to this court, then there was no 'civil case now pending' anywhere." *Saunders v. Moore*, 14 Bush, 97.

And a new Code shortening the time after the rendition of a judgment within which an appeal may be taken therefrom does not apply to a judgment rendered before the Code took effect, where one section thereof expressly provides that it shall not affect any existing right or remedy, but that, as to all such cases, the laws in force at the adoption of the Code shall continue in force. *Theo. Poull & Co. v. Foy-Hays Constr. Co.* 159 Ala. 453, 48 So. 785; *Montgomery-Moore Mfg. Co. v. Leith*, 162 Ala. 246, 50 So. 210; *Gray v. Strickland*, 163 Ala. 344, 50 So. 152.

In *Pignaz v. Burnett*, 119 Cal. 157, 51 Pac. 28, and *Kerlinger v. Barnes*, 14 Minn. 526, Gil. 398, the statute, if applied retrospectively, would have cut off the right of appeal at once upon going into effect. That fact, however, is mentioned by the court as illustrating the injustice of giving the statute a retrospective effect, rather than as a limitation of the rule denying it such effect.

But in *O'Bannon v. Ragan*, 30 Ark. 181, the fact that, if the statute had been given a retrospective effect, the time for appeal in the instant case would have been unreasonably abridged; and in *Robinson v. Kraft*, 154 Ill. App. 213; *Robinson v. Kraft*, 154 Ill. App. 221; and *Ryan v. Supreme Council, C. K. A.* 146 Ill. App. 384, the fact that it would have been immediately cut off upon the statute going into effect,—was apparently regarded as a limitation of the decisions denying a retrospective effect. This limitation, however, has been abrogated in those jurisdictions by subsequent decisions previously cited.

Thus, in *Georgé v. George*, 250 Ill. 251, 95 N. E. 167, the Illinois statute reducing from five years to three years the time with-

in which a writ of error may be sued out has been held not to apply to writs of error sued out to review judgments or decrees rendered prior to the passage of the statute, although a reasonable time (in this case about two years and nine months) remained after the statute became effective within which to sue out a writ of error thereunder. The court said: "This act must be applied generally to all causes of action accruing before the act of 1907 became effective. It cannot be said that the act will apply in one case and not in another. . . . Applying the rule of uniformity, the question whether a reasonable time was left plaintiffs in error within which to sue out their writ of error is not open for our decision."

For cases holding that the statute shortening the period should be applied retrospectively if a reasonable time remains, and cases holding that the new period governs, but that it should be computed from the time the statute took effect, and not from the time of the determination sought to be reviewed, see *infra*, II. a, 2.

The general rule of construction previously stated is, however, obviously inapplicable if the statute by its express terms purports to apply retrospectively. In that event, the only question open is the constitutionality of the statute; and upon that question, the fact as to whether the right to appeal or sue out a writ of error in the instant case would be cut off or unreasonably abridged may be important.

Thus, a statute providing that "the time for taking an appeal or suing out a writ of error on all judgments, final orders, and decrees rendered more than two years prior to the passage of this act shall be three years from the date of the judgment or decree," has been held to be unconstitutional and void as applied to a judgment against an infant, rendered three years or more prior to the passage of the act, from which no time is given in which to appeal. While under the previous law, he still had one year after he should have attained his majority, within which to exercise that right. *Rankin v. Schofield*, 70 Ark. 83, 100 Am. St.

Fisk, J., delivered the opinion of the court:

Respondent moves for a dismissal of this appeal upon the following grounds: "First. That no statement of the errors of law complained of or specification of insufficient evidence was served with the notice of appeal, as required by ¶ 4, chapter 131, Session Laws of 1913. Second. There has been inexcusable delay on the part of appellant in causing a statement of the case to be settled, and in taking said appeal; more than two terms of this court having passed since the entry of judgment in the district court on July 9, 1912, and no statement having been proposed or submitted. Third. The said appeal was not taken within the time as required by statute."

Appellant resists such motion, and as to the first ground he makes a counter motion for leave at this time to supply the omission to serve the required statement of errors and specifications as required by § 4, chapter 131, Laws of 1913, being the new practice act which took effect on July 1st. Counsel for appellant bases such application upon § 7224, Rev. Codes 1905, which provides: "When a party shall in good faith give notice of appeal, and shall omit through mistake or accident to do any other act necessary to perfect the appeal to make it effectual or to stay proceedings, the court from which the appeal is taken, or the presiding judge thereof, or the supreme court, or any one of the justices thereof, may permit an amendment or the proper

Rep. 59, 66 S. W. 197, on final hearing 71 Ark. 168, 100 Am. St. Rep. 59, 70 S. W. 306. (As to constitutionality of retrospective statute allowing a reasonable time, see *infra*, II. a, 2.)

The position taken in the case last cited on the constitutional question is opposed by *The Marinda v. Dowlin*, 4 Ohio St. 500, where it was held that, under a Code expressly abolishing writs of error in civil cases, which previously could be sued out to review a judgment within five years after its rendition, and giving instead a petition in error, which must be filed within three years after the rendition of the judgment complained of, and declaring that the provisions of this Code shall apply after a judgment, order, or decree "heretofore" or hereafter rendered, to the proceedings to enforce, vacate, modify, or reverse it,—a petition in error cannot be sustained unless filed within three years after the judgment sought to be reversed, whether it was rendered before or after the Code took effect, and notwithstanding it was rendered more than three years before that time, and the petition in error was thereafter filed within five years after the judgment was rendered. The court said: "A right to institute a proceeding in error is rather a right of appeal than a right of action, and it was perfectly competent for the legislature to curtail it as they have done."

While the court, in *The Marinda v. Dowlin*, supra, thus sustained the constitutional power of the legislature, by a statute explicitly retrospective, to cut off the right to sue out a writ of error, it does not touch the question of statutory construction, since, as the opinion observed, the language of the statute was too explicit to leave room for doubt, and the court could not do otherwise than follow its natural import.

In *Ewell v. American L. Ins. Co.* 6 Ohio L. J. 339, holding that a statute reducing the period limited for filing a petition in error from three years to two years from date of judgment applied to judgments rendered before the statute took effect, as well as to those rendered afterwards; and that "the petition in error must be filed 51 L.R.A. (N.S.)

within two years from the rendition of the judgment,"—it does not appear whether or not the statute purported to be retrospective.

In *Lafferty v. Shinn*, 38 Ohio St. 46, involving the same statute reducing from three years to two years the limitation period for proceedings in error, it was held that, by virtue of another statute (act of 1866) providing that "whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending . . . proceedings, . . . nor causes of such . . . proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided, . . ." the case was governed by the earlier statute providing the three-year limitation period for such proceedings. The court, however, said that, but for the statutory provision above quoted, it would have had no hesitation in holding that the statute reducing the limitation period applied to and barred this proceeding in error, although the judgment complained of was rendered more than two years before the statute took effect, and this proceeding was begun two days after the statute took effect, and within the former limitation period of three years from the time when the judgment was rendered. The court said that, while the legislature had no power so to abridge the period within which an existing right may be asserted as that there shall not remain a reasonable time within which an action may be commenced, yet, the right so to appeal to the courts does not involve a further right to appeal from the judgment of the court to which such application for redress is made; but, on the contrary, a right of appeal from such judgment exists only when given by statute, and such right to appeal, when so given, may be taken away by statute, even as to cases pending on appeal. And the same thing is true in Ohio as to proceedings in error.

If, as seems probable, the statute reducing the period did not expressly and explicitly purport to be retrospective, the remarks of the court in this case would apparently favor the view that, both as a matter of con-

act to be done on such terms as may be just." We are satisfied of appellant's good faith in serving the notice of appeal, and that the omission to serve such statement of errors and specifications was purely an oversight, due to the fact that the provision of the new statute aforesaid was overlooked; the notice of appeal having been served but a few days after the taking effect of the new statute.

The court clearly has the power and should permit such omissions to be supplied, unless the provisions of § 4, chapter 131, supra, are construed as mandatory and a compliance therewith jurisdictional. The section reads: "A party desiring to make a motion for new trial, or to appeal from a judgment or other determination of a

district court or county court with increased jurisdiction, shall serve with the notice of motion or notice of appeal, a concise statement of the errors of law he complains of; and if he claims the evidence is insufficient to support the verdict, or that the evidence is of that character that the verdict should be set aside as a matter of discretion, he shall so specify." If a compliance with such statute is essential to confer jurisdiction upon this court sufficient to enable it to permit amendments or other necessary acts to be done in order to make the appeal effectual, then it follows that respondent's motion should be granted; otherwise it should be denied, provided such amendment or other necessary act is made or taken by leave of court. The new prac-

stitutional law and statutory construction, such a statute should be applied retrospectively, in the absence of any other statute to the contrary. But, in any event, the remarks were *obiter*, and, as already indicated, they seem to have no support from the Marinda Case—upon the supposed authority of which they were made—so far as the question of statutory construction is concerned, when the statute does not expressly purport to be retrospective; although they would be supported by that case so far as the constitutional question is concerned.

Apparently under the statute of 1868 (§ 79, Rev. Stat.) above quoted, and which controlled the decision in the Lafferty Case, supra, it was held, in *Canaan Twp. v. Infirmary Directors*, 46 Ohio St. 694, 23 N. E. 492, that a statute reducing from two years to six months the time within which proceedings may be commenced "to reverse, vacate, or modify a judgment or final order," which statute contains no provision making it applicable to "causes of . . . proceeding" existing at the time of its taking effect,—does not affect the right of a party, under the previously existing law, to prosecute proceedings in error at any time within two years from the time judgment was rendered against him, if that was prior to the taking effect of the statute.

In *Kansas City v. Dore*, 75 Kan. 23, 88 Pac. 539, in which it does not appear whether or not the statute expressly purported to be retrospective, it was held that a statute changing the time within which an appeal can be taken to reverse a judgment, from one year after the rendition of final judgment, to thirty days from the settlement of the case-made, or ninety days from the entry of the judgment, applied to a case in which judgment had been rendered and the defeated party had had his case-made settled more than thirty days before the statute became effective. The court said: "The right to an appeal is neither a vested nor a constitutional right. It is purely statutory, and may be limited by the legislature to any class of cases, or in any manner, or may be entirely withdrawn. The 51 L.R.A. (N.S.)

repeal of § 5042 left the plaintiff in error without any right of appeal except that provided in the amendment."

2. As affected by reasonableness of time.

In some jurisdictions, the courts seem to have taken the view that statutes shortening the time allowed for commencing proceedings for the review of judgments or decrees should be applied to prior determinations, from the date thereof, provided only the injured party has a reasonable time after the passage of the statute in question within which to take such proceedings. *Stephen v. Lewis*, 62 Md. 229 (*obiter*).

And accordingly, it has been held that a statute reducing from four years to two years the time within which writs of error in "any case" may be brought applies to a case in which nine months remained, after the passage of the act, before the expiration of the two years from the date of the judgment. *Smith v. Packard*, 12 Wis. 371. The court said: "The authorities seem fully to establish the rule that where mere inchoate rights are concerned, depending for their original existence on the law itself, they are subject to be abridged or modified by law, and that statutes of this character apply to such rights existing at the time of their passage, provided a reasonable time is left after the passage of the act, and before it would operate as a bar, for the party to exercise the right. . . . There can be no doubt that this [nine months] must be considered as a reasonable time within which the writ of error might have been sued out, and that the statute therefore operated as a bar to its being issued afterwards."

And a statute reducing from three years to one year the time after removal of disability within which any party to a judgment, who was under legal disability, may file a complaint for a review of the judgment, applies to a case in which an infant party attained his majority after the statute went into effect, although the judgment

tice act aforesaid does not purport to amend or change the existing statute prescribing the steps necessary to be taken to perfect an appeal, and we do not think a fair construction of § 4 of such new act evinces any legislative intent to require such statement of errors and specifications as a prerequisite to this court acquiring jurisdiction of the appeal, to the extent, at least, of authorizing it to permit amendments or other necessary acts to be done to make the appeal effectual. The statute is, no doubt, mandatory in the sense that this court, without such statement of errors and specifications (when necessary), will be unable to dispose of the appeal on the merits; but we are agreed that the service of the notice of appeal and undertaking for costs, pursuant

to §§ 7205 and 7208, Rev. Codes, 1905, confers jurisdiction sufficient to authorize the court to permit appellants to supply the omissions above referred to. The recent case of *Burger v. Sinclair*, 24 N. D. 315, 140 N. W. 233, is authority for our conclusions as above announced.

A still more conclusive answer to respondent's contention in support of the first ground of the motion is found in § 7 of the new act. This section provides: "The court or judge may, upon good cause shown, in furtherance of justice, extend the time within which any of the acts mentioned in §§ 1-5 and 6 of this act may be done, or may, after the time limited therefor has expired, fix another time within which any of such acts may be done." As the only act

was rendered against him ten years before. *Rupert v. Martz*, 116 Ind. 72, 18 N. E. 381. In this case, the new act was held to repeal by implication the old act, so that if the new act were to be held not applicable to the case, there would be no remedy at all for the review of the decree.

A statute reducing from three years to one year the time for taking appeals from final decrees in chancery, which applies to such decrees made prior to the time it took effect, but provides that it shall not affect the right of appeal therefrom, provided appeal be made within six months after that time,—is not unconstitutional or invalid. "Since the legislature may prescribe the time within which an appeal may be taken, it may well fix any time after the passage of the act, provided it is not so short as to amount substantially to a denial of the right of appeal. That six months is a reasonable time cannot be denied." *State Council, J. O. U. A. M. v. National Council, J. O. U. A. M.* 79 N. J. Eq. 193, 69 Atl. 975.

And a statute limiting the time for writs of error is valid, which, as applied to judgments recovered before its passage, expressly allows six months from the time it took effect for issuing such writs. *Rogers v. Pennsylvania R. Co.* 81 N. J. L. 40, 78 Atl. 664.

In Texas, also, the general rule has been held to be that the legislature may shorten the time allowed for appeals or proceedings in error, and that a statute shortening such time will apply to pending actions, provided only that a reasonable time is allowed, after the statute takes effect, within which to take appeals or proceedings in error in actions in which such appeals or proceedings are not then barred under the old law. *Odum v. Garner*, 86 Tex. 374, 25 S. W. 18; *Wright v. Hardie*, 88 Tex. 653, 32 S. W. 885.

But, in the application of such statutes, a peculiar rule has been laid down. Thus, in *Odum v. Garner*, supra, it is held that a statute which reduces from two years to twelve months the time within which writs of error may be sued out, and postpones for more than four months the time after its

approval when it shall take effect, so that a reasonable time is given within which to sue out writs from judgments already rendered, applies, upon its taking effect, to judgments rendered before it took effect; and in computing the time remaining under the new law, the time which elapsed under the old law is counted in the ratio which it bears to the whole of the former limitation period, and the remaining time under the new law is computed upon the basis of the ratio that the unexpired time under the old law bears to the whole time. That is, if three fourths of the former period of two years had elapsed when the statute took effect, one fourth of the new period of one year would be allowed after the taking effect of the statute.

This decision was followed by the court of civil appeals, in *Compton v. Ashley*, — Tex. Civ. App. —, 28 S. W. 924, where that court, on the authority of the *Odum Case*, set aside, on rehearing, its previously made order in 4 Tex. Civ. App. 406, 23 S. W. 487, which overruled a motion to dismiss a writ of error on the ground that the twelve months statute permitted a party, otherwise entitled, to sue out a writ of error at any time within twelve months from the time the statute took effect, provided it was done within two years from the rendition of the judgment.

These rules were also reaffirmed in *Wright v. Hardie*, supra, a case involving a statute limiting to thirty days the time within which applications for writs of error might be filed, with the result that, there having been no limitation under the former law, it was held that the full period should be allowed after the new law took effect, in view of the fact that this thirty-day period was in itself no more than reasonably sufficient to prepare and prosecute an application for a writ of error.

And in *Perry v. Warner*, — Tex. Civ. App. —, 40 S. W. 170, it was held, citing the *Odum Case*, that the statute reducing the time within which writs of error might be sued out by infants, married women, and persons of unsound mind, from two years after the removal of their disabilities to

required to be done by § 4 is the service of such statement of errors of law and specification of the insufficiency of the evidence, it necessarily follows that the legislature, by the enactment of § 7, clearly evinced an intent not to make the service of such statement and specifications, with the notice of appeal, a jurisdictional prerequisite.

Leave is hereby granted the appellant to supply such omissions within thirty days from the date of the filing of this opinion. Should he fail so to do, the appeal may be dismissed upon proper showing of such neglect.

The second ground of the motion is manifestly untenable, conceding that appellant had the full period of one year in which to appeal from the date of notice of the entry

of the judgment, which we will hereafter consider. It is no ground for moving to dismiss the appeal because not taken earlier, and it is perfectly plain that a delay, or even an entire failure to cause a statement of the case to be settled, is no ground for such a motion, as the appellant may desire merely to have a review of errors appearing upon the judgment roll proper.

The third ground of motion presents a more complex question. The new practice act, which took effect on July 1st, reduces the time in which appeals may be taken from judgments from one year to six months after the entry thereof by default, or after written notice of the entry thereof where there was an appearance in the action. Section 14, chapter 131, supra.

twelve months after the rendition of judgments against them, and not thereafter, notwithstanding they were laboring under such disabilities when the judgments were rendered,—barred the right of such person to writs at the end of twelve months after the statute went into effect.

In some cases statutes shortening the time allowed for appeals have been applied, from the date of their taking effect, to judgments theretofore rendered, to appeal from which a longer period of time remained under the former law than was given by the statute in question, thus limiting the remaining time to the shorter period allowed by the statute. Thus, in *Bailey v. Kincaid*, 57 Hun, 516, 19 N. Y. Civ. Proc. Rep. 232, 11 N. Y. Supp. 294, it was held that a statute reducing from sixty days to thirty days the time within which an appeal may be taken, while not so operating retrospectively that the thirty-day limitation would begin to run before the statute was passed, does apply to cases in which appealable determinations have been made before that time, the thirty-day period beginning, in such cases, with the date of the passage of the statute, and the right of appeal becoming barred not later than thirty days after that date.

And an act limiting the time (theretofore unlimited) within which an appeal may be taken bars the right of appeal from a judgment rendered before the passage of the act, upon the expiration of the new limitation period after the act took effect. *Lewis v. Lindsay*, 33 Ala. 304.

So, it has been held that a statute limiting the time within which an appeal can be taken applies to a decree passed before it went into effect, at least to the extent of cutting down the time for an appeal to a period extending not beyond the expiration of the new limitation period, after the date when the statute went into effect. *Stephen v. Lewis*, 62 Md. 229.

And in *Rogers v. Trumbull*, 32 Wash. 211, 73 Pac. 381, it was held that a statute reducing from six months to thirty days the time within which appeals may be taken, and not purporting to be retroactive, does

not apply to judgments rendered prior to the time it took effect, except that (*obiter*) in the case of judgments the right of appeal from which, under the old law, extended more than thirty days from the time the act took effect, the statute limits the remaining time to thirty days after its taking effect.

And see also *WILSON v. KRYGER*.

A statute creating a new intermediate appellate court, and providing that appeals thereto must be taken within three months from the date of the entry of the judgment or decree appealed from, whereas, under the previously existing law, such appeals might be taken at any time within two years, directly to the supreme court of the state, as applied to cases in which judgments or decrees had been entered before the statute took effect, gives to the defeated parties therein three months from and after the date the statute took effect, unless less time remained to them under the old law. *Shelly v. Dampman*, 174 Pa. 495, 34 Atl. 124, affirming 1 Pa. Super. Ct. 115.

And a statute limiting all appeals to six months from the entry of the judgment or decree appealed from, which statute provides in effect that it shall apply to pending cases, but that the limitation of time therein provided for, as against any party entitled to appeal from a judgment or decree theretofore entered, shall not begin to run until the date when the statute takes effect, if, but for it, the right of appeal would have extended beyond six months after that date,—gives an appellant six months from the date of the taking effect of the statute, in any case in which, under the old law, he would have had that length of time or more remaining at the date when the new law took effect, within which to take his appeal. *Barlott v. Forney*, 187 Pa. 301, 41 Atl. 47.

And a statute reducing from six months to sixty days the time allowed for taking an appeal, which expressly provides that in all cases where the right to an appeal exists at the time when the statute takes effect, the time for taking such appeal is thereby extended for the period of sixty days thereafter,—has the effect to enlarge the six

Such new act is general, and applies to appeals from all judgments, whether entered before or after it became effective; and, as we understand respondent's contention, it is that such statute, relating as it does merely to the remedy, should be given not only a prospective but a retrospective operation, and as thus construed, it operated *eo instanti* to cut off appellant's right of appeal from the judgment in question on July 1st. We cannot, however, agree with the conclusion thus drawn by respondent's counsel. While the act deals only with the remedy, and on its face applies to all judgments, whether rendered before or after its enactment, we think it is entirely clear that the legislature did not intend to give it a retroactive operation so as to cut off

a right of appeal which existed at the time it took effect. While manifestly the legislative purpose was to shorten the time for appeal to six months as to all judgments, it no doubt intended to have such period computed from the date the new act should take effect; and where, under the old statute, more than six months would be left in which to take an appeal from an existing judgment, the new act would cut off the right of appeal at the expiration of six months from July 1st. But in cases of existing judgments where, on July 1st, a period of but six months or less remained in which to take an appeal under the old statute, the new act does not apply, and the time prescribed under the old act governs. In other words, the new act will not be

months' period originally allowed, in cases where less than sixty days of that period remained at the time the new statute went into effect. *Columbia City Land Co. v. Ruhl*, — Or. —, 134 Pac. 1035; *Walling v. LaFollette*, — Or. —, 134 Pac. 1192.

It may be observed that, while the cases cited in this subdivision held that the new statute, reducing the period, applied to judgments previously rendered, upon the condition that a reasonable time remained, or upon the assumption that the period prescribed by the new statute should be computed from the time the new statute became effective, yet they are not all opposed to the rule of construction stated *supra*, II. a, 1, to the effect that the statute reducing the period does not apply at all to judgments previously rendered, for the reason that, in some of them (*e. g.*, the *New Jersey cases*), the new statute, in express terms, applied to previous judgments, so that no question of statutory construction was involved, but merely a question of constitutional law. In other cases, however (*e. g.*, *Bailey v. Kincaid and Rogers v. Trumbull*, *supra*), the new statute was not in terms retrospective; and the result in these cases is therefore opposed to the rule of construction referred to, so far as it holds that judgments previously rendered do not come at all within the operation of a statute reducing the time, and not explicitly retrospective. As to some of the cases, it is not clear whether the decision is to be regarded as covering the question of constitutional law only, or both that question and the question of statutory construction.

b. Statute extending time.

1. Where time under former statute had not expired when new statute took effect.

"The legislature has control of remedies so far as they affect existing actions," and "this control includes power to extend the time to appeal, . . . provided some time yet remained, according to the law in 51 L.R.A. (N.S.)

force when the legislature acted, within which an appeal might have been taken." *Germania Sav. Bank v. Suspension Bridge*, 159 N. Y. 362, 54 N. E. 33.

So, a statute extending the right of appeal during the pendency of a motion for additional findings of fact and conclusions of law in an action in which judgment has been entered applies to cases in which judgments have been entered before the statute took effect, where the time for appealing from such judgments has not then expired, and another statute declares all suits to be pending until determined on appeal, or until the time for appeal has passed; the mere extension of the time for appealing in such a case not affecting any constitutional or vested rights of the successful party. *Boucofski v. Jacobsen*, 36 Utah, 165, 28 L.R.A. (N.S.) 898, 104 Pac. 117.

And a statute increasing the time allowed for settling cases in chancery, upon appeal, applies to a pending case in which the time had not expired when the statute took effect. *Beebe v. Birkett*, 108 Mich. 234, 65 N. W. 970.

In this case, the court also said, generally: "Our conclusion is that the act, being one affecting procedure merely, is of general application to pending as well as prospective cases. *Ibid*."

But in *Davis v. Pender*, Minor (Ala.) 57, the court said that the statute in question, extending from twelve months to three years the time from the rendition of judgment within which a writ of error might issue, could apply only to judgments rendered since its enactment; and it was accordingly held not to apply to a judgment rendered before its enactment, although, at the time of the enactment, the period within which a writ might issue under the former law had not yet expired.

And in *New York v. Schermerhorn*, 1 N. Y. 423, the court stated broadly that a statute extending from fifteen days to two years the time allowed for taking appeals did not apply to cases in which the judgment, decree, or order had been made before the statute took effect, such cases being governed by the old law.

given an interpretation which would result in thwarting the legislative will, which was to shorten—not lengthen—the time for prosecuting appeals.

In order to give effect to the evident legislative intent we are required to hold that the new act applies only to those judgments the time for appealing from which under the old statute would extend more than six months after the taking effect of the new statute. In other words, the new statute is prospective in its operation, but applies to all judgments, whether entered prior or subsequent to July 1st, which, but for such act, the period in which appeals might have been prosecuted therefrom would exceed six months from such date. As to other judgments, the period for appealing is governed by the old statute, and the new does not apply, for otherwise the new act would have the effect of enlarging rather than shortening the period for appealing therefrom, or else it would cut off all right to appeal on the date of the taking effect of such act, neither of which results was intended. The question is somewhat analo-

gous to that presented by statutes shortening the limitation of time in which actions may be commenced after the cause of action accrues. Such statutes are generally held to apply to causes of action existing at the time of their taking effect, provided the new act affords a reasonable time after it takes effect in which suits may be commenced thereon. If a reasonable time is not thus afforded, the new act, for reasons which are palpably sound, is held not to apply to such causes of action. *Merchants' Nat. Bank v. Braithwaite*, 7 N. D. 358, 66 Am. St. Rep. 653, 75 N. W. 244; *Osborne v. Lindstrom*, 9 N. D. 1, 46 L.R.A. 715, 81 Am. St. Rep. 516, 81 N. W. 72; *State Finance Co. v. Mather*, 15 N. D. 386, 109 N. W. 350, 11 Ann. Cas. 1112; *Adams & F. Co. v. Kenoyer*, 17 N. D. 302, 16 L.R.A. (N.S.) 681, 116 N. W. 98.

Of course there is a marked distinction which should be noted between causes of action and the privilege of appealing. The former is a property right which is protected by the Constitution from confiscation, while the latter is a mere privilege

2. Where time under former statute had expired before new statute took effect.

Generally, as to vested right in defense of statute of limitations, see note to *McEldowney v. Wyatt*, 45 L.R.A. 609.

According to the great weight of authority, an attempt to revive a right of appeal or a right to a writ of error after it has been barred by the existing statute is unconstitutional. Thus, it has been said: "If, . . . according to the law existing when the statute extending the time to appeal . . . was passed, the judgment had become final and unalterable, because no further right of appeal existed, then the judgment conferred a vested right and was property of which the owner could not be deprived by an act of the legislature, or otherwise than through due process of law. An appeal brought pursuant to a statute which authorizes an appeal after the time provided by law had expired, . . . although it might result in the reversal of the judgment and be in form a judicial proceeding, would not be what is known as due process of law, which is not satisfied by a judgment based upon an unconstitutional statute. A judgment is a contract which is subject to interference by the courts so long as the right of appeal therefrom exists; but when the time within which an appeal may be brought has expired, it ripens into an unchangeable contract and becomes property, which can be disposed of or affected only by the act of the owner, or through the power of eminent domain. It is then beyond the reach of legislation affecting the remedy, because it has become an absolute right which cannot be impaired by statute. Remedies may be modified even as to pend-

ing actions, but no action can be regarded as pending when it has expanded into a judgment and the time to appeal has expired." *Germania Sav. Bank v. Suspension Bridge*, 159 N. Y. 362, 54 N. E. 33.

So, a statute extending the time allowed for taking appeals does not apply to a case in which the right of appeal was barred by lapse of time when the statute took effect. *New York v. Schermerhorn*, 1 N. Y. 423.

And a statute extending from six months to one year the time within which an appeal may be taken "from a judgment heretofore or hereafter rendered," although retrospective in its terms, cannot apply to a judgment rendered more than six months before its passage, from which an appeal was already barred, under the existing law, at the time the statute took effect, as such an application would infringe the Constitution by taking away vested property rights. *Beaupre v. Hoerr*, 13 Minn. 366, Gil. 339.

Nor does a statute providing that petitions for review, commenced within six months after its passage, may be maintained in certain cases, apply to such a case, in which the time for a review under the existing law had expired at the time of the passage of the statute. *Atkinson v. Dunlap*, 50 Me. 111.

And an act authorizing, in cases which had been decided in special courts of equity, the filing of bills of review within ninety days after the passage of the act, under the same rules and regulations governing bills of review in cases regularly commenced and decided in courts of equity in the state, is unconstitutional and void in its application to a case in which, under the previously existing law, the right to file a bill of review was barred by the statute of limitations. *Woodman v. Fulton*, 47 Miss. 682.

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which may be taken away at any time by the legislature. The question here is one of legislative intent rather than of legislative power. Did the legislature intend, by the act in question, to cut off the privilege of appeals from certain existing judgments, or did it intend by such new act to enlarge the period previously allowed for appealing therefrom? Clearly neither result was intended. There is no sound reason why such new statute may not be held to apply to certain judgments existing on July 1st, and not to all. Manifestly it should be held to apply to those judgments where otherwise an appeal might be taken after six months have elapsed from July 1st; and it is equally manifest that it should not apply to any other existing judgments, because it fixes no time applicable to them. As before stated, the six-months period, which is the only time fixed in such act, if given a retroactive operation as to the latter class of judgments, would cut off all right of appeal on July 1st, and when given a prospective operation only, it would enlarge the time for appealing therefrom.

Likewise, a statute providing that no writ of error shall be refused or barred in any suit decided prior to a certain previous date, by reason of lapse of time, is invalid as an invasion of vested rights, in its application to a case in which a writ of error was completely barred by lapse of time, under the existing law, at the time of the passage of the statute. *Trim v. McPherson*, 7 Coldw. 15.

And a statute providing that the time between certain past dates shall not be computed in the application of any statute of limitations is unconstitutional and void, in so far as it revives a right already barred, by authorizing a writ of error in an action in which the right thereto was barred by lapse of time before the passage of the statute. *Story v. Runkle*, 32 Tex. 398.

And a statute authorizing writs of error, and expressly providing that it shall be deemed to apply to all judgments or decrees which have been rendered since a certain date, in so far as it allows writs of error to judgments from which appeals were barred, prior to its passage, is unconstitutional and void, as retrospective in its operation, and taking away the vested right to plead lapse of time as a bar to appeals. *Willoughby v. George*, 5 Colo. 80; *Bond v. First Nat. Bank*, 5 Colo. 83; *Hewitt v. Colorado Springs Co.* 5 Colo. 184.

A statute purporting to validate certain appeals which have already been attempted to be taken after the expiration of the time allowed by the statute in force for the taking thereof is unconstitutional and void as an interference with vested rights and an invasion of the judicial power by the legislative assembly. *Macartney v. Shipherd*, 60 Or. 133, 117 Pac. 814, Ann. Cas. 1913D, 1257.

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This identical question has frequently been before the courts, and there is some conflict in the holdings. We will notice only a few of such decisions.

Beebe v. Birkett, 108 Mich. 234, 65 N. W. 970, involved a statute extending the time for settling cases in chancery. It was there held that as the new statute dealt with procedure only, it applied to both pending and future cases. The court there, among other things, said: "The new act does not in express terms repeal the old, but it seems to cover the same ground as the old, with the exception mentioned. In our opinion, it was intended to supplant the other; and the only question here is whether it extends to pending cases, or whether they shall be governed by the former practice. It is certain that this act of 1895 should not be given retroactive effect, if vested rights were to be thereby affected; but a particular remedy is not necessarily a vested right. . . . It is a general rule that an act dealing with procedure, only, applies, unless the contrary intention is expressed, to all actions falling within its terms,

And a special act of the legislature, passed after the expiration of the time allowed by law to claim an appeal from a certain decree of a judge of probate, granting the right of appeal from such decree, is unconstitutional and void as being an exercise of judicial power by the legislature, and a retrospective act affecting, disturbing, and destroying vested rights. *Lewis v. Webb*, 3 Me. 326.

But a statute extending from ten days to thirty days the time within which appeals can be taken, and expressly providing that it shall apply to certain cases in which judgment has already been entered, is not unconstitutional or invalid, even as applied to a case in which the right to an appeal was barred by lapse of time before the passage of the statute, where the defeated party also had the right, under the previously existing law, to have the judgment reviewed by suing out a writ of error at any time within two years. *Alvord v. Little*, 16 Fla. 158. The court said: "Now the time for suing out a writ of error in the case at bar is two years under the existing law. The writ of error is a means of bringing before the appellate court the proceedings of the inferior court. The time, therefore, within which the parties in the present case might bring their case up for review, is two years. Can it be questioned that the legislature might extend the time for review by means of an appeal to the full term of two years, even without repealing or taking away the writ of error, but leaving both remedies to stand, and leaving parties to pursue either of these methods as might be convenient? In the light of past legislation and the practice of the courts, we cannot permit a doubt to prevail. The act in question scarcely comes

whether commenced before or after the enactment. . . . An act giving appeals from certain enumerated judgments and orders applies to such judgments and orders made prior to its passage [citing numerous cases]."

In *Odum v. Garner*, 86 Tex. 374, 25 S. W. 18, this precise question was involved, and the court treats the question as analogous to cases involving statutes shortening the limitation period for the commencement of actions, and adheres to a rule announced in *Gautier v. Franklin*, 1 Tex. 732, holding that "upon the substitution of a new term of limitation the time which elapsed under the former law will be counted in the ratio that it bears to the old period, and the time of the new law will be computed upon the basis of the ratio that the unexpired time under the old law bears to the whole time. That is, that if under the old law two thirds of the time had expired, then one third of the new law would be allowed in which to sue." No other court seems to have adopted such a rule, and it seems to us that the holding is unsound and constitutes judicial legislation rather than judicial construction.

In *Ryan v. Waule*, 63 N. Y. 57, it was held that a statute passed after an entry of a judgment, but before an appeal there-

from was taken, limiting appeals to cases involving an amount, exclusive of interest, less than \$500, applied to such former judgment, the court saying: "The fact that this cause was pending, or the recovery had before the enactment of the law of 1874, does not take the case out of the operation of the statute. The right of appeal is not a vested right, but is one of the remedies at all times within the discretion of the legislature, and to be dealt with as that body shall deem wise. Retroactive effect is not given to the act in applying it to all appeals brought after it became a law. It did not affect appeals already brought, but was only operative as to future appeals, and the fact that it may have taken away the right to appeal in some cases in which it existed before does not render it any the less an act prospective in its operation."

The Constitution of Arkansas guarantees the right of appeal, and in *Rankin v. Schofield*, 70 Ark. 83, 66 S. W. 197, it was held that a statute shortening the time for appeal is unconstitutional in so far as it cuts off at once the right to appeal from judgments previously entered, following the prior decision of *O'Bannon v. Ragan*, 30 Ark. 181. The latter case presents a state of facts quite parallel to those

within the definition of retroactive legislation. It merely permits a party to bring up a cause for review, within the time already provided, by a process different from that already allowed, but not infringing any rights of property already established."

And a statute authorizing, within six months after the passage thereof, appeals from decrees of the probate court rendered during the time of the Civil War, has been held not to be unconstitutional, as taking away vested rights, in its application to cases in which, before the passage of the law, appeals were barred by lapse of time under the prior law,—the bar of the statute of limitations not being a vested right. *Page v. Matthews*, 40 Ala. 547; *Noles v. Noles*, 40 Ala. 576.

So, in *Davis v. Ballard*, 1 J. J. Marsh. 563, it was held that a statute providing that, whenever the statute of limitation of writs of error is relied on, the period between two certain dates is to be deducted from, and not to compose any part of, the time allowed by law for suing out such a writ, and which is relied on as a bar to the writ, is not invalid on any constitutional ground, even as applied to a case in which the time for suing out a writ of error had fully expired before the statute was passed.

And in *Wheeler's Appeal*, 45 Conn. 306, it was held that a special act, passed after the expiration of the time allowed by law for the taking of appeals from the doings of the commissioners upon a certain estate, which 51 L.R.A. (N.S.)

provided that such appeals might be taken at any time within twenty-one days from the rising of the general assembly, was not unconstitutional, as the general assembly of Connecticut had a reserved power to authorize the probate courts to allow an appeal from their doings, and the alleged vested right affected and impaired by the act was not vested absolutely, but was subject to the contingency of further action by the legislature. The court, however, said: "We must concede that if the act in question should be tested by the decisions of the courts of the other New England states, and the states of New York and Pennsylvania, cited by the counsel for the appellee, it must be declared void. And such a weight of legal authority we should at once accept as conclusive were it not obvious, from the past history of our own jurisprudence and long continued legislative practice, that we have reserved a much larger field for legislative action than has ever been recognized in the states referred to." And further: "In regard to the decisions of the courts of other states that are adverse to our view of the present case, we have previously intimated that many of them were rendered in view of special constitutional provisions much more explicit than our own in limiting legislative action. . . . If such explicit provisions were in our state Constitution, we might, perhaps, be led to the same result that has been reached in other states."

A. C. W.

in the case at bar, and the court held the new statute inoperative as to existing judgments, where, under the new statute, the remedy by appeal would be cut off entirely.

This precise question arose in California, and was decided in *Pignaz v. Burnett*, 119 Cal. 157, 51 Pac. 48, and we quote from the opinion as follows: "At the time the judgment was entered an appeal could be taken from a final judgment at any time within one year after its entry. March 3, 1897 [Stat. 1897, p. 55], § 939 of the Code of Civil Procedure was so amended as to give only six months after the entry of judgment within which an appeal can be taken. At the time of the amendment the period of six months had already elapsed since the entry of the judgment; there remained, however, five months of the time allowed for taking an appeal under the Code before the amendment. The act took effect sixty days after its passage, at which time nine months had elapsed since the entry of judgment. The appeal was taken after that time, but within the period of twelve months from the entry of judgment. If the amendment operated retrospectively, it cut off the right of appeal immediately upon the taking effect of the act, affording no opportunity whatever thereafter for the exercise of this privilege, and depriving this court, so far as the legislature can, of its jurisdiction in the cases upon which it would so operate. To make this statute applicable to judgments entered before it went into effect is to give it a retroactive effect. But it is no objection to the validity of a statute to say that it is retrospective in its operation. The question is, Is the amendment an *ex post facto* law, or does it impair the obligation of contracts? and also, perhaps, whether it deprives anyone of vested rights. If it does none of these things, it is no objection to it that it applies to pending cases or past transactions. . . . It is quite obvious that great hardship is likely to result if a retroactive effect is given to this statute. One may be presumed to know the laws of the land, but the very instant this amendment took effect, if it be retroactive, the right of appeal was cut off at once. No time whatever was given to appeal in those cases in which judgments had been entered six months or more previously. Unless it is absolutely necessary, we should not impute such an intention to the legislature. In view of the construction which has almost invariably been given to statutes of this character, I feel sure that the legislature intended that its operation

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should be limited to judgments thereafter entered."

Bailey v. Kincaid, 57 Hun, 516, 11 N. Y. Supp. 294, is authority for holding the new statute to apply to cut off appeals from prior judgments after the expiration of the new period prescribed. The syllabus is as follows: "Where, subsequent to the time that the right to appeal from a judgment accrued, and before the expiration of the time limited for such appeal, § 1341 of the Code of Civil Procedure was amended by striking out sixty days and inserting thirty days, and thereafter the notice of appeal was served more than thirty days from the time that the right to appeal accrued, but less than sixty days thereafter, and also more than thirty days after the date at which the amendment took effect, the service of the notice is too late."

The Washington court in the recent case of *Rogers v. Trumbull*, 32 Wash. 211, 73 Pac. 381, announced a rule in harmony with our views as above expressed. The reasoning and conclusion of the court meets with our full approval, as we think it announces a sound rule of construction consistent with the evident intent of the legislature in enacting the new statute. At the time the judgment appealed from in that case was rendered § 1757 of their Code gave the appellant six months within which to take his appeal, which it was held would expire on March 9, 1903, on which date the appeal was taken. On that day an act took effect, amending the prior statute, limiting the time for appeal to thirty days after the rendition of the judgment. The appeal was taken after the new act took effect, and it was contended that the amendatory act was retrospective, and since more than thirty days had elapsed after the judgment was rendered, the appeal was too late. After quoting from *Sutherland on Statutory Construction*, § 482, the court briefly sums up its conclusions in the following language: "There is no indication in the act of 1903 that it applied to judgments rendered prior to the time the act took effect, so that judgments rendered more than thirty days prior thereto were barred of the right of appeal. It, therefore, under the rule above announced, applied only to judgments rendered subsequently, or to those where the right of appeal under the old law extended more than thirty days from the time the act took effect."

We conclude that the motion of respondent is untenable, and the same is accordingly denied.

CALIFORNIA SUPREME COURT.
(Department No. 2.)

JOE N. SEGLER, Resp't.,
v.
A. CALLISTER, Appt.

(— Cal. —, 139 Pac. 819.)

Master and servant — injury by automobile in possession of repairer — liability of owner.

One who turns his automobile over to the keeper of a garage to put it in repair for selling, the owner to pay for labor and storage and the garage keeper to have a commission if he sells the machine for a satisfactory price, is not liable for injury inflicted by the latter while running the machine on the road to test it.

(March 12, 1914.)

APPEAL by defendant from an order of the Superior Court for Los Angeles County denying his motion for new trial after verdict in plaintiff's favor, in an action brought to recover damages for an

injury caused by a collision with defendant's automobile while in the possession of a third person. Reversed.

The facts are stated in the opinion.

Messrs. Tanner, Taft, & Odell, for appellant:

In order for the rule of *respondent superior* to apply, the person sought to be charged must stand in the relation of superior to the person doing the wrongful act.

1 *Thomp. Neg.* § 578; *Flaherty v. Butte Electric R. Co.* 43 *Mont.* 141, 115 *Pac.* 40.

Witness McAlbin was in legal effect an independent contractor.

Boswell v. Laird, 8 *Cal.* 469, 68 *Am. Dec.* 345, 10 *Mor. Min. Rep.* 616, 26 *Cyc.* 970; *Allen v. Haywood*, 7 *Owens Bank, Rep.* 970; *Bennett v. Truebody*, 66 *Cal.* 509, 56 *Am. Rep.* 117, 6 *Pac.* 329; *Kennedy v. Chase*, 119 *Cal.* 641, 63 *Am. St. Rep.* 153, 52 *Pac.* 33, 3 *Am. Neg. Rep.* 520; *Hedge v. Williams*, 131 *Cal.* 455, 82 *Am. St. Rep.* 366, 63 *Pac.* 721, 64 *Pac.* 106; *Burns v. Clark*, 133 *Cal.* 634, 85 *Am. St. Rep.* 233, 66 *Pac.* 12, 21 *Mor. Min. Rep.* 489.

Messrs. George M. Marker and Fred J. Spring for respondent.

Note. — Automobiles: liability of owner for injury inflicted by car while being run by one to whom it has been entrusted for storage or repairs.

As to liability of owner for injuries by automobile while being used by a servant or third person for his own business or pleasure, see notes to *Christy v. Elliott*, 1 *L.R.A.(N.S.)* 215; *Hayes v. Wilkins*, 9 *L.R.A.(N.S.)* 1035; *Jones v. Hoge*, 14 *L.R.A.(N.S.)* 216; *Danforth v. Fisher*, 21 *L.R.A.(N.S.)* 93; *Steffen v. McNaughton*, 26 *L.R.A.(N.S.)* 382; *Fleischner v. Durgin*, 33 *L.R.A.(N.S.)* 79; *Hartley v. Miller*, 33 *L.R.A.(N.S.)* 81; *Riley v. Roach*, 37 *L.R.A.(N.S.)* 834; and *Symington v. Sipes*, 47 *L.R.A.(N.S.)* 662.

As to validity of statute making owner liable for injuries by automobile being used by another, see note to *Daugherty v. Thomas*, 45 *L.R.A.(N.S.)* 699.

It seems clear that where the owner of an automobile turns his machine over to another for repairs, and surrenders the entire control of it to the latter, he should not be held liable for an injury inflicted by the car while it is being tested by the repairer or his servants.

This was the result reached in *SEGLER v. CALLISTER*, and in harmony with that decision it was held in *Woodcock v. Sattle*, 84 *Misc.* 488, 146 *N. Y. Supp.* 540, that a mechanic engaged by the owner of an automobile to overhaul his car on his premises, and put it in running order, at a specified sum per week, was an independent contractor, it appearing that the repairs were left entirely to his judgment; and it was 51 *L.R.A.(N.S.)*

therefore held that the owner was not liable for an injury to a third person which occurred through the negligent operation of the car while the mechanic was testing it. The court said: "Sattle, in fact, reserved no right to control or direct Smith in repairing the car to be overhauled. He neither had the knowledge or experience necessary to do so. He, in fact, did not assume to direct what should be done, or how it should be done. He was only interested in the result to be accomplished. He relied upon, and trusted entirely to, the mechanical skill and experience of Smith, who undertook the job. The fact that the work was done on Sattle's premises does not change the legal relations between the parties. Had Smith had a shop of his own, and had he taken the automobile there to do the work, his duties would have been precisely the same. Nor does the fact that he was to be paid at an agreed compensation of \$20 per week, or at the rate of \$20 per week, alter the relations. It is a circumstance to be considered, but cannot control. If the 'auto' had been sent to a factory, the cost of the necessary repairs might have been either for a lump sum, or if the time and extent of the repairs could not be definitely foreseen, the parties could agree that the cost be ascertained on the basis of the time necessarily expended, plus the cost of the required new parts. This was, in substance, just what the arrangement was between Sattle and Smith; all necessary parts to be charged to Sattle, and the time expended to be paid for at the rate of so much per week."

In *Patterson v. Kates*, 152 *Fed.* 481,

Henshaw, J., delivered the opinion of the court:

This is an action for damages. An automobile, admittedly owned by defendant, came into collision with a motor bicycle ridden by plaintiff. Plaintiff was injured, brought his action, was awarded a verdict by a jury, judgment followed, and from an order denying his motion for a new trial defendant appeals.

The principal point urged on appeal, and the only one here necessary to consider, is that defendant was in no way legally responsible for the injuries sustained by plaintiff. Herein the facts are the following: The automobile had been bought by defendant, who himself could not drive the car, for the purpose of sale. It was an old car, and he had turned it over to one McAlbin who conducted a small garage. McAlbin was to put it in order, "tune it up," so that it might be sold, was to receive some small compensation for his services in this regard, and if thereafter McAlbin was able to sell it for more than the price Callister put upon it, he was to receive a commission accordingly. McAlbin had had the car in his possession for about a month, working

on it at odd times in his efforts to put it in order. The value of his services, together with the garage charges on the car, it was estimated amounted to about \$8, which defendant had paid to him, not in money, but in gasoline and oil. Upon a few occasions McAlbin had driven defendant in the car, but without charge for services. He was not employed by defendant as chauffeur or driver, but solely for the indicated purposes. McAlbin worked upon the car only at odd times. Upon Sunday, the day of the injury, McAlbin testifies that he had taken the car out to test it. The water pump was leaking, and he sought to locate the trouble. He took the car out upon his own initiative, without instruction or suggestion from the defendant,—indeed without the defendant's knowledge. While he was thus alone in the car the collision occurred from which plaintiff's injuries resulted. McAlbin's testimony is corroborated in all essential respects by that of the defendant, and there is in the record no direct contradictory evidence. All the evidence upon which it is sought to hold the defendant responsible comes from the testimony of plaintiff touching statements made to him

where the owner of an automobile which had broken down instructed his driver to repair the machine and bring it to his destination, and after having repaired it and proceeded part of the way, while waiting for a ferry, he met a third person and drove back some distance to carry the latter to a certain place, it was held that the owner was not liable for an injury resulting from the negligent handling of the machine while the driver was proceeding back to the ferry after having carried the person to his destination, since he was not at the time acting for the owner of the car.

In *Lane v. Roth*, 115 C. C. A. 227, 195 Fed. 255, the question whether the one who usually drove an automobile truck for the owner was, at the time of the accident in question, acting as the servant of the owner or of the repair company, was held to be for the jury, it appearing that the truck, which was owned by a resident of Camden, New Jersey, had been sent to Philadelphia, to the company from which it was purchased, for repairs, and that the owner, upon receiving word from the company that the truck would be delivered at the ferry opposite Camden, sent the one who was accustomed to it to the ferry, and that the latter, not finding it there, went to the repair shop of the company, and not having a license to drive a car in Philadelphia, took one of the repair company's men who had its dealer's license with him; that on the way to the ferry the truck broke down, and the company's employee telephoned the repair shop and a mechanic was sent with no definite instructions; that the latter

patched it up, but was unable to properly repair it, and "advised," "told," or "ordered" the owner's driver to take the car back to the shop; that while so doing, and while the latter was accompanied by the two representatives of the company, he negligently operated the car and injured the plaintiff.

And in *Colley v. Lewis*, 7 Ala. App. 593, 61 So. 37, where the defendant, whose automobile had become disabled, left it in charge of an electrician employed by him in his theater, telling him that when he got through with it to leave it in front of the theatre, and there was evidence from which the jury might have found that at the time the car injured the plaintiff, the electrician was indulging in a joy ride having no connection with the performance of any service for the defendant, and also evidence from which they might have found that the electrician was impliedly empowered to test the efficacy of the repairs made by him, and that, in operating the machine at the time of the injury, he was actuated by a bona fide purpose of seeing if it would run satisfactorily, it was held that the question whether he was acting within the scope of his employment was for the jury.

It was also held in this case that if, at the time of the collision, the electrician's use of the machine was incidental to the service which he had undertaken for the owner, the fact that the service was rendered gratuitously would not enable the owner to escape liability. *Ibid*.

J. T. W.

by McAlbin and defendant. Those statements are the following. Plaintiff testified that he was taken to the hospital, and that defendant called upon him that afternoon. Asked if the defendant said anything about the driver of the car, he replied: "No, not anything at all in regard to driving the machine, only he said the machine the driver was driving was his machine. He didn't say anything at all then about the driver." Plaintiff further testified that about the second day after he was hurt McAlbin, the driver, came to see him, "and he went on to tell me that he was—this Sunday afternoon he was going somewhere after a trunk, or something of that kind, with this machine; that they were fixing to go out and make a trip somewhere, he and Mr. Callister, I believed. In some way he was going after this trunk to bring back to fix up, you know, for this trip. They were fixing—trying to get the machine ready, or fixing on the machine, to get it in condition to go to make the trip. So that was all, I believe, that he had to say in regards to that."

Plaintiff further testified that afterward, upon a certain day, he had a talk with the defendant on the beach, "a little talk, a friendly talk." Defendant said that McAlbin "had been with him a good while, and he was paying him \$3 per day when he was working."

Q. What kind of work did Mr. Callister say that he was doing?

A. He was working on his machine.

Q. Working on his machine?

A. Yes sir.

Q. How long had he been working on his machine?

A. He didn't tell me how long he was working on it, but he told me whenever—he was paying him \$3 to work on the machine, was about all he had to tell me about it; that he was in his employ some time,—he didn't say what time, or how long.

Q. When did he tell you he was paying him \$3 a day?

A. That was when I was—I believe it was the first time he came to see me.

Q. The first time he came to see you?

A. Yes, sir; I believe it was. I believe it was the first time he came.

Q. What did he say he was paying him this \$3 a day for?

A. Well, for his work that he was doing for Mr. Callister.

Q. State what, if you please, Mr. Segler,—anything stated by Mr. Callister in regard to this driver driving the machine.

A. Well, he didn't say anything, except this man was working for him at these times; whenever he was paying him this

\$3, and they were fixing up to make this trip; Mr. Callister said they were fixing up to go somewhere, to make some trip, some way. It was some time when I was in the hospital; I couldn't tell you what time it was; I couldn't tell you what day it was.

Q. What trip did he say he was going to make?

A. Some trip out in the mountains somewhere, they were going. That was the words I got, you know, that they were going to make this trip; he didn't say where; they were fixing up for a trip, whenever they got the machine in repairs.

The Court: Who did he refer to by "they?"

A. Mr. Callister and his driver.

Mr. Harker: State whether or not both of them told you this.

A. They both of them told me that.

Q. The driver and Mr. Callister?

A. The driver and Mr. Callister.

Witness Robinson called for the plaintiff, testifies that after the accident McAlbin "ran around there like a crazy man," saying: "I am awful sorry. I don't want to get in trouble over it. I am willing to fix it up,"—and, continues the witness, "he kept going from one question to the other, jabbering different statements. I heard his jabbering something away there about going after some trunks." This is all of the evidence in the case connecting, or tending to connect, defendant with it. The evidence does not even tend to raise a conflict with the direct testimony given by the defendant and McAlbin upon any essential matter. McAlbin might have been going for a trunk, though he denies that he was going, or that he said he was going, but it is not and cannot be asserted that the evidence shows that he was going at the instance and under the direction of Callister for any trunk of the latter. That Callister employed McAlbin to work on the machine, as plaintiff testifies, is exactly what Callister himself declares. That McAlbin was fixing the machine for a trip to the mountains is quite in consonance with defendant's own statement that he and McAlbin "had talked over many trips, and what they were going to do if we ever got the thing in shape,—we probably would have made a trip in the near future." We have then the case of a man who has turned his automobile over to a mechanic to put it in order. He exercised no control over the work nor over the mechanic in the performance of the work. If, in the due performance of that work, it became proper for the mechanic to take the car out on the street to test it, the owner would be no more responsible for damage which might

result from the mechanic's bad management of the car than he would if the mechanic, without any authority at all, had taken the ear and so used it. The evidence of plaintiff is not sufficient to raise a conflict upon the question, and it certainly needs no citation of authority to show that the owner, who has surrendered possession and control of his property under the indicated circumstances to an independent contractor, is not legally responsible for the damages which that contractor may occasion in his use of the property.

The order appealed from is therefore reversed.

We concur: Lorigan, J.; Melvin, J.

CONNECTICUT SUPREME COURT OF
ERRORS.

NATHAN ROSENTHAL

v.

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY.

(88 Conn. 65, 89 Atl. 888.)

Carriers — sudden stopping of trains — liability.

1. Stopping a railroad train so suddenly and violently as to throw passengers forward in their seats and cause baggage to fall from the racks is evidence of negligence which the carrier must negative to avoid liability for injury caused by the falling baggage.

Same — fall of baggage — liability for injury.

2. That hand baggage placed by its passengers in overhead racks provided for it by the railroad company is not under the immediate control of the carrier does not relieve it from liability for injury caused by the fall of the baggage by operating the train in such a way as to render the use of the racks in the manner in which they were intended to be used unsafe.

Same — manner of stowing baggage — duty to give warning.

3. If the overhead racks provided by a railroad company for baggage are so constructed that it is not safe to place one suit case on top of another in them, which fact

Note.—Generally, as to liability of carrier for injury resulting from negligent or meddlesome act of fellow passenger, see notes to *Sure v. Milwaukee Electric R. & Light Co.* 37 L.R.A.(N.S.) 724, and *Pruett v. Southern R. Co.* 49 L.R.A.(N.S.) 810.

As to liability of carrier for injury to passenger from baggage or parcels in aisle of car, see notes to *Pitcher v. Old Colony Street R. Co.* 13 L.R.A.(N.S.) 481, and *Beiser v. Cincinnati, N. O. & T. P. R. Co.* 43 L.R.A.(N.S.) 1050.
51 L.R.A.(N.S.)

is not apparent to the ordinary passenger, the carrier, to avoid liability for injury to a passenger by the fall of a case so placed, must give warning as to the danger in such use of the rack.

(March 5, 1914.)

APPEAL by plaintiff from a judgment of the Superior Court for Hartford County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by its negligence. Reversed.

The facts are stated in the opinion.

Messrs. Hugh M. Alcorn and William M. Maltbie, for appellant.

It is not necessary for the plaintiff to establish to the satisfaction of this court that the stopping of the train was extraordinary in its suddenness and violence. All that is necessary is to show that there was evidence in the case from which the jury might draw the conclusion that this was so.

Cook v. Morris, 66 Conn. 196, 33 Atl. 994; *Bergh v. Spivakowski*, 86 Conn. 98, 41 L.R.A.(N.S.) 855, 84 Atl. 329; *Girard v. Grosvenordale Co.* 83 Conn. 20, 74 Atl. 1126; *Occum Co. v. A. & W. Sprague Mfg. Co.* 34 Conn. 529.

From the fact that a train stopped with an unusual degree of violence and suddenness, negligence in its operation may be inferred.

Inland & S. Coasting Co. v. Tolson, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; *Sprague v. Southern R. Co.* 34 C. C. A. 207, 63 U. S. App. 711, 92 Fed. 59; *Carpue v. London & B. R. Co.* 5 Q. B. 747, Dav. & M. 608, 3 Eng. Ry. & C. Cas. 692, 13 L. J. Q. B. N. S. 133, 8 Jur. 464; *Dixey v. Philadelphia Traction Co.* 180 Pa. 401, 36 Atl. 924, 1 Am. Neg. Rep. 675; *Fitch v. Mason City & C. L. Traction Co.* 124 Iowa, 665, 100 N. W. 618; *Redmon v. Metropolitan Street R. Co.* 185 Mo. 1, 105 Am. St. Rep. 558, 84 S. W. 26; *Chicago City R. Co. v. Morse*, 197 Ill. 327, 64 N. E. 304; *Burr v. Pennsylvania R. Co.* 64 N. J. L. 30, 44 Atl. 845; *Martin v. Second Ave. R. Co.* 3 App. Div. 448, 38 N. Y. Supp. 220, 5 Am. Neg. Cas. 644; Notes to *Foley v. Boston & M. R. Co.* 7 L.R.A.(N.S.) 1076; *McGinn v. New Orleans R. & Light Co.* 13 L.R.A.(N.S.) 601; and *Brown v. Union P. R. Co.* 20 L.R.A.(N.S.) 808; *Nolan v. Newton Street R. Co.* 206 Mass. 384, 92 N. E. 505.

The defendant was bound to exercise the highest degree of care to protect the plaintiff from such a mischance as that which befell him.

Kebbe v. Connecticut Co. 85 Conn. 641, 84 Atl. 329, Ann. Cas. 1913C, 167; *Thorson v. Groton & S. Street R. Co.* 85 Conn. 11,

81 Atl. 1024; *Hinckley v. Danbury*, 81 Conn. 241, 70 Atl. 590; *Stanley v. Steele*, 77 Conn. 688, 69 L.R.A. 561, 60 Atl. 640, 2 Ann. Cas. 342, 18 Am. Neg. Rep. 20; *Murray v. Lehigh Valley R. Co.* 66 Conn. 512, 32 L.R.A. 539, 34 Atl. 506; *Derwort v. Loomer*, 21 Conn. 245, 9 Am. Neg. Cas. 142; *Fuller v. Naugatuck R. Co.* 21 Conn. 557, 2 Am. Neg. Cas. 266; *Hall v. Connecticut River S. B. Co.* 13 Conn. 319, 9 Am. Neg. Cas. 136; *Flint v. Norwich & N. Y. Transp. Co.* 34 Conn. 554; *Baldwin v. Fair Haven & W. R. Co.* 68 Conn. 567, 37 Atl. 418, 2 Am. Neg. Rep. 308; *Glennen v. Boston Elev. R. Co.* 207 Mass. 497, 32 L.R.A. (N.S.) 470, 93 N. E. 700; *Kuhlen v. Boston & N. Street R. Co.* 193 Mass. 341, 7 L.R.A. (N.S.) 729, 118 Am. St. Rep. 516, 79 N. E. 815; *Northern Commercial Co. v. Nestor*, 70 C. C. A. 523, 138 Fed. 383; *Pennsylvania R. Co. v. Stockton*, 106 C. C. A. 433, 184 Fed. 422; *Exton v. Central R. Co.* 62 N. J. L. 7, 56 L.R.A. 508, 42 Atl. 486, 5 Am. Neg. Rep. 675; *Goddard v. Grand Trunk R. Co.* 57 Me. 202, 2 Am. Rep. 39, 8 Am. Neg. Cas. 316; *Montgomery Traction Co. v. Whatley*, 152 Ala. 101, 126 Am. St. Rep. 17, 44 So. 538; *Illinois C. R. Co. v. Minor*, 16 L.R.A. 627, note; *Jansen v. Minneapolis & St. L. R. Co.* 32 L.R.A. (N.S.) 1206, note; *Hansen v. North Jersey Street R. Co.* 64 N. J. L. 686, 46 Atl. 718, 8 Am. Neg. Rep. 276; *Carpenter v. Boston & A. R. Co.* 97 N. Y. 494, 49 Am. Rep. 540, 9 Am. Neg. Cas. 593; *Simmons v. New Bedford, V. & N. S. B. Co.* 97 Mass. 361, 93 Am. Dec. 99; *Pitcher v. Old Colony Street R. Co.* 196 Mass. 69, 13 L.R.A. (N.S.) 481, 124 Am. St. Rep. 513, 81 N. E. 876, 12 Ann. Cas. 886; *Farrier v. Colorado Springs Rapid Transit Co.* 42 Colo. 331, 126 Am. St. Rep. 158, 95 Pac. 294; *Morris v. New York C. & H. R. R. Co.* 106 N. Y. 678, 13 N. E. 455; *Whiting v. New York C. & H. R. R. Co.* 97 App. Div. 11, 89 N. Y. Supp. 584; *Ferry Cos. v. White*, 99 Tenn. 256, 38 L.R.A. 427, 41 S. W. 583, 3 Am. Neg. Rep. 279.

There can be no doubt that the defendant's agents ought, in the exercise of proper care, to have seen the dangerous position of the upper suit case, and the defendant is just as much chargeable with what its agents ought to have known with reference to it, as it is with what they actually did know.

Donovan v. Connecticut Co. 84 Conn. 531, 80 Atl. 779; *Elliott v. New York, N. H. & H. R. Co.* 83 Conn. 320, 76 Atl. 298; *Stedman v. O'Neil*, 82 Conn. 199, 22 L.R.A. (N.S.) 1229, 72 Atl. 923; *Snow v. Coe Brass Mfg. Co.* 80 Conn. 63, 66 Atl. 881; *Crotty v. Danbury*, 79 Conn. 379, 65 Atl. 147.
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The question, Did defendant exercise the highest practical degree of care and foresight in protecting the plaintiff? is one of fact for the sole determination of the jury.

Donovan v. Connecticut Co. 84 Conn. 531, 80 Atl. 779; *Robbins v. Hartford City Gaslight Co.* 82 Conn. 394, 74 Atl. 113; *Currie v. Consolidated R. Co.* 81 Conn. 383, 71 Atl. 356; *Nesbit v. Crosby*, 74 Conn. 554, 51 Atl. 550; *Donovan v. Hartford Street R. Co.* 65 Conn. 201, 29 L.R.A. 297, 32 Atl. 350; *O'Neil v. East Windsor*, 63 Conn. 150, 27 Atl. 237; *Andrews v. New York & N. E. R. Co.* 60 Conn. 293, 22 Atl. 566; *Farrell v. Waterbury Horse R. Co.* 60 Conn. 239, 21 Atl. 675, 22 Atl. 544.

Whether a situation has arisen which requires a carrier to take precautions to protect a passenger from injury, and what precautions, by way of prevention or warning, should be taken, are questions of fact for the determination of the jury, if one is impanelled.

Kebbe v. Connecticut Co. 85 Conn. 641, 84 Atl. 329, Ann. Cas. 1913C, 167; *Carroll v. Connecticut Co.* 82 Conn. 513, 74 Atl. 897; *Rohloff v. Fair Haven & W. R. Co.* 76 Conn. 689, 58 Atl. 5, 16 Am. Neg. Rep. 299; *Sprague v. New York & N. E. R. Co.* 68 Conn. 345, 37 L.R.A. 638, 36 Atl. 791; *Flint v. Norwich & N. Y. Transp. Co.* 34 Conn. 554; *Derwort v. Loomer*, 21 Conn. 245, 9 Am. Neg. Cas. 142.

Plaintiff had the right to assume that the defendant had exercised, and would continue to exercise, the highest degree of care in protecting him from any injury from the fall of the suit cases.

Moffitt v. Connecticut Co. 86 Conn. 527, 86 Atl. 16; *Delinks v. New York, N. H. & H. R. Co.* 85 Conn. 102, 81 Atl. 1036; *Levien v. Webb*, 30 Misc. 196, 61 N. Y. Supp. 1113; *Adams v. Louisville & N. R. Co.* 134 Ky. 620, 135 Am. St. Rep. 425, 121 S. W. 419, 21 Ann. Cas. 321.

The question of plaintiff's contributory negligence was for the jury alone to determine.

Church v. Spicer, 85 Conn. 579, 83 Atl. 1115; *Elie v. C. Cowles & Co.* 82 Conn. 236, 73 Atl. 258; *Lawler v. Hartford Street R. Co.* 72 Conn. 74, 43 Atl. 545; *Fritts v. New York & N. E. R. Co.* 62 Conn. 503, 26 Atl. 347.

Mr. J. F. Berry for appellee.

Beach, J., delivered the opinion of the court:

The plaintiff with two friends was playing cards in the smoking car of a train running from New York to Hartford, when it was suddenly stopped a short distance before reaching the New Haven sta-

tion, and at the same moment a suit case fell from the rack over the seat in which the plaintiff was then sitting and struck the plaintiff on the head, inflicting an injury which then appeared to be slight, but from which serious consequences afterwards developed. The plaintiff's friends had placed two suit cases in the rack, one over the other, before the train started from New York. The plaintiff makes a twofold claim: First, that the suit case was thrown from the rack by a train stop so unusually sudden and violent that, unless it was satisfactorily explained by the defendant, the jury might reasonably infer therefrom negligence in the operation of the train; and second, that if the stopping of the train was not unusual, and the fall of the suit case was occasioned in whole or in part by the ordinary motion of the train, the defendant ought to have foreseen the danger and protected the plaintiff against it.

The witness who placed the top suit case in the rack testified that it fitted snugly, and that, as he intended to sit under it, he saw it was safe. There is no evidence that it afterwards worked loose or shifted its position prior to the fall. The evidence as to the character of the stop comes from the plaintiff and his witnesses, who describe it as "an awful jar," "like leaping over" "threw me forward," "a strong jolt," "we lunged forward," "gave us a very big jar; I never saw anything like it." Simultaneously the suit case struck the plaintiff on the side of the head and landed in the center aisle of the car. The principal question is whether from this testimony the jury might reasonably have inferred negligence in the operation of the train. The conditions under which negligence may be inferred from sudden movements of trains and electric cars have been recently discussed in *Work v. Boston Elev. R. Co.* 207 Mass. 447, 93 N. E. 693, in which it is pointed out that the difference between such jars and jolts as are the usual incidents of the operation of electric and steam trains, and those which are so much more abrupt than usual as to give rise to an inference of negligence, is a difference of degree, and that therefore it is a difficult matter in practice to draw the line between two sets of cases in which opposite results are reached. The court then states the Massachusetts rule as follows (omitting citations): "But some points are settled. It is settled that it is not enough for a plaintiff in such a case to introduce the testimony of witnesses who characterize the jerk as an unusual one or as worse than unusual. The plaintiff, to make out a case, must go further than merely to characterize

the jerk, jolt, or lurch, and must show, (1) by direct evidence of what the motor-man did, that he was negligent in the way that he stopped or started the car; or (2) by evidence of what took place as a physical fact, or by evidence of what appeared to take place as a physical fact, show indirectly that the motorman was negligent." In this case the witnesses not only characterized the stop as sudden and violent, but they testified to the physical effect on themselves, as throwing them forward in their seats, and to the simultaneous fall of the suit case, which, according to the testimony, had been securely stowed in the rack before the train started. We think that the jury might reasonably have found that the stop was unusually sudden, and caused the suit case to fall from a position from which it would not probably have been dislodged by the ordinary motion of the train. The starting and stopping of trains is a matter peculiarly within the control of the employees of the railroad, and the safety of passengers may be endangered by careless or unskilful handling of the powerful apparatus employed for these purposes. A passenger cannot be expected to know the cause of an abrupt stop resulting in injury, and it is not asking too much of the defendant railroad that it should be put upon its explanation by evidence showing that the stop was uncommonly abrupt, and that it produced a physical consequence in itself unusual, from which the plaintiff's injury resulted. *Zeigler v. Danbury & N. R. Co.* 52 Conn. 543, 2 Atl. 462; *Thorson v. Groton & S. Street R. Co.* 85 Conn. 11, 81 Atl. 1024. It is said that the doctrine of *res ipsa loquitur* has no application to this case, because the suit case which caused the injury was not under the control of the defendant. But we are not inclined to follow the suggestion contained in some of the New York cases, that the railroad company is bound to exercise only a reasonable degree of care in protecting its passengers from the risk of luggage falling from racks provided for its stowage. The furnishing of racks for that purpose invites passengers to use them to the extent of their apparent limit of safety, and imposes on the railroad, when the racks are so used, the duty of operating its trains so as not to endanger passengers sitting in the seats underneath such racks. If the defendant maintained racks of such construction that there was a risk not apparent to the ordinary passenger in putting one suit case on top of another, it should have given notice that it was dangerous to do so, either before the train started, or at some time during the hour and a half after the train started, and be-

fore the accident happened. If any evidence had been offered from which the jury could reasonably have found that the rack in question could not safely hold two dress suit cases, one on top of the other, we think the jury would also have been justified in finding that the defendant was negligent in giving no warning of that fact, for it is clear that a passenger sitting in a seat provided for that purpose is not bound to maintain a lookout to protect himself against the danger of falling luggage, unless perhaps the danger is so obvious that it ought to attract the attention of any ordinarily observant person. But the evidence as offered pointed the other way, and indicated that the suit case in question was securely stowed in the rack before the train started, and there was no evidence that it was in fact dislodged, or was liable to be dislodged, by the ordinary motion of the train. Under this condition of the testimony, the jury might reasonably have found that the proximate cause of the accident was the unusually abrupt train stop; and this, as already stated, is a cause peculiarly under the control of the defendant's servants.

There is error, and a new trial ordered.

MASSACHUSETTS SUPREME JUDICIAL COURT.

FRED G. BURNHAM et al.

v.

EDWARD F. DOWD et al.

(217 Mass. 351, 104 N. E. 841.)

Appeal — recommitting master's report — absence of objections — discretion.

1. The question of recommitting a master's report to have rulings by which evidence is alleged to have been erroneously admitted inserted for review is within the discretion of the trial judge, where there

Note. — Right of labor union to forbid its members to handle one's product.

This note is supplemental to notes to Purvis v. Local No. 500, U. B. C. J. 12 L.R.A.(N.S.) 643, and Meier v. Spear, 32 L.R.A.(N.S.) 792.

As appears in the earlier notes, there is a conflict of opinion among the courts as to the right of members of a labor union to agree not to handle the product of an employer of labor, without reference to whether the purpose or end sought thereby to be attained is justifiable.

In Gill Engraving Co. v. Doerr, 214 Fed. 111, it was held that an injunction *pendente lite* would not lie at the instance of the company injured, to restrain a photo-engravers' union co-operating with the Allied Printing Trades Council, from putting into effect an agreement that they would not do any work in the different steps of photo-

engraving, unless they did all of such work, and that the members of such unions would handle the work only of those customers who would assure the union that they would have their engraving done in shops fair to the members. And this was held to be true although the effect of the enforcement of the agreement was to intimidate and coerce the customers of the photo-engraving company from further patronizing such company, which was upon the unfair list of the union, the result being the destruction of much of the former's business and the threatened destruction of the balance. The court regarded the object of the combination complained of as being to increase the power of the union, thereby securing more, better, easier, and better-paid work for its members, and said that the means resorted to was not unlawful, and, since the object and the means to carry out the same were lawful, the fact that as an

was no objection to the admission of such evidence when it was offered, although objection to the report was made upon that ground and exceptions filed in pursuance thereof.

Same — review of ruling — lack of exception.

2. Rulings of a master admitting evidence alleged to be incompetent cannot be reviewed if no exception was taken to them.

Injunction — boycott by labor organization — vender of materials.

3. Members of a labor union may be enjoined from refusing to handle materials sold by one who furnishes supplies to an employer of nonunion labor, if they have no dispute with their employers who purchase such materials.

Damages — uncertainty — boycott by labor union.

4. Members of a labor union who have caused a loss of business to a merchant because of an unlawful boycott of his materials cannot avoid liability to him for such damages as are capable of substantial proof, by the fact that it is impossible to determine the total amount of loss, and may be difficult to ascertain with absolute certainty the money value of even the damages that can be proved.

(March 31, 1914.)

REPORT by the Superior Court for Hampden County for the determination of the Supreme Judicial Court of exceptions by defendants to rulings made during the trial of an action brought to enjoin them from continuing certain acts alleged to be unlawful and detrimental to plaintiffs' business. Decree for plaintiffs.

The facts are stated in the opinion.

MESSRS. J. B. Carroll, W. H. McClintock, and J. F. Jennings, for defendants:

The plaintiffs' bill should be dismissed, for:

The relief of the sort prayed for will,

engraving, unless they did all of such work, and that the members of such unions would handle the work only of those customers who would assure the union that they would have their engraving done in shops fair to the members. And this was held to be true although the effect of the enforcement of the agreement was to intimidate and coerce the customers of the photo-engraving company from further patronizing such company, which was upon the unfair list of the union, the result being the destruction of much of the former's business and the threatened destruction of the balance. The court regarded the object of the combination complained of as being to increase the power of the union, thereby securing more, better, easier, and better-paid work for its members, and said that the means resorted to was not unlawful, and, since the object and the means to carry out the same were lawful, the fact that as an

under any circumstances, be granted only in the case of irreparable injury.

Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 437, 55 L. ed. 797, 804, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492.

The policy established by the courts of our commonwealth is opposed to such a curtailment of the rights of the defendants as would result if the relief asked for should be granted, for the general policy respecting the individual's right of initiative is opposed to such an infringement.

Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346; *Bowen v. Matheson*, 14 Allen, 499; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Walker v. Cronin*, 107 Mass. 555; *Worthington v. Waring*, 157 Mass. 421, 20 L.R.A. 342, 34 Am. St. Rep. 294, 32 N. E. 744; *Vegehn v. Guntner*, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; *Martell v. White*, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1083; *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; *L. D. Willcutt & Sons Co. v. Driscoll*, 200 Mass. 110, 23 L.R.A. (N.S.) 1236, 85 N. E. 897; *Minasian v. Osborne*, 210 Mass. 250, 37 L.R.A. (N.S.) 179, 96 N. E. 1036, Ann. Cas. 1912C, 1299.

The policy of the courts in other jurisdictions is likewise so opposed to the interference with such fundamental rights of the defendants.

Meier v. Speer, 96 Ark. 618, 32 L.R.A. (N.S.) 792, 132 S. W. 988; *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 21 L.R.A. (N.S.) 550, 98 Pac. 1027, 16 Ann. Cas. 1165; *Master Builders' Asso. v. Domascio*, 16 Colo. App. 25, 63 Pac. 782; 24 Cyc. 830; *Arthur v. Oakes*, 25 L.R.A. 414, 11 C. C. A. 209, 4 Inters. Com. Rep. 744, 24 U. S. App. 239, 63 Fed. 318, 9 Am. Crim. Rep. 169; *Clemmitt v. Watson*, 14 Ind. App. 38, 42 N. E. 367; *Brewster v. C. Miller's Sons Co.* 101 Ky. 368, 38 L.R.A. 505, 41 S. W. 301; *Orr v. Home Mut. Ins. Co.* 12 La. Ann. 255, 68 Am. Dec. 770; *Lindsay & Co. v. Montana Federation of Labor*, 37 Mont. 264, 18 L.R.A. (N.S.) 708, 127 Am. St. Rep. 722, 96 Pac. 127; *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373; *Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.)* 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; *Gray v. Building Trades Council*, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 96 N. W. 663, 1118, 1 Ann. Cas. 172; *Ulery v. Chicago Live Stock Exch.* 54 Ill. App. 233; *Marx & H. Jeans Clothing Co. v. Watson*, 108 Mo. 133, 56 L.R.A. 951, 90 Am. St. Rep. 440, 67 S. W. 391; *Mills v. United States Printing Co.* 99 51 L.R.A. (N.S.)

App. Div. 605, 91 N. Y. Supp. 185; *Sinsheimer v. United Garment Workers*, 77 Hun, 215, 28 N. Y. Supp. 321; *Cohen v. United Garment Workers*, 35 Misc. 748, 72 N. Y. Supp. 341; *Richter Bros. v. Journeymen Tailors' Union*, 11 Ohio Dec. Reprint, 45; *Riggs v. Cincinnati Waiters' Alliance*, 5 Ohio N. P. 386, 8 Ohio S. & C. P. Dec. 565; *Alfred W. Booth & Co. v. Burgess*, 72 N. J. Eq. 181, 65 Atl. 226; *National Protective Asso. v. Cumming*, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; *Tallman v. Gaillard*, 27 Misc. 114, 57 N. Y. Supp. 419; *Searle Mfg. Co. v. Terry*, 56 Misc. 265, 106 N. Y. Supp. 438; *Longshore Printing Co. v. Howell*, 26 Or. 527, 28 L.R.A. 404, 46 Am. St. Rep. 640, 38 Pac. 547; *Cote v. Murphy*, 159 Pa. 420, 23 L.R.A. 135, 39 Am. St. Rep. 686, 28 Atl. 190; *Erdman v. Mitchell*, 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327; *Macaulay Bros. v. Tierney*, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; *Payne v. Western & A. R. Co.* 13 Lea, 507, 49 Am. Rep. 666; *Perrault v. Gauthier*, 28 Can. S. C. 241; *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598; *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 62 J. P. 595, 46 Week. Rep. 259, 77 L. T. N. S. 717, 14 Times L. R. 125; *Quinn v. Leathem* [1901] A. C. 495, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749.

Even if the court should hold that any of the acts alleged in the plaintiffs' bill have been proved against these defendants sufficiently and definitely by the master's findings, and that furthermore there was neither a legal right nor a justification for any such conduct of the defendants, yet no pecuniary damages have been proved.

Todd v. Keene, 167 Mass. 157, 45 N. E. 81; *John Hetherington & Sons v. William Firth Co.* 210 Mass. 8, 95 N. E. 961; *Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 199, 206, 35 L. ed. 147, 150, 11 Sup. Ct. Rep. 500; *Hollweg v. Schaefer Brokerage Co.* 117 C. C. A. 83, 197 Fed. 689; *Loder v. Jayne*, 142 Fed. 1010; *Lowry v. Tile, Mantel & Grate Asso.* 106 Fed. 38; *Fox v. Harding*, 7 Cush. 516; *Central Coal & Coke Co. v. Hartman*, 49 C. C. A. 244, 111 Fed. 96; *United States v. Behan*, 110 U. S. 338, 344, 28 L. ed. 168, 170, 4 Sup. Ct. Rep. 81.

Mr. Nathan P. Avery, for plaintiffs:

The refusal of the motion to recommit was within the discretion of the trial justice.

Hillier v. Farrell, 185 Mass. 434, 70 N. E. 424; *Cook v. Scheffreen*, 215 Mass. 444, 102 N. E. 715.

The plaintiffs are entitled to relief by way of injunction.

Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; Vegelahn v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; Plant v. Woods, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; Berry v. Donovan, 188 Mass. 353, 5 L.R.A. (N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; Pickett v. Walsh, 192 Mass. 573, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; DeMinico v. Craig, 207 Mass. 593, 42 L.R.A. (N.S.) 1048, 94 N. E. 317; Folsom v. Lewis, 208 Mass. 336, 35 L.R.A. (N.S.) 787, 94 N. E. 316; Hanson v. Innis, 211 Mass. 301, 97 N. E. 756; Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Casey v. Cincinnati Typographical Union, 12 L.R.A. 193, 45 Fed. 135; Emack v. Kane, 34 Fed. 47; Loewe v. California State Federation of Labor, 139 Fed. 71; Aikens v. Wisconsin, 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3; Shine v. Fox Bros. Mfg. Co. 86 C. C. A. 311, 156 Fed. 357; Irving v. Joint Dist. Council, U. B. C. & J. 180 Fed. 897; Hopkins v. Oxley Stave Co. 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912; Rocky Mountain Bell Teleph. Co. v. Montana Federation of Labor, 156 Fed. 809; Doremus v. Hennessy, 176 Ill. 608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; Kemp v. Division No. 241, 153 Ill. App. 344; Brown v. Jacobs' Pharmacy Co. 115 Ga. 429, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; Lucke v. Clothing Cutters & T. Assembly No. 7507, K. L. 77 Md. 396, 19 L.R.A. 408, 39 Am.

St. Rep. 421, 26 Atl. 505; Crump v. Com. 84 Va. 927, 10 Am. St. Rep. 895, 6 S. E. 620; Master Builders' Asso. v. Domascio, 16 Colo. App. 25, 63 Pac. 782; Gray v. Building Trades Council, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172; State ex rel. Durner v. Huegin, 110 Wis. 189, 62 L.R.A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 332; Erdman v. Mitchell, 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327; Purvis v. Local No. 500, U. B. C. & J. 214 Pa. 348, 12 L.R.A. (N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 Ann. Cas. 275; Perkins v. Pendleton, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; Martin v. McFaul, 65 N. J. Eq. 91, 55 Atl. 465; Curran v. Galen, 152 N. Y. 33, 37 L.R.A. 802, 57 Am. St. Rep. 496, 46 N. E. 297; Albro J. Newton Co. v. Erickson, 70 Misc. 291, 126 N. Y. Supp. 949; Temperon v. Russell [1893] 1 Q. B. 715, 62 L. J. Q. B. N. S. 412, 4 Reports, 376, 69 L. T. N. S. 78, 41 Week. Rep. 565, 57 J. P. 676; Giblan v. National Amalgamated Labourers' Union [1903] 2 K. B. 600, 72 L. J. K. B. N. S. 907, 89 L. T. N. S. 386, 19 Times L. R. 708; Quinn v. Leathem [1901] A. C. 495, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749.

Plaintiffs have a right to come into equity.

Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; Emack v. Kane, 34 Fed. 47; Eddy, Combination, ¶ 1013, p. 1060.

Damages were properly awarded.

Purvis v. Local No. 500, U. B. C. & J. 214 Pa. 348, 12 L.R.A. (N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 Ann. Cas. 275;

incident injury occurred to another was immaterial, as was also the motive of the members of the combination. The court said that the result of legalizing strikes, lockouts, and boycotts under any circumstances must be that those who understand the use of such legal tools can always keep within the law and accomplish their main purpose while inflicting all necessary incidental injury.

In Albro J. Newton Co. v. Erickson, 70 Misc. 291, 126 N. Y. Supp. 949, affirmed in 144 App. Div. 939, 129 N. Y. Supp. 1111, granting an injunction against the agent and officers of certain labor organization at the instance of a private concern, it was held unlawful for labor unions to make war upon an employer of labor deemed unfair, who was the producer of building material, by striking, and threatening to call strikes of union men employed by builders or contractors who used the material produced by 51 L.R.A. (N.S.)

the manufacturer complained of. This combination was regarded as one to attack the plaintiff's good will, and upon this ground held unlawful.

And in Mears Slayton Lumber Co. v. District Council, C. U. B. C. J. A. 156 Ill. App. 327, a contempt proceeding, it is recognized that it is unlawful for labor organizations to follow the material of an employer of labor deemed unfair, to its destination, and call a strike of the union labor members to prevent the use of such material by the person to whom it was delivered.

And see New England Cement Gun Co. v. McGivern, — Mass. —, 105 N. E. 885, holding it to be unlawful for members of a labor union to procure the breach of a contract to plaster the exterior of a building, by the members refusing to plaster the inside unless also permitted to plaster the outside.

A. G. S.

Doremus v. Hennessy, 176 Ill. 608, 43 L.R.A. 797, 60 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; DeMinico v. Craig, 207 Mass. 593, 42 L.R.A.(N.S.) 1048, 94 N. E. 317; Berry v. Donovan, 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 5 Ann. Cas. 738; Hanson v. Innis, 211 Mass. 301, 97 N. E. 756; Botkin v. Miller, 190 Mass. 411, 77 N. E. 49; Weston v. Boston & M. R. Co. 190 Mass. 298, 4 L.R.A.(N.S.) 569, 112 Am. St. Rep. 330, 76 N. E. 1050, 5 Ann. Cas. 825, 19 Am. Neg. Rep. 306; French v. Connecticut River Lumber Co. 145 Mass. 261, 14 N. E. 113; Speirs v. Union Drop Forge Co. 180 Mass. 91, 61 N. E. 825; Dennis v. Maxfield, 10 Allen, 138; Snow v. Pulitzer, 142 N. Y. 263, 36 N. E. 1059; Raynor v. Valentin Blatz Brewing Co. 100 Wis. 414, 76 N. W. 343; Peabody v. Boston Elev. R. Co. 191 Mass. 513, 78 N. E. 392; Newark Coal Co. v. Upson, 40 Ohio St. 17; Chapman v. Kirby, 49 Ill. 211; Allison v. Chandler, 11 Mich. 542.

Sheldon, J., delivered the opinion of the court:

If it appeared from this record that the defendants' exceptions to the admission of evidence by the master had been taken at the hearing before the master, and that the objections made to the report by the defendants upon this ground, and the exceptions filed by them in pursuance thereof, had thus been based upon a proper foundation, it would not have been easy to justify the refusal to recommit the master's report in order that the rulings made upon these points and excepted to by the defendants might be reviewed. But this is not the case. So far as appears, all the evidence to the admission of which objection afterwards was made was received originally without any objection. Nor does it appear that a motion afterwards was made to strike out any part of this evidence, if that would have been sufficient. Undoubtedly, if seasonable objections had been made by the defendant and overruled by the master, and this fact had been shown to the superior court, the motion to recommit would have been granted. As the case stands, the motion was addressed merely to the discretion of the justice who heard it, and there is no reason to suppose that his discretion was exercised wrongly. Cook v. Scheffreen, 215 Mass. 444, 447, 102 N. E. 715; Lee v. Methodist Episcopal Church, 193 Mass. 47, 78 N. E. 646.

We see no ground on which any of the exceptions to the master's report can be sustained. Most of them relate to findings of fact, as to which the evidence is not be-

fore us. Others refer to the admission of evidence, and cannot be considered for the reasons already stated. The defendants have not argued separately any of these exceptions, although they have not been waived, and accordingly each one of them has been considered. But it is not necessary to discuss them in detail.

The leading material facts found by the master may be summarized as follows: The plaintiffs carry on a business which includes the selling at wholesale and retail of masons' supplies. The defendants are members of a voluntary unincorporated association or labor union in Holyoke, hereinafter called the union. It is the object and purpose of all the members of this union to make themselves and the union as powerful as possible in Holyoke and its immediate environment, and to exert their power for the purpose of bettering the labor conditions of members of the union, especially with reference to rates of wages and periods of labor. It is a part of their principles which all the members of the union are under obligation to respect and uphold, that all men of their craft or trade working in Holyoke or its immediate vicinity, that is, within the jurisdiction of their union, must be members thereof; that all their members should refuse to work with men of their craft who were not members of the union, or had not declared their intention to join it; should refuse to work for employers who were declared "unfair" by the union; and should refuse to use in their work any materials that had been sold or furnished by any merchant who was declared unfair by the union. They aimed to accomplish their purpose of bettering the labor conditions of their members, primarily by persuasion coupled with the fear of consequences if the party addressed should not yield, and secondarily, if necessary, by troubles and loss to the business of contractors or merchants. This union was connected with the Building Trades Council of Holyoke, which represented the various building trades unions (some fourteen in number) of Holyoke and vicinity, and was composed of delegates sent from these unions. In July, 1911, one Gauthier employed nonunion masons in certain construction work in Holyoke, against the protest of this union; and the plaintiffs furnished to him mason materials. In August, 1911, the union voted to refuse to handle any building material of any firm that furnished stock to Gauthier or to any "unfair" contractor. Soon after this, the delegates from the union to the Building Trades Council reported these facts to that body; and the agent of the council sent a written notice to the plaintiff that Gauthier was

"doing work contrary to laws of Building Trades Council," and was "therefore recognized by us as being unfair," and expressing the hope of "co-operation in this matter." The plaintiffs continued to furnish material to Gauthier. Thereupon, by successive votes, the union declared that the plaintiffs were "unfair." This was for the reason that the plaintiffs continued to furnish masons' supplies to Gauthier, and refused to promise not to sell to any party who should not be in good standing with the union. All the members of the union would have refused since August, 1911, and would refuse now and in the future (so long as the plaintiffs were held by the union to be unfair) to work with materials purchased from the plaintiffs. It has not been and in the future it will not be practicable, without the labor of members of the union, to perform building contracts of any size or importance in Holyoke or its immediate vicinity, without serious inconvenience, trouble, and loss to the contractors, and the defendants have intended that owners and contractors should fear this result if they purchased masons' supplies from the plaintiffs. The union and its officers and members, including some of the defendants, have notified various owners and contractors who either were buying or were intending to buy masons' supplies from the plaintiffs for construction work upon which members of the union necessarily were employed, that the plaintiffs were upon the "unfair" list of the union, and that its members would not use or work upon material furnished by the plaintiffs, and in substance threatened to strike if masons' supplies were purchased from the plaintiffs. These contractors and owners feared, and it was intended that they should fear, and they were justified in fearing, that these threats would be carried out; and in consequence thereof they ceased or refrained from buying supplies of the plaintiffs, as otherwise they would have done, and the plaintiffs' sales of masons' supplies were considerably diminished and their profits lessened in consequence of these facts. This state of affairs will continue, to the serious loss and damage of the plaintiffs, unless they shall promise not to sell to anyone considered unfair by the union.

The defendants did not act from actual personal malice towards the plaintiffs; but their acts were done in pursuance of their union principles and purposes, as above stated, and without caring for the injurious consequences to the plaintiffs. Indeed, these injurious consequences were anticipated and contemplated by the defendants. They did not attempt to declare or enforce any boycott against the plaintiffs, except

as this is included in the acts that have been mentioned. During the period involved in this case, some of the defendants have bought for their own use small quantities of masons' supplies from the plaintiffs, and others of the defendants during the same time have made purchases from the plaintiffs in other branches of the plaintiffs' business.

Although there has been a little contrariety of decisions in other jurisdictions, we do not consider that there is any doubt as to the rule of law to be applied in this case. The defendants have no real trade dispute with the plaintiffs. No one of the members of the union is, or so far as appears ever has been, employed by the plaintiffs. The plaintiffs have not interfered or sought to interfere with the employment of any of those members, or with the rates of pay, the periods of labor, or any of the conditions of such employment. There is no competition between these parties, as there was in *Bowen v. Matheson*, 14 Allen, 499. The matter that lies at the foundation of these proceedings is a dispute between the union and Gauthier. He employs or has employed nonunion labor; the defendants (including under this term all the members of the union) object to this. They have a right to say that they will do no work for him unless he will give to them all the work of their trade; that they will do all or none of his work. That was settled by our decision in *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638. If they were employed by Gauthier, and if he employed also nonunion men of their craft, they would have a right, unless they were bound by some term of their contract of employment, to strike, unless all of this work should be given to them or to their associates. But it was pointed out in the same case that not all strikes are lawful; and it now is settled in this commonwealth that it is a question of law whether any particular strike is a lawful one. *Reynolds v. Davis*, 198 Mass. 294, 17 L.R.A.(N.S.) 162, 84 N. E. 457; *De Minico v. Craig*, 207 Mass. 593, 42 L.R.A.(N.S.) 1048, 94 N. E. 317. But the second point decided in *Pickett v. Walsh*, *supra*, is in our opinion decisive of the principal question raised in this case. It was there held that the members of a labor union who are employed by a contractor to do work upon a building, and who have no dispute with that contractor as to work which they or their fellows are doing for him, cannot lawfully strike against him for the mere reason that he is doing work and employing some of their fellows upon another building upon which nonunion men are employed to do

like work, not by him, but by the owner, of that building. The language and reasoning of that decision are applicable here. The reason of the decision was that, as the court said (Loring, J., 192 Mass. 587) such a strike "has an element in it like that in a sympathetic strike, in a boycott, and in a blacklisting, namely, it is a refusal to work for A, with whom the strikers have no dispute, because A works for B, with whom the strikers have a dispute, for the purpose of forcing A to force B to yield to the strikers' demands." So in the case at bar, the threat of the defendants was to strike against owners and contractors, with whom the defendants had no dispute, for the purpose of forcing those owners and contractors to refuse to buy masons' supplies from the plaintiffs, and thus, by the loss of business and of the profits to be derived therefrom, force the plaintiffs to refuse to sell to Gauthier or others whom the defendants might call unfair, and thus put a pressure upon those persons which should force them to cease employing nonunion masons, and to give all their mason work to the defendants. This was a step further than what was held in *Pickett v. Walsh* to be an unlawful combination for an unjustifiable interference with another's business. It was in intention and effect a boycott; and it was none the less so because it was aimed at only one branch of the plaintiffs' business. There is no more right to interfere with one branch of a merchant's business, to obstruct it and lessen its profits and so far as may be done to destroy it entirely, than there is so to interfere with, obstruct, and destroy the whole of that business. The difference is merely one of degree, not of kind. And *Pickett v. Walsh* is well supported as to this point both upon the reasoning of the opinion and by authority. See the cases collected on page 588 of 192 Mass. It has been cited and followed in our later decisions. *Reynolds v. Davis*, 198 Mass. 294, 17 L.R.A.(N.S.) 162, 84 N. E. 457; *M. Steinert & Sons Co. v. Tegen*, 207 Mass. 394, 32 L.R.A.(N.S.) 1013, 93 N. E. 584; *Folsom v. Lewis*, 208 Mass. 336, 35 L.R.A.(N.S.) 787, 94 N. E. 316; *Hanson v. Innis*, 211 Mass. 301, 97 N. E. 756. Most of the decisions in other jurisdictions, besides those cited in *Pickett v. Walsh*, are to the same effect. *Aikens v. Wisconsin*, 195 U. S. 194, 40 L. ed. 154, 25 Sup. Ct. Rep. 3; *Emack v. Kane* (C. C.) 34 Fed. 46; *Shine v. Fox Bros. Mfg. Co.* 86 C. C. A. 311, 156 Fed. 357; *Rocky Mountain Bell Teleph. Co. v. Montana Federation of Labor* (C. C.) 156 Fed. 809; *American Federation of Labor v. Buck's Stove & Range Co.* 33 App. D. C. 83, 32 L.R.A.(N.S.) 748; *Gompers v. Buck's* 51 L.R.A.(N.S.)

Stove & Range Co. 33 App. D. C. 516; *Doremus v. Hennessy*, 176 Ill. 608, 43 L.R.A. 797, 802, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; *Kemp v. Division No. 241*, 153 Ill. App. 344; *Perkins v. Pendleton*, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96; *Lucke v. Clothing Cutters & T. Assembly No. 7507*, K. L. 77 Md. 396, 19 L.R.A. 408, 39 Am. St. Rep. 421, 26 Atl. 505; *Albro J. Newton Co. v. Erickson*, 70 Misc. 291, 126 N. Y. Supp. 949; *State ex rel. Durner v. Huegin*, 110 Wis. 189, 249, 62 L.R.A. 700, et seq. 85 N. W. 1046, 15 Am. Crim. Rep. 332.

As was said in *Hopkins v. Oxley Stave Co.* 28 C. C. A. 99, 105, 49 U. S. App. 709, 83 Fed. 912, 917: "Persons engaged in any service have the power, with which a court of equity will not interfere by injunction, to abandon that service, either singly or in a body, if the wages paid or the conditions of employment are not satisfactory; but they have no right to dictate to an employer what kind of implements he shall use, or whom he shall employ."

We have examined with care all the decisions that have been referred to by the defendants. Some of them turn upon a different state of facts from that which here is presented. Some of them we should hesitate to follow to the conclusions towards which they logically tend. But the result which we have reached seems to us to be in accord with sound reason and supported by authority.

The defendants contend earnestly that each one of them has a perfect right to refrain from dealing himself, and to advise his friends and associates to refrain from dealing, with the plaintiffs, and that they have a right to do together and in concert what each one of them lawfully may do by himself. But that is not always so. It is especially true in dealing with such questions as these that the mere force of numbers may create a difference not only of degree, but also of kind. No doubt the defendants' organization is a lawful one, and certainly some of the objects aimed at by the union thus formed are both legal and of high utility. But, as was pointed out by the Supreme Court of the United States in *Gompers v. Buck's Stove & Range Co.* 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492, "the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice

of rights protected by the Constitution; or by standing on such rights and appealing to the preventive powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many as well as the many against the one." To the same effect is what was said by this court, through Mr. Justice Hammond, in *Martell v. White*, 185 Mass. 255, 260, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085, 1087, quoting the words of Lord Justice Bowen in *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598, 616: "Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt." So in *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638, it was held among other things that "what is lawful if done by an individual may become unlawful if done by a combination of individuals." And see the cases collected on page 582 of 192 Mass. in that opinion. This principle is peculiarly applicable to cases like the one at bar. There is no such thing in our modern civilization as an independent man. No single individual could continue even to exist, much less to enjoy any of the comforts and satisfactions of life, without the society, sympathy, and support of at least some of those among whom his lot is cast. Every individual has the right to enjoy these, and is bound not to interfere with the enjoyment of them by others. That right indeed is usually one of merely moral obligation, incapable of enforcement by the courts, but it is none the less an actual wrong for any body of men actively to cause the infringement of that right in definite particulars; and especially where such an infringement is made possible only by the concerted action of many in combination against one, and results in direct injury to his business or property, the courts should interfere for the protection of that person.

In *Worthington v. Waring*, 167 Mass. 421, 20 L.R.A. 342, 34 Am. St. Rep. 294, 32 N. E. 744, where the court refused to enjoin the defendants from putting the names of the plaintiffs upon a blacklist, and thus making it impossible for them to obtain in that neighborhood employment in their trade, there was a misjoinder of plaintiffs. Apart from this technical difficulty, the decision was put upon the ground that, while courts of equity may protect property from threatened injury when the property rights are equitable, or when they cannot be pro-

tected adequately at law, yet equity has in general no jurisdiction to restrain the commission of crime, or to assess damages for torts already committed, and the rights there alleged to have been violated were said to be merely personal rights, and not rights of property. That case is not applicable here, for the rights now in question are distinctly property rights. Accordingly, we need not consider whether the doctrine of that case can be reconciled with our later decisions, or whether it now would be followed if the same state of facts were again presented.

The question of damages remains to be dealt with. Upon that we find no error in the master's report. That the plaintiffs have sustained substantial damage is manifest; and the mere facts that it may be impossible to determine the total amount of their loss, and that it may be difficult to ascertain with absolute certainty the money value of even the damages that can be proved, is no reason for refusing to allow to the plaintiff what has been found to be capable of substantial proof. *Fox v. Harding*, 7 Cush. 516; *Speirs v. Union Drop Forge Co.* 180 Mass. 87, 61 N. E. 825; *C. W. Hunt Co. v. Boston Elev. R. Co.* 199 Mass. 220, 235, 85 N. E. 446, et seq.; *De Minico v. Craig*, 207 Mass. 593, 600, 42 L.R.A.(N.S.) 1048, 94 N. E. 317. We find nothing inconsistent with this in *Todd v. Keene*, 167 Mass. 157, 45 N. E. 81; *John Hetherington & Sons v. William Firth Co.* 210 Mass. 8, 23, 95 N. E. 961, et seq., or the other cases relied on by the defendants. Doubtless merely speculative damages or any damages that have not been proved cannot be recovered; but this does not require absolute mathematical demonstration, or prevent the drawing of reasonable inferences from the facts and circumstances in evidence.

The result is that the plaintiffs are entitled to a decree enjoining the defendants from keeping the names of the plaintiffs upon their unfair list, from threatening to strike or to leave the work of any owner, builder, or contractor by reason of such persons having purchased masons' supplies from the plaintiffs or having dealt otherwise with the plaintiffs, and from ordering or inducing any strike against an owner, builder, or contractor for such reason, and that the plaintiffs shall recover from the defendants the sum of \$500 with interest from the date of the filing of the master's report, and their costs of suit, and have execution therefor.

So ordered.

WASHINGTON SUPREME COURT.
(Department No. 2.)

J. P. GLEASON, Appt.,
v.
MICHAEL EARLES, Resp't.

(78 Wash. 491, 139 Pac. 213.)

Specific performance — of stock pooling contract.

1. Specific performance will not be granted of an agreement between holders of stock in a corporation to vote it in block as directed by a majority of the contractors, even though the agreement is valid, but the parties will be left to their remedy at law for a breach.

Note. — Specific performance of stock pooling agreement.

As to specific performance of contract for sale of corporate stock, see notes to *Ryan v. McLane*, 50 L.R.A. 501, and *Hogg v. McGuffin*, 31 L.R.A.(N.S.) 401. Where the purpose of the sale is to enable the purchaser to secure control of the corporation, the question is analogous to the one raised by the present note. Cases on that point are not, however, within the scope of this note, which is limited to pooling agreements for the purpose of controlling the corporation without obtaining actual ownership of the majority of the stock.

By reference to cases cited in the notes to *Morel v. Hoge*, 16 L.R.A.(N.S.) 1136, and *Carnegie Trust Co. v. Security L. Ins. Co.* 31 L.R.A.(N.S.) 1186, it will be seen that the decisions are not in complete harmony as to the validity of agreements to control the voting power of corporate stock, most of the cases turning either upon the form of the agreement or the purpose for which the control is sought. For the purpose of the present note, the validity of the agreement is assumed, and the question considered is simply whether specific performance is an available remedy.

While stock pooling agreements made for the purpose of controlling the corporation are very common, practically all the cases involve attacks upon their legality in various forms, including petition for enjoining their execution, rather than for specific performance. See cases in note to which reference has been made, *supra*. The holding in *GLEASON v. EARLES*, that such agreement, even if valid, cannot be the basis of a suit by one of the contracting parties for specific performance, finds support in *Gage v. Fisher*, *infra*, though the court in that case was not obliged to pass directly upon the point, and in the *dictum* in *Fremont v. Stone*, *infra*. While a few cases are cited, *infra*, apparently indicating an opposite view, none of them are squarely in point. Therefore, it may be said that the law is not well settled as yet, but that the general trend of opinion seems to support the holding in *GLEASON v. EARLES*. 51 L.R.A.(N.S.)

Same — transfer of stock.

2. A desire on the part of a minority stockholder in a corporation to become a majority stockholder is not sufficient to take an agreement for transfer of stock out of the rule that specific performance of such agreement will not be enforced, in the absence of peculiar circumstances which leave the remedy at law inadequate.

(March 13, 1914.)

APPEAL by complainant from a judgment of the Superior Court for King County dismissing an action brought to enforce specific performance of a stock pooling contract. Affirmed.

The facts are stated in the opinion.

While *Gage v. Fisher*, 5 N. D. 297, 31 L.R.A. 557, 65 N. W. 809, was not a suit for specific performance, the holding is based upon the proposition that "a court of equity should never specifically enforce a contract by which one person agrees that another should control his stock without purchasing it, where the sole ground of the appeal to equity is the desire of the party making the appeal to secure control of a corporation through the use of the stock he is thus seeking to control." The court said: "The case before us presents a stronger one against the exercise of the equitable powers of the courts to enforce specific performance than a contract for the purchase of stock; for here the contract was to give the minority stockholder the right to dominate and direct the judgment of the plaintiff, as stockholder, in the voting of his stock, without owning the stock himself. Every other stockholder in the bank had the right to demand that the plaintiff should, if he desired so to do, exercise at the very time of the annual meeting his own judgment as to the best interests of all the stockholders, untrammelled by dictation, and unfettered by the obligation of any contract. We know of no case where a court of equity has enforced such an agreement. We regard as controlling on this question the rule that an irrevocable proxy to vote stock is revocable. See *Cook, Corp.* § 610, note, 6."

In *Fremont v. Stone*, 42 Barb. 169, the court refused to decree specific performance of a contract by which some of the defendants stipulated with the plaintiff that, on payment by him of a certain amount for a certain number of shares of stock in a railroad company then belonging to them, new directors, to be nominated by the plaintiff and his copurchaser, should be substituted in the place of all the other directors except defendants, who were directors at the time. It does not appear how the change was to be brought about. The decision is based upon the proposition that the contract was contrary to public policy and therefore invalid, but the court said: "If the subject-matter of this contract was of that species which would authorize a court of equity to

Messrs. Hughes, McMicken, Dovell, & Ramsey, for appellant:

The contract relied upon is valid.

Winsor v. Commonwealth Coal Co. 63 Wash. 62, 33 L.R.A.(N.S.) 63, 114 Pac. 908; Carnegie Trust Co. v. Security L. Ins. Co. 111 Va. 1, 31 L.R.A.(N.S.) 1195, 68 S. E. 412, 21 Ann. Cas. 1287; Faulds v. Yates, 57 Ill. 416, 11 Am. Rep. 24, 3 Mor. Min. Rep. 551; Beach, Corp. § 304; Smith v. San Francisco & M. P. R. Co. 115 Cal. 584, 35 L.R.A. 309, 56 Am. St. Rep. 131, 47 Pac. 582; Brightman v. Bates, 175 Mass. 105, 55 N. E. 809; Chapman v. Bates, 61 N. J. Eq. 658, 88 Am. St. Rep. 459, 47 Atl. 641; Weber v. Della Mountain Min. Co. 14 Idaho, 404, 94 Pac. 441; Hey v. Dolphin, 92 Hun, 230, 36 N. Y. Supp. 627; Brown v. Pacific Mail S. S. Co. 5 Blatchf. 525, Fed. Cas. No. 2,025.

For a violation of the contract a remedy is available.

Whipple v. Lee, 46 Wash. 266, 89 Pac. 712; Cole v. Price, 22 Wash. 18, 60 Pac. 153; Boothe v. Summit Coal Min. Co. 55

Wash. 167, 104 Pac. 207, 19 Ann. Cas. 1255.

Equity will not permit the trust to be destroyed because of failure of the trustees to carry out its purposes.

Cone v. Cone, 61 S. C. 512, 39 S. E. 748; Griswold v. Sackett, 21 R. I. 206, 42 Atl. 868.

An interest in corporate stock is such an interest as a party is entitled to have *in specie*, and for that reason, damages at law not furnishing an adequate remedy, specific performance of an obligation to transfer is decreed.

Krohn v. Williamson, 62 Fed. 869; 26 Am. & Eng. Enc. Law, 122; Dennison v. Keasby, 200 Mo. 408, 98 S. W. 546; Treasurer v. Commercial Coal Min. Co. 23 Cal. 390, 13 Mor. Min. Rep. 360; Krouse v. Woodward, 110 Cal. 638, 42 Pac. 1084; Sherwood v. Wallin, 1 Cal. App. 532, 82 Pac. 566; Frue v. Houghton, 6 Colo. 318; Johnson v. Brooks, 93 N. Y. 337; Northern C. R. Co. v. Walworth, 193 Pa. 207, 74 Am. St. Rep. 683, 44 Atl. 253; O'Neill v. Webb, 78 Mo. App. 1.

interpose in the manner required in this complaint, the object and nature of it would forbid any such interposition."

But in Smith v. San Francisco & N. P. R. Co. 115 Cal. 584, 35 L.R.A. 309, 56 Am. St. Rep. 119, 47 Pac. 582, three persons, preliminary to and at the time of purchasing a number of shares of stock, entered into an agreement that all the shares should be voted as a unit for a period of five years, in accordance with a decision of a majority of the contracting parties, to be determined by ballot, and separate certificates were issued to each of the parties for one third of the lot of shares purchased. One of the parties offered his ballot for the plaintiff, who was a candidate for director other than the one designated by the other two contracting parties, but the vote was rejected by the chairman of the meeting, and the other two parties to the contract were allowed to vote the entire lot of shares as a unit for the candidate of their choice. That candidate was declared elected director by the chairman of the meeting, although the voting power of the protesting member's share was determinative of the election as between him and the plaintiff. This was a statutory proceeding for the purpose of having it declared that plaintiff was elected instead of defendant, who had been declared elected by the chairman. It was held that the contract was not against public policy, that it was valid, and that defendant had been legally elected. While it was not necessary that the court act affirmatively in order to give effect to this contract, the holding had the effect of the decree of specific performance. The holding is not based upon the theory of noninterference by the court, but upon the theory that the decision of the chairman

was correct. It was held that the contract was in substance an informal, irrevocable proxy.

The holding in Greenwell v. Porter [1902] 1 Ch. 530, 71 L. J. Ch. N. S. 243, 86 L. T. N. S. 220, 9 Manson, 85, while not clearly decisive of the question here considered, furnishes some indication that under certain circumstances specific performance of an agreement to vote for certain persons may be decreed by the English court. The defendants, as executors holding a majority of the shares of stock of a corporation, as well as a few shares belonging to themselves as individuals, induced the plaintiff to purchase some of the shares from them as executors, by agreeing that as long as they held any shares either as executors or as individuals they would use the voting power of such shares for, and not against, two specified persons for directors; three of the four defendants, in violation of the agreement, voted against one of the persons named, and plaintiff asked for an injunction restraining them from so voting at a second or subsequent meeting. The injunction was granted over defendants' objection that the agreement was *ultra vires* and a delegation of their powers by the executors, and that it was inconsistent with the duty of the defendants as directors of the company. The court points out, however, that the plaintiff does not claim to make the defendants vote in accordance with the agreement, but claims an intention to restrain them from voting against the reelection of the party named. The decision had the same effect as a decree for specific performance, since plaintiff's candidate did not need the votes, provided they were not cast for the opponent. J. W. M.

Messrs. Kerr & McCord, for respondent:

Even though pooling contracts generally, if based upon no illegal consideration and not against public policy, may be valid and upheld by the courts, the contract now before the court is contrary to public policy and is based upon an illegal consideration, and is therefore unenforceable.

9 Cyc. 566; Meguire v. Corwine, 101 U. S. 108, 25 L. ed. 899; Union Cent. L. Ins. Co. v. Berlin, 33 C. C. A. 274, 62 U. S. App. 223, 90 Fed. 779; Hampton v. Buchanan, 51 Wash. 155, 98 Pac. 374; Guernsey v. Cook, 120 Mass. 501; Forbes v. McDonald, 54 Cal. 98; Woodruff v. Wentworth, 133 Mass. 309; Noel v. Drake, 28 Kan. 265, 42 Am. Rep. 162; Gage v. Fisher, 5 N. D. 297, 31 L.R.A. 557, 65 N. W. 809; Trist v. Child (Burke v. Child) 21 Wall. 441, 22 L. ed. 623; Hazelton v. Sheekells, 202 U. S. 71, 50 L. ed. 939, 26 Sup. Ct. Rep. 567, 6 Ann. Cas. 217; Pueblo & A. Valley R. Co. v. Taylor, 6 Colo. 1, 45 Am. Rep. 513; Moses v. Scott, 84 Ala. 608, 4 So. 742; Fisher v. Bush, 35 Hun, 641; Mississippi & M. R. Co. v. Cromwell, 91 U. S. 643, 23 L. ed. 367; Foll's Appeal, 91 Pa. 434, 36 Am. Rep. 671; Wonson v. Fenno, 129 Mass. 405; Morris Run Coal Co. v. Barclay Coal Co. 68 Pa. 173, 8 Am. Rep. 159; Kennedy v. Monarch Mfg. Co. 123 Iowa, 344, 98 N. W. 796; Greason v. Keteltas, 17 N. Y. 491; Hopkins v. Gilman, 22 Wis. 476; Gray v. Bloomington & N. R. Co. 120 Ill. App. 159; Wanneker v. Hitchcock, 38 Fed. 385.

Equity will not appoint a receiver when no substantial good would result, or where the trust is a personal confidence reposed by the settler in his appointee.

39 Cyc. 279; 2 Bates, Partn. §§ 585-596.

The agreement of March 20th, 1903, does not constitute a trust, and equity has no jurisdiction to appoint a trustee or receiver.

2 Cook, Corp. 2d ed. 1711; 39 Cyc. 76; Young v. Mercantile Trust Co. 140 Fed. 61; Decker v. Schulze, 11 Wash. 47, 27 L.R.A. 335, 48 Am. St. Rep. 858, 39 Pac. 261.

Fullerton, J., delivered the opinion of the court:

The appellant brought this action against the respondent to compel the specific performance of a contract entered into between them, concerning the management and control of certain shares of the capital stock of the American Savings Bank & Trust Company. On filing his complaint the appellant applied for a temporary injunction, and for the appointment of a trustee to take charge of the stock in question pending a trial of the action. This application was resisted by the respondent and denied §1 L.R.A. (N.S.)

by the court. Thereafter a demurrer was interposed and sustained to the complaint, and the action dismissed. This appeal is from the order of the court denying the application, and from the judgment of dismissal.

The contentions of the appellant can best be stated in his own language, and we herewith set forth his complaint at length:

"Comes now the plaintiff and complaining of the defendant alleges:

"I. That on or about the 20th day of March, 1903, this plaintiff and defendant, together with one J. J. Haggerty, were the owners of certain shares of the capital stock of the American Savings Bank & Trust Company, a banking corporation organized and existing under and by virtue of the laws of the state of Washington, and then and there doing a general banking and trust business in the city of Seattle, state of Washington, each being the owner of approximately 174 shares of said capital stock; and the said plaintiff and defendant and the said J. J. Haggerty were at said time desirous of and contemplating the acquisition of additional shares of the capital stock of said American Savings Bank & Trust Company. Thereupon, and in consideration of the premises, the said plaintiff and the defendant and the said J. J. Haggerty did make and enter into a certain agreement with regard to the said capital stock then owned or thereafter to be acquired by them, and each of them, a copy of which said agreement is hereto attached, marked 'Exhibit A,' and made a part of this complaint.

"II. In consideration of the making of said agreement so referred to as 'Exhibit A,' this plaintiff acquired additional shares of the capital stock of said American Savings Bank & Trust Company, so that plaintiff is now the owner and holder of 511 shares of the capital stock of said corporation.

"III. Subsequent to the making of said agreement, the said J. J. Haggerty disposed of the capital stock of the said corporation then owned and held by him to one Bonnafield, and thereafter this plaintiff, with the knowledge and consent of defendant, purchased from said Bonnafield, from one Minahan, one Grant, and one O'Brien 353 shares of the capital stock of said corporation at the price of \$240 per share, which said shares were thereupon and thereafter held by the plaintiff subject to the terms of said agreement referred to as 'Exhibit A.' Thereafter the said defendant was desirous of acquiring 262 shares of the capital stock of said corporation, so held by this plaintiff as aforesaid, and the plaintiff then and there transferred to the said

defendant 262 shares of the capital stock of said corporation so acquired by him as aforesaid, at said price of \$240 per share, with the express understanding and agreement that the same would be held by the said defendant at all times subject to the terms and conditions of the agreement referred to as 'Exhibit A.'

"IV. Thereafter the said defendant acquired additional shares of the capital stock of said corporation, so that he, the said defendant, now holds 776 shares of the capital stock of said corporation.

"V. Disregarding the provisions of said contract, hereinbefore referred to as 'Exhibit A,' that the holdings of stock owned and controlled by the parties to said agreement should be voted together as if one holding in all matters pertaining to the voting, managing, controlling, and officering of the corporation, and that the entire holdings of stock owned and controlled by the plaintiff and defendant should be voted together upon all matters arising in the corporation wherein the stockholders are called upon to vote, the said defendant has refused to co-operate with the plaintiff in voting their joint holdings of stock at stockholders' meetings, or in any matter pertaining to the managing, controlling, and officering of the corporation, and threatens to continue to do so. The defendant by reason of the fact that he has secured a voting alliance with other stockholders in said corporation, and by reason of the further fact that he disregards the agreement hereinbefore referred to with this plaintiff, is able to and does control the said banking corporation.

"VI. At the time of making of said agreement, said plaintiff was the manager and one of the directors of said banking corporation. The said defendant in combination with other stockholders as aforesaid, and by disregarding the rights of said plaintiff under said contract, has attempted to remove the said plaintiff as manager and director of said banking corporation, and, unless this defendant is enjoined by order of your honorable court from disregarding the rights of the said plaintiff under said contract, will remove the said plaintiff as manager and director of said banking corporation, and deprive him of any voice in the management of the affairs thereof.

"VII. By disregarding the rights of the said plaintiff under said contract, and by voting the capital stock now held by him without regard to this plaintiff or the rights of said plaintiff under said contract, the said defendant has chosen and placed in control of the affairs of said corporation trustees and officers who are entirely subservient to him. The said trustees and 51 L.R.A.(N.S.)

officers have by his direction and procurement denied to this plaintiff, though a director and officer of said banking corporation, access to the books and papers thereof, so that this plaintiff is unable to properly perform his duties and the duties imposed by law upon him as an officer and director of said banking corporation.

"VIII. The said J. J. Haggerty, having as aforesaid disposed of his interest in the capital stock of said corporation, has declined to act further in determining how said capital stock so referred to in said agreement should be voted. The said defendant wrongfully and fraudulently, and with intent to deprive the said plaintiff of any voice in the management of said corporation, and with wrongful and fraudulent intent to violate the terms of said agreement, has refused and still continues to refuse, and threatens to continue to refuse, to co-operate with the said plaintiff in determining how the vote of the shares of the capital stock so owned by the plaintiff and defendant shall be cast upon any matter arising in the corporate meetings and affecting the control or management of the corporation, so that, by reason of the refusal of the defendant to co-operate as aforesaid, said 776 shares of the capital stock of said corporation now held by the defendant, and said 511 shares of the capital stock of said corporation now held by the said plaintiff, which said stock so held constitutes a majority of the capital stock of said corporation, cannot be voted as is contemplated by the terms of said agreement, and will therefore be robbed of its function and greatly depreciate in value, unless the court shall appoint a trustee to take possession of said capital stock and vote the same at stockholders' meetings of said corporation so long as the said plaintiff and defendant do not agree as to the way in which the votes of said capital stock so jointly held by them as aforesaid shall be cast.

"IX. It is necessary, in order that the rights assured the said plaintiff by the contract marked 'Exhibit A' be conserved to him, that an officer of this court shall take possession of the said 776 shares of the capital stock of said corporation now held by the defendant, and the said 511 shares of said corporation now held by the plaintiff, and sell the same, unless the said plaintiff and defendant will agree as to the manner in which all of said shares of the capital stock shall be voted at stockholders' meetings of said corporation.

"X. On the 14th day of January, 1913, will be held the annual meeting of the stockholders of said corporation for the election of trustees and officers and the transaction

of other business relative to the management of said institution, so that an emergency exists, and it will be necessary that a trustee be appointed to take possession of and vote said capital stock now held by the plaintiff and defendant pending the final determination of this action and prior to said stockholders' meeting on January 14, 1913. Unless the said defendant is enjoined by order of this court, he will vote said shares of the capital stock so owned and held by him at said stockholders' meeting on January 14, 1913, in disregard of said agreement and the rights of said plaintiff thereunder, to the great and irreparable damage of the said plaintiff.

"Wherefore this plaintiff prays that the said defendant be enjoined from voting any shares of the capital stock of said corporation owned or controlled by him without agreeing with this plaintiff as to how the vote of said stock shall be cast at any stockholders' meeting; that an officer of this court be appointed to take possession of all of the capital stock of said corporation held by the plaintiff and the defendant, and that such officer forthwith cause said stock to be sold in the open market, the proceeds thereof to be distributed ratably between the plaintiff and the defendant, and that pending said disposition said officer shall cast the vote of said capital stock at all stockholders' meetings of said corporation.

"And further prays that pending the final determination of this action, said defendant be restrained from voting said stock at such stockholders' meeting on January 14, 1913, or at any time to which said meeting may be adjourned, without agreeing with said plaintiff as to the manner of voting said stock.

"And plaintiff further prays that if the said defendant shall disavow the agreement under which, as hereinbefore set forth, said 262 shares of the capital stock of said corporation were transferred to said defendant by this plaintiff, an accounting be had, and that the said defendant be required to re-transfer to this plaintiff said 262 shares of the capital stock of said corporation upon payment to the said defendant of \$240 per share, together with interest at legal rate, less dividends which have been paid thereon, which said sum the said plaintiff avows his willingness to pay to the said defendant whenever this court shall by decree determine the amount which in good conscience should be paid therefor.

"And further prays that he may have and recover his costs and disbursements herein, and have such other and further relief as to the court may seem meet in the premises considered."

51 L.R.A.(N.S.)

Exhibit A.

This agreement made and entered into this 20th day of March A. D. 1903, between J. J. Haggerty, J. P. Gleason, and M. Earles, witnesseth: That, whereas all said parties are stockholders in the American Savings Bank & Trust Company, a banking corporation, and therefore interested in the management and success of said corporation, and to that end each of the parties hereto agrees, one with the other, that all the stock owned and controlled in said corporation by each of the parties shall be pooled and joined as if one holding in all matters pertaining to the voting, managing, controlling, and officering the corporation, and to that end doth each enter into this agreement one with the other, to wit:

First. That the entire holdings of stock owned and controlled by the three parties hereto shall be voted together upon all matters arising in the corporation wherein the stockholders are called upon to vote, and such vote shall be cast as decided by a majority of the three parties hereto.

Second. That in the absence of any one of the parties hereto, his stock may be voted by proxy by either or both jointly of the other parties hereto, and shall be voted as directed in such proxy or as decided by a majority vote as before stated herein, on any matter affecting the business of the corporation.

Third. That as trustee of the corporation, each of the parties hereto agrees one with the other to abide by a majority decision, as to any matter arising in the corporate meetings and affecting the control and management of the corporation, and to cast his vote on any such matter as decided by a majority of the parties hereto.

Fourth. That each of the parties hereto hereby agrees and promises one to the other that he will subscribe for and take such shares of stock of the corporation so as that the joint holdings of the three parties hereto shall at all times constitute and be a majority of all the outstanding stock of the corporation, and that each shall take an equal number of shares to that end at any time it may be decided by the board of trustees to sell additional stock to that at present issued, but the sale of additional stock shall be sanctioned and agreed to by the parties hereto only when they and each of them are able and willing to increase their holdings as herein stated.

Fifth. That in case either of the parties hereto wishes to sell or dispose of his holdings in the stock of the corporation, he shall give the right and option to purchase same, to the other parties hereto, for at least thirty days, at the then actual value

of such stock as determined by the assets of the corporation, before offering same to any other party; and after such option expires, and in case of an offer of purchase from any other party, the parties hereto shall have the right, and the option is hereby extended, to take such stock at any price offered by any other party, in preference to any such intending purchasers whatever: Provided, that for a period of five years from date the parties hereto agree one with the other that neither shall sell nor offer for sale, except to one another, his stock in the corporation, unless the whole pool or holdings of the parties hereto shall be sold together, and in case of any sale a majority decision of the parties hereto, as to the price, shall be binding.

Sixth. This agreement shall run with the stock now owned by the parties hereto, as well also with all stock hereafter acquired by the parties hereto, and shall be binding upon the parties and their legal representatives until such time as dissolved in writing by mutual consent. This agreement is based upon a valuable consideration which each of the parties hereto hereby acknowledge, one unto the other.

In witness whereof, we, the parties hereto, set our hands and seals this 20th day of March, A. D. 1903.

J. J. Haggerty,
James P. Gleason,
Michael Earles.

In support of his allegation for a temporary injunction and for the appointment of a trustee, the appellant filed with his complaint his own affidavit, in which he set forth more in detail the matters alleged in his complaint, averring specially therein that the respondent had, since the time of the making of the agreement therein referred to up to the time of the meeting of the stockholders in January, 1912, recognized the same as a binding obligation between the parties thereto, and had voted his stock in the corporation in accordance with the provisions thereof.

The respondent filed the affidavit of himself and certain of the trustees and officers of the bank in opposition to the application. In his own affidavit the respondent took issue with many of the material allegations of the complaint. While he admitted the execution of the agreement set forth therein, he denied that it had ever been acted upon by the parties thereto, and averred that upon the purchase of the stock referred to in the complaint as the Bonnafield, Minahan, Grant, and O'Brien stock, the matter of the agreement was talked over between them, and it was then mutually agreed that the same should be treated and

considered as an absolute nullity. He also denied the appellant's version of the purchase of such stock, averring that the same was purchased and paid for by himself individually through the instrumentality of one Kavanaugh, who acted as agent for the several holders, and that he afterwards, at the appellant's request, sold the appellant 91 shares of his holdings, none of which was of the stock purchased through Kavanaugh. He denied that the trustees of the bank elected at the January, 1912, meeting of the stockholders were "dummy trustees," or subservient to his control, or that he had absolute or unlimited control of the bank; denied that he had in combination with other stockholders, or otherwise, attempted to remove the appellant as manager and director of the bank; on the contrary he averred that the appellant voluntarily resigned as manager on being confronted with certain of his acts as such manager, and that he was still a director of the bank; denied that he had refused the appellant access to the books of the bank; and averred that the appellant had, on the contrary, been expressly tendered the privilege of examination at any time when such examination would not interfere with the conduct of the business of the bank. He specially averred that he had refused, and would continue to refuse, to vote his stock in conjunction with that of the appellant under the written agreement. The respondent further averred that the appellant, while manager of the bank, had, in furtherance of his private business and business adventures, mismanaged the business of the bank, causing it direct losses in large sums of money, and that the bank had been compelled to cease paying dividends for a time that these losses might be recuperated out of the profits of the bank's general business.

The trustees in their affidavits averred their independence of action. They denied coercion, or attempted coercion, of their acts as such trustees by the respondent, and substantiated the respondent's averments of mismanagement of the affairs of the bank by the appellant.

The affidavits of the officers of the bank show, among other things, the financial condition of the bank. It was shown that it had an unimpaired capital stock of \$200,000, a surplus fund of \$300,000, and a deposit of upwards of \$2,000,000, and that it was doing a legitimate and profitable banking business. Counter affidavits were filed on behalf of the appellant in which the charges of incompetency and mismanagement were denied, and in which charges of misconduct in the management of the bank's affairs were made against the respondent. It was charged that he had se-

cured from the bank, for himself and for corporations of which he was the principal stockholder, loans vastly in excess of the proper limit; that the state bank examiner had complained of these excessive loans, and had insisted that they be reduced, and that the respondent's enmity towards him as manager arose when he insisted on a compliance with the bank examiner's demands. A reply affidavit was filed by the respondent, in which he sought to show that he had not borrowed from the bank in excess of the proper limit, and that the bank examiner's complaint had been made on misinformation, that all of the loans made him from the bank were loans on call, that he stood ready at any time to pay them on demand, and that the appellant made no complaint concerning these loans until after his withdrawal as manager of the bank. He further averred that he at that time personally owed the bank nothing whatever; that he was indorser on paper for others to the extent of \$38,280; that he was worth, over and above his debts and liabilities, more than \$2,500,000; that the greater part of the paper on which he is indorser is secured by first mortgage on real estate; and that all of the makers of such paper are of themselves abundantly able to pay their several obligations in full.

In this court the appellant assigns error upon the ruling of the court refusing to grant a temporary injunction, refusing to appoint a trustee to take control of and vote the capital stock of the parties pending the final determination of the action, and in sustaining the demurrer to the complaint. He argues that contracts of the nature of the one here in question are valid; that while such contracts have been often attacked in the courts, the present tendency is to uphold them in the absence of a showing that their purpose is to avoid some express provision of the law, or to commit a fraud upon other stockholders; "for," he concludes, "there is nothing inherently illegitimate in a combination by certain stockholders whereby they may, for a lawful purpose, control the conduct of the affairs of a corporation."

Many cases are cited in support of the contention, among which is the case from this court of *Winsor v. Commonwealth Coal Co.* 63 Wash. 62, 33 L.R.A. (N.S.) 63, 114 Pac. 908. We shall not, however, enter into an extended review of the cases cited from other jurisdictions. We think that an examination of them will show that in none of them has the court, in upholding the contract, gone to the extent we are asked to go in this instance. In all of the cases cited, in so far as we have been permitted to consult them, the contracts relate to

corporations engaged in purely private enterprises, having no public or trust character, and in which the suit was brought, either by a minority stockholder to restrain the parties to the contract from acting thereunder, or by one party to the contract against another or others to set the contract aside. In none of the cases was the suit to compel the specific performance of the contract. The case cited from our own court is of the same character. The plaintiff in that case, prior to the execution of the contract of which he complained, was the owner of the majority of the corporation's capital stock. The corporation had become embarrassed financially, and was in the hands of a receiver appointed by the court at the suit of a creditor. The plaintiff had been unsuccessful in his endeavors to extricate it from its difficulties. While in this situation he entered in a contract with certain of the defendants, whereby they agreed, in consideration of the transfer to them of certain of the plaintiff's stock, to advance sums of money to the corporation so that it could be taken from the hands of the receiver, and put back upon a working basis; the contract including a pooling agreement to continue for ten years, under which the remaining stock held by the plaintiff was pooled with that of the other parties to the contract to be voted by such parties during the continuance of the term of the agreement. The contracting defendants had performed their part of the agreement, in so far as it was then capable of being performed, and had advanced large sums of money to the use of the corporation on the faith of the agreement. It was sought to be set aside on two grounds; one that the plaintiff had been overreached, and the other that the agreement was void as being in contravention of public policy. This court denied both contentions, saying with respect to the latter: "The agreement to pool the stock was not against public policy, because there was nothing unlawful about it, and nothing which necessarily affected the rights of minority stockholders. Persons owning stock have the unqualified right to combine their interests to secure the management of the corporation when such management is fair to all stockholders alike. . . . If this agreement had been made for the purpose of depriving some stockholder of his rights in the company, or of doing some other illegal act, a different rule would apply. But this contract seems to have been entered into for legal purposes and in good faith, and has been acted upon. The plaintiff is not now in a position to seek its rescission."

This case we think was rightly decided. So also we think were most, if not all, of

the cases cited by the appellant from other jurisdictions to the same purport. But, as we say, we think them not in point on the particular question here presented. The corporation concerning whose capital stock the contract in question was made is a corporation having functions of a public nature, as well as private functions, to perform. It is a banking corporation authorized by law to receive deposits. It is by statute subject to inspection by officers appointed by the state, and subject in a measurable degree to control by such officers. Its stockholders are subject to liabilities in addition to those assumed by stockholders of a merely private corporation. Its trustees are also more restricted in their powers pertaining to the management of the corporation's affairs than are the trustees of a private corporation; and such trustees may, for certain omissions of duty, not necessarily involving moral turpitude, be convicted and imprisoned as for a felony. The cases cited also differ widely from the case at bar in the relief sought. Our own case is illustrative of the others. In it the court was asked to declare void a contract entered into in good faith and for a lawful purpose, which was being carried out by the parties thereto having the obligation to perform, when to do so would result in an irretrievable loss to such parties. In the case at bar we are asked to specifically enforce a contract against the will of one of the parties thereto, when to do so may take the corporation from without the control of officers selected by the mutual agreement of the stockholders, and vest it in officers selected by the parties to the contract, one of whom is coerced to act against his will; or perhaps may vest its control in the court through the medium of a trustee appointed by the court.

If, therefore, we assume that the contract is so far valid that a court would not interfere were the parties thereto carrying it out in good faith, and further assume that it is a contract capable of being specifically enforced by the court, we think it clear that it is a contract a court ought not to specifically enforce. We need not enlarge upon the reasons for this conclusion. They abundantly appear from a consideration of the matters above recited. We may properly add, however, that the complaint is not left utterly without remedy. If the contract be valid, he has an action at law in damages for the injury suffered by him because of the failure of the other party to the contract to carry out its terms. And to this remedy he must be relegated.

The appellant contends further that, if the pooling contract is not specifically enforced, he should be permitted to recover 51 L.R.A. (N.S.)

from the respondent the capital stock purchased from Bonnafield, Minahan, Grant, and O'Brien, mentioned in the complaint, and which he alleges he transferred to the respondent on the promise that it should be held at all time subject to the terms of the contract. But since the contract itself does not provide this as a remedy for a breach of its condition, the agreement falls within the general rule relating to breaches of condition concerning the transfer of personal property. The general rule is that such contracts will not be specifically enforced, but the injured party will be left to an action in law for damages. Corporate stock comes within the scope of the rule. An exception exists where there are peculiar features concerning the agreement which leave the remedy at law inadequate, but no such peculiar feature exists in the present case. A specific enforcement of the contract is sought that a minority stockholder therein may become a majority stockholder, and this is not sufficient to invoke the rule. *Foll's Appeal*, 91 Pa. 434, 36 Am. Rep. 671; *Gage v. Fisher*, 5 N. D. 297, 31 L.R.A. 557, 65 N. W. 809.

The judgment is affirmed.

Crow, Ch. J., and Morris, Parker, and Mount, JJ., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

J. M. LIGHT

v.

E. M. GRANT et al., Appts.

(— W. Va. —, 79 S. E. 1011.)

Rescission — grant of coal — deficiency.

1. The grantee of coal in place in a deed conveying all the coal in a tract of land cannot rescind the sale merely because the coal area in the land is not as large as he

Headnotes by **POFFENBARGER, P.**

Note. — *Rescission, or abatement from price, because of deficiency in quantity under grant or lease of coal in place.*

Sales.

The question of fraud is closely connected with the question here annotated, but it is not intended to discuss rescission or abatement on the ground of fraud, even though a deficiency in quantity appears. The first two following cases illustrate this class, which has in general been excluded.

One who has purchased coal land on which there has been no developments, experimental or otherwise, to test the existence of coal, but which is represented by an agent

had hoped or expected to obtain, provided there is a substantial quantity of coal in the land.

Same — absence of vein.

2. Nor can rescission of the sale executed by such a deed be had because of nonexistence of a particular coal vein or measure in the land.

Evidence — representations.

3. On a bill for such rescission, parol evidence to prove expectancy of a particular vein, or a representation of the presence thereof, in the land, is inadmissible.

Sale — deficiency — abatement from price.

4. Under a sale of land or coal by the acre, there may always be an abatement from unpaid purchase money, or a recovery of purchase money paid, in case of a deficiency in the quantity of the land or coal.

of the vendors claiming to be familiar with coal lands, to contain three underlying veins of coal, is not entitled to a rescission of the contract upon its being discovered that the only coal in the tract is a little under one corner, which could not be profitably worked. *Lynch's Appeal*, 97 Pa. 349. The representations of the vendors' agent are treated as mere opinions, not facts, and since the purchaser was on the land and saw for himself that it was not developed, he knew perfectly that the representations of the agent were merely the expressions of his opinion. A further fact existed in this case, in that the purchaser represented to the vendors that he intended it for another purpose, in order to conceal his true purpose and get the claim for as low a price as possible. The court states that a contract will not be rescinded except upon the ground of fraud, illegality, or mistake, and the evidence of these should be so clear as to leave no room for hesitation or doubt in the mind of the court.

But where vendors of land through their agent have represented to a prospective purchaser that the land contains large deposits of coal, and prevent a full investigation by an agent of the purchaser by fraudulent means, such purchaser, upon discovery that the land did not contain coal as represented, may rescind the contract. *Alger v. Keith*, 44 C. C. A. 371, 105 Fed. 105. Petition for leave to file a bill of review was denied in 59 C. C. A. 552, 124 Fed. 32.

So, one who has renewed an option to purchase coal land in ignorance of the fact that the grantor during the continuance of the former option had sold a considerable quantity of the land, the renewal option being taken for the same quantity of land as the original, is entitled to a rescission of the contract, and to be placed *in statu quo*, unless the vendor can make good his contract by conveying to the purchaser the whole boundary of coal as covered by the first option. *Carney v. Harbert*, 44 W. Va. 30, 28 S. E. 712.

Under a contract for the sale of coal land, in which it is stipulated for a deduction of a stated amount per acre for any number

Deed construction — character of sale.

5. A deed for coal, conveying a certain number of acres as acres of coal, in consideration of a sum of money which is an exact multiple of the number of acres specified, is ambiguous on its face as to whether it is a sale by the acre or a sale in gross.

Same — matters considered.

6. In such case the purpose of the vendee to obtain coal, not land, nonexistence of coal in a large portion of the land, and an option for purchase of the coal in the land at a certain price for each and every acre of the coal, under which the deed was made, may be considered in seeking the intent of the parties; and the deed read in the light thereof is properly construed as embodying a contract of sale by the acre.

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of acres of coal not delivered, and another stipulated amount per acre for land not delivered, a purchaser is not entitled to deduction of the area of coal under a creek and that under a railroad. *Redstone Oil, Coal & Coke Co's Dissolution*, 207 Pa. 125, 56 Atl. 355. The sale here was for a lump sum with the deductions above mentioned provided for.

The court in *Redstone Oil, Coal & Coke Co's Dissolution*, supra, states that the parties to the contract contemplated a deduction for a deficiency in the absolute acreage of the coal delivered, and not for a deficiency in the available acreage. It appears that a number of acres had been mined out by the grantors, and both parties agreed to the deduction of this quantity according to the price stipulated in the contract, and there was also an excess of surface of about 40 acres conveyed, and for this an allowance at the stipulated price was made.

In *Pittsburg Coal Co. v. Cook*, 219 Pa. 539, 69 Atl. 85, the parties provided in their contract for an abatement from the purchase price in case of a shortage in acreage, and an extra payment in case the acreage overran as shown by a survey to be made by the parties; a claim for such shortage was held to be properly made after the deed had been delivered and payment made, where it was agreed that such adjustment as might be necessary upon the property conveyed being surveyed should be held open for future settlement.

It was admitted in *Fuller v. Mulhollan*, 40 Pa. Super. Ct. 257, that a purchaser of coal land was entitled to an abatement from the purchase price where he had purchased a certain acreage of coal and it turned out that a portion thereof had been previously mined, the only question in the case being as to the measure of his damages or the amount of the abatement.

The contract of purchase in *Rainey v. Hogsett*, 40 C. C. A. 335, 100 Fed. 207, contained a provision that there should be an abatement of the purchase price in case of a shortage in the acreage. The original agreement required the vendee to make claims for shortage within three months

A PPEAL by defendants from a decree of the Circuit Court for Preston County in plaintiff's favor in a suit to enforce a vendor's lien. Reversed.

The facts are stated in the opinion.

Messrs. P. J. Crogan and Goodwin & Reay, for appellants:

Appellants are entitled to cancelation of the deed and the return of cash payment, because of the fraud and deceit practised upon them.

Engeman v. Taylor, 46 W. Va. 669, 33 S. E. 922; Goshorn v. Snodgrass, 17 W. Va. 717; Harden v. Wagner, 22 W. Va. 356; Farley v. Bateman, 40 W. Va. 540, 22 S. E. 72; Butler v. Thompson, 45 W. Va. 660, 72 Am. St. Rep. 838, 31 S. E. 960; Dent v. Pickens, 46 W. Va. 378, 33 S. E. 303;

Ballouz v. Higgins, 61 W. Va. 68, 56 S. E. 184; Deepwater Council, No. 40, O. U. A. M. v. Renick, 59 W. Va. 343, 53 S. E. 552; Winton v. McGraw, 60 W. Va. 98, 54 S. E. 506; Hale v. Hale, 62 W. Va. 609, 14 L.R.A. (N.S.) 221, 59 S. E. 1056; Cleavenger v. Sturm, 59 W. Va. 658, 53 S. E. 593; Tolley v. Poteet, 62 W. Va. 231, 57 S. E. 811; Cork v. Cook, 56 W. Va. 51, 48 S. E. 757.

This is a sale of coal by the acre, and there is such a gross deficiency in the quantity of coal conveyed as to amount to failure of consideration, entitling appellants to a rescission of the contract and a cancelation of the deed on that ground.

Crislip v. Cain, 19 W. Va. 438; Newman v. Kay, 57 W. Va. 99, 68 L.R.A. 908, 49

after entering upon the property, and a claim was made by him for a shortage of 16 acres. The vendor denied the claim, and no agreement having been reached at the time that the first instalment on the purchase price fell due, this amount was paid in full, and a supplementary agreement was entered into providing that if any shortage should be found in the acreage, the amount was to be deducted, and that the amount of the shortage should be ascertained within six months. The vendee was here held not confined to the shortage claimed under the original agreement, but might make a claim for any shortage appearing.

In an action against one who has purchased all the coal lying within or under certain premises at a stated price for every statute acre found in the premises, and until the price be fully paid a stated annual sum, in order to recover the stated annual sum it is not necessary to allege that the purchaser has found the coal, where it is alleged that there is still a large quantity of coal remaining in the premises. Jowett v. Spencer, 1 Exch. 647, 17 L. J. Exch. N. S. 367, 2 Mor. Min. Rep. 499.

Leases.

One who has contracted to lease a mine at a stated minimum rent per annum cannot resist a specific performance of the contract on the ground that the mine is worthless. Haywood v. Cope, 25 Beav. 140, 27 L. J. Ch. N. S. 468, 4 Jur. N. S. 227, 6 Week. Rep. 304, 17 Eng. Rul. Cas. 817, 6 Mor. Min. Rep. 499. The lessee in this case had made a personal examination of the mine and satisfied himself in regard thereto before entering into the agreement.

On the contrary, it has been held that the lessee in a coal lease for a fixed annual rental, executed by the parties under the belief that there was coal under the land, will be relieved from the contract where it is subsequently ascertained that there is no coal, since there is a material mistake of fact, causing a total failure of consideration. Fritzler v. Robinson, 70 Iowa, 500, 31 N. W. 61, 17 Mor. Min. Rep. 105. 51 L.R.A. (N.S.)

A lessee who has agreed to pay the lessor a certain sum per ton for each ton of coal mined, and has further agreed to pay a fixed sum each year as fixed rent whether said rent on coal dug and mined shall amount to said sum or not, is not entitled to an abatement from such fixed sum of an amount equal to the difference between such fixed sum and that to which the coal mined amounted to at the rate agreed upon. McDowell v. Hendrix, 67 Ind. 515, 9 Mor. Min. Rep. 96. The lessors and the lessees here investigated the coal deposit by drillings and tests, and had come to the conclusion that there was more coal in place than was actually the fact. When this mistake was discovered by the actual opening of the mines, the lessee sought an abatement from the rental agreed upon, on the theory that the mistake was a mutual mistake as to fact, and alleged that the contract at least would have never been executed had not the parties thereto been misled as stated.

The question frequently arises over the payment of rent after the coal has become exhausted.

A lessee under a lease for ten years containing a stipulation for the mining of a stated quantity per year and a certain sum per ton, with an agreement that the payments must be made "at the time specified, . . . whether the coal is mined at the time or not," is not entitled to be relieved from the payment upon its appearing that there is not sufficient coal to furnish the stipulated yearly amount for the time of the lease. Stark v. Scott, 4 Luzerne Leg. Reg. 49.

The lease in Stark v. Scott is treated as an absolute agreement to pay a stated sum of money. "No conditions" says the court, "were coupled with these covenants or either of them. The lessees were not to work the coal as far as it could be worked; the rents were not to cease when the mining became unprofitable or even impossible; the existence of a sufficient amount of coal under the premises to meet the terms of the lease was not a condition precedent to the payment of rents."

A lessee of coal lands under a lease re-

S. E. 926, 4 Ann. Cas. 39; Winton v. McGraw, 60 W. Va. 98, 54 S. E. 506; Berry v. Fishburne, 104 Va. 459, 51 S. E. 827; Pratt v. Bowman, 37 W. Va. 715, 17 S. E. 210; Carney v. Harbert, 44 W. Va. 30, 28 S. E. 712; Boggs v. Harper, 45 W. Va. 555, 31 S. E. 943; Kelly v. Riley, 22 W. Va. 247.

Messrs. Hughes & Conley, for appellee:

Defendants had equal, if not greater, knowledge of and means of information concerning the property purchased, and therefore equity will not interfere.

13 Cyc. 50-b; Beckley v. Riverside Land Co. 2 Va. Dec. 283, 23 S. E. 778; McCobb v. Richardson, 24 Me. 82, 41 Am. Dec. 374; Story, Eq. §§ 150, 151; Simmons v. Palmer, 93 Va. 389, 25 S. E. 6; Miller v. Craig, 36

Ill. 109; Adams v. Pardue, — Tex. Civ. App. —, 36 S. W. 1015.

Defendants having served notice on the plaintiff that they accepted the option, and called on him for the abstract of title and the deed, both of which were accepted, and having had ample opportunity to thoroughly examine the property, they cannot now interpose objections.

Armstrong v. Maryland Coal Co. 67 W. Va. 589, 69 S. E. 195; Simmons v. Palmer, 93 Va. 389, 25 S. E. 6; McCobb v. Richardson, 24 Me. 82, 41 Am. Dec. 374; Truslow v. Parkersburg Bridge & Terminal R. Co. 61 W. Va. 628, 57 S. E. 51.

It appearing from the deed as a whole that all the coal and also all the mining rights and privileges should be considered

quiring payment for a certain minimum amount of coal "whether the same should be got or not" is not entitled to recover from the lessor payments made under the lease, where it appears that, owing to the difficulty of mining the coal stipulated for in the lease, the lessee did not obtain the amount to which he was entitled. Mellers v. Devonshire, 16 Beav. 252, 22 L. J. Ch. N. S. 310, 1 Week. Rep. 44.

A lessee is not entitled to be relieved from the payment of rent under a lease providing for the payment of a certain stipulated rent whether the mines were worked or not, although it is impossible to continue the working except at a certain and ruinous loss. Phillips v. Jones, 9 Sim. 519, 3 Jur. 242, 8 Mor. Min. Rep. 344.

A lessee who has agreed to pay a fixed minimum rental whether coal is obtained or not is not entitled to be relieved from the payment when the coal is exhausted so that not enough remains to make up the yearly amount provided for. Bute v. Thompson, 13 Mees. & W. 487, 14 L. J. Exch. N. S. 95, 8 Mor. Min. Rep. 371.

So, in Ridgway v. Sneyd, Kay, 627, 8 Mor. Min. Rep. 414, under a lease containing a stipulation for a minimum rent, it was held that equity would not restrain an action for the minimum, although the coal could not be worked at a profit.

Under a lease requiring the mining of a minimum amount, and the payment of an annual minimum rental of not less than a stated sum, and giving the lessee the privilege in case of failure in any year to mine coal to the amount of the minimum, which it or they shall have paid, to make up the deficiency in any subsequent year during the continuation of the lease without any payment thereunder, a lessee who has failed to mine the stipulated minimum, but has paid the required minimum rental until a short time before the filing of the bill in question, is not entitled to an injunction restraining the lessor from declaring a forfeiture on the lease, on the theory that the payments already made covered all the coal in the land in question, and therefore he should have the right to take the balance

without further payment. Lehigh & W. B. Coal Co. v. Wright, 177 Pa. 387, 35 Atl. 919.

A lease of land for ten years for the purpose of mining coal contained thereon, requiring the lessees to mine at least 10,000 bushels of coal every year, or pay a royalty on that amount, was treated as a sale of coal in place, in Timlin v. Brown, 158 Pa. 606, 28 Atl. 236, and it was there held that the lessees could not be relieved from the payment of the annual minimum royalty, although the coal had become so nearly exhausted as to be unworkable at the end of the seventh year. The court, after stating that the existence of workable marketable coal under this land had been demonstrated by the lessees in sinking a shaft, continues: "The only element of uncertainty—the quantity—they took the risk of by an unqualified covenant to pay a fixed minimum sum."

A lessor was enjoined in Smith v. Morris, 2 Bro. Ch. 311, 8 Mor. Min. Rep. 317, from suing for a minimum annual rental under a lease which was to terminate upon exhaustion of the coal, where the mining of coal became very expensive, upon the lessee paying for all the coal remaining.

A lease containing a provision for a minimum rent or royalty was sustained in Coal Creek Min. & Mfg. Co. v. Tennessee Coal, Iron, & R. Co. 106 Tenn. 651, 62 S. W. 162, and a recovery of the minimum rent allowed, although the royalties on the coal actually mined did not amount to this sum. It does not appear, however, that the failure to mine was due to the lack of coal or the difficulty of mining the same. The lease was subsequently terminated for the reason given that, because of existing conditions of the mine, it was impossible to conduct operations, without losing money.

Where there is an express covenant to pay a certain royalty upon a lease of coal lands, the lessor may recover such royalty notwithstanding there is no minable coal that the lessee may take out; especially is this true where the lessee has not pleaded this fact in defense. Consolidated Coal Co. v. Peers, 150 Ill. 344, 37 N. E. 937.

W. A. E.

together as constituting the property for which the purchase price was paid, it does not matter that the deed provides that the consideration was so much per acre for the coal.

Arnold v. Cramer, 41 Pa. Super. Ct. 8.

The burden of proof is on the defendants who attack the deed. They absolutely fail to prove fraud of any sort, and therefore cannot set the deed aside.

Armstrong v. Bailey, 43 W. Va. 778, 28 S. E. 766; *Burrows v. Fitch*, 62 W. Va. 116, 57 S. E. 283; *Sanson v. Wolford*, 60 W. Va. 380, 55 S. E. 1020; *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39.

Even if the plaintiff had represented that the property in controversy was underlaid with the Upper Freeport seam of coal, which he did not, it would only be an opinion, and though such opinion was confidently expressed and equally as confidently relied upon by the purchasers, they relied upon it at their own risk, and it would afford no grounds for relief in equity.

Lynch's Appeal, 97 Pa. 349; *Tuck v. Downing*, 76 Ill. 71, 7 Mor. Min. Rep. 83; *Cooper v. Lovering*, 106 Mass. 77, 6 Mor. Min. Rep. 662; *McCobb v. Richardson*, 24 Me. 82, 41 Am. Dec. 374.

Poffenbarger, P., delivered the opinion of the court:

To the bill for the enforcement of a vendor's lien in this cause, the answer set up two alternative defenses, a right of rescission of the contract of sale, with a recovery of the purchase money paid, and an abatement from the unpaid purchase money for a deficiency, both of which were disallowed by the court, and a decree was entered for the full amount claimed by the plaintiff, with interest thereon.

The deed in which the lien was reserved conveyed "all the coal in, on, and underlying all that certain tract of land owned by the grantors," described as containing 244.55 acres, out of which there was reserved a strip containing 4.157 acres which had been conveyed to a railroad company out of the tract, and 6 acres of coal to be located in a contiguous body under and around the dwelling and outbuildings on the property, leaving 234.4 acres of coal. The consideration was \$2,812.80, of which one third was paid in cash and the balance deferred in two equal payments for one and two years, respectively. The conveyance was made March 30, 1907, pursuant to an option dated October 12, 1905, several extensions of which had been granted, the last one until January 2, 1907.

Unsustained by proof, the prayer for rescission was properly denied. The answer set up two grounds therefor, the nonexist-

ence of any coal in the land of the kind contracted for, and fraud on the part of the plaintiff, consisting of misrepresentation as to the kind and quantity of coal in his land. Though neither the option nor the deed specifies any particular vein of coal as the subject-matter of the contract, the answer charges the contract was for coal of the Upper Freeport vein, which averment is denied by a special replication. Some witnesses were of the opinion that none of that vein of coal is found in the land, while others believed it contains 5 or 6 acres of such coal. That the quantity thereof, if any, is meager, is an undisputed fact in the case. A witness for the defendant testifies to a representation of the existence of a large quantity of such coal by the plaintiff, but this the plaintiff denies, saying he made no claim of that sort, but, on the contrary, had said there was very little of the Upper Freeport vein of coal in his land. To strengthen the evidence of the claim or representation contrary to the fact, evidence was adduced tending to show the Upper Freeport vein of coal was the only one in that section of the country at that time deemed to have a commercial or marketable value.

The general terms used in the option and deed, calling for all of the coal in the land, clearly negative any intention to limit the conveyance to a particular vein. To admit parol evidence of intention so to limit it would clearly violate a well-established rule of evidence. The terms of the deed are certain and definite. It contains not a word upon which any claim of ambiguity or uncertainty can rest, and no latent ambiguity is disclosed by the oral testimony. Hence there is no basis or ground for the admission of parol evidence. It could perform no office other than contradiction of the plain terms of the written contract, and that is inhibited by a firmly established rule of evidence. *Poling v. Williams*, 55 W. Va. 69, 46 S. E. 704; *Troll v. Carter*, 15 W. Va. 567. Having contracted for all of the coal in the land, the defendants are not entitled to rescission of the contract on account of the absence or nonexistence of a particular vein. *Shackelford v. Fulton*, 71 C. C. A. 295, 139 Fed. 97. Nor is the testimony adduced sufficient to show they were induced to enter into the contract by any representation as to the existence of the vein of coal in question. On this issue the evidence consists of the testimony of two witnesses only, and they squarely contradict each other. Moreover, a preponderance of the evidence favors the presence of the Upper Freeport coal in the land, and there is no pretense of a representation that the Freeport vein underlies

the whole thereof. That the land contains less coal than was expected or represented constitutes no ground for rescission, for the quantity was not in any way made an essential element of the contract. Its plainly expressed purpose was to take and pay for such coal as the land contained, whether much or little, provided there should be a substantial quantity of it.

If the sale was one by the acre, as regards the coal, and not in gross, there should have been a large abatement from the price, for 234.4 acres were sold, and, as a matter of fact, the land contained at the most not more than 125 acres of coal in veins, the existence of which has been ascertained and shown. In all cases of sale by the acre, there may be an abatement from the purchase price for deficiency in quantity. *Butcher v. Peterson*, 26 W. Va. 447, 53 Am. Rep. 89; *Bartlett v. Bartlett*, 37 W. Va. 235, 16 S. E. 450; *Thompson v. Catlett*, 24 W. Va. 524; *Board v. Wilson*, 34 W. Va. 609, 12 S. E. 778; *Neal v. Logan*, 1 Gratt. 14, 15. Right to abatement or compensation for a deficiency in the case of a sale of land in gross stands upon the existence of a warranty of quantity, or fraud and misrepresentation on the part of the vendor respecting the quantity. *Crislip v. Cain*, 19 W. Va. 438; *Hansford v. Chesapeake Coal Co.* 22 W. Va. 70; *Newman v. Kay*, 57 W. Va. 98, 68 L.R.A. 908, 49 S. E. 926, 4 Ann. Cas. 39; *Winton v. McGraw*, 60 W. Va. 98, 54 S. E. 506.

As the consideration agreed upon and recited in the deed is an exact multiple of the number of acres conveyed, it is ambiguous on its face as to whether it was a sale in gross or a sale by the acre. *Newman v. Kay* and *Hansford v. Chesapeake Coal Co.* supra. On the question of the construction of such a deed, or determination of the question of intent, only evidence of the circumstances which surrounded the parties, their situation when the deed was made, and their conduct in carrying the contract into execution, is admissible. *Winton v. McGraw*; *Newman v. Kay*; *Hansford v. Chesapeake Coal Co.* and *Crislip v. Cain*;—supra. A mere declaration of intention cannot be considered. In this instance the vendees were purchasing coal, not land, and it would be unreasonable to suppose they intended to pay coal prices for land in which there was no coal, or, in other words, to pay for what did not exist. The option they had taken upon the land provided for payment of \$12 an acre for each and every acre of coal, not for the land, nor any supposed quantity of coal, and also for ascertainment of the coal acreage in the land, and the deed itself represents "a net coal area . . . of 234.4 acres." The force 51 L.R.A.(N.S.)

of these facts and circumstances stand unopposed by anything indicative of a sale in gross, and they must be accorded their legal effect, making plain and obvious an intention on the part of the parties to effect a sale of the coal by the acre.

The land was mountainous and steep. Near the top there is a coal area of 5 or 6 acres in the Upper Freeport vein. Some distance below this there is another area which contains about 40 acres, which is supposed to be in the Lower Freeport vein. Still lower down there is an area of about 120 or 125 acres which is said to be in one of the Kittanning measures. Such is the testimony of the witnesses for the plaintiff. That of the witnesses for the defendants classes the upper area as the Lower Freeport, the next one as the Kittanning, and the third one a Mercer coal bed of the Pottsville measures of series. The deficiency established by this evidence is the difference between 125 acres and 234.4 acres, amounting to 109.4 acres, which, at \$12 an acre, amounts to \$1,312.80. This deducted from the full amount of the purchase money received, \$2,812.80, leaves a balance of \$1,500, of which \$937.60 has been paid, leaving a balance of \$562.40, bearing interest from March 30, 1907.

In conformity with this conclusion, the decree will be reversed, and the cause remanded, with directions to the trial court to enter a decree for said sum of \$562.40, with interest thereon from the 30th day of March, 1907, to be added to the principal and included in the decree as of the date thereof, and for further proceedings in accordance with the rules and principles governing courts of equity.

Miller, J., absent.

WEST VIRGINIA SUPREME COURT OF APPEALS.

CENTRAL BANKING & SECURITY COMPANY, Appt.,

v.

UNITED STATES FIDELITY & GUARANTY COMPANY et al.

(— W. Va. —, 80 S. E. 121.)

Bond — personal representative — validity.

1. A bond of a personal representative,

Headnotes by *POFFENBARGER, P.*

Note. — Judgment in favor of one or more sureties and against others in action by obligee as res judicata between sureties.

There seems to be a decided conflict of

taken by an officer without authority, and voluntarily given, is valid as a common-law obligation and enforceable as such, in the absence of a statutory prohibition of such construction.

Same — given in vacation — effect.

2. Bonds given by a personal representative before the clerk of a county court in the vacation of the court as new bonds, after he had previously qualified and given bond, are not substitutes for the original bond, but are valid and enforceable as additional ones and as further security; and in case of necessity for contribution among the sureties, the proportion of contribution is determinable by the penalties of the several bonds.

Same — recital of substitution — indemnity.

3. A recital in such a subsequent bond

authority upon the question whether a judgment in favor of one or more sureties and against others in an action by the obligee is *res judicata* as between the surety or sureties held liable and those exonerated by such judgment, in an action by the former against the latter for contribution.

One line of cases is authority for the rule that the original judgment is not *res judicata* as between the sureties, unless such sureties are adversely interested in the original action, and held that sureties when jointly sued are not so adversely interested. These cases, however, seem hard to justify, because the sureties, although codefendants, are in effect adversely interested, since exoneration of one ordinarily increases the liability of the others. This would certainly be true where the surety or sureties held liable would have a right to question the exonerations of the other sureties in an appellate court.

The other, and seemingly the better, rule is that the judgment in the original action is conclusive as between all those who were parties thereto, even though they were not in form adverse parties, and irrespective of the objection that the cause of action between the obligee and the sureties is technically different from that between the sureties for contribution.

Aligned with the first class of cases above referred to is *CENTRAL BKG. & SECUR. Co. v. UNITED STATES FIDELITY & G. Co.* In order to fully understand the majority opinion in this case without going outside thereof, it may be stated that the "principles" therein referred to as enunciated in *Pomeroy Nat. Bank v. Huntington Nat. Bank*, — *W. Va.* —, 79 S. E. 662; *Hudson v. Iguaño Land & Min. Co.* 71 *W. Va.* 402, 76 S. E. 797; and *Biern v. Ray*, 49 *W. Va.* 129, 38 S. E. 530, are that, in West Virginia, when the causes of action are different, the former decision is conclusive only as to questions, rights, and facts actually decided thereunder, but is not, as is sometimes held in other jurisdictions, conclusive as to matters which "might" have been decided; and that the former decision is conclusive as to the latter class of matters (those which

of the tender thereof in lieu of the preceding one, in compliance with a desire on the part of the principal therein to release the surety in it from further liability, is not a stipulation or covenant for indemnity of the surety in the preceding bond.

Judgment — on bond — suit for contribution — effect.

4. A decree in a suit by the distributees of the estate for the benefit of which such bonds were given, against the principal and sureties in all of them, dismissing the bill as to the sureties in the subsequent ones on their separate demurrers thereto, does not conclude the surety in the original bond in a subsequent suit against the sureties in the others for contribution, under the principles of *res judicata*, after payment and satisfaction of the liability to the estate by the surety in such first bond.

"might" have been decided), if the cause of action in the second suit is the same as that in the former one, and the parties are identical.

And the decision in *CENTRAL BKG. & SECUR. Co. v. UNITED STATES FIDELITY & G. Co.* finds support in *Miller v. Gillespie*, 59 Mo. 220, wherein it was held that a judgment dismissing an action on an administrator's bond as to one surety, he having pleaded a discharge in bankruptcy, and against the other surety, was not *res judicata* in an action between the sureties for contribution, the court saying that, as both plaintiff and defendant in the latter action were defendants in the previous action, they did not occupy a hostile position to each other, nor was any question of contribution between them involved or determined.

And the principles applied and decision reached in the *CENTRAL BKG. & SECUR. Co. CASE* are in full accord with those of *Koelsch v. Mixer*, 52 Ohio St. 207, 39 N. E. 417, wherein it was held that it was no defense to an action for contribution between cosureties that the defendant surety had been exonerated by the jury in the original action, which had been brought by the obligee jointly against both sureties, the ground being that they were not adversely interested in the original action, and that the conclusiveness of the judgment therein depends upon the question whether an issue was joined between the parties and determined material to their respective rights in the action for contribution. In addition to that portion of the opinion in this case which is quoted in the *CENTRAL BKG. & SECUR. Co. CASE*, the court used the following interesting language: "Whilst the exact limits of the doctrine of *res judicata* in its application to some cases are not definitely settled, it is accepted as generally true that the judgment relied on for that effect in subsequent litigation must have been pronounced upon the same issues, between the same parties or their privies, standing in an adversary character to one another. By this is not meant that they should have stood upon the record as plaintiff and defendant, but that this should

Same — matters not in issue.

5. The cause of action in such subsequent suit is separate and distinct from that involved in the first, and is not therefore merged in the decision therein. In such case, the decree in the first suit does not bar the second, unless the question of liability involved in the second was actually put in issue by proper pleadings and decided in the first.

(Williams, J., dissents.)

(November 11, 1913.)

A PPEAL by plaintiff from a decree of the Circuit Court for Wood County in defendants' favor in an action to recover indemnity from liability upon an administra-

have been their real attitude upon the issues tried and determined. . . . The mere fact that it was there [the original action] determined that he was not liable on the bond to the obligee cannot conclude the plaintiff in this action from demanding contribution from the estate of his deceased cosurety, if, as a matter of fact, they were cosureties on the bond, and the plaintiff has been compelled to discharge all or more than his just proportion of the common liability. The subject-matter of the two actions is different. The former was a suit on a treasurer's bond by the obligee against the makers as codefendants to recover for a breach of it. The present is a suit by one surety on the bond against the estate of another for contribution, and had not accrued at the time of the former suit. It is not based upon the bond. . . . The only difference between this case [an earlier Ohio case] and the one under review is that in the former case a judgment was pleaded in which the opposite party was held to an obligation, and, here, he was released. But this can make no difference in the application of the principle; the conclusiveness of the judgment in either case must depend on the same question,—whether an issue was joined between the parties and determined in the former case, material to their respective rights in the subsequent suit; for, as shown by the authorities above cited, and they are sustained by reason, when such is not the case, there is no ground for the application of the doctrine of *res judicata*, which rests upon that principle of public policy which requires that where a matter has once been tried and determined on issues joined between the parties in interest in a court of competent jurisdiction, there should, in the interest of society, be an end of litigation. It, however, reaches and concludes only parties to the issue, and does not affect persons who, though parties to the suit, were not parties to the issue upon which the judgment was rendered. The latter, being strangers to the issue, are in a legal sense strangers to the judgment."

So, in *Comstock v. Keating*, 115 Mo. App. 372, 91 S. W. 416, it was held that a judgment

tor's bond for which defendants were alleged to be responsible with a cross assignment of error in the allowance of partial relief to plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. Merrick & Smith for appellant.

Messrs. Van Winkle & Ambler, for appellees:

The parties to this suit are the same as those who appeared and submitted to the jurisdiction of the circuit court of Calhoun county in the suit by the beneficiaries of the bonds and the bill in that suit, which expressly charged liability upon this defendant, was wholly dismissed, and it was adjudicated and decreed that there was no liability upon this demurrant by reason of the giving of the said bond, and each of the

ment on a bond against one and in favor of another surety was not *res judicata* in a subsequent action between the sureties for contribution, the court stating the rule to be that the parties to a judgment are not bound by it in subsequent controversies between each other, unless they were adversaries in the action wherein the judgment was entered, or unless as coplaintiffs or codefendants they did in fact, though not in form, occupy the attitude of adversaries; and saying that in the present case none of the issues in the original action was between the sureties *inter sese*.

Foremost, perhaps, among those cases which adhere to a contrary doctrine, is *Ruff v. Montgomery*, 83 Miss. 185, 36 So. 67. In this case an action had been brought against two sureties, and the judgment was in favor of one, upon the ground that he was entitled to release under a statute providing for release upon failure of the creditor to sue after notice, and against the other surety, and it was held, no appeal having been taken from the judgment in the original action, that the surety who was compelled to pay could not maintain an action against his cosurety for contribution, the ground being that, since the surety against whom judgment was obtained in the original action could have appealed and contested the judgment in favor of his cosurety, but failed to do so, such judgment constituted a bar to the action for contribution.

And in *Ledoux v. Durrive*, 10 La. Ann. 7, where two cosureties had been sued jointly, and, judgment being against the plaintiff as to both, he appealed as to one of the sureties, and judgment was reversed, and the appellee surety paid the judgment and sought contribution from his cosurety, it was held that the judgment in the original action, having become final because of no appeal having been taken as to the one surety, was *res judicata* as to him, the court saying that, although such judgment perhaps did not amount to a technical bar of the second action, to have which effect it should have been rendered in a suit between the same parties and for the same cause of action, it did decide that there

parties to that record are bound and estopped by said decree.

A judgment rendered on the demurrer is conclusive as to facts confessed by the demurrer.

Gould v. Evansville & C. R. Co. 91 U. S. 526, 23 L. ed. 416; Nispel v. Laparle, 74 Ill. 306; Poole v. Dilworth, 26 W. Va. 583; Richmond Hosiery Mills v. Western U. Teleg. Co. 123 Ga. 216, 51 S. E. 290; McLaughlin v. Doane, 40 Kan. 392, 10 Am. St. Rep. 212, 19 Pac. 854; Washington, O. & W. R. Co. v. Cazenove, 83 Va. 744, 3 S. E. 433; Van Horn v. Van Horn, 53 N. J. L. 514, 21 Atl. 1069; Oregonian R. Co. v. Oregon R. & Nav. Co. 27 Fed. 283.

was nothing due from the defendant thereupon the obligation, and therefore it took away the foundation from the action for contribution.

And in Cross v. Scarboro, 6 Baxt. 134, which is discussed with disapproval in CENTRAL BKG. & SECUR. CO. v. UNITED STATES FIDELITY & G. CO., it was held that contribution could not be had by one set of sureties who had been compelled to pay a claim, from another set of sureties who had been joined as defendants in the original action, but as to whom the judgment had been favorable. The facts in this case resemble those of the CENTRAL BKG. & SECUR. CO. CASE, as the bond executed by the second set of sureties was obtained to succeed the first bond, but as the court had failed upon the taking of the second bond to exonerate the sureties on the first bond, the action by the obligee was brought against both sets of sureties, judgment being obtained against the first set only. It is true, however, as is stated in the above referred to criticism, that the court did not discuss the applicability of the doctrine of *res judicata*, but there seems to be no doubt but that the decision was upon that ground, and that the court regarded it as sufficient that both sets of sureties were parties to the original action.

So, in Hood v. Morgan, 47 W. Va. 817, 37 S. E. 911, which seems to be overruled in effect by the majority opinion in CENTRAL BKG. & SECUR. CO. v. UNITED STATES FIDELITY & G. CO., but which was expressly approved in the dissenting opinion of Williams, J., sureties against whom judgment had been obtained by the obligee sued another surety who was exonerated from liability in the original action, for contribution, it being held that the original judgment was conclusive as between the rights of the exonerated surety and the obligee, and therefore that such surety was not liable in an action for contribution. As is stated in the majority opinion above referred to, however, the court did remark that plaintiff's right to contribution, if any he had, was based upon the exonerated surety's liability to the obligee, and the plaintiff surety's subrogation to the rights of the obligee; but it seems clear that the court

Res judicata applies not only to what was necessarily decided, but to every point which properly belonged to the subject-matter, and which with diligence might have been brought forward.

Gould v. Evansville & C. R. Co. 91 U. S. 533, 23 L. ed. 418; Brown v. District of Columbia, 127 U. S. 589, 32 L. ed. 265, 8 Sup. Ct. Rep. 1314; South & North Ala. R. Co. v. Henlein, 56 Ala. 373; Dent v. Pickens, 59 W. Va. 274, 53 S. E. 154.

Facts established by matter of record, whether admitted or proved, cannot be contested between the same parties or their privies.

Gould v. Evansville & C. R. Co. 91 U. S.

also had in mind the principles of *res judicata*, as the court subsequently also said that "the judgment is *res judicata*."

And in Waggoner v. Walrath, 24 Hun, 443, affirmed without opinion in 92 N. Y. 639, where two cosureties were sued jointly, but judgment was entered against one only, it was held that the other was thereby released from all liability, and could not be called upon for contribution by his cosurety, who paid the full judgment. It was said, however, that the judgment could not have been enforced against the judgment defendant for more than one half of the amount, and that it was his own fault if he paid more than he was legally liable for.

And in Love v. Gibson, 2 Fla. 598, the doctrine of *res judicata* was carried so far as to be held applicable to an action for contribution between cosureties to a judgment obtained by an obligee against one of such sureties, even though the surety sued for contribution was not a party to the original action, he, however, having had notice of the suit in time sufficient to have put in pleas to the action. In this case the alleged defense of the cosurety was that neither surety was liable to the obligee, rather than that the cosureties stood in different relations to the obligee. This fact affords a possible ground for distinguishing the case from CENTRAL BKG. & SECUR. CO. v. UNITED STATES FIDELITY & G. CO.; but nevertheless the cases seem to be in conflict as regards the principles applied.

In Preslar v. Stallworth, 37 Ala. 402, which is cited in the dissenting opinion of Williams, J., in the CENTRAL BKG. & SECUR. CO. CASE, as pertinent to the question under discussion in the present note, the original action was brought by the obligee against both cosureties, but was discontinued as against the defendant in the action for contribution, he not having been served with process. From this it follows that the rights of the defendant in the contribution action were not adjudicated in the action between the obligee and the other sureties, and furthermore the case does not profess to decide as to whether the judgment in the original action was *res judicata* upon the question of contribution between the sureties

G. J. C.

534, 23 L. ed. 419; Nickless v. Pearson, 128 Ind. 486, 26 N. E. 481; Plant v. Carpenter, 19 Wash. 621, 53 Pac. 1108.

A decision upon demurrer, though a decree dismissing a bill, will be conclusive of every matter, whether specially stated in the bill or not, provided it was in controversy in that suit.

Poole v. Dilworth, 26 W. Va. 583; Corrothers v. Sargent, 20 W. Va. 351; Bias v. Vickers, 27 W. Va. 463; Dent v. Pickens, 59 W. Va. 274, 53 S. E. 154.

The scope of the estoppel is not to be determined by the reasoning of the court, the substantial effect of the actual decision being the only consideration.

23 Cyc. 1123, note, 68; Gould v. Evansville & C. R. Co. 91 U. S. 534, 23 L. ed. 419; Abraham v. Casey, 179 U. S. 210, 45 L. ed. 156, 21 Sup. Ct. Rep. 88; Denike v. Denike, 167 N. Y. 585, 60 N. E. 1110.

The record shows that the clerk of the county court of Calhoun county had no power or authority to take the bond of this defendant or to release the Central Company, and that fact rendered the bond of defendant invalid, both as a statutory and as a common-law bond.

San Francisco v. Hartnett, 1 Cal. App. 652, 82 Pac. 1064; Rupert v. People, 20 Colo. 424, 38 Pac. 702; Morrow v. State, 5 Kan. 563; Harris v. Simpson, 4 Litt. (Ky.) 165, 14 Am. Dec. 101; United States v. Goldstein, 1 Dill. 413, Fed. Cas. No. 15,226; Vose v. Deane, 7 Mass. 280; Com. v. Lovelidge, 11 Mass. 337; Benedict v. Bray, 2 Cal. 251, 56 Am. Dec. 332; Com. v. Roberts, 1 Duv. 199; State v. Kruike, 32 N. J. L. 313; State v. Young, 56 Me. 219; Powell v. State, 15 Ohio, 579; People v. Brown, 23 Wend. 47; Couchman v. Lisle, 15 Ky. L. Rep. 543; State v. Russell, 24 Tex. 505; Com. v. Otis, 16 Mass. 199; Territory ex rel. Thacker v. Woodring, 1 L.R.A. (N.S.) 848, and note, 15 Okla. 203, 82 Pac. 572, 6 Ann. Cas. 950; Gray v. State, 43 Ala. 41; Jacquemine v. State, 48 Miss. 280; Blevins v. State, 31 Ark. 53; State v. Nelson, 28 Mo. 13; People v. McKinney, 9 Mich. 444.

A nullity cannot be ratified.

State v. Caldwell, 124 Mo. 509, 28 S. W. 4; Morrow v. State, 5 Kan. 563; Territory ex rel. Thacker v. Woodring, 15 Okla. 203, 1 L.R.A. (N.S.) 848, 82 Pac. 572, 6 Ann. Cas. 950; Dickenson v. State, 20 Neb. 72, 29 N. W. 184; United States v. Horton, 2 Dill. 94, Fed. Cas. No. 15,393; Reilly v. Atchison, 4 Ariz. 72, 32 Pac. 262; Robertson v. Shepherd, 165 Mo. 360, 65 S. W. 573.

If Central Banking & Security Company is entitled to relief, the last bond is liable for the whole amount.

State ex rel. Chatham Nat. Bank v. Finn, 51 L.R.A. (N.S.)

98 Mo. 532, 14 Am. St. Rep. 654, 11 S. W. 994; Crawn v. Com. 84 Va. 282, 10 Am. St. Rep. 843, 4 S. E. 721; Dugger v. Wright, 51 Ark. 232, 14 Am. St. Rep. 48, 11 S. W. 213; Gross v. Davis, 87 Tenn. 226, 10 Am. St. Rep. 635, 11 S. W. 92; M'Donald v. Ma-gruder, 3 Pet. 470, 7 L. ed. 744.

Mr. J. M. Hamilton also for appellees.

Poffenbarger, P., delivered the opinion of the court:

After the Central Banking & Security Company, surety in one of the bonds of Amnon Taylor, administrator of Tasriel Taylor, had paid the decrees pronounced against it, as corrected and affirmed by this court, in Taylor v. Taylor, 66 W. Va. 238, 66 S. E. 690, 19 Ann. Cas. 414, it brought this suit, primarily for indemnity and secondarily for contribution, against the United States Fidelity & Guaranty Company, of Baltimore, Maryland, and the Citizens' Trust & Guaranty Company, of Parkersburg, West Virginia, sureties in the two subsequent bonds given by Taylor as administrator of the same estate. The prayer of the bill is in the alternative. The plaintiff claims the subsequent bonds operate in law as full and complete indemnity, requiring the sureties therein, or one of them, to reimburse it to the extent of the whole amount it was compelled to pay as Taylor's surety. It had become the surety in a \$6,000 bond given in February, 1903. In July, 1904, the United States Fidelity & Guaranty Company gave, before the clerk of the county court of Calhoun county, another bond in the same penalty, and in July, 1905, the Citizens' Trust & Guaranty Company became surety in a third bond in the same penalty and given in the same way. Each of these subsequent bonds contains a recital of desire on the part of the principal therein to release the surety in the preceding one from further liability, and of tender thereof in lieu of the preceding one. The claim for complete indemnity and full reimbursement is predicated upon this recital. In the case of Taylor v. Taylor, the distributees of the Taylor estate sued the principal and sureties in all three of the bonds, and the trial court sustained the demurrers of the United States Fidelity & Guaranty Company and the Citizens' Trust & Guaranty Company, and dismissed the bill as to them. It held the Central Banking & Security Company liable as surety in the first bond, and it appealed from the decrees. The sureties in the other two did not appeal, and the dismissal as to them remains unreversed. As the bill in this cause exhibits the printed record of the former one, showing all the proceedings had therein, as well as the

mandate and opinion of this court in it, the defendants herein, in their separate demurrers thereto, relied principally upon said dismissal of the former bill as an adjudication in their favor, not only against the plaintiff in the former suit, but as against the alleged cosurety, the plaintiff here. The demurrer of the United States Fidelity & Guaranty Company to this bill was unqualifiedly overruled, and that of the other defendant partially sustained, but the bill was not dismissed as to it; the court deeming it a proper party, but not subject to direct liability. Thereafter the United States Fidelity & Guaranty Company filed its answer, and answer in the nature of a cross bill, praying affirmative relief against the Central Banking & Security Company, the Citizens' Trust & Guaranty Company, and the administrator and heirs of Taylor, the purpose of which was, in the main, to demand indemnity from the Citizens' Trust & Guaranty Company, its successor in the bond as surety, or rather the surety in the last of the three bonds. The Citizens' Trust & Guaranty Company filed its answer to the original bill and also to the cross bill, and upon these pleadings and general replications of the plaintiff to the answers and a stipulation as to the facts, the court held the parties to be cosureties, and required each of the two defendants to pay to the plaintiff one third of the amount it had been compelled to pay at the suit of the distributees of the Taylor estate. From this decree, the Central Banking & Security Company has appealed, complaining of the disallowance of full indemnity against the other companies, and also of the denial of contribution as to the costs and expense incident to its defense in the cause of Taylor v. Taylor. Denying liability for contribution or indemnity, the two defendants cross assign error in the enforcement thereof, and resist the further claims of the appellant.

In the cross assignments of error, the validity of the two subsequent bonds is denied on account of lack of authority in the clerk of the county court of Calhoun county to take them. As is shown by the report of the decision in Taylor v. Taylor, these two bonds were taken by the clerk in the vacation of the court, and he had no authority, under the statute, to take them as substitute bonds, each releasing the preceding one. The contention in that cause was that they were such bonds, and that there was no liability except upon the last one, the one in which the Citizens' Trust & Guaranty Company was the surety. In the rejection of this claim and contention, the question of the validity of the two subsequent bonds as additional ones was left

open and undecided. As the statute nowhere confers upon the clerk authority to take a new bond from a personal representative or other fiduciary, and makes it his duty to report to the court the necessity thereof, it may well be conceded he had no authority to take either of the two substitute bonds, but their absolute invalidity and worthlessness does not necessarily follow. Every bond taken without authority in the officer who took it is not void. Such bonds are often held good as common-law obligations. Numerous authorities holding them void are cited in support of the cross assignments of error, but the bonds in those cases were, for the most part, held void because the taking thereof contravened a principle of public policy. Most of them were recognizances under which officers had discharged prisoners. One of them, involved in *Benedict v. Bray*, 2 Cal. 251, 56 Am. Dec. 332, was a void attachment bond, but the opinion is unsatisfactory. It assumes, contrary to almost uniform authority, that all bonds taken by officers not authorized to take them are void. The law on this subject was summarized by Judge Green in *Porter v. Daniels*, 11 W. Va. 250, in the following terms: "The mere fact that a bond not authorized by law has been taken by an officer does not render such bond invalid at common law. Such bonds have been frequently held void at common law, but wherever so held, it has been not simply because taken by an officer without authority, but for other and sufficient reasons appearing in each particular case,—such as that they were not voluntarily executed; that they were given to the officer to induce him to violate his duty as such officer; or to induce him to perform a duty he was bound to perform without the giving of such bonds; that the taking of the bond was oppressive, and it was given without consideration; that the obligee in the bond had no interest in the subject-matter; that the taking of the bond was a violation of public policy, or was executed under circumstances, or contained provisions, which would have rendered a private bond void at law." These bonds were voluntarily given for consideration paid to the sureties, and neither the acceptance nor the giving of the same contravenes any principle of public policy. Hence they are clearly good as common-law obligations.

That they were not substitute, release, or indemnity bonds as matter of law or by force of the statute was decided in the case of Taylor v. Taylor. It is said, however, the parties expressly made them such by stipulation. The only matter relied upon as evidence of such an undertaking is the recital in each of the subsequent bonds as to the

motive or purpose of the giving of the same. It says the new bond was tendered in lieu of the old one in compliance with a desire of the principal therein to release the surety in the preceding one from further liability, not from all liability. It proves a tender of the subsequent bond in lieu of the preceding one for the purpose of releasing the former surety from further liability, but it is not a covenant of indemnity for breaches of the condition of the former bond. The assumption of this grave responsibility must be imposed by implication, if at all, and the implication does not necessarily arise from the terms used. Generally a provision, fact, or purpose is not read into an instrument as having been implied, unless necessity therefor is found in the terms used, or purpose expressed therein. *White v. Bailey*, 65 W. Va. 573, 23 L.R.A. (N.S.) 232, 64 S. E. 1019; *Morgan v. Chicago & A. R. Co.* 96 U. S. 716, 24 L. ed. 743; *Waterford & W. Turnp. Co. v. People*, 9 Barb. 161; *Jackson ex rel. Boyd v. Lewis*, 17 Johns. 475; *United States v. Fisher*, 2 Cranch, 358, 2 L. ed. 304; *Chitty, Contr.* p. 113; *Hammon, Contr.* pp. 811, 813, § 412; *Devlin, Deeds*, § 836. The implication is said to arise here out of the fact that the bond given is such a one as would have been required by the court under the provisions of § 10 of chapter 87 of the Code, and must therefore be considered as having been given with intent that it should operate as a statutory bond would; but the circumstances contemplated by said section were not disclosed at the time these bonds were given. The court had not ordered a new bond, nor does it appear that necessity for one had been shown by the report of the clerk or a commissioner, or evidence produced by a surety or other person interested. It cannot be assumed that, under such circumstances, either of the two defendants would have executed a subsequent bond. If the Central Banking & Security Company had moved the court to be released as surety, the United States Fidelity & Guaranty Company would have at once suspected some default on the part of the principal, or some other good and sufficient cause for refusal of the surety to remain on his bond, and would almost certainly have refused to take its place. The same observations may be made as to the Citizens' Trust & Guaranty Company. In either case, there would have been a previous ascertainment of the condition of the decedent's estate in the hands of the administrator, and of his ability to make good any devastavit committed by him or other default in the conduct in this trust. No such investigation was made because no steps had been taken that were suggestive of any default or irregularity in

the administration. Had there been a previous order of the court requiring a new bond, it would have suggested irregularity and failure of duty on the part of the principal, which would, no doubt, have prevented the giving of a new bond and left the surety in the first one liable for the entire default. In view of these facts, the authorities do not sustain an implied undertaking on the part of the sureties in the subsequent bonds. To confer a right or impose an obligation by implication, the intention arising out of the terms used or the purpose of the instrument and circumstances under which it was given, must be so strongly apparent that the contrary thereof cannot be reasonably supposed. The implication must be a necessary one, as is shown by authorities already cited.

Being valid obligations and yet not substitute bonds, and having been given for the same principal as the one for whom the first bond was given, and to guarantee faithful execution of the same trust, the two subsequent bonds are mere cumulative or additional bonds, and the sureties therein are cosureties with the surety in the first one. *Brandt, Suretyship & Guaranty*, § 707. "Successive bonds given by guardian are cumulative securities for the faithful performance of the duties of the office, and the liabilities of the sureties are in proportion to the penalties of the several bonds in which the respective sureties bound themselves." *Jones v. Hays*, 38 N. C. (3 Ired. Eq.) 502, 44 Am. Dec. 78. "In all these cases the sureties have . . . a common burden; they are joined by the common end and purpose of their several obligations, as much as if they were joined in one instrument, with this difference only, that the penalties will ascertain the proportion in which they are to contribute, whereas if they had joined in one bond, it must have depended on other circumstances." *Dering v. Winchelsea*, 1 Cox, C. C. 318, 21 Eng. Rul. Cas. 617.

That the dismissal of the bill in the cause of Taylor v. Taylor as to the sureties in the two subsequent bonds is not an adjudication against the right of contribution, nor as between the sureties, is obviously apparent from principles enunciated in *Pomeroy Nat. Bank v. Huntington Nat. Bank*, — W. Va. —, 79 S. E. 662, not yet officially reported, *Hudson v. Iguaño Land & Min. Co.* 71 W. Va. 402, 76 S. E. 797, and *Biern v. Ray*, 49 W. Va. 129, 38 S. E. 530. That all three of the sureties were parties to that suit, relating to the bonds in which they were sureties, is not conclusive. Even though parties to a subsequent suit are the same as those to the prior one, a former decision is not conclusive in the

second one, and does not bar it, unless the cause of action in the two suits is the same. If the second one is founded upon a different cause of action from that involved in the first, the former adjudication is conclusive only as to matters actually litigated and decided in the first suit. In *Hudson v. Iguano Land & Min. Co.* cited, these propositions were stated as follows: "When the cause of action in the second suit is the same as that in the first and the parties are identical, they are concluded, not only as to what was actually decided, but also as to all matters which the plaintiff could have adduced to sustain his claim, and which the defendant could have pleaded or proven in defense of the action. In such cases there is no inquiry as to what was actually decided, as contradistinguished from things which could have been decided or may have been. But the principle applies in cases in which the parties to the second suit are the same as those of the first and the cause of action is not the same, so as to prevent a trial in the second suit of a question settled and determined in the first; but the rules in such cases are different. In them it becomes necessary to ascertain whether the particular question sought to be raised in the second suit was actually decided and determined in the first. This necessitates resort to the particular issues made and findings thereon."

In *Taylor v. Taylor* there was no decision of any question between the sureties. There was one between the plaintiffs in that suit, the distributees of the Taylor estate, on the one hand, and the principal and sureties on the other. The cause of action therein comprehended two things: The right to a proper accounting and distribution of funds by the principal in the bond, guaranteed by the sureties; and failure of the principal to accord such right. The suit was brought for redress of wrongs done the plaintiffs. No pleadings in the cause put in issue any right of contribution or any other matter between the sureties. There was an adjudication of nonliability to the distributees of the estate as to two of the sureties, but this was obviously not an adjudication of nonliability to their cosurety. It could not have been, for no issue of that sort was raised by the pleadings. The cause of action asserted here is a right of contribution among the cosureties, and injury by refusal of the defendants to contribute to the common burden the plaintiff had to discharge under the decree against it in the former suit. Notwithstanding the two rights grow out of the same transaction among the parties, they are not the same nor even similar. The nonidentity of causes

of action here asserted is well illustrated in *Coville v. Gilman*, 13 W. Va. 314. Under an agreement between himself and A, B sunk an oil well. A claimed B was to pay himself a reasonable price for drilling the well out of its production, and thereafter the well was to belong to A. B claimed he was to sink the well and pay himself for the same out of the first oil obtained, and thereafter he and A were to be equal partners in the production thereof. On this theory of the contract, A sued B in assumpsit and recovered a judgment, on the verdict of a jury, for oil produced from the well and sold by B. Afterwards A brought another suit in assumpsit for oil subsequently produced and sold. Then B filed his bill setting up a copartnership relation between them, and asking for a dissolution thereof and settlement of the partnership account and an injunction to prevent the collection of the judgment previously obtained. A endeavored to rely upon that judgment as an adjudication against the existence of the copartnership. To that contention this court replied as follows: "This verdict and judgment did not establish that there was no partnership in the oil pumped after the institution of the first suit, even though it were proven ever so clearly that there was and is no claim that any partnership in any of the oil existed, except such as might have been formed by the original contract, and that, in the trial of the common-law suit, B defended himself by claiming that this original contract created a partnership in all the oil pumped from the well, and obtained from the court an instruction that if the jury believe such partnership existed, they must find for the defendant, and that, as the question of partnership or no partnership was not directly involved in the pleadings, it cannot, so far as oil not sued for in that suit is concerned, be regarded as conclusively determined by the verdict of the jury and judgment of the court, though it be shown by evidence it was the controverted fact on which the verdict of the jury must have been based. Nor is this verdict even evidence of the nonexistence of the partnership."

The limited application of the first proposition, namely, that everything the parties to the first action could have litigated between themselves is deemed to have been determined, in other words, is merged in the judgment, is sometimes overlooked by the courts, and the principle regarded as if it were general in its application. It is for this reason more than any other that courts sometimes fall into an error in applying the principles of *res judicata*, and the doctrine is so often invoked under circum-

stances not justifying its application. The rule or principle by which to test the conclusiveness of former litigation between parties seems to have been first deduced and clearly stated by Mr. Justice Fields in *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195, decided in 1876. Since that time the rules and principles governing the doctrine have been much better understood than they were before, and there have been fewer misapplications of it. Prior to that time many courts perceived the difference between a former judgment between the same parties upon the same cause of action as that involved in the subsequent suit, and a judgment between the same parties upon a cause of action different from that involved in the subsequent suit, and correctly applied the principles without defining the standard or test of applicability.

An attempt is made here to show identity of the present cause of action with that involved in *Taylor v. Taylor*. It is said the principal in the bond is the representative of the sureties, and the latter are bound by his action in all respects, so long as he acts in good faith, wherefore a judgment either for or against him is binding upon all the sureties, not only as regards the right of the creditor or obligee in the bond, but also as regards the relation of co-suretyship. This argument is supplemented by the further proposition that the right of contribution among sureties stands only upon the principle of subrogation. Ordinarily a judgment against a principal is not evidence against the surety, unless the surety was a party to the action, or was made privy thereto by notice. In the latter case, it may be evidence, but it is clearly not conclusive. There are some exceptional instances in which a judgment against the principal alone is conclusive upon the surety, as when the undertaking of the surety is that he will be liable for the result of the suit against the principal. State use of *Beard v. Abbott*, 63 W. Va. 189, 61 S. E. 369; *Brandt, Suretyship & Guaranty*, § 802. "A judgment against the principal alone is, as a general rule, evidence against the surety of the fact of its recovery alone, and not of any fact which it was necessary to find in order to recover such judgment." *Id.* § 803. This is given by the author as the general rule, sustained by the weight of authority. Under it the judgment against the principal is no evidence of liability on the part of the surety. By another line of cases, the judgment against the principal is *prima facie* evidence against the surety, but not conclusive. *Brandt, Suretyship & Guaranty*, § 803. These conclusions deduced from the authorities show the principal is not the representative of

the surety in any comprehensive sense of the term. If he were, the judgment against him would be conclusive upon the surety in all cases.

Nor is the right of contribution derived from the equitable principle of subrogation. Contribution and subrogation are separate and distinct things, the latter being in equity a broader right and including the former, just as many other legal rights are obtainable through subrogation. Subrogation gives the surety, as against the principal and co-surety, all the rights and remedies of the creditor, and some of these may be legal. Subrogation is not strictly a remedy. It is an equitable principle through which the benefit of remedies is obtained. As subrogation is not recognized at all by the law courts, the recognition and enforcement of contribution in actions at law prove contribution is not dependent upon the right of subrogation. It must be distinct from subrogation, else courts of law could not enforce it. That a surety has a right of action at law against a co-surety for contribution is well settled. *Story, Eq. Jur.* § 495; *Kemp v. Finden*, 12 Mees. & W. 421, 12 L. J. Exch. N. S. 137, 8 Jur. 65; *Mitchell v. Sproul*, 5 J. J. Marsh. 264; *Bachelor v. Fiske*, 17 Mass. 464. The meaning of the declaration, often made, that contribution does not spring from contract, is sometimes misapprehended. It only means that there need not be an express contract for it. This is made clear by the opinion of Lord Chief Baron (Eyre) in *Dering v. Winchelsea*, 1 Cox, C. C. 318, 21 Eng. Rul. Cas. 617. As the sureties in that case obligated themselves by separate instruments, it was argued there could not possibly be any contract of co-suretyship between them. The court held: "If we take a view of the cases both in law and equity, we shall find that contribution is bottomed and fixed on general principles of justice, and does not spring from contract." The opinion then goes on to show many instances in which the courts of common law had always enforced contribution, not because, however, there was a contract in express terms to indemnify, but because natural justice and equity imposed the duty. In the opinion the lord chief baron said: "Now the doctrine of equality operates more effectually in this court than in a court of law." This is a plain recognition of the jurisdiction of the law courts to enforce contribution, and obviously they could have none if the right were purely equitable. The plain purpose of the argument was to dispense with the necessity of proof of an express contract for contribution or indemnity, and not to deny contribution as a legal right. Of course, the re-

lation of suretyship gives rise to equities, not cognizable by the law courts, in which contribution is included, or equities growing out of the legal right of contribution. There are grounds for interposition of equitable remedies for the protection of a surety before his right to sue at law has accrued, and to obtain greater relief than the law courts can give.

That the demand of a cosurety for contribution is a new and distinct cause of action from that founded on the contract between the creditor and the promisors or obligors in the instrument has been decided and clearly demonstrated by the application of legal principles in *Camp v. Bostwick*, 20 Ohio St. 337, 5 Am. Rep. 669. The court held: "The right to contribution among cosureties is not founded on the contract of suretyship, but is based on an equity arising from the relation of cosureties. . . . The right of action for contribution among cosureties accrues when one has paid more than his proportion of their liability." In working out this conclusion, Judge McIlvaine said: "But this action was not founded on the note. The note was fully paid and satisfied by the payment of Giddings's judgment by Bostwick, on the 19th of November, 1866. By that payment, however, a new cause of action accrued to Bostwick against the representatives of his deceased cosurety, founded upon a 'general equity' which equalizes burdens and benefits among cosureties. This new cause of action never did accrue to Giddings, and it first accrued to Bostwick only forty days before suit was commenced. . . . If the right of a cosurety to claim contribution rested upon the doctrine of subrogation to the rights of the creditor, the proposition might be true. The doctrine of subrogation has its origin in the relation of principal and surety, whereby a surety who pays the debt of his principal is, in equity, substituted in the place of the creditor, and is entitled to all the rights which the creditor may have against his principal. But the doctrine of contribution has its origin in the relation of cosureties or other joint promisors in the same degree of obligation. It is not founded upon the contract of suretyship. . . . It is an equity which springs up at the time the relation of cosureties is entered into, and ripens into a cause of action when one surety pays more than his proportion of the debt. . . . From this relation the common law implies a promise to contribute in case of unequal payments by cosureties. But equity resorts to no such fiction. It equalizes burdens, and recognizes and enforces the reasonable expectations of cosureties, because it is just and

right in good morals, and not because of any supposed promise between them. This equity, having once arisen between cosureties, this reasonable expectation that each will bear his share of the burden, is, as it were, a vested right in each, and remains for his protection until he is released from all his liability in excess of his ratable share of the burden. Neither the creditor, the principal, the statute of limitations, nor the death of a party, can take it away." In accordance with this view, the court further held: "The neglect of a creditor, whereby the estate of one surety is released, under the statutes of limitation, from its direct liability, does not discharge a cosurety from his liability for the whole or any part of the debt." Similarly, in *McCrory v. Parks*, 18 Ohio St. 1, it was held that the judgment in an action by the obligee against the principal and sureties in a sheriff's bond was not *res judicata* of the right of contribution among the sureties. The principle was again judicially applied in *Koelsch v. Mixer*, 52 Ohio St. 207, 39 N. E. 417. In that case Judge Minshall said: "It is not enough that an issue may have been joined between the obligee and the defendant as to the liability of the latter on the bond. Whatever that issue may have been, it was not an issue between himself and his codefendant, the plaintiff in this action, and could not therefore conclude the latter. Though parties to the suit, they were not such in an adversary character, being simply codefendants to the suit on the bond. The plaintiff in this suit could not, in the former suit, as a matter of right, have insisted on the admission or rejection of evidence on the trial of the issue, had no right to move for a new trial, nor prosecute error if aggrieved by the rulings of the court; and hence he cannot be held bound by the judgment in any subsequent litigation to which he may be a party." He then states the limitation upon the doctrine of *res judicata* as follows: "It is the general rule that parties to a judgment are not bound by it in a subsequent controversy between each other, unless they are adversary parties in the original action,"—and cites abundant authority to sustain the proposition. This is only another way of saying the former judgment, to be conclusive, in the absence of a showing of an express decision of the question in the later one, must have been upon the same cause of action, and fully harmonizes with the principles of *res judicata* as herein stated.

To make the former judgment in such cases conclusive puts the surety at a fearful disadvantage. As shown by Judge Minshall, he has no control of the action on the bond, and is at the mercy of the credit-

or, whose sole object is to get his money in the shortest time, with least expense, and at the slightest risk. Standing within his legal rights, he permits all the sureties but one to get away, and then his action, according to the contention here, is forever binding on the remaining surety, cutting off resort to his cosureties for contribution.

Our conclusion harmonizes with other principles. Until he has paid, the surety has no cause of action. How then can he be said to have asserted it in the action on the bond? He had not then paid and had none to assert. If he can be said to have had an equity, a court of law in which he may have been sued would not recognize that; and in a court of equity it is an incomplete cause of action, and a man is not bound to sue until his cause of action is complete. *Broaddus Institute v. Siers*, 68 W. Va. 125, 69 S. E. 468, Ann. Cas. 1912A, 920.

Only two decisions declaring the contrary of the conclusions here stated have been found. *Cross v. Scarboro*, 6 Baxt. 134, and *Hood v. Morgan*, 47 W. Va. 817, 35 S. E. 911. In neither of them was there any effort in the opinion to apply the principles of *res judicata*. In other words, the principles were not stated, nor was there any effort to demonstrate their application. The conclusions are certainly not sustained by the application of those principles. *Hood v. Morgan* erroneously assumes that the right of contribution arises by subrogation only, and it is upon that proposition it declares the former judgment in favor of the sureties against the creditor conclusive. The decision in that case may not be wrong. Possibly it can be sustained upon the doctrine of estoppel. As to whether it can or not, it would be useless to enter upon any inquiry now. It suffices to say it makes an erroneous application of the doctrine of *res judicata*, and no element of estoppel appears in this cause.

As the costs paid and expenses incurred in the litigation in the cause of *Taylor v. Taylor* by the plaintiff in this bill were the result of its effort, not to refute liability in general to the distributees of the estate of Taylor, but to be relieved from liability on the bond, as a result of the execution of the subsequent ones, the court did not err in refusing to enforce contribution against the defendants as to costs and expenses. In the main the defense was purely personal.

Seeing no error in the decree appealed from, we will affirm it.

Lynch, J., absent.

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Williams, J., dissenting:

I think the decree in *Taylor v. Taylor*, sustaining the demurrers of the United States Fidelity & Guaranty Company and the Citizens' Trust & Guaranty Company, and dismissing the bill as to them, is an adjudication against the Central Banking & Trust Company of any right to contribution. The principal and all the sureties were there sued, and a decree rendered holding the principal and one surety only liable, and releasing the other two. What is the effect of that final and unreversed decree? In the absence of fraud or collusion between the obligee and the discharged sureties, is it not conclusive upon the cosureties as well as upon the creditor? If not, why so? There is a privity of relation and obligation between principal and surety; and it is out of regard to that relation that a judgment against a principal bound for a collateral undertaking is conclusive of the amount for which his surety is liable. *Crim v. England*, 46 W. Va. 480, 76 Am. St. Rep. 826, 33 S. E. 310; *State v. Nutter*, 44 W. Va. 385, 30 S. E. 67; *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924. No one, I imagine, will question that a judgment recovered against a principal and all the sureties, in a subsequent suit for contribution by the surety who paid it, would be conclusive of liability to the creditor. They would be estopped to deny liability. Why? Because the right of contribution rests on liability to the obligee, and that liability was an issue adjudicated by the judgment. Why, then, is not a judgment of discharge as to some of the sureties equally conclusive? It will not do to say that a judgment against them has one effect, and a judgment for some of them and against others, on the same issue, has another effect. The judgment must have the same force in either case. The right of contribution is not a primary right; it depends on a common liability to a third person. The sureties must occupy toward the creditor exactly the same attitude. The right to have contribution springs out of a common burden resting on two or more persons occupying the same position in relation to the creditor. 27 Am. & Eng. Enc. Law, 483. Therefore, if a surety is not liable to the creditor, he is under no obligation to help bear the burden; he is not then liable to his cosurety. A surety who pays a debt for which another surety is not liable cannot have contribution. 1 Brandt, *Suretyship & Guaranty*, § 267. "He takes the place of the original creditor, and may be resisted on the same principles, and in the same way." *Lowndes v. Pinckney*, 1 Rich. Eq. 155. A surety paying a debt can occupy no better position than the creditor did.

2 Brandt, Suretyship & Guaranty, § 316. In a suit for contribution, by a surety who paid the judgment, there is involved the same identical issue that was litigated in the suit by the creditor against the sureties, and that issue, having been determined by a final judgment, is *res judicata*. It matters not that the issue was not joined between cosureties. It was joined between the creditor on the one side and the principal debtor and sureties on the other, and, in the absence of fraud, it is conclusive on all parties. It is on the ground that a judgment in such case has a conclusive effect that equity subrogates the surety who pays it to all the rights of the creditor, not only as against the principal debtor, but against the other sureties as well. Hawker v. Moore, 40 W. Va. 49, 20 S. E. 848; Woods v. Douglas, 46 W. Va. 657, 33 S. E. 771; Hess's Estate, 69 Pa. 272; 2 Brandt, Suretyship & Guaranty, § 309. What are the rights, then, of a creditor who has obtained a judgment against principal and sureties? Why, he has a final judgment conclusive upon all of them, which the law makes a lien upon their lands. Now, is it not clear that if, in a suit for contribution, a cosurety could controvert the judgment, the surety who paid it would not be enjoying the rights of the creditor? Says Chief Justice Marshall in Lidderdale v. Robinson, 2 Brock. 159, Fed. Cas. No. 8,337, after reviewing some early Virginia decisions: "The principle which the cases decide is this: Where a person has paid money for which others were responsible, the equitable claim which such payment gives him on those who were so responsible shall be clothed with the legal garb with which the contract he has discharged was invested, and he shall be substituted to every equitable intent and purpose, in the place of the creditor whose claim he has discharged. This principle of substitution is completely established in the books, and, being established, it must apply to all persons who are parties to the security, so far as is equitable. The cases suppose the surety to stand in the place of the creditor, as completely as if the instrument had been transferred to him, or to a trustee for his use. Under this supposition, he would be at full liberty to proceed against every person bound by the instrument." Two cosureties were sued jointly, and judgment was rendered in favor of them both. The creditor appealed to the Supreme Court from the judgment in favor of one of them, and such judgment was, as to such surety, reversed, and judgment in the Supreme Court was rendered against such surety for a large amount, which he paid. Held, he could not recover contribution from the 51 L.R.A. (N.S.)

other surety. The judgment, which as to him remained in force in the court below, established the fact that he was not liable to the creditor, and consequently not liable for contribution. 1 Brandt, Suretyship & Guaranty, § 267. The author cites Ledoux v. Durrive, 10 La. Ann. 7, which is not in the library. But I have no doubt he correctly states the principle decided.

Mr. Black, a very eminent law writer, in his work on Judgments, § 591, says: "Where, in a suit against one of two sureties, judgment is fairly obtained against him, and no collusion existed between him and the party recovering the judgment, or the principal obligor of the bond, if notice of the pendency of such suit has been given his cosurety, the latter stands virtually in privity with him against whom the judgment has been obtained. The cosurety in such case is bound to avail himself of any defense which he may have, and he will not be permitted afterwards, in a suit for contribution brought against him by his cosurety who has paid and satisfied the judgment, to set up any defense which he ought to have pleaded in the original suit upon the bond, by becoming a party for that purpose. It was his duty to join in the defense to the action. Having failed to do so, though he had full notice of the pendency of the action, he waives all defenses he might have had, and in the suit for contribution the matter is *res judicata*." The author here states a proposition even stronger than the one I am contending for, but he is supported by Love v. Gibson, 2 Fla. 598, and other authorities. I would give the judgment conclusive effect only in case the sureties were parties to the suit. The exact principle for which I contend arose, and was decided, in Hood v. Morgan, 47 W. Va. 817, 35 S. E. 911. But the majority opinion, in effect, overrules that case. The question was also decided by the supreme court of Tennessee in Cross v. Scarboro, 6 Baxt. 134. That case is almost identical with the one at bar. There some of the sureties, as in this case, had executed several obligations. In a suit by the creditor against all of them some were discharged and others held liable. Those that were held liable paid the debt and sued the others for contribution, and the court held that the former judgment of discharge was an adjudication of their nonliability, and was binding on the cosureties. The following cases are also pertinent: Preslar v. Stallworth, 37 Ala. 402; Hess's Estate, 69 Pa. 272; Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98. In fact, after a very careful examination of the subject, I do not find that any court, except the supreme court of Ohio, holds to the principle de-

ided by the majority opinion. The cases of *Pomeroy Nat. Bank v. Huntington Nat. Bank*, *Hudson v. Iguano Land & Min. Co.* and *Biern v. Ray*, decided by this court and cited in the majority opinion, in my opinion, are not applicable.

DISTRICT OF COLUMBIA COURT OF APPEALS.

PERCY HAMILTON, Appt.,

v.

UNITED STATES OF AMERICA.

(41 App. D. C. 359.)

Seduction — conditional promise of marriage — misdemeanor.

Securing sexual intercourse with a sixteen-year-old girl by promising, at her solicitation,

Note. — Seduction: promise of marriage conditioned on pregnancy.

I. Criminal actions.

a. Under statutes making promise of marriage essential element of crime.

1. Conditional promise in general, 809.
2. Conditional promise together with prior absolute promise, 810.

b. Under statutes not making promise of marriage essential element of crime.

1. Conditional promise in general, 810.
2. Conditional promise together with prior absolute promise, 811.

II. Civil actions, 812.

I. Criminal actions.

a. Under statutes making promise of marriage essential element of crime.

1. Conditional promise in general.

Under statutes making a promise of marriage an essential element of seduction, the rule is almost universal that a promise of marriage conditioned upon pregnancy resulting from the intercourse will not amount to seduction. *People v. Jensen*, 15 Cal. App. 220, 114 Pac. 585 (*obiter*); *Cherry v. State*, 112 Ga. 871, 38 S. E. 341 (*obiter*); *Woodall v. State*, 7 Ga. App. 245, 68 S. E. 619; *State v. Thomas*, 231 Mo. 41, 132 S. W. 225; *Russell v. State*, 77 Neb. 519, 110 N. W. 380, 15 Ann. Cas. 222; *People v. Van Alstyne*, 144 N. Y. 361, 39 N. E. 343, reversing 78 Hun, 509, 29 N. Y. Supp. 542; *People v. Duryea*, 81 Hun, 390, 30 N. Y. Supp. 877; *State v. Adams*, 25 Or. 172, 22 L.R.A. 840, 42 Am. St. Rep. 790, 35 Pac. 36; *Simmons v. State*, 54 Tex. Crim. Rep. 619, 114 S. W. 841; *Muhlhouse v. State*, 56 Tex. Crim. Rep. 288, 119 S. W. 866; *Thacker v. State*, 51 L.R.A. (N.S.)

tation, to marry her if anything happened, is not within a statute making it a misdemeanor to seduce and carnally know any female of previous chaste character between the ages sixteen and twenty-one.

(January 5, 1914.)

APPEAL by defendant from a judgment of the Supreme Court convicting him of seduction. Reversed.

The facts are stated in the opinion.

Mr. Henry E. Davis for appellant.

Messrs. Clarence R. Wilson and S. McComas Hawken, for the United States:

The act disclosed by the evidence constituted seduction, for there were repeated solicitations and persuasion, resistance by the woman, and finally yielding upon renewed solicitations and promises of protection and marriage.

62 Tex. Crim. Rep. 294, 136 S. W. 1095; *Gillespie v. State*, — Tex. Crim. Rep. —, 166 S. W. 135.

In *People v. Van Alstyne*, supra, it is said: "It was never intended to protect a woman who was willing to speculate upon the results of her intercourse with a man, and who only exacted, as the price of her consent, a promise on his part to marry her in case the intercourse resulted in her pregnancy."

And in *State v. Adams*, 25 Or. 172, 22 L.R.A. 840, 42 Am. St. Rep. 790, 35 Pac. 36, the court assigns its reasons for the decision in the following language: "The gist of the offense is that the seduction shall be accomplished under or by means of a promise of marriage which is unfulfilled. Without the promise there can be no crime under this statute, however reprehensible the conduct of the man may be. A promise of marriage, and her reliance upon it, must be the means of inducing the woman to surrender her virtue. She must be drawn aside from the path of virtue she is then pursuing, and induced to yield to the solicitations of her seducer, by means of and under the influence of a promise of marriage, upon the performance of which she in good faith had a right to rely. Nothing less will satisfy this statute. Its object is not to punish illicit intercourse, but to punish the seducer who, by means of a promise of marriage, destroys the chastity of an unmarried female of previous chaste character, and who thus draws her aside from the path of virtue and rectitude, and then fails and refuses to fulfil his promise. It is, however, not necessary that the promise should be technically valid to sustain a civil action for breach of promise; and, although it may be conditioned upon immediate intercourse, thus rendering it void in a civil proceeding, because founded upon an immoral consideration, it is still held sufficient to sustain a criminal prosecution if the woman in good faith relied upon it and was thereby deceived. . . . In such case, the mu-

35 Cyc. 1294; Clark, Crim. Law. 194; State v. Patterson, 88 Mo. 88, 57 Am. Rep. 374; State v. Hamann, 109 Iowa, 646, 80 N. W. 1064; Croghan v. State, 22 Wis. 444; Bradshaw v. Jones, 103 Tenn. 331, 76 Am. St. Rep. 655, 52 S. W. 1072; State v. Hughes, 106 Iowa, 125, 68 Am. St. Rep. 288, 76 N. W. 520; State v. Price, — Iowa, —, 138 N. W. 520; State v. Prizer, 49 Iowa, 531, 31 Am. Rep. 155; State v. Higdon, 32 Iowa, 262; State v. Hemm, 82 Iowa, 609, 48 N. W. 971; State v. Knutson, 91 Iowa, 549, 60 N. W. 129; State v. Sortviet, 100 Minn. 12, 110 N. W. 100.

Van Orsdel, J., delivered the opinion of the court:

Appellant, Percy Hamilton, defendant be-

tual promise of the woman is implied from her yielding to the solicitations of her seducer under his promise of marriage, and the promise becomes absolute. But when the seduction is accomplished by means of a promise of marriage, to be performed only upon the condition that the intercourse results in pregnancy, no promise of the woman can be implied from such yielding, and it seems to us the contract smacks too much of a corrupt and licentious bargain to fall within the statute. How can it be claimed that a pure-minded woman is led astray and her ruin accomplished under a promise of marriage which, with her assent, amounts to nothing more than a mutual agreement to engage in illicit relations so long as pregnancy does not result, and which neither party expects nor intends shall be fulfilled except upon the happening of an event which may never occur?"

In Spenrath v. State, — Tex. Crim. Rep. —, 48 S. W. 192, in which it is held that the evidence is not sufficient to support a verdict for seduction, on account of the fact that the woman did not consent to the intercourse solely because of a promise of marriage to be executed immediately if pregnancy followed, and, if not, at a later time, the court, in stating its conclusion, says: "And this view is strengthened by her original testimony before the examining court, in which she stated, unequivocally, that she agreed to have carnal intercourse with appellant on his promise to marry her if anything happened to her." The court, by ignoring the possibility of basing a conviction upon such a conditional promise, inferentially holds against the sufficiency of such a promise to satisfy the requirements of the statute.

On the other hand, a few cases hold that a promise of marriage conditioned upon pregnancy will be sufficient to satisfy the statute defining seduction.

People v. Hustis, 32 Hun, 58, holding to that effect, has, however, been overruled in effect by subsequent New York cases cited above.

In State v. Sortviet, 100 Minn. 12, 110 N. W. 100, the court says: "We are not 51 L.R.A.(N.S.)

low, was convicted in the supreme court of the District of Columbia of the crime of seduction under § 873 of the District Code [31 Stat. at L. 1332, chap. 854], which provides: "If any person shall seduce and carnally know any female of previous chaste character, between the ages of sixteen and twenty-one years, out of wedlock, such a seduction and carnal knowledge shall be deemed a misdemeanor."

The portion of the agreed statement of facts appearing in the record essential to the disposition of this appeal is as follows: "At the time of the alleged commission of the offense laid in the indictment, the complaining witness (hereinafter called witness), was a little under the age of seventeen years, and the defendant a little over

impressed by the argument that the promise was not sufficient because it was conditioned upon the girl becoming pregnant. . . . The statute contains no limitation as to the character of the promise. It is general in terms, and is broad enough to cover any promise of marriage, whether conditional or restricted, if it is shown that the effect of the promise was to induce the female to consent to the act of sexual intercourse."

It has also been held that a promise of marriage conditioned upon pregnancy is a "promise of marriage" within the terms of the statute defining seduction. Rex v. Romans, 13 Can. Crim. Cas. 68; Rex v. Comeau, 5 D. L. R. 250, 11 East. L. Rep. 37, 104.

2. Conditional promise together with prior absolute promise.

Intercourse permitted by a woman in reliance upon a conditional promise of marriage if she gets into trouble will not amount to seduction, although there is a subsisting engagement between the parties at the time of the intercourse. People v. Ryan, 63 App. Div. 429, 71 N. Y. Supp. 527.

Where, however, two parties are engaged to be married at a definite future time, intercourse procured by the inducement of such absolute promise, together with the additional inducement to hasten the marriage in case the intercourse results in pregnancy, will amount to seduction. Cherry v. State, 112 Ga. 871, 38 S. E. 341.

And see, in this connection, Spenrath v. State, — Tex. Crim. Rep. —, 48 S. W. 192, supra, I. a, 1.

b. Under statutes not making promise of marriage essential element of crime.

1. Conditional promise in general.

Under statutes not making a promise of marriage an essential element of seduction, it is agreed that any promises, deception, or artful influences which induce a chaste woman to surrender her chastity by overcoming her natural tendency to-

eighteen, and each was unmarried. Prior to the alleged commission of the offense, the defendant and another young man had on several occasions called upon the witness and another young woman at the house of the witness, in the city of Washington, District of Columbia. Each of the several persons mentioned is of the colored race. On the date named in the indictment, namely, April 15, 1912, the said four persons were together in a room at the said house, having a social time, during which the witness had been playing upon a piano, the defendant standing close beside her; and the two other persons were seated in another part of the room. The defendant, leaning over witness, suggested that they go into the next room and have carnal intercourse;

which the witness refused to do. Some days later, on a similar occasion and under similar circumstances, the defendant made a similar suggestion, to which witness replied that she was afraid something might happen. The defendant said that there was no use of being afraid; that nothing would happen. The witness then asked the defendant if he would marry her if anything did happen, and upon his saying that he would, she then consented, and the two went into the next room and there had intercourse. After the first occasion the act of intercourse between the witness and the defendant was repeated a number of times up to and including June 30, 1912. The witness's monthly sickness was due July 18, 1912, at which time she missed it; and was, in

ward virtue and purity, will satisfy the statutory requirements.

However, there is no seduction "where it is shown that she yielded, not by reason of any promises, deception, or other artful influences, but merely to gratify her lustful desires." 35 Cyc. 1296.

The cases seem agreed that a promise of marriage conditioned upon pregnancy is not such a promise as will ordinarily overcome the natural tendency of a chaste woman toward virtue and honor. However, there seem to be instances where a promise of marriage conditioned upon pregnancy will overcome the natural tendency of a chaste woman. In such cases the conditional promise is considered sufficient basis for a conviction.

In *HAMILTON v. UNITED STATES*, it was held that the promise was not made under such circumstances as are necessary to constitute an exception to the general rule.

So, in *People v. Smith*, 132 Mich. 58, 92 N. W. 776, it was held that the defendant could not be convicted of seduction, where his only inducement to procure the intercourse had been a promise of marriage conditioned upon pregnancy, and where the complaining witness was not a young and inexperienced girl. The court says: "The complaining witness in this case, however, was not a young and inexperienced girl. She was nearly twenty years of age, and it is apparent knew quite well the consequences of her act. She cannot complain, therefore, if she is judged by the rules applicable to ordinary pure women. Is a promise to marry, conditioned upon the illicit intercourse resulting in pregnancy, calculated to induce a pure woman to yield her chastity? In our judgment, this question admits of but one answer. Such a promise has no tendency to overcome the natural sentiment of virtue and purity. The woman who yields upon such a promise is in no better position than as though no promise whatever had been made. No wrong is done her if she is put in the class with those who commit the act to gratify their desire. She was willing to lose her virtue if some provision was made to conceal its loss. If preg-

nancy does not result from the illicit intercourse, her conduct is in every respect as culpable as that of her companion."

In *State v. Hughes*, 106 Iowa, 125, 68 Am. St. Rep. 288, 76 N. W. 520, it is said: "The reasoning of these cases leads to the inevitable conclusion that to induce an unmarried woman of previous chastity to yield her virtue by a promise of marriage in event she becomes pregnant may be seduction. Whether a woman of chaste character would so yield, and whether, if she so does, it is voluntary, and to gratify her desires, rather than because of such conditional promise, may well be considered in connection with all the facts and circumstances shown upon the trial. But it cannot be said as a matter of law that an unsophisticated country girl of seventeen years, when addressed by a young man of five or six years her senior, with possibly a greater knowledge of the world, as in this case, and under the circumstances disclosed, would necessarily be of previous unchastity in yielding on the strength of such a promise, or that she submitted as a result of passion, rather than the false promises of the defendant. The question is not determined in *State v. Reilly*, 104 Iowa, 13, 73 N. W. 356."

In *State v. Reilly*, supra, referred to in the preceding quotation, the court holds proper an instruction "that if the prosecutrix assented to the intercourse upon the promise of the defendant to marry her should pregnancy result therefrom, then the verdict should be, not guilty."

It did not appear in *Neary v. People*, 115 Ill. App. 157, whether the promise of marriage "if anything happened" was made before or after the connection, but it was held that, even assuming that it was made prior thereto, it did not amount to seduction.

2. Conditional promise together with prior absolute promise.

The courts seem to take the position that, where there is a subsisting contract to marry, an additional promise of marriage conditioned upon pregnancy will be likely

fact, pregnant. The witness would not have consented to the act in the first instance except for the defendant's assurances as aforesaid. After learning her condition, she asked the defendant to marry her, which he refused to do." The remainder of the agreed statement relates to the sufficiency of the evidence to sustain the verdict, which it will not be necessary to consider.

The case, we think, turns upon the court's refusal to grant an instruction requested by counsel for defendant challenging the sufficiency of the evidence to support a verdict of guilty. The law of seduction is distinguished by two lines of decisions in this country. One is based upon statutes similar to ours, and the other upon statutes requiring a promise of marriage as a condition precedent to the commission of the offense. The distinction has been elaborately pointed out in the briefs of counsel, but, when applied to the facts of this case, we are unable to discover wherein the cases make any real distinction. In Michigan, under a statute similar to ours, the court, in the leading case of *People v. Smith*, 132 Mich. 58, 92 N. W. 776, defined the application of the statute as follows: "Is a promise to marry, conditioned upon illicit intercourse resulting in pregnancy, calculated to induce a pure woman to yield her chastity? In our judgment, this question admits of but one answer. Such a promise has no tendency to overcome the natural sentiment of virtue and purity. The woman who yields upon such a promise is in no better position than as though no promise whatever had been made. No wrong is done her if she is put in the class with those who commit the act to gratify their desire. She was willing to lose her virtue if some provision was made to conceal its loss. If

pregnancy does not result from the illicit intercourse, her conduct is, in every respect, as culpable as that of her companion. If pregnancy does result, his conduct becomes more culpable than hers only when, and not until, he refuses to marry her. The commission of the offense cannot depend upon the happening of a subsequent event."

On the other hand, in New York, where the statute requires a promise of marriage, in the case of *People v. Van Alstyne*, 144 N. Y. 361, 39 N. E. 343, Mr. Justice Peckham, speaking for the court, said: "It was never intended to protect a woman who was willing to speculate upon the results of her intercourse with a man, and who only exacted as the price of her consent a promise on his part to marry her in case the intercourse resulted in her pregnancy. . . . The statute was passed to protect a confiding and chaste woman in yielding to the solicitations of the man who had promised to marry her. It was not the purpose of the law to throw its protection around the woman who was willing to consent to the act, and who only asked for a promise of marriage in case her lapse from chastity should be discovered by reason of her pregnancy. In such case she consents at a time when there is no real promise."

An attempt has been made to distinguish the holding of the Iowa court, where a statute similar to ours exists, from the holding of the Michigan court in *People v. Smith*, supra, but the courts are in accord where the facts are similar. In the case of *State v. Price*, — Iowa, —, 138 N. W. 520, the court affirmed the Michigan rule in the following language: "Where the matter is one merely of barter, as in *People v. Smith*, supra, there is reason for saying this does not amount to seduction. It is

to overcome the natural tendency toward chastity, thus creating one of the exceptions to the rule stated in supra, 1. b.

Thus, in *State v. Price*, — Iowa, —, 138 N. W. 520, it was held that a conviction was authorized upon a finding that the intercourse was procured on the conditional promise of marriage in event of pregnancy, where the prosecutrix was only sixteen years old and engaged to marry the defendant.

And where the evidence showed that an engaged woman submitted to sexual intercourse in reliance upon the promise of immediate marriage if she got into trouble, a case of seduction was made out. *State v. O'Hare*, 36 Wash. 516, 68 L.R.A. 107, 104 Am. St. Rep. 970, 79 Pac. 39.

A general promise of marriage and a further promise, immediately before intercourse, of marriage if pregnancy results, "may be considered as constituting seductive arts." *State v. Stolley*, 121 Iowa, 111, 96 N. W. 707. 51 L.R.A. (N.S.)

And where the defendant before connection promised to marry prosecutrix, and, upon her expression of disbelief, again promised to marry her if anything should go wrong, the effect of the promises upon the woman is for the jury. *State v. Knutson*, 91 Iowa, 549, 60 N. W. 129.

II. Civil actions.

It is competent for plaintiff in an action for seduction to show that the intercourse was obtained under promise of marriage if anything happened, inasmuch as such amounts to a seductive art which might induce such intercourse. *Ayer v. Colgrove*, 81 Hun, 322, 30 N. Y. Supp. 788.

So, it is held in *Rabeke v. Baer*, 115 Mich. 328, 68 Am. St. Rep. 567, 73 N. W. 242, that recovery for seduction is not barred by reason of the promise of marriage which induced the connection being conditioned upon the begetting of a child as the result thereof. E. L. D.

then but a blunt offer of wedlock *in futuro* in exchange for sexual favors *in presenti*. *State v. Reeves*, 97 Mo. 668, 10 Am. St. Rep. 349, 10 S. W. 841, 8 Am. Crim. Rep. 698." The rule of the Michigan court was approved in Nebraska, where the statute provides that "any person over the age of eighteen years, who, under promise of marriage, shall have illicit carnal intercourse with any female of good repute for chastity shall be deemed guilty of seduction." *Russell v. State*, 77 Neb. 519, 110 N. W. 380, 15 Ann. Cas. 222.

With these distinctions in mind, the present case is not difficult of solution. The agreed statement, in substance, shows that when defendant, on the first occasion, made the suggestion, upon the refusal of complaining witness, the matter was dropped, without further argument or solicitation by defendant. When the second suggestion was made, complaining witness did not refuse, but demurred on the ground "that she was afraid something might happen," to which defendant replied "that there was no use of being afraid; that nothing would happen." Then complaining witness solicited and secured a promise from defendant that "he would marry her if anything did happen." If seduction were present in this case, and it were possible for the complaining witness to commit the crime, under these facts it would be difficult to determine which of the parties to this meretricious transaction was the seducer. We are unable to distinguish between a bargain of this sort and one where a virgin deliberately parts with her virtue for a money consideration. The parties were practically of equal age, both of the age of discretion, and it does not appear that they were lovers. Defendant was only a casual visitor to the house where the prosecuting witness resided. There is no evidence of his having practised any art or wile, deception or persuasion, to induce the prosecuting witness to yield to his desires. Hence, none of the elements enter into the transaction upon which the crime of seduction may be predicated. Where, as in this instance, a woman traffics away her chastity for no other consideration than a mere contingent promise of marriage procured by her solicitation as an indemnity against possible pregnancy, it is not seduction under any statute or rule of law with which we are familiar.

The learned counsel for defendant in a single sentence so skilfully marshals the law which distinguishes this case from the cases relied upon by the government that we feel constrained to adopt the following short paragraph from his brief: "Such a 'meretricious transaction' as this case presents, such a matter 'merely of barter,' 51 L.R.A.(N.S.)

which 'smacks too much of bargain and barter, and not enough of betrayal,' 'smacks too much of a corrupt and licentious bargain,' consisting only of a 'blunt offer of wedlock *in futuro* in exchange for sexual favors *in presenti*,' and conditioned upon ensuing pregnancy, does not constitute seduction; the law knows not such a thing as seduction on *de bene esse*, to be canceled by marriage *nunc pro tunc*."

It is urged by counsel for the government that the statute should be so construed as to make the carnal knowledge of any virtuous woman, between the ages of sixteen and twenty-one years seduction. We are not aware of a case where a similar statute has been so construed, and we perceive no sound reason why such a construction should be applied here. The object of the statute is to protect the chaste virgin against betrayal from an honest belief in the betrayer's protestations of love and affection, or an existing promise of marriage, or a present unqualified promise of marriage, as an inducement for the commission of the act. It is not intended as a shield for a lascivious barter and sale of chastity, either by a corrupt consideration or upon a promise of marriage contingent upon the possibility of pregnancy, which would, at most, be remote to the minds of the parties engaging in the immoral transaction.

The judgment is reversed, and the case remanded for a new trial.

MAINE SUPREME JUDICIAL COURT.

ANNIE CRANDALL ARNOLD

v.

MARCELLUS L. HUSSEY et al.

(111 Me. 224, 88 Atl. 724.)

Evidence — diary entries — admissibility.

1. Entries of temperature in a dairy kept by an individual since deceased, not a part of any employment or duty, are not admissible in evidence in actions between strangers.

Note. — Admissibility of entries in diary.

As to the scope and effect of statutes making competent entries, memoranda, and declarations of deceased persons, see *Walter v. Sperry*, 44 L.R.A.(N.S.) 28, and note.

This note deals with the admissibility of entries in diaries proper, as distinguished from account books, official records, memorandum books, or individual memoranda of particular transactions.

The general rule is that such entries are

Appeal — Inadmissible evidence — prejudice.

2. The admission in evidence of an entry of temperature in a private diary of a person since deceased, in an action to recover damages for injuries caused by a fall upon a ridge of ice on the sidewalk, is prejudicial.

(November 5, 1913.)

EXCEPTIONS by plaintiff to rulings of the Supreme Judicial Court for Piscataquis County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence, which resulted in a verdict in their favor. Sustained.

The facts are stated in the opinion.

Messrs. J. S. Williams and C. W. Hayes, for plaintiff:

Entries of deceased parties in no way connected with the parties to the suit are inadmissible where the entries were not made in the performance of some duty, official or otherwise, or in the regular performance of business pursued by the party making the entry.

2 Wigmore, Ev. § 1523; *Leask v. Hoagland*, 205 N. Y. 171, 98 N. E. 395, Ann. Cas. 1913D, 1199; *Kennedy v. Doyle*, 10 Allen,

inadmissible as evidence, though they may be used to refresh the memory of a witness, if, after such use, he can testify from an independent recollection of the matter.

Thus, in *Elliott v. Sheppard*, 179 Mo. 382, 78 S. W. 627, an entry by deceased in a diary kept by him, reciting what he did on a certain day, was held to be inadmissible to show that deceased was in a different state at the time a deed purporting to be signed by him was dated, the issue being the genuineness of the deed, there being no showing that the entry was made at the time and place it purported to have been made, the court saying: "Suppose he had made the statements to a third party, and this third party was offered as a witness to prove his statement, would it be contended seriously that this testimony would be competent? This diary does not belong to that class of documentary evidence which is admissible. It is not in the nature of a book account, which, upon showing that it was correctly kept, would render it admissible. It is merely a statement purporting to be made by Hamilton, and is of no more force or effect than if he had made such statements to some witness the day before he died. Again, it is inadmissible, because it falls within that class of testimony denominated self-serving statements."

In *Monarch Mfg. Co. v. Omaha, C. B. & S. R. Co.* 127 Iowa, 511, 103 N. W. 493, it was held that records of daily observations of the temperature and precipitation taken

161; *Beattie v. McMullen*, 82 Conn. 484, 74 Atl. 767; *Monarch Mfg. Co. v. Omaha, C. B. & S. R. Co.* 127 Iowa, 511, 103 N. W. 493; *Hutchins v. Berry*, 75 N. H. 416, 75 Atl. 650; *Amee v. Boston & M. R. Co.* 212 Mass. 421, 99 N. E. 168.

Messrs. Hudson & Hudson for defendants.

Spear, J., delivered the opinion of the court:

This case comes to the law court upon exceptions which are stated as follows: This is an action brought for the purpose of recovering against the defendants, as owners of the Braeburn Block, in Guilford, for negligence in so constructing and maintaining said block that the water from the roof was precipitated upon the sidewalk, wholly on the private property of the defendants, so that a ridge of ice naturally would be formed, and the plaintiff alleges actually was formed, on said walk in front of the postoffice which was in said building. Evidence was introduced which tended to show that a ridge of ice was formed in front of the said postoffice, and that the plaintiff, in the exercise of due care and in the prosecution of lawful business, stepped upon said ridge of ice and slipped,

voluntarily for the Department of Agriculture by a railroad depot agent, and not identified and verified by him, but produced by his successor, are inadmissible, not being admissible as records because not required to be kept, nor as private memoranda because not verified.

In *Mair v. Bassett*, 117 Mass. 356, entries by deceased in his diary, which at most were to the effect that he had made an agreement with defendant to take his note with certain mortgages and insurance policies as collateral, and had paid a certain sum on the agreement, which entries were not shown to be known to defendant, were held to be merely the declarations of deceased, and properly excluded as not competent to prove that defendant borrowed money from deceased and gave his note therefor.

In *Costello v. Crowell*, 139 Mass. 588, 2 N. E. 698, it was held that entries made by a person in his diary were not admissible in evidence after his death, the diary not being an account book, and having no weight beyond that of any memorandum in writing made by him.

In *Stabler v. Clark*, 155 Mich. 26, 118 N. W. 605, it is held that an entry made in a diary of daily events, of a certain payment, is not admissible in evidence, it not being used as an aid to the memory, and no claim being made that the witness did not have exact, independent memory of the narrated facts.

Entries by a lawyer in his diary as to

breaking her leg, which was the injury sued for.

1. The defendants introduced evidence which tended to deny the fact that there was any ice there at the time of the injury, and, for the purpose of showing that the weather on the afternoon of the day on which the accident happened was too warm for the formation of ice, offered to be read to the jury extracts from the diary of one James Ham. Evidence in regard to said diary was adduced by the defendants from their witness Ernest Ham, which is as follows:

Q. What is your residence?

A. Guilford.

Q. Your father's name?

A. James Ham.

Q. When did he die?

A. The 6th of November.

Q. Have you in your possession a record of the weather in his handwriting?

A. Yes, sir.

Q. Do you know that he kept a record of the weather there in Guilford village?

A. Yes, he always did.

Q. Will you let me see his book? I show defendants' Exhibit No. 1, and calling your attention to a page at the top of which are the words "Thermometer, Saturday, Jan.

21, 1911," and "weather," and to the handwriting directly thereunder, ask you if that is the handwriting of your father?

A. Yes, it is.

Mr. Hudson: We offer that.

Mr. Hayes: We object.

The Court: A private diary was it?

Mr. Hudson: Yes, your Honor.

The Court: Not kept as a part of any employment or duty?

Mr. Hudson: Simply a matter of custom.

The Court: Do you dare risk it?

Mr. Hudson: Yes, your Honor.

The Court: Admitted.

Mr. Hayes: Exception?

The Court: Certainly.

Q. Do you know how many times a day he took the temperature?

A. Twice a day, at 6 in the morning and 6 at night.

Mr. Hudson: "Saturday, Jan. 21, 1911, 10 above. Cloudy, S. W. P. M." S. W. means wind southwest. That was in the A. M. "P. M. 36 above."

The exceptions raise a question upon the competency of one class of hearsay evidence upon which the authorities are not in full accord. When a deceased person who is a stranger to the transaction has made entries in a book, which become relevant to

engagements for certain dates are inadmissible to show that he was not at a different place on those dates, though they could be used to refresh his memory as to such engagements, they being irrelevant when introduced as original entries. *Whitaker v. White*, 69 Hun, 258, 23 N. Y. Supp. 487.

Entries by a lawyer in his diaries relating to services rendered are to be regarded as self-serving declarations, and therefore clearly inadmissible in a suit by his executrix for fees for such services. *Burke v. Baker*, 188 N. Y. 561, 81 N. E. 1033, disapproving 111 App. Div. 422, 97 N. Y. Supp. 768, on this point, but affirming the decision generally.

The use of a diary to refresh the memory of a witness is illustrated by *Star Mills v. Bailey*, 140 Ky. 194, 140 Am. St. Rep. 370, 130 S. W. 1077, where a witness, with a diary kept by himself before him, was enabled to testify that he was not at a certain place on a certain date, and the court said: "While the diary is not evidence, it may be referred to by the witness to refresh his recollection as to where he was on a certain day, and if, when so refreshed, he could remember and say that he was not at the place testified to by the adversary witness, the testimony is not only relevant, but the circumstance indicates a carefulness of habit, and a ready and generally reliable means of refreshing the recollection."

And by *Burson v. Vogel*, 29 App. D. C. 388, writ of certiorari denied in 207 U. S. 51 L.R.A. (N.S.)

585, 52 L. ed. 352, 28 Sup. Ct. Rep. 254, in which it was held that a diary kept by a person for fifty years, and containing nothing to excite suspicion, was properly used by a plaintiff to refresh his memory as to dates in issue, and the fact that the diary was in shorthand would not effect its use, it appearing that an interpretation thereof could be made with sufficient certainty by one skilled in the method used.

An entry in a decedent's diary purporting to be the result of an examination of his account as shown by the books of a firm of which he was a member, some of which had been destroyed by fire, which was against his interest when made, was held to be admissible in *Miller v. McLean*, 31 Ohio C. C. 64.

In *Remick v. Rumery*, 69 N. H. 601, 45 Atl. 574, entries of items in plaintiff's diaries were held to be admissible as being his books of account.

And the fact that charges are entered in a diary, and not in the plaintiff's regular books of account, does not render them inadmissible where they are of the nature and form of original entries in a book account, rather than mere memoranda. *Gleason v. Kinney*, 65 Vt. 563, 27 Atl. 208.

If a diary is such a book or writing the production of which will be compelled by the court, it must be shown to contain something pertinent and material to the defense before the court will require that it be produced. *Dorris v. Morrisdale Coal Co.* 215 Pa. 638, 64 Atl. 855. R. L. S.

the proof of some fact in issue in the case on trial, such entries, with certain limitations, may be admitted in evidence, and although not made in the presence of the parties, and not directly concerning their transactions, yet they may be pertinent and even conclusive proof of coeval facts.

But just what the limitations are is where the authorities divide. Yet there seems to be but one qualification that differentiates the decisions. All agree that such entries, to become admissible, must be made "in the ordinary course of business." Some hold that they must also be made against the interest of the parties making them; others that this is not essential. Accordingly, the result to be reached is not whether this kind of testimony is competent, but what are the limitations to its admissibility as suggested, the important division of the courts upon the limitations is confined to the one question whether the entries must be against interest. But this limitation has been rejected by our court, as will appear below.

While no Maine cases are cited by plaintiff's counsel, yet the Maine reports, in several opinions, contain as comprehensive and satisfactory a solution of the question as we have been able to find. *Augusta v. Windsor*, 19 Me. 317, very early announced the rule on this subject in harmony with the leading cases of that time, confirmed by the weight of authority since, and consistent with both reason and authority now. The principle here enunciated for the government of the admission of this class of testimony is found in this language, adopted from *Nicholls v. Webb*, 8 Wheat. 337, 5 L. ed. 630: "We think it a safe principle: that memorandums made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done." In the next paragraph the opinion in terms rejects the limitation found in some states, that the entry must appear to have been made against the interest of the party making it, saying: "This court is not satisfied with the reasoning upon which that limitation was introduced, and does not feel obliged to adopt it."

With the statement of this rule, which has not been modified or repealed, we might well sustain the exceptions without further citation, but as no recent opinion, that we are aware of, has had occasion to discuss this precise question, where it was directly raised, and became the pivot upon which the decision of the case turned, it may be well to collate the few decisions that are found and note the different forms of expression in which the rule is announced. 51 L.R.A. (N.S.)

We have already referred to *Augusta v. Windsor* in 19 Me. The next case in which the point is considered is *Dow v. Sawyer*, 29 Me. 117, which uses this language: "Contemporaneous entries made by third persons in their own books in the ordinary course of business, the matter being within the knowledge of the party making the entry, and there being no apparent motive to pervert the fact, are received as original evidence." This case also holds that such entries may be received without extraneous proof, if, upon inspection of the books, they appear to have been fairly kept and contain entries respecting the matter in issue. The next case is *Oldtown v. Shapleigh*, found in 33 Me. 278, which states: "'A minute in writing made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances which render it probable that the fact occurred, is admissible in evidence.' And such a minute is competent 'where it is one of a chain or combination of facts, and the proof of one raises a presumption that another has taken place.'" See also cases cited. In *Lord v. Moore*, 37 Me. 208, it is stated this way: "To make such entries in books of a private character admissible, the books in which they are made must have been fairly and regularly kept, the entries must have been made by a deceased person whose duty it was to make them, or in the regular course of business, who had personal knowledge of the subject-matter entered, and whose situation was such as to exclude all presumption of his having any interest to misrepresent the fact recorded." See also *Pike v. Crehore*, 40 Me. 503. In *Wigmore on Evidence*, vol. 2, § 1523, the author says, relating to this class of testimony: "The first general requirement is that the entry must have been made in the regular course of business. The judicial phrasings of this requirement vary in terms. The entry must have been therefore in the way of business." In *Leask v. Hoagland*, 205 N. Y. 171, 98 N. E. 395, Ann. Cas. 1913D, 1199, is found this expression: "The reason for receiving statements in entries made in the course of business, as an exception to the rule [hearsay rule], is that they were made as a part of the regular work of one's livelihood or profession." In *Kennedy v. Doyle*, 10 Allen, 161, we find this conclusion: "In the United States the law is well settled that an entry made by a person in the ordinary course of his business or vocation, with no interest to misrepresent, before any controversy or question has arisen, and in a book produced from the proper custody, is competent evidence, after his death, of the facts thus

recorded." From these varied expressions of the rule, it seems to be well established that the entries of deceased persons in books kept by them, but not connected with the suit in question, and not made in the performance of any duty nor in the course of their own business, are inadmissible; and we fail to find any cases in which a contrary rule is declared. On the other hand, the cases are numerous where entries not made in accordance with the rule herein stated have been rejected.

While public records, kept in the discharge of public duties, when produced by the proper custodian, tending to prove the facts therein contained, are admissible, such as entries made in books kept by the weather bureau, this question is not here involved and requires no discussion.

It very clearly appears from the exceptions that the diary offered and admitted was a book of private memoranda, whose entries were not made by the owner in the performance of any duty nor in the regular course of his own business, and were therefore inadmissible.

It was argued that, even if the exceptions were sustainable, the admission of the entries in the book was not prejudicial. We are not able to concur in this view. The very question at issue was whether the weather conditions on the day in question were such as to congeal the water flowing from the roof of the building, and thus form the ridge of ice complained of, or whether the weather was so warm as to avoid the conclusion that ice could thus form.

Exceptions sustained.

MISSOURI SUPREME COURT. (In Banc.)

RE ASSESSMENT OF THE COLLATERAL INHERITANCE TAX IN THE ESTATE OF JAMES QUIRK, Deceased.

(— Mo. —, 165 S. W. 1062.)

Tax — inheritance — devise to nonresident charity.

An exception of property conveyed for some educational, charitable, or religious

Note. — Right of charitable, educational, or religious institution to exemption from taxation as affected by the geographical field of operation.

This is a continuation of note to Carter v. Whitcomb, 17 L.R.A.(N.S.) 733.

The following cases support the holding of RE QUIRK, that exemptions under tax laws in favor of charitable, educational, or religious institutions do not apply to for-

purpose exclusively, in a statute imposing an inheritance tax upon property in the state which shall pass by will or the intestate laws, does not extend to property conveyed to charitable institutions located in other states.

(Woodson, Bond, and Walker, JJ., dissent.)

(April 2, 1914.)

A PPEAL by the State from an order of the Circuit Court for Nodaway County reversing an order of the Probate Court assessing a tax on property passing to non-resident charities, in an action for the collection of the collateral inheritance taxes from the estate of James Quirk, deceased. Reversed.

The facts are stated in the opinion.

Messrs. John T. Barker, Attorney General, George Pat Wright, and F. C. Donnell, for appellant:

In order for the legislation to relieve any species of property from its proportion of taxation, such legislation should be so clear that there can be neither reasonable doubt nor controversy about its terms.

Riesterer v. Horton Land & Lumber Co. 160 Mo. 141, 61 S. W. 238; Beal, Cardinal Rules of Legal Interpretation, p. 232; State ex rel. Harvey v. Wright, 251 Mo. 325, 158 S. W. 828; Jefferys v. Boosey, 4 H. L. Cas. 815, 3 C. L. R. 625, 24 L. J. Exch. N. S. 81, 1 Jur. N. S. 615; Black, Interpretation of Laws, 2d ed. 107; Sutherland, Stat. Constr. § 513; 12 Am. & Eng. Enc. Law, 2d ed. 285, 292; Minet v. Leman, 20 Beav. 269, 24 L. J. Ch. N. S. 545, 1 Jur. N. S. 410, 3 Eq. Rep. 501, 3 Week. Rep. 359; State ex rel. Spillers v. Johnston, 214 Mo. 656, 21 L.R.A.(N.S.) 171, 113 S. W. 1083; State ex rel. Mt. Mora Cemetery Asso. v. Casey, 210 Mo. 235, 109 S. W. 1; Ford v. Delta & P. Land Co. 164 U. S. 662, 41 L. ed. 590, 17 Sup. Ct. Rep. 230; Fitterer v. Crawford, 157 Mo. 51, 50 L.R.A. 191, 57 S. W. 532.

Section 309, Rev. Stat. (Mo.) 1909, should be so construed as to exempt from taxation only such charitable, religious, or educational purposes as are to be carried out in the state of Missouri.

Riesterer v. Horton Land & Lumber Co. 160 Mo. 154, 61 S. W. 238; Re Prime, 136 N. Y. 347, 18 L.R.A. 713, 32 N. E. 1091; Re

eign corporations: Board of Education v. Illinois, 203 U. S. 553, 51 L. ed. 314, 27 Sup. Ct. Rep. 171, 8 Ann. Cas. 157 (devise of Chicago real estate by resident of Kentucky to Kentucky educational body. Illinois act excluding foreign corporations from exemption from inheritance tax in favor of property devised for educational or religious uses, held not invalid as class legislation); Re Tuigg, 2 Connolly, 633, 15 N. Y. Supp. 548 (a foreign society, corporation, or in-

Parker, No. 70,121, St. Louis City Cir Ct.; *Ross v. Kansas City*, St. J. & C. B. R. Co. 111 Mo. 18, 19 S. W. 541; *Re Speed*, 216 Ill. 23, 108 Am. St. Rep. 189, 74 N. E. 809, 203 U. S. 553, 51 L. ed. 314, 27 Sup. Ct. Rep. 171, 8 Ann. Cas. 157; *Alfred University v. Hancock*, 69 N. J. Eq. 470, 46 Atl. 178; *Re Hickok*, 78 Vt. 269, 62 Atl. 724, 6 Ann. Cas. 578; *Humphreys v. State*, 70 Ohio St. 67, 65 L.R.A. 776, 101 Am. St. Rep. 838, 70 N. E. 957, 1 Ann. Cas. 233; *Davis v. The Treasurer*, 208 Mass. 343, 94 N. E. 556; *People ex rel. Huck v. Western Seaman's Friend Soc.* 87 Ill. 249; *Carter v. Whitcomb*, 74 N. H. 482, 17 L.R.A. (N.S.) 733, 69 Atl. 779; *Venable v. Wabash Western R. Co.* 112 Mo. 103, 18 L.R.A. 68, 20 S. W. 493.

Respondents' point that where the language of a statute is clear, the intent of the general assembly must be found in the words of the statute, does not deprive the court of the right to determine the intent of the exemption in § 309.

Verdin v. St. Louis, 131 Mo. 163, 33 S. W. 480, 36 S. W. 52; *Riesterer v. Horton Land & Lumber Co.* 160 Mo. 141, 61 S. W. 238; *Herring v. Boston Iron Co.* 1 Gray, 134; 2 Am. & Eng. Enc. Law, 2d ed. 289; 26 Am. & Eng. Enc. Law, 2d ed. 601; *Black, Interpretation of Laws*, 2d ed. 180.

"That there is no presumption against exemption from special taxation" is neither

stitution is not entitled to the benefit of exemption from legacy tax, although exempt under the law of its organization and origin); *Davis v. The Treasurer*, 208 Mass. 343, 94 N. E. 556 (succession tax).

So, a foreign religious corporation is held in *Re Gopsill*, 77 N. J. Eq. 215, 77 Atl. 793, not exempt from the payment of the state collateral inheritance tax, under an amendment impliedly repealing an act exempting from such tax foreign as well as domestic charitable or religious corporations.

It was held in *Re Wolfe*, 23 Misc. 439, 52 N. Y. Supp. 415, that the American Baptist Publication Society, a foreign corporation, was not exempt from the state legacy tax under the statutory right to take, hold, and enjoy property in the state of New York by devise, bequest, gift, grant, or purchase.

A bequest, however, to the American Missionary Union (Boston, Massachusetts) was, in *Re Lyon*, 144 App. Div. 104, 128 N. Y. Supp. 1004, held not subject to a transfer tax, although incorporated in three different states, including that of New York, since the union was a distinct legal entity, and was made a domestic corporation by New York state laws. "Theoretically," said the court, "it may be said that there is a distinct legal entity in each of the three states; but the substance is the same in all. It is a single body possessing the franchises 51 L.R.A. (N.S.)

borne out by the weight of authority, nor, even if it were correct in law, would it justify the construction of the statute invoked by respondents.

Fitterer v. Crawford, 157 Mo. 51, 50 L.R.A. 191, 57 S. W. 532; *Ross, Inheritance Taxn.* 1912, §§ 131, 135; *Re Gopsill*, 77 N. J. Eq. 215, 77 Atl. 793; *Leavell v. Blades*, 237 Mo. 695, 141 S. W. 892; *Sutherland, Stat. Constr.* 2d ed. § 537; *Mullins v. Mt. St. Mary's Cemetery Assn.* 239 Mo. 689, 144 S. W. 109; *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684, 53 L.R.A. 921, 43 S. W. 115; *Lincoln, Inheritance Tax Law*, § 170.

And that, although exemptions of institutions and corporations are admittedly, under settled rules of construction, held to be those of the same state when not otherwise stated in the statute, yet the rule is different when religious, charitable, or educational purposes are the subject of exemption, is without merit.

Board of Education v. Illinois, 203 U. S. 553, 51 L. ed. 314, 27 Sup. Ct. Rep. 171, 8 Ann. Cas. 157; *Carter v. Whitcomb*, 74 N. H. 482, 17 L.R.A. (N.S.) 733, 69 Atl. 779; *Ross, Inheritance Taxn.* § 146.

Messrs. Ira K. Alderman and M. E. Ford, for respondent:

The rule of statutory construction is that statutes purporting to grant exemptions from general taxation are to be strictly construed against the claimant, and in favor

and privileges of a domestic corporation in three states. To say that the bequest is to a foreign corporation, merely because the testatrix named the place where its principal office is located, is to substitute form for substance. If she had distinctly said that she intended the bequest to go to the New York corporation, it would have gone into the same treasury, and have been disbursed in the same manner and by the same people."

So, it is stated in *State v. New York Yearly Meeting of Friends*, 61 N. J. Eq. 620, 48 Atl. 227, that a bequest to the New York Yearly Meeting of Friends is exempt from the payment of an inheritance tax under statute providing that all gifts, etc., to any Bible or tract society, religious institution, or church board not confined in their operations and benefactions to local or state purposes, but for the general good of the people interested therein, of the United States or of foreign lands, as the board of home and foreign missions of various church denominations, shall not be taxed under said act, whether said society, religious institution, or board aforesaid is organized under the laws of this state, or incorporated and organized under the laws of some other state, the New York Yearly Meeting of Friends being the general governing body of the Society of Friends, and having primary control over the missionary purposes and general benefactions of such minor

of the government, but special tax laws are to be construed strictly against the government, and most favorably to the taxpayer.

Dos Passos, *Inheritance Tax Law*, 2d ed. § 32, pp. 74, 75; 27 Am. & Eng. Enc. Law, 2d ed. 340, ¶ III.; Re Lambard, 88 Me. 587, 34 Atl. 530; Cooley, *Taxn.* 2d ed. 74.

No authority predicated on property tax can be applicable to case at bar, for the tax in question is not a property.

State ex rel. Fath v. Henderson, 160 Mo. 217, 60 S. W. 1093.

A succession tax is a special tax, and the rule is that special tax laws are to be considered strictly against the government, and favorably to the taxpayer.

Dos Passos, *Inheritance Tax Law*, 2d ed. § 32, pp. 74, 75; Re Lambard, 88 Me. 587, 34 Atl. 530; 27 Am. & Eng. Enc. Law, 340; Hooper v. Bradford, 178 Mass. 95, 59 N. E. 678; Re Fayerweather, 143 N. Y. 114, 38 N. E. 278; Cooley, *Taxn.* 2d ed. 205; Tucker v. Ferguson, 22 Wall. 527, 22 L. ed. 805; Re Enston (People v. Sherwood) 113 N. Y. 174, 3 L.R.A. 464, 21 N. E. 87.

The inheritance tax law of this state is not a property tax, but is a proper succession tax, and authorities bearing on general or property taxation do not control.

State ex rel. Fath v. Henderson, 160 Mo. 215, 60 S. W. 1093.

The rule of presumption is in favor of the constitutionality of a statute, and, in ac-

cordance therewith, when a statute is susceptible of two constructions, one of which supports the act and gives to it effect, and the other renders it unconstitutional and void, the former will be adopted.

26 Am. & Eng. Enc. Law, 2d ed. 640; State ex rel. Maggard v. Pond, 93 Mo. 606, 6 S. W. 469.

Mr. Frederick N. Judson, *amicus curiae*:

The presumption against exemption from taxation has no application at all in the case of inheritance or other special taxation.

Eidman v. Martinez, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; English v. Crenshaw, 120 Tenn. 531, 17 L.R.A. (N.S.) 753, 127 Am. St. Rep. 1025, 110 S. W. 210; 27 Cyc. 340; Morrow v. Smith, 145 Iowa, 514, 26 L.R.A. (N.S.) 696, 124 N. W. 316, Ann. Cas. 1912A, 1183; Re Spangler, 148 Iowa, 333, 127 N. W. 625; General Assembly v. Gratz, 139 Pa. 497, 20 Atl. 1041; Re Mergentime, 129 App. Div. 367, 113 N. Y. Supp. 948, affirmed in 195 N. Y. 572, 88 N. E. 1125; Re Enston (People v. Sherwood) 113 N. Y. 174, 3 L.R.A. 464, 21 N. E. 87; Re Starbuck, 63 Misc. 156, 116 N. Y. Supp. 1030; Re Graves, 242 Ill. 23, 24 L.R.A. (N.S.) 283, 134 Am. St. Rep. 302, 89 N. E. 672, 17 Ann. Cas. 137; Re Crawford, 148 Iowa, 60, 126 N. W. 774, Ann. Cas.

bodies as act by its authority, also its field of operation not being confined to the state of New York.

So, while a legacy to or for the Salvation Army, or other religious or charitable institutions organized under the corporation laws of another state, is not exempted from the inheritance tax of Iowa, a gift or bequest to a branch of such a society, in the nature of a trust to be expended within the state for purely local benefit and local purposes, may be held exempt. Re Crawford, 148 Iowa, 60, 126 N. W. 774, Ann. Cas. 1912B, 992.

So, legacies to the Baptist Convention, a corporation with powers broad enough to authorize the use of its funds in the promotion of religious and charitable objects in other states and countries, are not subject to the New Hampshire inheritance tax, where the charity of the convention is of substantial benefit to the people of that state, within the intent of the statute exempting such property from the tax mentioned. Carter v. Story, 76 N. H. 34, 78 Atl. 1072.

Re Jones, 73 N. J. Eq. 353, 67 Atl. 1035, is set out in note in 17 L.R.A. (N.S.) 734, and is affirmed without opinion in 74 N. J. Eq. 447, 70 Atl. 1101.

The fact that a domestic charitable institution expends, for charitable purposes without the commonwealth, part of a fund to which it has succeeded, does not deprive it of the benefit of the statute exempting §1 L.R.A. (N.S.)

charitable institutions within the state from the payment of a collateral inheritance tax. Balch v. Shaw, 174 Mass. 144, 54 N. E. 490.

But, distinguishing Balch v. Shaw, supra, it is held in Pierce v. Stevens, 205 Mass. 219, 91 N. E. 319, that a residuum devised and bequeathed to trustees, the net income of which was to be paid to the board of managers of free schools for girls in a foreign country for a certain period, is not exempt from payment of an inheritance tax, because such trustees had, by the exercise of a discretionary power under the will, formed a corporation for the purpose of so administering the trust. "It is contended by the corporation," said the court, "that it is a charitable and educational institution whose property is by law exempt from taxation, and that therefore no tax can be collected upon the property that passed to it from the trustees under the will. If the corporation had been in existence when the will took effect, and if the will had passed the property from the testator's estate directly to it, there would be strong grounds for its contention. . . . There is no ground for a contention that, by electing to form a charitable corporation under the laws of Massachusetts, instead of forming a corporation in some other state or country, or not forming a corporation at all, they could relieve the property from liability to taxation, or affect the rights of the commonwealth in any way." J. D. C.

1912B, 992; *Blackmore & B. Inheritance Taxn.* § 241.

The exemption in the Missouri inheritance taxation statute, of devises made for educational, charitable, or religious purposes, is sharply and intentionally distinguished from the statutes in other states, where the exemption is made of "institutions" or "corporations," which, under settled rules of construction, are held to be those of the same state when not otherwise stated in the statute.

Re Prime, 136 N. Y. 347, 18 L.R.A. 713, 32 N. E. 1091; *Humphreys v. State*, 70 Ohio St. 67, 65 L.R.A. 776, 101 Am. St. Rep. 888, 70 N. E. 957, 1 Ann. Cas. 233; *Minot v. Winthrop*, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512; Re Balleis, 144 N. Y. 132, 38 N. E. 1007; Re Palmer, 33 App. Div. 307, 53 N. Y. Supp. 847, affirmed in 158 N. Y. 669, 52 N. E. 1125; Re Speed, 216 Ill. 23, 108 Am. St. Rep. 189, 74 N. E. 809, affirmed in 203 U. S. 553, 51 L. ed. 314, 27 Sup. Ct. Rep. 171, 8 Ann. Cas. 157.

The bishop of Peoria, Illinois, was exempt from the payment of this tax.

Knight v. Rawlings, 205 Mo. 412, 13 L.R.A.(N.S.) 212, 104 S. W. 38, 12 Ann. Cas. 325; *State ex rel. Guion v. Miles*, 210 Mo. 127, 109 S. W. 595; *State v. Conway*, 241, Mo. 288, 145 S. W. 441.

Graves, J., delivered the opinion of the of the court:

This action arose in the probate court of Nodaway county, and is one wherein it is sought to collect certain collateral inheritance taxes from the estate of James Quirk, deceased. The case involves the construction of the exemption clause of § 299 of article 16 of chapter 1, Rev. Stat. 1899. The case in both the probate and the circuit court of Nodaway county was tried upon the following agreed statement of facts:

Agreed statement of facts.

It is agreed by and between the parties hereto that the facts in the above cause are as follows: That James Quirk, prior to and at the time of his death, was a resident of the state of Illinois; that he died testate on the 13th day of November, 1906, seised of a three-fourths interest in fee in the following described real estate, lying, being, and situated in the county of Nodaway, in the state of Missouri, to wit: An undivided three-fourths interest in and to the north half of the southeast quarter of section ten (10), in township sixty-three (63) north, of range thirty-six (36) west of the principal meridian, in Nodaway county, Missouri; that by the last will and testament §1 L.R.A.(N.S.)

of the said James Quirk, dated the 18th day of November, 1902, he bequeathed and devised to Mary Quirk, his sister, also a resident at all times herein mentioned of the state of Illinois, the use, rents, income, and profits of all his estate, both real and personal, including the above lands, so long as she should live; that all the remainder of his estate, including the above lands, both real and personal, which should be left after the death of his said sister, Mary Quirk, and after paying the legacies therein mentioned and expenses of administration, he directed his executors, named in said will, to convert into money, and to pay the same over to the bishop of Peoria, Illinois, the same to be used by him for the use and benefit of the Church of the Visitation of Kewanee, Illinois, and the Dominican Sisters School of Kewanee, Illinois, as he might deem best, and he, the said James Quirk, by his said last will, bequeathed the said remainder of his estate so converted into money to the said bishop of Peoria, Illinois, in trust for such use and purposes; that on the 5th day of August, 1907, the said Mary Quirk died; that, on the death of said Mary Quirk, all the rest and residue of the property of James Quirk, including the lands above, when converted into money by his executors, and after paying legacies and expenses of administration, passed to and vested in the bishop of Peoria, Illinois, in trust for the uses and benefit of the Church of the Visitation of Kewanee, Illinois, and the Dominican Sisters School of Kewanee, Illinois; that on the 18th day of May, 1908, Joseph Jackson, Sr., a resident of the city of Maryville, Nodaway county, Missouri, was, by the probate court of Nodaway county, Missouri, duly appointed as administrator with will annexed, of the estate of said James Quirk, in Nodaway county, in the state of Missouri; that said Joseph Jackson, Sr., as such administrator, under the powers and terms of the will of said James Quirk, sold the lands above described for the sum of \$6,400; that the interest in the same of the said James Quirk amounted to three fourths of said sum, or \$4,800; that sum was and is the fair market value of said lands; that the debts and legacies of said estate have all been paid except expenses of administration, which amount to \$550, and which amount said administrator now retains in his hands; that the said Joseph Jackson, Sr., as such administrator of said estate, has paid to the bishop of Peoria, Illinois, the sum of \$4,250. It is further agreed that the bishop of Peoria is not a resident of the state of Missouri, but is a resident of the state of Illinois; that the Church of the Visitation and the Dominican Sisters School are educational, charitable, and

religious institutions exclusively devoted to such purposes in the state of Illinois; that said Church of the Visitation and the Dominican Sisters School are located in the city of Kewanee, in the state of Illinois. It is further agreed that if the court decides that said bequests to said Church of the Visitation and Dominican Sisters School are liable to pay a collateral inheritance tax, that the amount of such tax is \$212.50, and penalties of \$55.25.

William Earl Wiles,
Prosecuting Attorney.

Ira K. Alderman, Attorney for Bishop of
Peoria, Illinois, and Joseph Jackson, Sr.,
Administrator.

Upon these facts the probate court found that the property was not exempt from the collateral inheritance tax, and the administrator appealed to the circuit court. The circuit court found that it was exempt, and reversed the judgment of the probate court, and, from that judgment, the opposing parties have appealed, and invoke the judgment of this court. The case is one purely of law.

I. At the institution of this suit, the statute involved was § 299, Rev. Stat. 1899. The statute has not been amended, and is now § 309, Rev. Stat. 1909. The statute so far as material reads: "All property which shall pass by will, or by the intestate laws of this state from any person who may die seized or possessed of the same while a resident of this state, or, if decedent was not a resident of this state, at the time of death, with property or any part thereof shall be within this state, or any interest therein or income therefrom, which shall be transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, bargainer, vendor or donor, to any person or persons, or to any body politic or corporate, either directly or in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled in possession or expectancy, to any property or the income thereof, other than to or for the use of the father, mother, husband, wife, legally adopted children, or direct lineal descendant of the testator, intestate, grantor, bargainer, vendor or donor, *except property conveyed for some educational, charitable or religious purpose exclusively*, shall be and is subject to the payment of a collateral inheritance tax of \$5 for each and every \$100 of the clear market value of such property."

We have italicized the clause which is the crux of this case. Under the agreed facts, the beneficiaries of the fund bequeathed by James Quirk are educational

and religious organizations, and the funds go to educational and religious purposes. The only question is whether it was the intent of our law to grant a tax exemption for charities located outside of Missouri. Differently stated, did the Missouri legislature intend this exemption clause of our statute to apply to all charities wherever located, or was it the intent to have it apply only to resident charities? We use the word "charities" to cover all the exempted subjects named in the statute. We have concluded that the legislative intent was to make this exemption apply to Missouri "charities" alone, and for reasons which follow.

II. The following rules of statutory construction are invoked by the respondents: First, it is said that, where the language of the statute is clear and unambiguous, the intent of the general assembly must be found in the statute; secondly, that there is no presumption against exemption from special taxation, and that the rule of presumption against tax exemptions in general taxation has no application to this case; thirdly, it is contended that, by the use of the words "educational, charitable, or religious purposes," the legislature meant to make our law different from the laws of other states, wherein the exemption is extended to "institutions" or "corporations;" in other words, the word "purposes" is emphasized by respondents as having a peculiar and saving grace in our statute; and, fourthly, it is conceded that the legislative power of the state is limited to persons or property within the state, but it is averred that such principle has no application to the case at bar, "where it is sought by judicial construction to limit by taxation the right of a citizen of another state to exercise his charitable disposition over his property for the benefit of the institutions in his own home."

We are not prepared to say that the statute is so plain in terms as not to require judicial construction as to the legislative intent. From statements in the briefs, and in oral arguments, it appears that the circuit courts of the state have not been of one voice in the construction of the statute. In most instances such courts have held that it is not the legislative intent to exempt foreign charities, or charities outside of the state. In the case at bar the learned circuit judge took a different view, and in so doing was opposed in judgment to some of his fellow circuit judges of the state, as well as the probate judge of his county. When the limits and bounds of legislative acts are considered, it is by no means clear what was intended by the act in question. The words used must be considered from all the surroundings. But this matter we dis-

cuss later. Suffice it to now say that we believe the wording of the statute is such as to call for judicial determination of the legislative intent as to the subjects of exemption, and on this theory we shall proceed.

III. We do not deem it material to discuss the question as to whether or not the general presumption against exemption from taxation applies to this kind of a case. That presumption is one valuable in the trial of cases, because it forces those claiming the exemption to show that the property sought to be exempt clearly falls within the exempted class. But, if we find that the legislative intent in the instant law was not to extend the exemption to "charities" outside of the state, then there is an end to this controversy, and the reasoning as to whether or not the presumption as to exemptions applicable in general taxes applies to this case is but a side question, upon which there is learning upon both sides. If the law is one requiring judicial construction as to the legislative intent, as we hold, then a determination of that question will forego all other questions.

The basic principle of all statutory construction is the legislative intent. This is true whether such intent must be drawn from the words of the act, or whether we go to extrinsic aids to find the intent. Black, *Interpretation of Laws*, 2d ed. p. 180; *Verdin v. St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; *Sedalia ex rel. Taylor v. Smith*, 206 Mo. loc. cit. 361, 104 S. W. 15; *Perry v. Strawbridge*, 209 Mo. 621, 16 L.R.A.(N.S.) 244, 123 Am. St. Rep. 510, 108 S. W. 641, 14 Ann. Cas. 92; *Decker v. Diemer*, 229 Mo. 296, 129 S. W. 936. So, at the very threshold of all statutory construction we are met with the paramount question: "What was the legislative intent?" If no ambiguity appears, the courts go to the language of the law itself. If there is an ambiguity or uncertainty, then extrinsic aid may be used in determining the meaning, and these are various. *Sedalia ex rel. Taylor v. Smith*, supra. In getting at the legislative intent, one of the prime considerations is the condition of the law at the time the new law was enacted, because words general in meaning are often used in legislative acts, because the lawmaking power knows that such broad general meaning is curtailed and limited by general laws, rules of law, or public policies. To these we must oftentimes go to gather the real intent. As stated, one of the things always in the mind of the legislative body is that their language will be construed in the light of existing laws, rules of law, and public policies, and this, perhaps, accounts for the use of many general terms, rather than more limited ones. 51 L.R.A.(N.S.)

To start with, in this case it must be presumed that the general assembly, in passing this law, and making this exception, did so relying upon the fact that it would be interpreted in the light of existing law. One of the fundamental principles of the then existing law was that a statute would prima facie be declared to be operative only as to persons and things within the territorial jurisdiction of the lawmaking power which enacted it. In the very recent case of *State ex rel. Harvey v. Wright*, 251 Mo. 325, 158 S. W. loc. cit. 828, our brother Faris has well stated the rule: "Besides this *reductio ad absurdum*, which would seem to settle this contention, certain presumptions confine us to our own state. 'A statute is prima facie confined in its operation to persons and conditions within the territorial jurisdiction of the legislature.' Beal, *Cardinal Rules of Legal Interpretation*, p. 232. 'Prima facie every statute is confined in its operation to the person's property rights or contract which are within the territorial jurisdiction of the legislature which enacted it.' *Sutherland, Stat. Constr.* 513. We elect to our offices our own citizens of our own state under the provisions of our own laws. We never elect by direct suffrage a citizen of another state to any office; these are the elections at which the election commissioners act, and the elections which they are required to hold. We conclude, then, that it is too clear for argument that by the 'leading party politically opposed to that to which the governor belongs' is meant the 'leading party' in this state." In that case we were called upon to determine what was meant by the general term "leading party politically opposed to the governor." It was urged that we should give the phrase such a meaning as to say that the strongest party, nationally speaking, which was opposed to the political principles advocated by the governor, was the "leading party," within the meaning of the act then under consideration. This we declined to do, because of the general existing law which confined all laws to persons and things in the state. The same doctrine should apply here. We should say that the legislature, in using the general terms "some educational, charitable, or religious purpose exclusively," had reference to such charities as were within the territorial limits of the lawmaking power.

In other words, the general doctrine seems to be that prima facie the law should be held to have reference to persons and things within the territorial jurisdiction of the body enacting it, unless it clearly appears that another and different purpose should be gathered from the act itself. Presumptively the lawmaking power is acting

in the interest of persons and things within the state. Presumptively the lawmakers in this case were looking after the interests of Missouri, and not legislating for charities in other states, and especially is this so when they were unloosing our own purse strings by this exemption clause. It means, if given the construction urged by the respondent, that a Missouri lawmaking body was releasing its hold upon a source of revenue for charities outside of the state. To give it that construction would, in effect, be to say that the lawmaking body was taking Missouri money to support foreign charities.

In *Ross on Inheritance Taxation*, § 146, it is said: "It has been contended that the exemption of charitable institutions from inheritance taxation applies to all such institutions, regardless of their location within or without the state granting the exemption, for, it is argued, the exemption is in recognition of the beneficent purpose of these institutions, and, inasmuch as the purpose is common to them all, wherever located, the exemption should be universal. But the courts have not yielded to this argument. They have held, with unanimity, it is believed, that, in the absence of any language plainly indicative of a different intent, the legislature must be deemed to have made the exception for the benefit of its own institutions only, and that foreign corporations, or institutions without the state, must pay the inheritance tax, although exempt in the state of their domicil, and although some of their charitable work and enterprises are carried on within the state enforcing payment of the tax."

So, too, as said by Andrews, Ch. J., in *Re Prime*, 136 N. Y. loc. cit. 362, 18 L.R.A. 713, 32 N. E. 1095: "It is the policy of society to encourage benevolence and charity; but it is not the proper function of a state to go outside of its own limits and devote its resources to support the cause of religion, education, or missions for the benefit of mankind at large. The argument may have force that the state might, consistently with its proper function, give immunity from taxation to some of the foreign corporations engaged in the work of education or charity. But, however this may be, we are convinced that the statute of 1891 has no application to foreign corporations, and, having reached that conclusion, our duty is ended."

Again, in *Carter v. Whitecomb*, 74 N. H. loc. cit. 489, 17 L.R.A.(N.S.) 733, 69 Atl. 784, it is said: "When, however, an auxiliary body like the Auxiliary of the Woman's Foreign Missionary Society, though connected with a local church and existing within the jurisdiction as an association, seeks as its principal object 'the

evangelization of heathen women' and the raising of funds for that purpose alone, it is difficult to discover how the public represented by the people of this state is benefited by the supposed benevolence. Even if there are 'heathen women' in our midst, this society can do nothing for their enlightenment and civilization; for, as found in the case, none of its funds 'are or can be devoted to charitable objects within the state of New Hampshire.' Its money may be sent, and presumably the principal part of it is sent, to assist in the conversion of people living in remote parts of the earth, from their native religion to that of Christianity. The expenditure of large sums of money for the enlightenment upon religious subjects of the natives of the antipodes evidently was not one of the objects the legislature intended to encourage when, in 1895, the property of charitable associations 'devoted exclusively to the uses and purposes of public charity' was exempted from taxation, or when, in 1905, legacies to such associations 'in this state' were exempted from inheritance tax. The benefit to the public of this state of such a trust is so visionary, problematical, and uncertain that it cannot be deemed for the purposes of this case a public charity, without imputing to the legislature motives which it is reasonably certain they did not entertain. The state is not itself a charitable institution, and does not authorize its representatives to expend the public money, by exemptions from taxation or otherwise, for purposes having little or no relation to the welfare of the inhabitants of the state. The purpose of such laws is the acquisition of some supposed public advantage. Opinion of Justices, 58 N. H. 623; *Perry v. Keene*, 56 N. H. 514. If it is impossible to see how the public good of the state is promoted by a claimed exemption from the tax burden, it cannot be inferred that the legislature intended such a result from language which does not necessarily require such a construction. 'If a statute is capable of two meanings, and one is more reasonable, and therefore more probable, than the other, this fact is necessarily considered, with all other competent evidence, on the question of intent. The evidence of intention may include various inherent probabilities and the probative force of many circumstances, as well as the literal sense of the words used. When the meaning is found by giving due weight to everything that legally tends to prove it, it is not a matter of discretion whether it shall be adopted or rejected. If the evidence establishes the fact that the literal sense is not the true sense, a literal construction would be an alteration of the

law.' Opinion of Justices, 66 N. H. 629, 651, 33 Atl. 1076."

And, further, at page 491 of 74 N. H., in the same case it is said: "As a matter of practice, it has devoted substantially all its funds to the support of charities outside of New Hampshire, and presumably it will continue that practice. If its object was to maintain an orphans' home or a hospital for poor people on the Pacific coast, and all its resources were devoted to that purpose, the public benefit of such a charity in New Hampshire would not be apparent. Perhaps it would be no more evident than the maintenance of missions in China. *Its relation to the public interests of this state, which alone the legislature is ordinarily presumed to have in view, would be so slight, arising merely from a general community of interstate interests, that it is not probable such a charity would be the object of legislative bounty and encouragement. Nor should we expect to find the lawmakers exempting from the common burden of taxation a society whose purpose is, as established by long practice, to use its funds exclusively in the promotion of charities in other states.* If some substantial local benefit accrues of a public nature by the actual use of some of its funds for charitable purposes in this state, it might be found that it was included within the exemption, though it used the balance of its funds in other jurisdictions. Balch v. Shaw, 174 Mass. 144, 54 N. E. 490. The question would be whether its charity was of such a character and so administered as to be of any substantial benefit or advantage to the public of this state; and this would be principally a question of fact, to be determined upon competent evidence." (The italics are ours.)

Quite a number of cases are cited by Ross in his work on Inheritance Taxation, supra, but these suffice to illustrate the rule and the reasons of the rule. There is no deep-seated meaning in the use of the word "purposes" in our act which can avail the respondents.

Under the great weight of the case law, we are constrained to hold that it was not the legislative intent, by the exemption clause of our statute, to include property conveyed for educational, charitable, or religious purposes outside of this state. In this view of the law, other questions are immaterial.

From this it follows that the property in question is subject to a collateral inheritance tax, under § 309, Rev. Stat. 1909, and the circuit court was wrong in holding *contra*.

The judgment is reversed, and the cause 51 L.R.A.(N.S.)

remanded, to be proceeded with in accordance with this opinion.

All concur, except Woodson, Bond, and Walker, JJ., who dissent in an opinion by Walker, J.

Walker, J., dissenting:

I do not concur in the majority opinion. The statute (§ 299, Rev. Stat. 1899, now § 309, Rev. Stat. 1909) is general in its terms, and unmistakable in its meaning. Under its provisions, property which passes by deed, grant, bargain, sale, or gift to other than the father, mother, husband, wife, or natural or adopted children, is subject to the collateral inheritance tax, except when conveyed for educational, charitable, or religious purposes. These clear and definite provisions do not, in my opinion, require adventitious aid in their interpretation. There is no indication that the exemption of the property conveyed for the purposes mentioned was to be limited to that bequeathed to benevolences located within the state. If the terms of the statute demanded a liberal interpretation, it certainly should be given when the purpose of the exemption is beneficent in its nature; but the terms of the statute are broad and clear enough in themselves without recourse to any rule in regard to liberal interpretation. The framers of the law, having in view the encouragement of bequests and grants for the general good, did not intend that the statute should be limited to geographical lines; and it is immaterial whether the property granted or bequeathed passes to an institution within the borders of Missouri, or to one in a sister state or a foreign country; it is the purpose of the grant which the legislature had in mind, and not the location of the benevolence to be aided. If I am correct in my conclusion, then it is necessary, before the statute can be construed as it has been by the majority, for these words, "within the state of Missouri," to be inserted after the exceptions in the statute, so that the same shall read as follows: "except property conveyed for educational, charitable, or religious purposes exclusively within the state of Missouri." Under no rule of construction with which I am familiar is this interpolation authorized.

A tax, under any view that may be taken of it, is a burden; an express statute is necessary to authorize its imposition; here, instead of such a statute, we have an express exemption. Under this state of facts, I am of the opinion that the taxation of the property specified as exempt under § 309, supra, is unauthorized.

So much for the grounds of my difference

with my Brethren as to the rules of construction applicable to this statute.

Woodson and Bond, JJ., concur herein.

Petition for rehearing denied April 13, 1914.

DISTRICT OF COLUMBIA COURT OF APPEALS.

THOMAS J. KEMP, Appt.,
v.

UNITED STATES OF AMERICA.

(41 App. D. C. 539.)

Postoffice — nonmailable letter — interpretation — consideration of one which it answers.

1. To determine whether or not a letter deposited in the mail violates the statute forbidding the mailing of any letter giving

Note. — Instigation or consent to crime for the purpose of detecting criminal as a defense to prosecution.

This note is supplementary to the notes to Connor v. People, 25 L.R.A. 341; Com. v. Hollister, 25 L.R.A. 349; and State v. Smith, 30 L.R.A. (N.S.) 946, and contains only the cases decided since the time of the preparation of the last of these notes.

Illegal sale of liquor.

Supplementing note in 30 L.R.A. (N.S.) 946.

"Decoys are permissible to entrap criminals, but not to create them; to present opportunity to those having intent to or willing to commit crime, but not to ensnare the law-abiding in unconscious offending." United States v. Healy, 202 Fed. 349.

So, it is no defense to a charge of selling intoxicating liquors in violation of the law, that the purchases were made by persons seeking to ascertain if the accused was engaged in the unlawful sale of such liquors. State v. Spiker, 88 Kan. 644, 129 Pac. 195.

And it is no bar to a prosecution for selling intoxicating liquors without a license, that the sale was made to two police officers of the prosecuting city, who went to the defendant's store and asked to purchase the liquors for the express purpose of obtaining evidence that the defendant was selling intoxicating liquors there. Salt Lake City v. Robinson, 40 Utah, 448, 125 Pac. 657. The court said: "While it may be conceded that the particular sale in question here would not have been made if the two officers had not asked to purchase the liquor, yet in view of the facts and circumstances the appellant was no more induced to make this sale than he would be induced to make any sale in his place of business. Moreover, the sale in question was seeming-

information as to where or by whom an abortion would be performed, it may be interpreted in the light of the one to which it is an answer.

Evidence — as to nonmailable character of letter.

2. Upon the question whether or not a letter deposited in the mail gives information prohibited by statute, evidence is admissible of an interview with the sender by one supposed by him to have appeared in response to it.

Same — decoy — information leading to.

3. In a prosecution for depositing in the mail a letter containing information as to where an abortion would be performed, in violation of statute, in answer to a decoy letter sent by a detective, the information upon which the detective acted is immaterial, as well as his motive in sending the decoy, if it was not to induce the commission of a crime.

Postoffice — sending nonmailable letter — decoy — effect.

4. It is no defense to a prosecution for

ly only one of many that appellant was prepared to make. . . . It was not the purpose of the officers to induce the appellant to make a sale for the sole purpose of convicting him of making that sale, but it seems their object was to obtain evidence from which it was made manifest that appellant was engaged in the illegal traffic of intoxicating liquors, and that they desired to break up such traffic. As public officers who, under their oaths, were required to enforce the ordinances of the city, we cannot see wherein they offended against public policy or against good morals in seeking to obtain evidence against a willing offender against the law for the purposes aforesaid."

And in State v. Hopkins, 154 N. C. 622, 70 S. E. 394, following State v. Smith, annotated in 30 L.R.A. (N.S.) 946, it was held to be no defense to a prosecution for illegally selling liquor, that a policeman, to catch the defendant in the act of violating the law, procured another person to go to the defendant's house to purchase whisky, and gave him a marked dollar bill to pay for it, and went with him and overheard the conversation between him and the defendant at the time of the sale in question.

But in a prosecution for an unlawful sale of intoxicating liquor to an Indian, although there was suspicion that the defendant was making like unlawful sales, a conviction is unjust and contrary to public policy, and should be set aside, where the sale in question was solicited from the defendant by an Indian who was in the service of government officers as a decoy, and the defendant was ignorant that the purchaser was an Indian, and nothing in the latter's dress, speech, manner, or appearance served to put him on inquiry as to that fact. United States v. Healy, supra. The court said: "Where a statute, as here, makes an act a crime regardless of the ac-

mailing a letter containing information as to where an abortion would be performed, contrary to statute, that it was sent in response to a decoy letter of a detective who wrote under an assumed name.

Appeal — refusal to permit recall of witness — immateriality of evidence.

5. Whether or not one mailing a letter giving information as to where an abortion would be performed, contrary to statute, had a physician's sign on his office, is immaterial, and it is not error to refuse to permit a witness to be recalled for cross-examination on that question.

Indictment — variance — materiality.

6. The variance between purported language of a letter alleged to have been unlawfully deposited in the mail, set out in

the indictment as "and have to say here one week," and the letter itself as offered in evidence, "& would have to stay here one week," is immaterial.

(March 2, 1914.)

A PPEAL by defendant from a judgment of the Supreme Court convicting him of sending a letter through the mails containing forbidden information, in violation of statute. Affirmed.

The facts are stated in the opinion.

Messrs. John E. Laskey and A. S. Worthington, for appellant:

The admission in evidence by the court below, of the defendant's reply to the

ed of voluntary like sales does not justify entrapping as here; for thereby a law-abiding person may as easily be ensnared. And the result proves nothing but overzeal, to put it mildly, of government officers. The practice cannot be tolerated, and a conviction for an offense so procured cannot stand."

So, in *Smith v. State*, 61 Tex. Crim. Rep. 328, 135 S. W. 154, reversing, apparently on other grounds, a conviction of violating the local option law, which had been obtained largely upon the testimony of a witness who had been employed by the sheriff as a detective in local option matters, the court said: "In regard to this phase of the bill, we desire to say the state's case was made by the hired detective, who worked up cases, and in this case developed the fact that he had induced the appellant to secure the whisky for him with a view and for the purpose of instituting this very prosecution. In every case . . . [the detective] had induced the violation of law to which he testified. This manner of instituting prosecutions against the citizenship of the state, and inducing them to commit crime, is to be deplored. While it is eminently proper that officers should be diligent in ferreting out crime and violations of the law, yet it does not occur to us that the theory of our law is predicated upon the idea that parties should be induced to violate the law in order that a prosecution may be brought about. The machinery of the state should be put into operation to detect and punish crime, but not to organize and institute it. The prevention of crime is one of the main purposes of our law, not its encouragement or propagation."

And in *Scott v. State*, — Tex. Crim. Rep. —, 153 S. W. 871, also reversing on another ground a conviction of violating the local option law, the court said: "The writer has had occasion heretofore to criticize the character and manner of inducing men to commit crime as is evidenced by this record. This witness [the main witness for the prosecution] testifies, and is not controverted or contradicted, that the sheriff agreed to give him \$10 for each case he would 'turn in,' and additional money or compensation if a conviction should oc-

or's intent or knowledge, ignorance of fact is no excuse if the act be done voluntarily; but when done upon solicitation by the government's instrument to that end, ignorance of fact stamps the act as involuntary, and excuses, or at least estops the government, from a conviction. In the former case the actor is bound to know the facts, and acts at his peril. In the latter case he is relieved of the obligation by the government's invitation, which is of the nature of fraudulent concealment and deceit, and, if not consent, yet doth work an estoppel. Though the seller has violated the statute, he was the passive instrument of the government, and his is a blameless wrong for which he cannot be justly convicted. If, however, the decoy is one whose appearance, or otherwise, conveys knowledge of his disability, or is sufficient to put the seller on inquiry, any sale made is voluntary, establishes guilt, and warrants conviction. For in such case the seller is either of guilty intent, or negligent ignorance or recklessness, which relieves the government's participation of any taint of fraudulent concealment or deceit. It will be observed the case at bar is not of those where the actor knows his act violates the law. Of the latter is he who, on solicitation, sells or passes money known to him to be counterfeit, or he who thus mails prohibited matter, or he who thus sells intoxicants without a license or in 'dry' territory. These latter acts are criminal, let the status of the solicitor be what it may; and hence that he is a decoy does not neutralize the criminal quality of the act. In the case at bar the act is innocent but for the status of the solicitor, and because he is a decoy of concealed disability the act is blameless, and there is estoppel against conviction. Were it otherwise, honest men could easily be made felons. Many of the government's Indian wards are not distinguishable from Caucasians. Any purveyor of liquors, and anyone moved by hospitality to share thereof with guests, ignorant of their status, would unhesitatingly sell or give to them. As decoys in the service of government officers, what instruments of oppression they might be to men devoted to law, but ignorant of their disability! That the seller is suspect-

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"Quincy Compton" letter, was error on the ground of variance.

2 Bishop, New Crim. Proc. 2d ed. 559; Rex v. Powell, 1 Leach, C. L. 77, 2 W. Bl. 787, 2 East, P. C. 976; 1 Chitty, Crim. Law, 233; Rex v. Beare, 1 Ld. Raym. 414; Dana v. State, 2 Ohio St. 91; Reg. v. Drake, 3 Salk. 224; United States v. Hinman, Baldw. 292, Fed. Cas. No. 15,370; Com. v. Gillespie, 7 Serg. & R. 469, 10 Am. Dec. 475; United States v. Mason, 12 Blatchf. 497, Fed. Cas. No. 15,736; Murphy v. State, 6 Tex. App. 554; Com. v. Stevens, 1 Mass. 203; State v. Street, 1 N. C. Pt. 2, p. 98 (Taylor, p. 158), 1 Am. Dec. 589; Sheehy v. Mandeville, 7 Cranch, 208, 3 L. ed. 317; State v.

Smith, 31 Mo. 120; Ex parte Rogers, 10 Tex. App. 655, 38 Am. Rep. 654; Sharley v. State, 54 Ind. 168, 2 Am. Crim. Rep. 138; Baker v. State, 14 Tex. App. 332.

The action of the court in hearing, out of the presence of the jury, testimony as to whether the Quincy Compton letter was sent to the defendant, and in deciding that question on such evidence, instead of submitting it to the jury, was erroneous.

Thompson v. State, 18 Ind. 386, 81 Am. Dec. 365; Wharton, Crim. Law, § 389; 1 McClain, Crim. Law, § 557; McAdams v. State, 8 Lea, 456; Pigg v. State, 43 Tex. 108; O'Brien v. State, 6 Tex. App. 665; Crowder v. State, 50 Tex. Crim. Rep. 92,

cur. The officers are not justified in inducing men to commit crime, or in employing others to induce them to commit crime, in order that prosecutions may be instituted. It is his duty as an officer, where he understands that parties are engaged in crime, to use every effort legitimate and permissible by law, to detect and ferret out crimes and bring criminals to trial and justice. But this does not justify him in employing parties to go out and induce the citizens to commit crime that prosecutions may be instituted and carried on."

And in Salt Lake City v. Robinson, 40 Utah, 448, 125 Pac. 657, the court further said: "By what we have said we do not mean to be understood as offering any encouragement to a certain class of so-called private detectives or informers who may, in pursuance of offered rewards, or for other valuable considerations, act as decoys, and as such induce certain individuals to commit offenses. When it is made to appear that the offense charged was induced by a detective or other person, or that such detective or person was paid for obtaining the evidence necessary to convict, or that he is to receive additional compensation in a case of conviction, both the prosecuting officers and the trial courts should carefully scrutinize the evidence, and should permit no conviction to be had, or, if had, to stand, in case the offense was induced as aforesaid; and in case of paid evidence, none should be permitted to stand if there is any doubt of the guilt of the accused."

Illegal use of mails.

Supplementing notes in 25 L.R.A. 346, and 30 L.R.A.(N.S.) 948.

It is no defense to a prosecution for sending through the mail a letter conveying information as to where obscene matter may be obtained, that a postoffice inspector, believing from general information and from an advertising pamphlet issued by the defendant that he was engaged in illegal use of the mails, sent to him a "decoy letter," in response to which the letter in question was sent by the defendant. Ackley v. United States, 118 C. C. A. 403, 200 Fed. 61 L.R.A.(N.S.)

217. The court said that when an officer, or even a private citizen, desirous of enforcing the laws, believes from general information that the laws are being violated, he has the legal, as well as the moral, right to send "decoy letters;" and that it is now too late to complain of decoy letters in such a case (citing authorities).

And see also KEMP v. UNITED STATES.

Larceny.

Supplementing notes in 25 L.R.A. 343, and 30 L.R.A.(N.S.) 950.

One in charge of the mailing department of a corporation, who is indicted for the embezzlement and larceny of United States postage stamps belonging to the corporation, was not so encouraged or solicited to take the stamps as to prevent his conviction therefor, where postoffice inspectors, having arrested a person who had been obtaining stamps from the accused, arranged with this person and representatives of the corporation that he should arrange to obtain more stamps from the accused, and the representatives of the corporation should mark certain stamps belonging to the corporation, so that they could identify them, and the accused was subsequently arrested by the inspectors with some of the marked stamps in his possession, when he met the accomplice to deliver stamps to him as arranged. "The criminal design and intent originated in the mind of plaintiff in error [the accused]. Neither the owner of the stamps nor its agents urged or advised the commission of the crime, but, suspecting the plaintiff in error, it took precautions to ascertain whether he would commit the offense. The law does not prohibit this being done. If it did, it would destroy one of the most effective agencies for the detection of crime." People v. Smith, 251 Ill. 185, 95 N. E. 1041.

So, there is no such consent on the part of a gold milling company, through its agents, to the taking of gold amalgam from its mill, as will prevent the taking from constituting larceny, where a watchman in the employ of the company, having been approached by conspirators with reference to their obtaining amalgam from the mill, re-

96 S. W. 934; *Saunders v. People*, 38 Mich. 218; *People v. McCord*, 76 Mich. 200, 42 N. W. 1106, 8 Am. Crim. Rep. 117; *Love v. People*, 160 Ill. 501, 32 L.R.A. 139, 43 N. E. 710; *State v. Hayes*, 105 Mo. 76, 24 Am. St. Rep. 360, 18 S. W. 514; *State v. Waghalter*, 177 Mo. 676, 76 S. W. 1028, 12 Am. Crim. Rep. 283; *Connor v. People*, 18 Colo. 373, 25 L.R.A. 341, 36 Am. St. Rep. 295, 33 Pac. 159; *State v. Dudoussat*, 47 La. Ann. 977, 17 So. 685; *United States v. Bott*, 11 Blatchf. 346, Fed. Cas. No. 14,626; *United States v. Whittier*, 5 Dill. 35, Fed. Cas. No. 16,688; *United States v. Adams*, 59 Fed. 674; *Ackley v. United States*, 118 C. C. A. 403, 200 Fed. 217; *United States v. Healy*, 202 Fed. 349; *Goode v. United States*, 159 U. S. 663, 40 L. ed. 297, 16 Sup. Ct. Rep. 136; *Rosen v. United States*, 161 U. S. 29, 40 L. ed. 606, 16 Sup. Ct. Rep. 434, 480, 10 Am. Crim. Rep. 251; *Montgomery v. United States*, 162 U. S. 410, 40 L. ed. 1020, 16 Sup. Ct. Rep. 797; *Hall v. United States*, 168 U. S. 632, 42 L. ed. 607, 18 Sup. Ct. Rep. 237; *Grimm v. United States*, 156 U. S. 604, 39 L. ed. 550, 15 Sup. Ct. Rep. 470; *Andrews v. United States*, 162 U. S. 420, 40 L. ed. 1023, 16 Sup. Ct. Rep. 798; *Price v. United States*, 165 U. S. 311, 41 L. ed. 727, 17 Sup. Ct. Rep. 366.

Mr. A. D. Smith also for appellant.

Messrs. Clarence R. Wilson and Reginald S. Huldekoper, for the United States:

The letters must be read together to determine the intent of the defendant.

United States v. Grimm, 50 Fed. 528;

ported this to the company, and, with its knowledge and approval, pretended to act as an accomplice of the thieves, and, in accordance with an arrangement with them, pretended to give one of them a signal when it was safe to take the amalgam, but did not persuade or induce the conspirators to take the property, or himself assist in the actual taking, and merely allowed the amalgam to be taken for the purpose of detecting and entrapping the thieves. *State v. Smith*, 33 Nev. 438, 117 Pac. 19.

Burglary.

Supplementing notes in 25 L.R.A. 342, and 30 L.R.A. (N.S.) 951.

Where the defendant suggested to an employee of a pawnbroker a plan by which the defendant might burglarize the pawnbroker's shop, and the employee pretended to agree to the proposed scheme, but in fact informed his employer and the police authorities thereof, and thereafter, acting under the instructions of the police, with the pretended object of assisting the defendant to carry out his scheme, lent him the keys of the shop, from wax impressions of which he made duplicate keys, with one of which, on a day arranged with the employee, after returning the original keys to him, the defendant unlocked a padlock securing the outer door, and entered the shop, where he was arrested by the police officers who had been keeping watch near by,—the shop owner and the police having been informed by the employee of the arrangement with the defendant,—there was no such assent on the part of the shop owner to the entry as to prevent the defendant from being guilty of the offense of shop breaking. *Rex v. Chandler* [1913] 1 K. B. 125, 82 L. J. K. B. N. S. 106, 108 L. T. N. S. 353, 77 J. P. 80, 29 Times L. R. 83, 57 Sol. Jo. 160, 23 Cox, C. C. 330. The court said: "In our opinion, although the prosecutrix may have been fully aware of what was going to be done, she did not assent to the breaking and entering of her premises by the prisoner for the purpose of stealing. The 51 L.R.A. (N.S.)

keys were only supplied to the prisoner by the servant of the prosecutrix in order that he might be detected in the commission of the offense; that did not make the servant an accomplice of the prisoner, nor make the breaking and entering lawful."

But there can be no conviction of the crime of housebreaking where the owner of the building which was entered directed a servant to induce the defendant to break into the building, and the servant obeyed his orders, and he and the defendant entered the building together, and the owner and a policeman and others were present watching them, and arrested the defendant after he so entered. *State v. Goffney*, 157 N. C. 624, 73 S. E. 162. The court says that, while it recognizes the principles laid down in *State v. Smith* (annotated in 30 L.R.A. (N.S.) 946), there is an obvious distinction between that case and this. "In that case it is properly held that the fact that a party was deceived into a violation of the liquor laws of the state by a detective will not be a justification. In the case at bar the owner himself gave permission for the defendant to enter, which destroyed the criminal feature and made the entry a lawful one."

False pretenses.

Supplementing note in 25 L.R.A. 345.

A coal dealer who knowingly sells and delivers 1,750 lbs. of coke as a ton, and charges and receives therefor the price of a ton, is guilty of obtaining money by false pretenses, notwithstanding the purchaser had a strong suspicion that the dealer was selling by short weight, but could not have testified to it as a fact, and had to buy the coke in question and weigh it to find out with certainty that it was short weight. *State v. Ice & Fuel Co.* — N. C. —, — L.R.A. (N.S.) —, 81 S. E. 737, affirmed on motion to reconsider opinion in — N. C. —, — L.R.A. (N.S.) —, 81 S. E. 956. The court said: "The defendant offered a ton of coke for \$5, the offer was accepted, and \$5 was paid for a ton. The prosecutor acted

Ackley v. United States, 118 C. C. A. 403, 200 Fed. 217; Clark v. United States, 202 Fed. 740; United States v. Somers, 164 Fed. 259; United States v. Kline, 201 Fed. 954; United States v. Dempsey, 188 Fed. 450.

The court did not err in refusing to permit the defendant to recall the witness Honvery for further examination.

40 Cyc. 2493.

There was no material or fatal variance between the copy of the letter set out in the indictment, and the letter admitted by the appellant to have been written and mailed by him, which was offered in evidence.

Bennett v. United States, 227 U. S. 333, 57 L. ed. 531, 33 Sup. Ct. Rep. 288; Harris v. People, 64 N. Y. 148, 2 Am. Crim. Rep.

in good faith, because he paid the purchase price for a ton, and on weighing it, the only possible method, he found that there was not a ton. He was therefore induced to part with his \$5 in reliance upon the assertion of the defendant that a ton of coke had been sent him. He could not possibly know beforehand whether this would be done or not, nor indeed after he saw the coke, until he had actually weighed it. However much he might have mistrusted the defendant's representation, he relied on it by paying the \$5 charged."

In its second opinion (— N. C. —, — L.R.A.(N.S.) —, 81 S. E. 956), the court, in distinguishing this case from the larceny and burglary cases, in which it is held that, if the act is committed with the consent of the owner, the perpetrator cannot be convicted, further said: "The difference between the cases like this and those cases in which the defense can be set up that the prosecuting witness was consenting to the act seems to be that where the owner of the property procures the offense to be committed, and seduces or influences the perpetrator to do the act, then he cannot complain. But where the offender commits the act of his own volition, and an officer or other party, suspecting that the crime is being committed, sets a trap, as by furnishing money to buy whisky that is being sold illegally, or, as in this case, bargains for an article which, on being weighed, proves to be short weight, or sends decoy letters through the mail to 'trap' a person who is suspected of using the mails illegally, and in like cases, such conduct does not procure the offense to be committed, but the offender acts of his own volition, and is simply caught in his own devices."

Offering bribe.

Supplementing note in 25 L.R.A. 345.

It is no defense to a prosecution for offering to bribe a public official, that the latter, by his words, acts, and conduct, induced the accused to make a proposition to pay him a certain sum of money to in-

416; De Gignac v. United States, 52 C. C. A. 71, 115 Fed. 197; Thomas v. State, 103 Ind. 419, 2 N. E. 808; Rex v. Hart, 1 Leach, C. L. 145, 2 East, P. C. 978, 1 Dougl. K. B. 193, Cowp. pt. 1, p. 229; People v. Tonielli, 81 Cal. 275, 22 Pac. 678; People v. Phillips, 70 Cal. 61, 11 Pac. 493; United States v. Mason, 12 Blatchf. 497; Fed. Cas. No. 15,736; Quigley v. People, 3 Ill. 301; Webster v. People, 92 N. Y. 422.

It is an offense under § 211 of the Criminal Code to mail a letter giving the information prohibited by the statute, even though such letter be in reply to a decoy letter written by a government inspector.

State v. Jansen, 22 Kan. 498; Grimm v. United States, 156 U. S. 604, 39 L. ed. 550, 15 Sup. Ct. Rep. 470, 45 Fed. 558, 50 Fed.

fluence his action as an official. "The offer to bribe a public official is a transgression of a public right, and the consent or non-consent of the officer cannot affect the criminality of the act of the person who makes the offer, and even though Mr. Wilson [the officer], by his words, acts, and conduct, may have been the inducing cause of the offer to bribe, yet, if appellant did, in fact, tender money to the officer with the intention and for the purpose of influencing his action as such officer, he would be guilty under our statute. It would not be an offense against Mr. Wilson so much as an offense against the public welfare, and one which no officer would have the authority nor power to give his consent to." Davis v. State, — Tex. Crim. Rep. —, 158 S. W. 288.

Conspiracy.

Supplementing note in 25 L.R.A. 345.

It is no defense to a prosecution for conspiracy to procure the passage of ordinances through councils by the gift or promise of bribes, that two of the conspirators were hired detectives seeking to entrap the defendants, where every essential element of a criminal conspiracy was present when the defendants entered into the confederation with the detectives. Com. v. Wasson, 42 Pa. Super. Ct. 38. The court said: "No deception or subterfuge was resorted to to induce belief in the minds of the defendants that the part they were to perform in carrying out the general scheme would not be criminal, as on its face it plainly was.

Upon what ground, then, can it be claimed that the fact that they would not have confederated had it not been for the deception and subterfuges resorted to, and the promises made by the detectives, constitutes a defense? Certainly not upon the ground that if the defendants had performed the acts to be performed by them, they would have been disappointed in their expectation of receiving bribes therefor; nor upon the ground that the commonwealth is estopped by any action of its officers; nor

528; *Bates v. United States*, 11 Biss. 70, 10 Fed. 97; *DeGignac v. United States*, 52 C. C. A. 71, 113 Fed. 197; *Knowles v. United States*, 95 C. C. A. 579, 170 Fed. 409; *United States v. Harris*, 122 Fed. 551; *United States v. Musgrave*, 160 Fed. 700; *Ackley v. United States*, 118 C. C. A. 403, 200 Fed. 217; *Board of Excise v. Backus*, 29 How. Pr. 33; *Rosen v. United States*, 161 U. S. 29, 40 L. ed. 606, 16 Sup. Ct. Rep. 434, 480, 10 Am. Crim. Rep. 251; *Price v. United States*, 105 U. S. 311, 41 L. ed. 727, 17 Sup. Ct. Rep. 366; *United States v. Slenker*, 32 Fed. 691; *Andrews v. United States*, 162 U. S. 420, 40 L. ed. 1023, 16 Sup. Ct. Rep. 798; *Shepard v. United States*, 87 C. C. A. 486, 160 Fed. 584; *Goode v. United States*, 159 U. S. 663, 40 L. ed. 297, 16 Sup. Ct. Rep. 136; *Montgomery v. United States*, 162 U. S. 410, 40 L. ed. 1020, 16 Sup. Ct. Rep. 797; *United States v. Dorsey*, 40 Fed. 752; *Hall v. United States*, 168 U. S. 632, 42 L. ed. 607, 18 Sup. Ct. Rep. 237; *Scott v. United*

States, 172 U. S. 343, 43 L. ed. 471, 19 Sup. Ct. Rep. 209; *United States v. Whittier*, 5 Dill. 35, Fed. Cas. No. 16,688; *United States v. Somers*, 164 Fed. 259; *United States v. Tubbs*, 94 Fed. 356.

Van Orsdel, J., delivered the opinion of the court:

Appellant, Thomas J. Kemp, defendant below, was convicted of the crime of sending a letter through the mails in violation of § 211 of the United States Criminal Code [35 Stat. at L. 1129, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1651], which, in part, provides as follows: "Every . . . letter . . . or notice of any kind giving information directly or indirectly, . . . where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion procured, whether sealed or unsealed, . . . is hereby declared to be nonmailable mat-

ter upon the ground that the detectives' consent to acts which were to be performed by the defendants would have deprived their acts, if performed, of any essential element of criminality; nor upon the principle upon which it has been held in some cases to be no burglary where a servant to whom a scheme of burglary has been proposed tells his master or the police, and, while apparently confederating with the burglar, acts with the knowledge and advice of his master, and lets the thieves into the house by opening the door. If there is any ground upon which the facts as to the part the detectives took in the formation of the conspiracy can be held to be a defense, it is upon the ground of public policy, and it is strenuously contended that an acquittal should have been directed for that reason. In general, one who has committed a criminal act is not entitled to be shielded from its consequence merely because he was induced to do so by another. There has been much discussion in the courts of this country and by the text writers as to the relation of detectives to crime, and many of their methods have been severely denounced. A few exceptional cases can be found where, upon grounds of public policy, the courts have refused to sustain convictions because of the abhorrent methods adopted to lure the accused into crime. Upon the other hand there are many cases wherein the courts, while in some instances condemning the methods employed by the detectives, have sustained the convictions, although the particular crime charged would not have been committed had it not been for the deceptions or subterfuges or the suppression of the truth resorted to by the detective. . . . In considering the question of public policy, the clear distinction, founded on principle as well as authority, is to be observed between measures used to

entrap a person into crime in order, by making him a criminal, to aid the instigator in the accomplishment of some corrupt private purpose of his own, and artifice used to detect persons suspected of being engaged in criminal practices, particularly if such criminal practices vitally affect the public welfare rather than individuals. Without declaring that under no circumstances ought the courts to direct an acquittal of a crime clearly proved, upon the ground that the accused was entrapped into it by immoral and illegal detective methods, we are quite clear that there is enough evidence that the purpose was to secure the conviction and punishment of those suspected to be engaged in criminal practices, to bring this case within the second class above mentioned, and that the court did not err in refusing to direct an acquittal upon the ground of public policy."

Miscellaneous.

It is no defense to a prosecution of a street railway company for violation of a city ordinance requiring it to stop its cars at every street crossing to take on passengers, that the refusal to stop the car in question was upon the signal of a policeman acting as a detective for the purpose of securing evidence of a violation of the ordinance, and having no bona fide desire to become a passenger. "He was not merely an informer seeking to make a case, in order that he might obtain or share the penalty, but a public official acting for a public purpose in pursuance of his official duty. Under such circumstances his motive is of no more importance than the motive of one pursuing his legal right in a court of justice." *Camden v. Public Service R. Co.* 84 N. J. L. 305, 86 Atl. 447, affirming 82 N. J. L. 242, 82 Atl. 609,

ter and shall not be conveyed in the mails or delivered from any postoffice or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable . . . shall be fined . . . or imprisoned," etc.

It appears that one James L. Woltz, a detective in the employ of the Postoffice Department, caused to be mailed the following letter from Concord, North Carolina, to defendant in Washington, District of Columbia, signed by the fictitious name, "Quincy Compton:"

Concord, N. C., Nov. 14, 1912.

Dr. Thomas J. Kemp, 433 G. St., N. W.,
Washington, D. C.,

My Dear Doctor:—

I trust you will pardon my writing you as I am, but I am in such great distress and so anxious to find some way out of it, that this is my only excuse. I am a young

man, married, and have been unfortunate enough to have gotten a young woman friend into trouble; to be plain, she is in a family way. Of course, I cannot marry her, and the condition she is in makes it necessary that she be afforded relief at as early a period as possible. She cannot permit the matter to go to full period either, as that would mean the ruin of her reputation, a thing not to be thought of. The girl is only twenty-two years old, and is about two and a half months gone. If you can and will take this matter for us and relieve the girl of her trouble, will you please let me know what it will cost and about how long she would have to stay up there in Washington? Will it be necessary for her to go to a hospital, or could the business be done here by the use of medicines? I want to be frank and tell you that we have tried two or three things we saw advertised and got at the drug store here, but they have been without effect.

Sincerely, Quincy Compton.

And it is no defense to a conviction of the statutory crime of knowingly receiving money for and on account of procuring and placing women in the custody of another person for immoral purposes, that a trap was laid for the defendant, and that the principal witness, in whose custody the women were placed, did not intend to, and did not in fact, make use of them for immoral purposes,—the defendant having, in fact, knowingly received the money, having knowingly procured the women, and having intended to deliver, and having delivered, them for immoral purposes. *People v. Moore*, 142 App. Div. 402, 25 N. Y. Crim. Rep. 471, 127 N. Y. Supp. 98, affirmed without opinion in 201 N. Y. 570, 95 N. E. 1136.

In *United States v. Phelps*, 16 Philippine, 440, reversing a judgment convicting the defendant of having smoked opium on a certain occasion in violation of the law, which judgment rested solely upon the testimony of a single witness who was secretly acting as an employee of the Bureau of Internal Revenue, the court said: "According to the statements made by the witness Smith, he not only suggested the commission of this crime, but he (Smith) also stated that he desired to commit the same offense and would pay his part of the expense necessary for the commission of the prohibited act. Such conduct on the part of a man who is employed by the government for the purpose of taking such steps as are necessary to prevent the commission of the offense, and which would tend to the elevation and improvement of the defendant, as a would-be criminal, rather than further his debasement, should be rebuked rather than encouraged by the courts; and when such acts as those committed by the witness Smith are placed beside the positive testimony of the defendant, corroborated 51 L.R.A.(N.S.)

by the Chinaman and the doctor, the testimony of such witness sinks into insignificance and certainly does not deserve credit. When an employee of the government, as in this case, and according to his own testimony, encourages or induces persons to commit a crime in order to prosecute them, such conduct is most reprehensible. We desire to be understood that we base our conclusions as to the conduct of the witness Smith and the incredibility of his testimony on his own acts according to his own testimony. We are therefore of the opinion, and so hold, that the appellant is not guilty of this crime. The judgment of the lower court is reversed and the appellant acquitted."

In a civil action by a city against a druggist to recover a penalty for a violation of a provision of the Municipal Code prohibiting the sale of morphine, no such unlawful entrapment of the defendant by the police officers to make the sale in question, as will prevent a recovery, is shown by evidence that the purchaser had notified a police inspector that she could get morphine from the defendant, and the inspector told an officer to see if she could do it, whereupon the officer took her to the defendant's store, gave her money with which to make the purchase in question, and waited outside the store for her while she made the purchase, and received from her the envelop containing the morphine tablets purchased. "The police officers had no communication whatever with plaintiff in error [defendant below] prior to the sale of the morphine by him. They merely afforded him an opportunity to voluntarily and deliberately do what they had reason to believe he would so do, if opportunity offered. This did not constitute unlawful entrapment." *Chicago v. Brendecke*, 170 Ill. App. 25.

A. C. W.

In answer to this letter, defendant mailed in the District of Columbia, in an envelop addressed to Quincy Compton, Concord, North Carolina, the following letter:

Washington.

Dear Sir:—

Your letter received and would say it would cost about two hundred and would have to stay here one week—destroy this letter—Can't write about this better come—This is answer to your letter won't sign my name.

It is conceded that this letter was written by defendant. For the purpose of interpreting what it was intended to convey, the government introduced the Compton letter in evidence, and the testimony of a detective named Honvery, who interviewed defendant a short time after the letter in question was written, representing that he was Quincy Compton and that the girl referred to in the Compton letter was at the Metropolitan Hotel, in this city, prepared to undergo treatment. He testified that defendant refused to see the girl in his office, but went so far as to procure a room for her and fix the time for the treatment to begin. Much of the evidence given by this witness was denied by defendant. This, however, created an issue of fact for the jury, with which we are not concerned.

It is urged by counsel for defendant that the indictment does not charge an offense, because the letter written by defendant to Quincy Compton does not, in itself, give information "where and by whom any act or operation of any kind for the procuring or production of abortion will be done or performed." The trial court was not confined to the letter of defendant. It properly held that, in determining the intent of defendant, his letter should be interpreted in the light of the one to which his was an answer. "The letter addressed to the defendant, which is set out in the indictment, is perfectly clear in its terms as to what information is desired, and the letter deposited by the defendant, which is alleged to be in pursuance of the request contained in the letter to him, and in reply thereto, and with his knowledge that it gave the information desired, considered in connection with the letter received by him and the allegations in the indictment, is sufficient, in my opinion, to sustain a charge of the offense prohibited by the statute of giving the prohibited information 'directly or indirectly.'" *United States v. Kline*, 201 Fed. 954. See also *Ackley v. United States*, 118 C. C. A. 403, 200 Fed. 217; *Clark v. United States*, 121 C. C. A. 51 L.R.A.(N.S.)

209, 202 Fed. 740; *United States v. Somers*, 164 Fed. 259.

It was also competent to establish that defendant's letter gave information prohibited by the statute, by the extrinsic evidence of the detective who interviewed defendant when he supposed the girl was in a hotel in this city.

"In a prosecution of this character the government is not confined to the letter itself, but may show by any competent extrinsic testimony that the letter gives information which the statute prohibits being given through the mail, and that it was in fact intended to convey such information. If the character of a letter cannot be thus shown by extrinsic facts, the statute under which this indictment is drawn could be easily evaded and would prove a dead letter." *United States v. Grimm*, 50 Fed. 528.

Applying these rules of interpretation, it is not difficult to bring this case within the statute. Compton, after detailing the girl's condition and the relief sought, wrote in part: "If you can and will take this matter for us and relieve the girl of her trouble, will you please let me know what it will cost and about how long she would have to stay up there in Washington?" Defendant replied: "Your letter received and would say that it would cost about two hundred and would have to stay here one week." Read together, defendant's reply can be interpreted as meaning but one thing: I will perform the operation, or procure someone who will perform it; it will cost \$200, and the girl will have to stay in Washington one week. This interpretation is confirmed by defendant's interview with the witness Honvery, when he supposed that he was talking to Compton, and that, in response to his letter, the girl had been brought by Compton to Washington. It is unnecessary that the letter should upon its face disclose the information. It may be innocent upon its face. *Grimm v. United States*, 156 U. S. 604, 39 L. ed. 550, 15 Sup. Ct. Rep. 470; *De Gignac v. United States*, 52 C. C. A. 71, 113 Fed. 197.

Defendant was charged with mailing a letter intending to furnish the information sought in the Compton letter. We think the proper test to be applied is, whether or not, reading the letters together, defendant's answer gave Compton information upon which he could intelligently act. Of this there can be no doubt. It matters not whether defendant intended to treat the girl himself, or procure another to give the treatment. His letter furnished the forbidden information. To hold that the letter itself must directly contain on its face the information would be to defeat the

whole object, purpose, and intent of Congress in enacting this statute.

Error is assigned in the refusal of the court to require witness Woltz, the writer of the Compton letter, to give the name of the person who made complaint against defendant. The record does not disclose that such complaint was ever made. The witness testified: "The letter in question was sent to the defendant not to induce him to break the law, but to discover whether he was using the mails in violation of the law, and but for information possessed by the witness that the defendant was probably using the mails in violation of the law, the letter signed 'Quincy Compton' would not have been sent." It is true this statement was made to the court, out of the hearing of the jury, when the court was ascertaining from this witness his motives in sending the decoy letter, in order that the preliminary question of its admissibility might be determined. The court properly found that the letter was admissible. It is not material upon what information Woltz acted. It does not appear that it was his purpose to induce defendant to commit a crime, but to ascertain whether he was engaged in an unlawful business. It is no defense that the letter written by defendant was in answer to a decoy letter written, as in this case, by a government detective. *Andrews v. United States*, 162 U. S. 420, 40 L. ed. 1023, 16 Sup. Ct. Rep. 798. Neither is it material that the letter was written under an assumed name and contained a false statement of fact. The trap set was a proper one. "The official, suspecting that the defendant was engaged in a business offensive to good morals, sought information directly from him, and the defendant, responding thereto, violated a law of the United States by using the mails to convey such information, and he cannot plead in defense that he would not have violated the law if inquiry had not been made of him by such government official. The authorities in support of this proposition are many and well considered. . . . The law was actually violated by the defendant; he placed letters in the postoffice which conveyed information as to where obscene matter could be obtained, and he placed them there with a view of giving such information to the person who should actually receive those letters, no matter what his name; and the fact that the person who wrote under these assumed names and received his letter was a government detective in no manner detracts from his guilt." *Grimm v. United States*, 156 U. S. 604, 39 L. ed. 550, 15 Sup. Ct. Rep. 470.

But it is urged that the ruling of the court restricted defendant's right to a full 51 L.R.A.(N.S.)

cross-examination of this witness. The admission of the letter and the further testimony of the witness that "the idea of writing the said letter to the defendant originated with said Woltz, and the said letter was entirely fictitious, none of the statements of fact therein contained being true, the name of Quincy Compton being also fictitious, there being no such person in existence," were sufficient to lay the witness open to a searching cross-examination as to his motives in writing the decoy letter.

The motive, however, of the writer of the decoy letter, is not important. The letter was admissible on its face, irrespective of the motive of the writer. It was not such an inducement to commit crime as the law condemns. It left the way open to defendant, either by ignoring it, or by answering it, to disclose that he was not conducting the sort of unlawful business in which he was requested by its express terms to engage. It was optional with him either to act the part of an honest man, or the part of a criminal. Without any influence from anyone, he chose the latter course. He is estopped to complain when he is confronted with the trap into which he knowingly and voluntarily stepped. "Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the plea as ancient as the world, and first interposed in Paradise: 'The serpent beguiled me and I did eat.' That defense was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say Christian, ethics, it never will." *Board of Excise v. Backus*, 29 How. Pr. 33.

It is assigned as error that the court refused to permit counsel for defendant to recall, for further cross-examination, the witness Honvery, the detective who interviewed defendant under the assumed name of Quincy Compton, when he (defendant) supposed the girl was in this city. This witness testified in the course of his examination that he "looked for but saw no sign on the outside of 433 G Street, and his recollection was that there was no sign there." It appears that after witness had testified, in a conversation with a policeman relative to the sign, witness said that he had testified there was no sign on defendant's office, and he did not want to be made out a liar. It was evidently for the purpose of laying the ground for impeachment by the testimony of the policeman that counsel for defendant sought to recall

this witness. This was merely a collateral matter. It is not important, nor even material, whether there was a sign on the house or not. It is conceded defendant is a physician; but that is not important, since the offense could be as well committed by a layman as a physician. Besides, the defendant got the full benefit of the evidence, in so far as it tended to impeach the witness, when the policeman was permitted to testify as a witness for defendant that "for eight years . . . the defendant had out physicians' signs at his office, which had never been removed."

It is insisted that there is a fatal variance between the copy of the letter signed by defendant, as set out in the indictment, and the original letter offered in evidence. The letter, as set out in the indictment, contained the words, "It would cost about two hundred and have to stay here one week." In the original letter, the expression read, "It would cost about two hundred & would have to stay here one week." It will be observed that in the copy the word "would" is omitted, and instead of the sign for the word "and" the word is spelled out. These errors in no way change the sense or meaning conveyed by the letter. The question of variance is one of law for the court, and, unless it appears that it is prejudicial to the rights of the accused, it will not be deemed material. The gravamen of the offense here charged is not the writing of the letter, but the depositing of it in the mail. Hence, there is no occasion for the application of the strict rule which is sometimes invoked in cases of forgery, fraudulently procuring an indorsement of a promissory note, or other kindred crimes, where the offense relates directly to the instrument relied upon. *Thomas v. State*, 103 Ind. 419, 2 N. E. 808. The old technical rules of pleading in criminal cases, inherited from an early English civilization, have been greatly relaxed, and have been supplanted by the more reasonable rule "that only material and substantial variances between the pleadings and the proofs will be regarded." *Williams v. United States*, 3 App. D. C. 335.

The court committed no error in refusing to grant defendant's request for an instructed verdict, or his request for an instruction to the effect that the jury should return a verdict of not guilty if it appeared from the evidence "that there was no such person as Quincy Compton, that the statements in the letter to the defendant signed 'Quincy Compton,' were false, and were made for the purpose of entrapping the defendant and in pursuance of a plot or scheme adopted and carried out by officials of the Postoffice Department to induce or

solicit the defendant to mail a nonmailable letter." We have held it immaterial that the letter addressed to defendant was signed in the name of a fictitious person and that its contents were false. Defendant's crime consisted in mailing a letter containing the forbidden information, and it is not important that it could never reach the person to whom it was addressed. The crime was complete when defendant deposited in the mail a letter giving such information as the statute prohibits. *United States v. Grimm*, 45 Fed. 559, 50 Fed. 528, 156 U. S. 604, 39 L. ed. 550, 15 Sup. Ct. Rep. 470; *Ackley v. United States*, 118 C. C. A. 403, 200 Fed. 217; *United States v. Musgrave*, 160 Fed. 700.

The judgment is affirmed.

Petition for writ of certiorari denied by the Supreme Court of the United States April 20, 1914. 234 U. S. 756, 58 L. ed. —, 34 Sup. Ct. Rep. 675.

KANSAS SUPREME COURT.

ROSAMONDE GILLMORE, Appt.,
v.

ROBERT E. GILLMORE et al.

(91 Kan. 707, 139 Pac. 386.)

Pleading — Incapacity to contract.

1. Where the question is so raised that a liberal construction is required, legal incapacity of the plaintiff, sufficient to suspend the operation of the statute of limitations, is sufficiently pleaded by allegations that at the time of the accrual of her cause of

Headnotes by MASON, J.

Note. — Mental incapacity as affecting running of statute of limitations.

For physical or mental incapacity as an excuse for failure to give notice of injury required as a condition of municipal liability, see *Touhey v. Decatur*, 32 L.R.A. (N.S.) 350, and the note thereto.

This note does not cover the effect of insanity to suspend the period allowed for claiming dower, or electing between dower and benefits under a will: nor does it cover cases like *Downham v. Holloway*, 158 Ind. 626, 92 Am. St. Rep. 330, 64 N. E. 82, holding that the statute of limitations does not begin to run against a deed of an insane person who is not under guardianship, until disaffirmed by the grantor after becoming sane, or by his heirs after his death.

In general.

Mental incapacity is not a bar to the running of the statute of limitations unless it is expressly made so. *Shorick v. Bruce*,

action she was a "morphine fiend;" that she was afflicted with "morphinomonia," although she did not know it; that she was unable to control her desire for morphine, and was wholly under the influence of the defendant; and that she did not realize her condition or the wrong done her.

Evidence — incapacity — sufficiency.

2. As against a demurrer to the evidence, an allegation of legal incapacity is sufficiently sustained by testimony that the plaintiff was a morphinomaniac; that she was incompetent of exercising any judgment and discretion in the ordinary business affairs of life; that she was not responsible; that she was a maniac; that her will power was gone; that she could not fix her attention on anything.

(Porter, J., dissents.)

(March 7, 1914.)

21 Iowa, 305; Collier v. Smaltz, 149 Iowa, 230, 128 N. W. 396, Ann. Cas. 1912C, 1007.

So, where a statute requiring that action for injury from a defective road be begun within thirty days is complete in itself, and makes no provision for cases of disability, the fact that the injured party is rendered insane by the injury, and remains so for over thirty days, does not prevent the operation of the limitation. *Swaney v. Gage County*, 64 Neb. 627, 90 N. W. 542.

The courts will not add an exception to those enumerated by the statute. *Molton v. Henderson*, 62 Ala. 426; *Sallier v. St. Louis, W. & G. R. Co.* 114 La. 1090, 38 So. 868.

The statutes generally make mental incompetency existing at the time a cause of action arises, a bar to the running of the statute while the disability continues. *Fleming v. Black Warrior Copper Co.* — *Ariz.* —, 136 Pac. 273; *Howard v. Carter*, 71 Kan. 85, 80 Pac. 61; *Anderson v. Layton*, 3 Bush, 87; *Lackey v. Lackey*, 8 B. Mon. 107; *Collins v. Lawson*, 140 Ky. 510, 131 S. W. 262; *Edson v. Munsell*, 10 Allen, 557; *Hervey v. Rawson*, 164 Mass. 501, 41 N. E. 682; *Little v. Downing*, 37 N. H. 355; *Smith v. Felter*, 61 N. J. L. 102, 38 Atl. 746; *Kidder v. Houston*. — *N. J. Eq.* —, 47 Atl. 336; *Outland v. Outland*, 118 N. C. 138, 23 S. E. 972; *Oldham v. Oldham*, 58 N. C. (5 Jones, Eq.) 89; *Cleveland v. Jones*, 3 Strobb. L. 479, note; *Moore v. Waco*, 85 Tex. 206, 20 S. W. 61; *McLean v. Stith*, 50 Tex. Civ. App. 323, 112 S. W. 355; *Kaack v. Stanton*, 51 Tex. Civ. App. 495, 112 S. W. 702; *Mitchell v. Stanton*. — *Tex. Civ. App.* —, 139 S. W. 1033; *Chamberlin v. Estey*, 55 Vt. 378; *Curry v. Wilson*, 45 Wash. 19, 87 Pac. 1065; *Trusts & G. Co. v. Trusts Corp.* 2 Ont. L. Rep. 97.

A final limitation of twenty four years against insane persons, though the insanity continues, is not unconstitutional as depriving insane persons of their property without due process of law. *Faris v. Moore*. — *Mo.* —, 165 S. W. 311.

51 L.R.A. (N.S.)

APPEAL by plaintiff from a judgment of the District Court for Stafford County in defendants' favor in an action brought to recover damages for inducing plaintiff to marry their son knowing he was afflicted with a communicable disease, and for making her a victim of the morphine habit. Reversed in part.

The facts are stated in the opinion.

Mr. Paul R. Nagle for appellant.

Messrs. Frank L. Martin and Van M. Martin, for appellees:

The evidence shows that plaintiff was not of unsound mind, and there is no evidence to show that if she was ever of unsound mind, this condition was continuous from the time her cause of action accrued until a period within one year before the date of filing her petition.

Jenkins v. Jenkins, 2 Dana, 102, 26 Am. Dec. 438; *Makepeace v. Bronnenberg*, 146

Degree of incapacity which will suspend statute.

When insanity of plaintiff's ancestor is set up to defeat the bar of the statute of limitations to an action of ejectment, plaintiff must show that his ancestor was insane as to the subject-matter, so that he was unable to protect his rights, and that the insanity continued to a period less than that fixed by the statute. *Clarke v. Irwin*, 63 Neb. 539, 88 N. W. 783.

The rule that insanity once shown to exist is presumed to continue till the contrary is shown has been applied in cases involving the statute of limitations. *Lantis v. Davidson*, 60 Kan. 389, 56 Pac. 745; *Howard v. Carter*, 71 Kan. 85, 80 Pac. 61; *Clark v. Trail*, 1 Met. (Ky.) 35.

One who, because of her extreme old age and mental imbecility, is incapable of attending to any business or of taking care of herself, comes within the exception of the statute. *Porter v. Porter*, 3 Humph. 586.

One who does not have sufficient mental ability to know what he is doing and the nature of the act is insane within the statute of limitations. *Burnham v. Mitchell*, 34 Wis. 117.

A showing that a person has been deaf and dumb from birth was formerly *prima facie* evidence of mental incompetency, so as to bring him within the exception as to persons *non compos mentis*. *Oliver v. Berry*, 53 Me. 208, 87 Am. Dec. 547.

But this presumption of law no longer exists. *Christmas v. Mitchell*, 38 N. C. (3 Ired. Eq.) 535.

An habitual drunkard, though under the care of a guardian, is not a person of "unsound mind" within the statute. *Makepeace v. Bronnenberg*, 146 Ind. 243, 45 N. E. 336.

"Being cross, cranky, freakish, and peculiar, on occasions either in private or public, is not being insane within the meaning of the statute." *Calumet Electric Street R. Co. v. Mabie*, 66 Ill. App. 235.

Ind. 243, 45 N. E. 336; *Rugan v. Sabin*, 3 C. C. A. 578, 10 U. S. App. 519, 53 Fed. 415; *Hovey v. Chase*, 52 Me. 304, 83 Am. Dec. 514; *Jackson ex dem. Cadwell v. King*, 4 Cow. 207, 15 Am. Dec. 354; *Edwards v. State*, 38 Tex. Crim. Rep. 386, 39 L.R.A. 262, 43 S. W. 112; *Miller v. Oestrich*, 157 Pa. 274, 27 Atl. 742; *Brown v. Torrey*, 24 Barb. 583.

Mason, J., delivered the opinion of the court:

Rosamonde Gillmore sued Mary A. and Frank B. Gillmore, alleging that they had induced her to marry their son, knowing that he had a communicable disease, and that they had made her a victim of the morphine habit. A demurrer to her evidence was sustained, and she appealed. Upon the original hearing in this court the judgment was affirmed on the ground that the statute of limitations had run, because the action was not brought until more than a year after the plaintiff had been cured of the habit. *Gillmore v. Gillmore*, 91 Kan.

A person mentally weak, but neither an idiot nor lunatic, having power to comprehend the nature of the fraud upon him when explained to him by friends, does not come within the exception. *Piper v. Hoard*, 107 N. Y. 67, 1 Am. St. Rep. 785, 13 N. E. 632.

The fact that a party was old, credulous, and so feeble in mind and body that he was unfit to transact business, is not sufficient to bring him within the exception of the statute as being insane. *Rugan v. Sabin*, 3 C. C. A. 578, 10 U. S. App. 519, 53 Fed. 415.

In *Carter v. Stewart*, — Tenn. —, 43 S. W. 366, where the evidence as to a party's mental capacity was quite conflicting, and witnesses not interested in the suit regarded her as being sane, the court refused to reverse the finding of the chancellor that her mental condition interposed no bar to the statute of limitations.

It is not generally necessary that an insane person be adjudged insane to bring him within the exception to the statute of limitations. *Lantis v. Davidson*, 60 Kan. 389, 56 Pac. 745; *Kaack v. Stanton*, 51 Tex. Civ. App. 495, 112 S. W. 702.

But incompetency does not prevent the running of the statute in Louisiana, unless the incompetent has been interdicted. *Cox v. Ahlefeldt*, 105 La. 543, 30 So. 175.

Disability arising after accrual of cause of action.

The general rule that disability intervening after the statute has commenced to run will not operate to suspend it (2 Cyc. 126) has been applied to disability arising from insanity.

Thus, mental disability arising after the statute has begun to run does not suspend its operation. *Black v. Ross*, 110 Iowa, 112, 51 L.R.A. (N.S.)

293, 137 Pac. 958. This ruling was based upon the date of the filing of the amended petition on which the case was tried. It appears that the original petition contained substantially the same averments, and was filed within the year. For this reason a rehearing was granted.

The defendants maintain that the plaintiff neither pleaded nor gave evidence of any facts tending to show that at the time her cause of action accrued she was under any "legal disability" in the sense in which that term is used in the statute of limitations. Civil Code, § 18 (Gen. Stat. 1909, § 5611). The phrase is elsewhere defined as including persons "of unsound mind." Gen. Stat. 1909, § 9037, subd. 27. The petition does not employ apt words to bring the plaintiff clearly within the terms of the statute. It does not use the phrase "legal disability," or "of unsound mind," or any obvious equivalent. We think, however, that by a very liberal construction it may be regarded as containing allegations which, when supplemented by inferences fairly to

81 N. W. 229; *Calumet Electric Street R. Co. v. Mabie*, 66 Ill. App. 235; *Hale v. Ritchie*, 142 Ky. 424, 134 S. W. 474; *Allis v. Moore*, 2 Allen, 306; *Kelley v. Gallup*, 67 Minn. 169, 69 N. W. 812; *Asbury v. Fair*, 111 N. C. 251, 16 S. E. 467; *Grady v. Wilson*, 115 N. C. 344, 44 Am. St. Rep. 461, 20 S. E. 518; *Adamson v. Smith*, 2 Mill. Const. 269, 12 Am. Dec. 665; *Lincoln v. Norton*, 36 Vt. 679; *Oliver v. Pullam*, 24 Fed. 127; *DeArnaud v. United States*, 151 U. S. 483, 38 L. ed. 244, 14 Sup. Ct. Rep. 374; *Doe ex dem. Griggs v. Shane*, 4 T. R. 306, note (Eng.).

And this rule has been applied even though the insanity commenced within a short time after the injury which gave the cause of action. *Roelefsen v. Pella*, 121 Iowa, 153, 96 N. W. 738; *McCutchen v. Currier*, 94 Me. 362, 47 Atl. 923.

But in *Nebola v. Minnesota Iron Co.* 102 Minn. 89, 112 N. W. 880, 12 Ann. Cas. 56, it is held that, inasmuch as the law does not taken notice of parts of a day, the statute was suspended where the injury and the insanity resulting from it occurred on the same day.

And in *Sasser v. Davis*, 27 Tex. 656, mental incapacity resulting from the assault for which suit was brought was held to prevent the statute from running, the question of the time the incapacity began not being discussed.

Period of suspension.

When an insane person has been restored to his right mind for such length of time as to have enabled him to have looked into his affairs, and to have instituted an action to recover his rights, the statute will start and continue to run though the disability

be drawn therefrom, are sufficient to bring the case within the statutory exception. It alleges that in July, 1899, she had become a "morphine fiend," and was affected with "morphinomania," although she did not know this until 1910; that the habit was so fixed and permanent that she was unable to control her desire for the drug, and was wholly under the influence of the defendant Mary A. Gillmore; that she first fully realized that she had been addicted to the use of morphine, and first fully realized the wrongs practised upon her, after she had been cured of the habit, in 1910. It also alleges that the plaintiff had become "mentally weak and incapacitated." This is said however, of her condition at the time of the commencement of the action,—not when her cause of action accrued. To say that a person is addicted to the morphine habit does not necessarily imply that he is of unsound mind, or under legal disability. But where it is added that he is afflicted with "morphinomania," is wholly under the influence of another person, and does not

realize his condition, we think a basis is laid for introducing evidence. In *Howard v. Carter*, 71 Kan. 85, 80 Pac. 61, an allegation that the plaintiff was "mentally weak" was held a sufficient plea of incapacity. There was no clear and explicit evidence that the plaintiff's condition, as the result of the morphine habit, amounted to unsoundness of mind. But upon the entire record we think there was room for an inference to that effect. A physician testified that a person in her condition is incompetent of exercising any judgment and discretion in the ordinary business affairs of life; that he is not responsible; is a maniac; his will power is gone; he cannot fix his attention on anything; and he starts to do something he will forget it. He also gave testimony of a contrary tendency, but the present question is whether there was any evidence at all to support the theory of legal incapacity. Another witness said that at times the plaintiff's mind wandered,—that there was no sense to her talk. A letter written by her gives room for an

returned. *Clark v. Trial*, 1 Met. (Ky.) 35; *Duncan v. Vick*, 7 Ky. L. Rep. 750.

In *Verdery v. Savannah, F. & W. R. Co.* 82 Ga. 675, 9 S. E. 1133, a somewhat different rule was adopted, it being held that successive periods of competency may be added in making up the statutory period.

The statute begins to run from the time of the removal of the disability and knowledge of the existence of the deeds in question. *Dicken v. Johnson*, 7 Ga. 484.

Restoration of sanity will start the statute running, so that, though a woman is insane when married, subsequent sanity for the prescriptive period will bar any right of action by her heir to recover her property from the husband. *Ward v. Dulaney*, 23 Miss. 410.

The Pennsylvania statute provides that no exception to the statute shall extend more than thirty years after the right of entry to land accrues to any person within the exception, and it was held that the time began to run from the date of the deed, not from the death of the lunatic. *Boyd v. Weber*, 193 Pa. 651, 44 Atl. 1078.

The suspension of the statute ends with the death of the incompetent. *Parker v. Betts*, 47 Colo. 428, 107 Pac. 816; *Wood v. Wood*, 136 Iowa, 128, 12 L.R.A. (N.S.) 891, 125 Am. St. Rep. 223, 113 N. W. 492; *Sanford v. Sanford*, 2 Hun, 94; *Arnold v. Arnold*, 35 N. C. (13 Ired. L.) 174, 55 Am. Dec. 434; *Warlick v. Plonk*, 103 N. C. 81, 9 S. E. 190.

And the general rule that disabilities cannot be piled one upon another, but a party claiming the benefit of the exception can avail himself only of the disability existing when the right of action first accrued (25 Cyc. 1270), has been applied where the incompetent's heirs are under similar disability at the time of his death, 51 L.R.A. (N.S.)

that fact not affecting the running of the statute against them. *Hale v. Ritchie*, 142 Ky. 424, 134 S. W. 474; *Bensell v. Chancellor*, 5 Whart. 371, 34 Am. Dec. 561; *Griswold v. Butler*, 3 Conn. 227.

In *Thurman v. Shelton*, 10 Yerg. 383, it was held that the statute began to run as to the real property of a *non compos* at his death, but not as to his chattels until letters of administration were granted.

In *Molton v. Henderson*, 62 Ala. 426, it was held, that death of the trustee of the estate of a lunatic, who might have brought suit, does not interrupt the running of the statute of limitations against the lunatic.

But in *Bradley v. Singletary*, — Ala. —, 59 So. 58, it was held that the statute did not run against a *non compos* as to a conveyance made fraudulently by his guardian, the ward being in effect without a guardian as to the subject-matter.

And in *Bourne v. Hall*, 10 R. I. 139, it was held that the fact that a *non compos* had guardians who might have sued for him does not qualify the privilege conferred upon him by the exceptions in the statute of limitations.

Disability never shortens the period of limitation, so that a provision extending the statute for a certain period after the disability is removed will in no event bar the right of action in a shorter time than the original prescriptive period. *Langer v. Newmann*, 100 Minn. 27, 110 N. W. 68; *Fowler v. Pritchard*, 148 Ala. 261, 41 So. 667.

In Iowa the statute is construed to mean that the period of limitation runs against an insane person, but is extended for one year after the disability is removed. *McNeil v. Sigler*, 95 Iowa, 587, 64 N. W. 604.

R. L. S.

argument that her mind was not unsound, but cannot be said to establish this conclusively. We think there was sufficient evidence of incapacity to require the overruling of the demurrer. Cases on the general subject are collected in the works cited, but few of them are sufficiently similar to this to be helpful. 19 Am. & Eng. Enc. Law, 237; 25 Cyc. 1265; Note in Ann. Cas. 1912C, 1013; Note in 39 L.R.A. 262; 5 Words & Phrases, 4060; 8 Words & Phrases, 7212.

As to the defendant Frank B. Gillmore, we conclude after a careful examination, that there was no substantial evidence against him upon the merits of the action, and that as to him the demurrer was properly sustained. There was evidence that he knew his son was afflicted with a communicable disease, but the same evidence showed that he told the bride's father of the fact before the marriage took place, so he cannot be regarded as having induced the wedding by concealing the fact. And we find no evidence of complicity on his part in the administering of morphine to the plaintiff. That he was willing to pay the expense of having her treated for the habit does not justify the inference that he was a party to its formation. In this state a husband is not liable for a tort committed by his wife where he is not a participant. *Norris v. Corkill*, 32 Kan. 409, 49 Am. Rep. 489, 4 Pac. 862.

The judgment is reversed as to Mary A. Gillmore and affirmed as to Frank B. Gillmore.

Johnston, Ch. J., and Burck, Smith, Benson, and West, JJ., concur.

Porter, J., dissenting:

I adhere to the view expressed in the former opinion (91 Kan. 293, 295, 137 Pac. 958), where it was said: "It seems clear, therefore, that the plaintiff, many years before this action was brought, not only knew of the fact that the morphine habit had been fixed upon her, and how this had been accomplished, but also knew, at least in a general way, the nature and consequences of the habit." (p. 295.) To my mind it seems incredible that during all the years from 1899 to 1910 the plaintiff could have been wholly under the control of the defendant, or that she first fully realized in 1910 the wrongs practised upon her, and first realized that she had been addicted to the use of morphine after she had been cured of the habit, in 1910. In my opinion, these claims are wholly unsupported by evidence, and are contradicted by her own testimony. 51 L.R.A.(N.S.)

KENTUCKY COURT OF APPEALS.

J. O. HIXSON, Appt.,
v.
J. L. SLOCUM.

(156 Ky. 487, 161 S. W. 522.)

Assault — self defense — forcing person from sidewalk.

One under the influence of liquor who, while on the sidewalk, has applied insulting epithets to the owner of abutting property, has the right of self-defense if the latter advances upon him to force him to leave the walk.

(December 16, 1913.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Owen County in defendant's favor in an action brought to recover damages for assault and battery. Affirmed.

The facts are stated in the opinion.
Mr. J. H. Settle for appellant.
Mr. John W. Douglas for appellee.

Nunn, J., delivered the opinion of the court:

Hixson sued to recover of Slocum damages for assault and battery, and upon the trial in the lower court the jury returned a verdict in favor of Slocum, the defendant.

The parties are elderly men living in the town of Owenton; but on the day of the difficulty Slocum had returned to town in a new automobile after a visit to the

Note. — Right of self-defense against assault provoked by abusive language.

Generally, as to the right of accused who began conflict to plead self-defense, see note to *Fouch v. State*, 45 L.R.A. 687.

As to the right of officer to arrest without warrant for abusive language, see note in 13 L.R.A.(N.S.) 881.

As to abusive language as justification for assault on passenger by train employee, see note in 33 L.R.A.(N.S.) 280.

Both civil and criminal cases are included in this note, which is intended to treat generally of the right of self-defense against any assault provoked by the abusive or insulting language of the accused, either to his assailant or to some third person. While it includes a number of cases in which there was something more than opprobrious language relied upon to deprive the accused of his right to protect himself against injury, it is primarily the purpose of this note to include only those cases passing upon the question whether or not such language in itself is sufficient to take away this common right of all who do not seek to use it as a means of offense instead of defense.

As a broad general proposition, it is es-

country. The machine attracted quite a crowd, and Slocum insists that the presence of the machine and the crowd immediately in front of Hixson's hotel was a mere coincidence. Hixson maintains that it was premeditated on the part of Slocum, so that Slocum might come upon Hixson and provoke him to a difficulty. Slocum admits that he had had two drinks. The other evidence in the case shows that he was either drunk, or considerably under the influence of whisky. At all events, these enemies of long standing were thus brought together, and Hixson says that Slocum broke the years of silence in these words addressed to Hixson: "We are always fighting each other." Hixson replied: "You are fighting whisky," and turned back

into his hotel. In a few minutes he came out, and Slocum was still on the sidewalk in front of the hotel, and seeing Hixson on his hotel porch, Slocum spoke to him with vile and vulgar epithets. Hixson came down the steps from the hotel, and according to his evidence, when he came to the last step, he reached for Slocum with his left hand, and held his right arm extended down by his side. Slocum then struck Hixson three times with what Slocum terms a "little rattan cane." Another witness testifies that, at the time Slocum used the cane, Hixson was either on the last step of his hotel, or the sidewalk, he could not say which. All of the other witnesses say that he was off the step, and went to Slocum out on the sidewalk.

sential to the right of self-defense that the accused should not have been the aggressor in the difficulty, that is, as some courts say, he must be wholly free from fault in provoking the trouble (*Baldwin v. State*, 111 Ala. 11, 20 So. 528; *McQueen v. State*, 103 Ala. 12, 15 So. 824; *Gibson v. State*, 89 Ala. 121, 18 Am. St. Rep. 96, 8 So. 98; *Bankhead v. State*, 124 Ala. 14, 26 So. 979), or reasonably free therefrom, as others say. So the question involved in this note may be said to resolve itself into the question whether the accused's use of offensive language in provoking the difficulty amounts to such provocation as to make him the aggressor in such sense as to deprive him of the right to defend himself.

Clearly, where, as in Alabama, the rule of absolute freedom from fault prevails, it would seem that the use of opprobrious language in provoking an assault abrogates the right of self-defense. See Alabama cases previously cited; also *Harrison v. State*, 144 Ala. 20, 40 So. 568; *Myers v. State*, 62 Ala. 599; *Jackson v. State*, 81 Ala. 33, 1 So. 33.

And in *Howell v. State*, 79 Ala. 283, it is said that the combatant who provokes a difficulty by using the first words of insult, or otherwise, being regarded as the aggressor, cannot plead that he afterward struck in self-defense, whether he fought willingly or unwillingly.

But this is not true as to one who merely answers one verbal insult or abusive epithet with another. This does not deprive him of the privilege of afterward defending himself without being amenable to the law, provided he did not fight willingly or by his voluntary consent. Not being the author or originator of the difficulty, he may still protect his person from assault and injury, by opposing force to force as far as may be necessary, taking care that he uses no more violence than is requisite to repel the attack upon him; that is, that his defense does not degenerate into aggression. *Ibid*.

The great majority of the reported cases on this question, however, are more or less at variance with the decisions of the Alabama L.R.A. (N.S.)

bama court. As in *HIXSON v. SLOCUM*, some courts, proceeding upon the theory that abusive language toward another, no matter how grievous, is not sufficient justification or provocation for an assault, hold that one who uses such language is not thereby deprived of his right of self-defense, and may employ such force as is necessary to prevent the other from doing him personal injury. *State v. Higginson*, 157 Mo. 395, 57 S. W. 1014; *State v. McDaniel*, 94 Mo. 301, 7 S. W. 634; *Smith v. State*, 75 Miss. 542, 23 So. 260; *Allen v. Com.* 80 Ky. 642, 6 S. W. 645; *Wheatley v. State*, 93 Ark. 409, 125 S. W. 414; *People v. Curtis*, 52 Mich. 616, 18 N. W. 385.

So, one is not deprived of the right of self-defense by the fact that he seeks another to straighten out a misunderstanding, and, during the interview, applies to him opprobrious epithets which provoke an assault. *State v. Doris*, 51 Or. 136, 16 L.R.A. (N.S.) 660, 94 Pac. 44.

The same is true of one who seeks an interview with, and uses words of abuse and vilification toward, another who he is justified in believing has insulted his wife. *Gray v. State*, 55 Tex. Crim. Rep. 90, 22 L.R.A. (N.S.) 513, 114 S. W. 635.

And that one after arming himself, before asking an explanation of insulting language spoken of him, upon the repetition of such language without provocation on his part, replies in terms equally insulting, does not deprive him of the right to take his adversary's life in self-defense. *Shannon v. State*, 35 Tex. Crim. Rep. 2, 60 Am. St. Rep. 17, 28 S. W. 687.

And the right to defend one's self from a public horse whipping is not defeated by the circulation of slanders about relatives of the assailant. *State v. Bartlett*, 170 Mo. 658, 59 L.R.A. 756, 71 S. W. 148.

So, one assaulted by citizens of a town for the purpose of compelling him to leave it is not bound to retreat to avoid a conflict, in order to protect himself from liability to prosecution for assault, but he may repel force with force as long as he uses only such force as is necessary, short of killing his assailants, even though he

Hixson explains that he carried his right arm to his side because his right hand was crippled. It is not shown that Slocum knew this fact, and therefore Slocum's statement is not without plausibility that he feared Hixson was trying to grab and hold him with his left hand, and with his right use a knife on him, and which he believes Hixson was carrying. Slocum admits that when Hixson returned from the hotel he addressed Hixson without Hixson having said anything to him, and called him the vile names as testified to by Hixson; but he takes issue with Hixson as to the words spoken before Hixson went into the hotel. He claims while in the crowd, and finding himself standing in Hixson's presence, he said to him, "Why can't we be

friends?" Hixson replied, "You are fighting booze; you are drunk now." Slocum replied, "Every time I speak to you, Mr. Hixson, you insult me." Then Hixson went into the hotel, and returning, Slocum began the conversation by saying, "Mr. Hixson, you always go out of your way to insult people." Both agree that then Hixson ordered him away, and that Slocum called him the vile names which soon led to the encounter.

It is not shown that Hixson suffered any physical injury, and his whole complaint is that Slocum brought on the difficulty by the provoking language used, and his chief effort is to magnify the effect of Slocum's words; while Slocum is mainly concerned in minimizing the size of his "little rattan

provoked the attack by profane and obscene language, drunkenness, and other disorderly conduct. *State v. Evenson*, 122 Iowa, 88, 64 L.R.A. 77, 97 N. W. 979.

In Georgia, by statute, opprobrious words may justify a simple assault or an assault and battery, but they do not justify an attack with a deadly weapon, made in a manner likely to produce death. And where such an attack is made upon the accused upon the sole provocation of his language to his assailant, the latter is engaged in the commission of a felony upon him, against which he has the right to defend himself to the extent, if necessary, of taking his assailant's life. Provocation of this kind not only does not justify a deadly assault, but it is not such provocation as could be considered in mitigation, so as to reduce the assailant's guilt from murder to manslaughter, if the assault should prove fatal. Of course, if the purpose of the accused in his language and conduct on the particular occasion is to provoke an attack which will afford him a pretext for killing his assailant or inflicting serious bodily harm upon him, the necessity afterward arising to kill in defense of his own life would not render the killing justifiable. The law will not hold him guiltless who thus creates the necessity to kill another. But if he has no purpose of this kind, the fact that the language he uses to his assailant is the occasion of the difficulty does not render him chargeable with having brought on the assault or created the necessity to kill, if it appears that the attack upon him exceeds the provocation, and is of such an aggravated character as to be without any legal justification or excuse. He is not responsible for a result which, in the eyes of the law, is not a legitimate result of his words or conduct, and which therefore he is not legally bound to anticipate. One who insults another by opprobrious words may be bound to anticipate that the person insulted will repel the insult to the extent the law allows, but he is not bound to anticipate that the latter will go to the extent of trying to take his life; and if such an attack is made upon no greater provo-

cation than mere words, and the person thus assaulted kills his assailant under a reasonable belief that it is necessary to do so in order to save his own life, it is neither murder nor manslaughter. *Butler v. State*, 92 Ga. 601, 19 S. E. 51; *Boatwright v. State*, 89 Ga. 140, 15 S. E. 21; *Crawley v. State*, 7 Ga. App. 95, 66 S. E. 273; *Sam v. State*, 124 Ga. 25, 52 S. E. 18; *Brown v. State*, 58 Ga. 212. See also *Mitchell v. State*, 41 Ga. 527.

The whole idea here is that when the prosecutor made an assault of greater degree than the opprobrious words would justify, he put himself in the wrong, and placed himself in the same attitude as if he were the aggressor *ab initio*; and the defendant had the right to make any counter attack upon him that would not exceed the necessities of a defense against his attack. *Crawley v. State*, 7 Ga. App. 95, 66 S. E. 273.

So, a defendant who used profane and abusive language to another was not thereby precluded from defending herself with her fists against an attack made upon her by a third person with a board. *Arthur v. State*, 9 Ga. App. 298, 70 S. E. 1127.

In South Carolina, on the other hand, it is stated that the true rule is that the plea of self-defense is not available to one who used language which was so opprobrious that a reasonable man would expect it to bring on a physical encounter, and which did actually contribute to bringing it on. *State v. Rowell*, 75 S. C. 494, 56 S. E. 23; *State v. Ferguson*, 91 S. C. 235, 74 S. E. 502; *State v. Lee*, 85 S. C. 101, 137 Am. St. Rep. 869, 67 S. E. 141; *State v. Hunter*, 82 S. C. 153, 63 S. E. 685. See also *State v. Trammell*, 40 S. C. 331, 42 Am. St. Rep. 874, 18 S. E. 940.

This rule is not limited to opprobrious language used toward the deceased himself. Opprobrious or insulting language directed to a man's wife or daughter, or to some other person in his care and under his protection, in his presence, might and probably would provoke a difficulty even more quickly than if directed to himself; and the person who used it might reasonably expect

ane," and the amount of whisky he had imbibed that day. Ordinarily one in an intoxicated condition is not a safe bearer of the olive branch, and if he goes to his enemy to bury the hatchet, he should be careful not to carry the hatchet with him. Reasoning from these propositions, Slocum was not at all discreet, if in fact he was sincere, in his effort to make peace with Hixson; but the action here is not to recover damages for language used, or words spoken of or concerning Hixson, but for the assault and battery committed upon him. An actionable assault "is any attempt or offer with force or violence, to do a corporal hurt to another, whether from malice or wantonness, with such circumstances as denote, at the time, an intention to do it,

coupled with a present ability to carry such intention into effect." 3 Cyc. 1020. And the same book (pages 1021 and 1022) further correctly defines an assault and battery "as an unlawful touching of the person of another by the aggressor himself;" and again "the force or violence attempted or offered must be physical, and no words of themselves can constitute an assault." In the case of *White v. South Covington & C. S. R. Co.* 150 Ky. 684, 150 S. W. 838, this court held: "An assault . . . is not excused . . . by the fact that the passenger [assaulted] had used grossly profane and abusive language . . . without provocation." Applying these fundamental principles to the facts, it would seem that the lower court was

that it would, and therefore he would be at fault in bringing on the difficulty. *State v. Ferguson*, 91 S. C. 235, 74 S. E. 502; *People v. Curtis*, 52 Mich. 616, 18 N. W. 385.

Whether or not the language used in a particular instance was so opprobrious that it might have reasonably been expected to bring on a difficulty is a question of fact for the jury. *State v. Ferguson*, supra.

Notwithstanding the difference in the decisions of the courts on this question, it would seem, upon reason and principle, that the true rule should be that abusive or insulting language reasonably calculated to provoke a physical encounter deprives one of the right of self-defense against a simple assault provoked thereby, but not against an aggravated or deadly assault. This rule would fix the penalty according to the offense; and the decision in *State v. Gordon*, 191 Mo. 114, 109 Am. St. Rep. 790, 89 S. W. 1025, seems to sustain it, but the decision in that case is based upon the *Butler* and *Boatwright* Cases, supra. See also *Harris v. Com.* 140 Ky. 41, 130 S. W. 801.

All the courts, however, seem to agree upon one point, and that is that one cannot use opprobrious language for the purpose of provoking an assault, and affording him a pretext for wreaking his malice upon his adversary, and then exercise his right of self-defense. *State v. Lewis*, 118 Mo. 79, 23 S. W. 1082; *State v. Higginson*, 157 Mo. 395, 57 S. W. 1014; *State v. McDaniel*, 94 Mo. 301, 7 S. W. 634; *Butler v. State*, 92 Ga. 601, 19 S. E. 51; *Wheatley v. State*, 93 Ark. 409, 125 S. W. 414; *Allen v. Com.* 86 Ky. 642, 6 S. W. 645; *Jackson v. State*, 32 Tex. Crim. Rep. 192, 22 S. W. 831; *Hays v. Territory*, — Okla. —, 52 Pac. 950, reversed on rehearing in 7 Okla. 15, 54 Pac. 300; *State v. Bryant*, 102 Mo. 24, 14 S. W. 822; *State v. Scott*, 41 Minn. 365, 43 N. W. 62; *Barstado v. State*, 48 Tex. Crim. Rep. 255, 87 S. W. 344. See also *Garza v. State*, 48 Tex. Crim. Rep. 382, 88 S. W. 231; *Pedro v. State*, 48 Tex. Crim. Rep. 406, 88 S. W. 233; *Gray v. State*, 61 Tex. Crim. Rep. 454, 135 S. W. 1179.

One armed with a deadly weapon and 51 L.R.A.(N.S.)

ready to fight cannot provoke an assault by insulting language, and, when assaulted with a mere blow of the fist, at once shoot his assailant. *Hollingsworth v. Warnock*, 20 Ky. L. Rep. 883, 47 S. W. 770. See also to the same effect, *Cartwright v. State*, 14 Tex. App. 480.

Where defendant used abusive language to decedent, and decedent expressed his intention of striking him if he repeated such language, and he did repeat it, it was held in *State v. Doherty*, 52 Or. 591, 98 Pac. 152, that defendant could not successfully set up the right of self-defense, unless he had, in good faith, withdrawn, or attempted to withdraw, from the conflict. Such a holding the court said was but an announcement of the general rule that one who provokes a difficulty in which he kills another cannot plead self-defense, unless he, in good faith, withdrew, or attempted to withdraw, therefrom. *People v. McGrath*, 47 Hun, 325, 13 N. Y. S. R. 359, is to the same effect.

Evidence of vile language applied to the deceased by defendant, in *People v. Dobbins*, 138 Cal. 694, 72 Pac. 339, was held sufficient to countervail against the plea of self-defense, and to justify a verdict of murder in the first degree.

In *Shaw v. State*, — Tex. Crim. Rep. —, 73 S. W. 1046, it was held that if defendant provoked the difficulty by cursing and abusing the injured party, he could not justify on the ground of self-defense.

Besides the cases already cited containing other circumstances than mere abusive language as ground for the denial of the right of self-defense, see the following cases: *People v. Robertson*, 67 Cal. 646, 8 Pac. 600, 6 Am. Crim. Rep. 519; *Godfrey v. Com.* 15 Ky. L. Rep. 3, 21 S. W. 1047; *State v. McDonald*, 67 Mo. 13; *State v. Kloss*, 117 Mo. 591, 23 S. W. 780; *Hinton v. State*, 24 Tex. 454; *King v. State*, 13 Tex. App. 277; *Carver v. State*, — Tex. Crim. Rep. —, 148 S. W. 746; *Isaacs v. State*, 25 Tex. 174; *Barnett v. State*, 100 Ind. 171; *Turner v. State*, 80 Tenn. 547, 15 S. W. 838; *Smith v. State*, 105 Tenn. 305, 60 S. W. 145; *Moore v. People*, 26 Colo. 213, 57 Pac. 857. W. W. A.

very liberal with Hixson in suffering his case to go to the jury at all.

The first encounter was a mere war of words, and upon which no action can or is attempted to be based. Slocum remained upon the sidewalk, where he had a right to be. Although on the second encounter Slocum began it by the use of abusive language, still that did not justify Hixson leaving his premises to come upon the sidewalk, and grab, or attempt to grab, Slocum. Under such circumstances the jury were warranted in finding, under the court's instructions, that "the defendant (Slocum) then and there believed, or had reasonable grounds to believe, that the plaintiff was about to inflict upon him great bodily harm," and that in striking Hixson with the cane, he used only such means or force at his command as was necessary to resist the assault of plaintiff, and he was thereby excusable on the grounds of self-defense.

Appellant concedes that the instructions given by the court correctly apply the law to the general run of assault and battery cases, but insists that the court erred in refusing to instruct the jury so that they might believe the assault was begun with the first passage of words, and that the defendant was therefore the aggressor, and for that reason he cannot justify assaulting Hixson with the cane upon the grounds of self-defense. But, as we have seen, words do not constitute an assault, and therefore they cannot be the beginning of one.

Neither is appellant's contention sound that he had a right to go upon the sidewalk and make or force Slocum to leave it. The sidewalk belongs to the public. If Slocum's conduct was equivalent to a breach of the peace, he should have been prosecuted for it, and the record discloses the fact that he was. Appellant was not justified in attempting to take the law into his own hands.

While there is very little conflict of a material kind in the testimony, such as there was, under proper instructions of the court, the jury considered, and in rendering a verdict for Slocum, the appellee, we are unable to discover that they erred.

We therefore affirm the judgment of the lower court.

KENTUCKY COURT OF APPEALS.

PEYTON LIGON, Appt.,
v.

AMOS ALLEN, by Guardian.

(157 Ky. 101, 162 S. W. 536.)

Evidence — X-ray photograph.

To render an X-ray photograph admissible 1 L.R.A.(N.S.)

ble in evidence, its accuracy must be established.

(January 23, 1914.)

A PPEAL by defendant from a judgment of the Circuit Court for Henderson County in plaintiff's favor in an action brought to recover damages for alleged malpractice in the treatment of plaintiff's broken arm. Reversed.

The facts are stated in the opinion.

Messrs. Hines & Norman, Clay & Clay, and N. Powell Taylor, for appellant.

Messrs. H. M. Stanley and Newton Belcher, with Mr. John C. Worsham, for appellee:

When the pictures are identified by the person who took them, they are competent evidence.

Bowling Green Gaslight Co. v. Dean, 142 Ky. 678, 134 S. W. 1115; Louisville v. Arrow-smith, 145 Ky. 498, 140 S. W. 1022; Louisville & N. R. Co. v. Brown, 127 Ky. 732, 13 L.R.A.(N.S.) 1135, 106 S. W. 795.

Where certain conditions are proved to exist, the presumption is that the same condition continues to exist, until the contrary is established by evidence.

Wade v. Southern R. Co. 89 S. C. 280, 71 S. E. 859.

Note. — Use of photographs as evidence.

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- IX. Extraneous matter on photographs, 858.
- X. X-Ray photographs, 858.

Miller, J., delivered the opinion of the court:

This is an appeal from a judgment obtained by Amos Allen, who sues by his guardian, against the appellant, Dr. Peyton Ligon, for damages for alleged malpractice in the treatment of appellee's broken arm.

On December 4, 1911, the appellee, a boy about nine years of age, fell from a box to the floor of his father's store and fractured the bone in his arm called the humerus, about 2 inches above the elbow. The appellant, a practising physician, was promptly called and set the arm, binding it in splints and leaving the finger tips exposed. Appellant says he examined the fracture and placed the ends of the bones in a position, retaining them in position by placing

an angular splint from axilla to the ends of the fingers inside of the arm, and from shoulder to elbow joint on the outside, and that over these he applied a wider bandage down to and including the hand, leaving a part of the fingers exposed. He left the boy about 10 o'clock at night, with instructions for the father to call him promptly if the boy suffered any pain or showed any symptoms that indicated the need of attention. The father did not call appellant during the night. On the morning of the second day thereafter, about thirty six hours after he had applied the dressing, appellant made his second visit, and from an examination of the exposed fingers he saw the circulation of the arm was not good. He thereupon removed the dressing

I. Introduction.

This note is supplementary to the one appended to *Dederichs v. Salt Lake City R. Co.* 35 L.R.A. 802, where the earlier cases will be found.

The effect and conclusiveness of photographs as evidence are discussed in a note to *Higgs v. Minneapolis, St. P. & S. Ste. M. R. Co.* 15 L.R.A.(N.S.) 1162, and that question is excluded from this note.

II. In general.

Photographs duly verified are admissible as aids to the jury in understanding the evidence or the situation or condition of objects or premises material and relevant to the issues. *Higgs v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 446, 15 L.R.A. (N.S.) 1162, 114 N. W. 722, 15 Ann. Cas. 97; *Kansas City Southern R. Co. v. Morris*, 80 Ark. 528, 98 S. W. 363, 10 Ann. Cas. 618; *Davidson v. St. Louis & S. F. R. Co.* 164 Mo. App. 701, 148 S. W. 406.

But it is better to exclude photographs which can serve no special purpose. *State v. Hossack*, 116 Iowa, 194, 89 N. W. 1077.

Thus, photographs of a horse hitched to a carriage and standing at rest were properly excluded as having no tendency to disprove its alleged habit of kicking, which was the issue. *Morgan v. Hendrick*, 80 Vt. 284, 67 Atl. 702.

And when it is not shown that photographs will develop anything new or strengthen other proof, their rejection is not prejudicial error. *Lake Erie & W. R. Co. v. Wilson*, 87 Ill. App. 360.

However, if a photograph might be of some assistance in determining the issues presented to the jury, it should be admitted. *Re Lyle*, 93 Neb. 768, 141 N. W. 1127.

The difference between the image made upon a photographic plate and that made upon the retina of the eye is no reason for excluding the former, but goes only to its effect as evidence. The jury should, however, be carefully warned against the liability of the photograph to mislead. *Scott v.* 51 L.R.A.(N.S.)

New Orleans, 21 C. C. A. 402, 41 U. S. App. 498, 75 Fed. 373.

Notice to the other party of the taking of a photograph is not necessary to render it admissible. *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816, 11 Am. Neg. Rep. 63; *Hawkins v. Missouri, K. & T. R. Co.* 36 Tex. Civ. App. 633, 83 S. W. 52.

The trial judge may in his discretion allow photographs which have been put in evidence to be taken to the jury room. *Williams v. Carterville*, 97 Ill. App. 160; *State v. Shaw*, 73 Vt. 149, 50 Atl. 863, 13 Am. Crim. Rep. 51. And the appellate court cannot revise the exercise of his discretion in the matter. *Halloran v. New York, N. H. & H. R. Co.* 211 Mass. 132, 97 N. E. 631.

The jury may properly be allowed to inspect a photograph with a magnifying glass. *State v. Wallace*, 78 Conn. 677, 63 Atl. 448.

III. Preliminary proof.

a. In general.

Where the photographer's testimony showed that photographs were misleading as to the distances, objects, and conditions they purported to represent, they should not have been admitted. *Morris v. Territory*, 1 Okla. Crim. Rep. 617, 99 Pac. 760, 101 Pac. 111.

In *Chicago v. Hutchinson*, 129 Ill. App. 239, where photographs had been admitted to show only the general surroundings of the place of an accident, it was held to be error to reject subsequent testimony offered to prove their accuracy as to the condition of the ice and snow at the time of the accident, so as to make them admissible to show such condition.

One need not be a photographer or an expert to testify as to whom a photograph looks like. *Russell v. State*, — Ala. —, 38 So. 291.

b. Necessity for showing accuracy.

Photographs are legitimate evidence, but must be shown by other evidence to be

and found the arm to be considerably swollen, with blisters on it, and other evidence of defective circulation. Appellant then called Dr. Letcher to see the case with him on the same day; and, owing to the defective circulation of the arm, the doctors discarded the splints and used only bandages to hold the cotton on the arm, and splints only for the purpose of protecting the arm.

Appellee testified that he had suffered greatly during the night, but that the pain was removed intermittently by taking several small tablets which appellant had left with his father to be given to the boy in case his arm pained him.

Appellant says, however, that the defective circulation was not due to the tightness of the bandage, which had always been

sufficiently loose not to interfere with the circulation, but that the defective circulation was due to some injury to an artery or pressure from the fragments of the broken bone which caused the formation of a clot, and that this, with a natural swelling of the parts, produced such pressure upon the musculospiral nerve as to interfere with the function of that nerve; and that this condition frequently results from such fracture where no bandages or splints have been used. For about ten days appellee continued to suffer greatly with his arm. At the end of that time appellant and Dr. Letcher extended the arm for the purpose of increasing the circulation and relieving the pressure of the blood supply; Dr. Floyd administering the chloroform, and

photographs of the place or objects they purport to represent. *Smart v. Kapsas City*, 91 Mo. App. 586.

Thus, in *Beardslee v. Columbia Twp.* 188 Pa. 496, 68 Am. St. Rep. 883, 41 Atl. 617, the court said: "Photographs are competent evidence, and when properly taken are judicially recognized as of a high order of accuracy. . . . But in careless or inexpert or interested hands, they are capable of very serious misrepresentation of the original. Before they are permitted to be used in the trial, therefore, there should always be preliminary proof of care and accuracy in the taking of them, and of their relevancy to the issue before the jury."

Photographs unsupported by any proof that they correctly represent the place shown as it was at the time of an accident are properly excluded. *Goldsboro v. Central R. Co.* 60 N. J. L. 49, 37 Atl. 433, 2 Am. Neg. Rep. 408.

A photograph introduced to show the height of a rail from the ground is inadmissible without preliminary evidence as to its accuracy. *Cunningham v. Fair Haven & W. R. Co.* 72 Conn. 244, 43 Atl. 1047, 6 Am. Neg. Rep. 427.

And in *Com. v. Stirling*, 10 Pa. Dist. R. 437, the court said: "Where the offer of a photograph in evidence may affect so serious a question as one of life or death, the offer ought to be accompanied with proof of the circumstances under which the photograph was taken, and of its subsequent custody and history."

But it must be presumed by the appellate court that the preliminary proof is sufficient in the absence of anything appearing to the contrary. *Griffin v. Fredonia Brick Co.* 90 Kan. 375, 133 Pac. 574.

Although it was error to permit a witness to refer to a photograph and point out upon it the place of an accident, without any proof as to its accuracy, the error was cured by making the necessary proof before the photograph was formally admitted in evidence. *Beardslee v. Columbia Twp.* supra.

However, in *Cabbage v. Youngerman*, 51 L.R.A.(N.S.)

155 Iowa, 39. 134 N. W. 1074, it was held that photographs which have not been sufficiently verified to be admissible as independent evidence may be used as illustrations enabling a witness to testify more intelligibly.

In the absence of proof of its correctness, a photograph of plaintiff in an action for assault and battery, taken on the day of the assault, to show plaintiff's injuries, is inadmissible. *Martin v. Moore*, 99 Md. 41, 57 Atl. 671.

c. Effect of time of taking.

The time at which a photograph was taken is not important except as to the probability of change in the conditions or objects shown, and, ordinarily, when witnesses are able to verify photographs as substantially correct representations of conditions as they were at the time in question, they will be admitted in evidence, though taken at a different time. *Tracy v. Baltimore & O. R. Co.* 98 Fed. 633; *M. McGirr Sons Co. v. Babbitt*, 61 Misc. 291, 113 N. Y. Supp. 753; *Mahar v. Montello Granite Co.* 146 Wis. 46, 130 N. W. 949.

Thus, though photographs of the scene of a crossing accident were taken several months after the accident, at a time when there was no snow on the ground and after a building had been removed, they were admissible where these changes did not materially affect their value for the purpose for which they were introduced. *Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co.* 24 N. D. 40, 138 N. W. 976.

The fact that photographs were taken one and two years after the date involved does not render them incompetent when they are offered to show the topography of the country and other permanent conditions. *St. Louis & S. F. R. Co. v. Dale*, 36 Okla. 114, 128 Pac. 137.

If the changes made between the time when an accident occurred and when a photograph was taken were not so great as to be entirely misleading, it may properly be introduced, allowance being made

Dr. Forward being present. The doctors agree in the opinion that no surgical interference at that time was proper, and that such interference would have been dangerous. In the meantime the blisters upon the arm had developed into running sores.

About three weeks after the fracture the arm was examined by Drs. Watson and Smith. Upon a careful examination and measurement, the arm was found not to have shortened. Thereafter appellant and Dr. Letcher made daily visits to appellee for some time, and later visiting him at intervals of every three or four days, until February 14th, when they ceased to call at his father's residence, but instructed the father to bring the boy to appellant's

office in order that he might observe the condition of the boy's arm and direct such treatment as might be needed. In the meantime the father was instructed to massage and flex the fingers and elbow joint.

Appellant testifies that, when he and Dr. Letcher saw the boy's arm for the last time, on February 14th, its condition was much improved; that the bore had united and showed no deformity or shortening of the arm; that it was healing in a satisfactory manner; and that appellant and Dr. Letcher then believed that with continued massaging, which they repeatedly urged upon the boy's father as of supreme importance, the arm would be restored to all its motions. Appellee, however, did not go to appellant's office after February 14th. And a few

for the changes. *Craig v. Augusta-Aiken R. Co.* 93 S. C. 49, 76 S. E. 21.

Where photographs of a hole in a sidewalk were shown to represent conditions as they were at the time of the injury, they were equally admissible though taken two months after the accident, as though they had been taken on the day it occurred. *San Antonio v. Talerico*, — Tex. Civ. App. —, 78 S. W. 28.

It is proper to admit photographs of a house and its surroundings, the scene of a murder, upon testimony of several witnesses that they correctly represent the place as it was at the time of the murder, though there is no satisfactory proof as to when the photographs were taken. *Gibson v. State*, 53 Tex. Crim. Rep. 349, 110 S. W. 41.

Where the physical condition of plaintiff before and after an injury is in issue, it is proper to admit a photograph of him taken two months before the injury, upon his testifying that it was a good likeness of himself as he appeared at the time of the injury. *Galveston, H. & S. A. R. Co. v. Harper*, 53 Tex. Civ. App. 614, 114 S. W. 1169, 1190.

It is not error to admit a photograph of plaintiff taken two and one-half years before an accident, and another taken after, their correctness and accuracy being established by witnesses. *Houston & T. C. R. Co. v. Cluck*, — Tex. Civ. App. —, 84 S. W. 852.

A photograph of deceased, shown by her parents to be a correct likeness of her as she appeared shortly before her death, though taken two years prior thereto, was admissible for the purpose of identifying her as the woman a witness had seen in defendant's office under such peculiar circumstances that he observed her critically. *State v. McCoy*, 15 Utah, 136, 49 Pac. 420.

And the fact that a photograph of a murdered girl was taken two or three years before her disappearance does not render it inadmissible, where a sister testifies that it fairly represented her as she appeared at the time of her disappearance. *People v.* 51 L.R.A. (N.S.)

Durrant, 116 Cal. 179, 48 Pac. 75, 10 Am. Crim. Rep. 499.

In the absence of proof of change, it will be presumed that photographs of a bridge and an approaching trestle represent conditions as they were at the time of an accident, though they were taken long afterward. *Wade v. Southern R. Co.* 89 S. C. 280, 71 S. E. 859.

The fact that a photograph of an injured leg was taken long after the injury would be proper to consider upon the weight which should be given it, but would not affect its competency. *Bonnet v. Foote*, 47 Colo. 282, 28 L.R.A. (N.S.) 136, 107 Pac. 252.

But in *Porter v. Buckley*, 78 C. C. A. 138, 147 Fed. 140, photographs were held properly excluded on the ground that they were taken more than a year after the accident, and disclosed conditions which could not be proved to have been the same at the time of the accident.

And it was not error to exclude photographs of a railroad crossing taken three years after an accident, where it was not shown that the crossing was in the same condition when photographed as when the accident occurred. *Columbia & P. D. R. Co. v. State*, 105 Md. 34, 65 Atl. 625.

So, the fact that a photograph of an old man was taken twenty-nine years before the time it was sought to identify him as having been seen by a certain person is sufficient at least to make its exclusion a proper question for judicial discretion. *State v. Ready*, 77 N. J. L. 329, 72 Atl. 445.

And in *Western Maryland R. Co. v. Martin*, 110 Md. 554, 73 Atl. 267, where plaintiff, who offered a photograph in evidence, was unable to tell when it was taken or from what position or how long ago, but could say only that it represented conditions before a fill was made, according to his way of looking at them, its admission was held to be error.

A photograph of a plaintiff in a personal injury action, taken nine years before trial, should not have been admitted, as it could only have misled the jury with-

weeks thereafter appellant learned from appellee's father that he had sent the boy away for treatment; the father declining, however, to tell where he had sent him.

Appellee testifies, however, that his arm became stiff and the hand drawn, and that, by the time he had been discharged by appellant, on February 14th, the muscles had hardened, rendering the arm and hand practically useless. This condition of the arm, however, was not reported to appellant.

In April appellee's father sent appellee to Dr. Ford, at Livermore, Kentucky, for examination and treatment. Dr. Ford took an X-ray photograph of the arm and concluded that an operation would be necessary in order to relieve the pain caused by what he thought was the lapped bone of

the broken arm. This operation was performed by Dr. Ford and his assistant, in which they took off about an inch of the protruding bone, and then wired the two ends together with a silver cord. Appellee testifies that the operation relieved the pain and enabled him to raise his hand as high as his shoulder, but the muscles and ligaments in the arm remained atrophied; the arm becoming withered to some extent and having little life.

Appellant testified that the X-ray photograph taken by Dr. Ford before the operation performed by him in April did not correctly show the condition of the boy's arm as it was at the last time appellant saw it in February, since the arm at that time was not shortened or deformed, and the boy then

out proving any important fact for the appellee. *Rock Island v. Drost*, 71 Ill. App. 613.

d. Effect of change in conditions.

See also *supra*, III. c.

The effect of a change in conditions between the time in question and the time when the photograph offered in evidence was taken depends upon the extent of the change.

Thus, whether photographs of a building taken soon after a fire were sufficiently accurate to throw some light on the condition of the building at the time of the fire was a question of fact determinable at the trial. *Turner v. Cochecho Mfg. Co.* 75 N. H. 521, 77 Atl. 999.

And in a suit involving the existence of a partnership at the time certain goods were sold, a photograph of the building in which the alleged partners were doing business was properly excluded, where it appeared that a sign had been removed so that the photograph did not represent the premises as they were at the time of the transactions involved. *Alpaugh v. Hulse*, 72 App. Div. 438, 76 N. Y. Supp. 571.

A photograph offered to show the general situation at a railroad and highway crossing was not rendered inadmissible by the fact that a car appeared in the photograph which was not there at the time of the accident, the jury being properly cautioned concerning it. *Curtis v. New York, N. H. & H. R. Co.* 32 R. I. 542, 80 Atl. 127.

In *State v. Rogers*, 129 Iowa, 229, 105 N. W. 455, it was held that photographs of a room in which a murder was committed were admissible, it being shown that the partitions and entrances were the same, even though the furniture may not have been similarly located.

Though the season had changed and some trees had been trimmed at the place of an accident before photographs were taken, the action of the trial judge in admitting them will not be reversed without clear proof that injury was thereby inflicted 51 L.R.A. (N.S.)

upon defendant. *Maryland Electric R. Co. v. Beasley*, 117 Md. 270, 83 Atl. 157.

And photographs of a wreck taken an hour after it occurred were properly admitted, the only change shown to have been made in the meantime being the piling up by workmen of ties which were torn loose and broken in the wreck. *Johnson v. Union P. R. Co.* 35 Utah, 285, 100 Pac. 390.

Where defendant put in evidence photographs of the sidewalk where plaintiff was injured, plaintiff could show that changes had been made between the time of the accident and the taking of the photograph. *Achey v. Marion*, 126 Iowa, 47, 101 N. W. 435.

e. Sufficiency of proof of correctness.

The correctness of the representation by a photograph of the objects portrayed need not be proved by the one who took it, but may be shown by any witness competent to speak from personal observation. *Mow v. People*, 31 Colo. 351, 72 Pac. 1069; *McGar v. Bristol*, 71 Conn. 652, 42 Atl. 1000; *Temple v. Gilbert*, 86 Conn. 335, 85 Atl. 380; *Indiana Union Traction Co. v. Scribner*, 47 Ind. App. 621, 93 N. E. 1014; *Consolidated Gas, E. L. & P. Co. v. State*, 109 Md. 186, 72 Atl. 651; *McKarren v. Boston & N. Street R. Co.* 194 Mass. 179, 80 N. E. 477, 10 Ann. Cas. 961; *Hall v. Connecticut Mut. L. Ins. Co.* 76 Minn. 401, 79 N. W. 497; *Stiasny v. Metropolitan Street R. Co.* 58 App. Div. 172, 68 N. Y. Supp. 694, affirmed without opinion in 172 N. Y. 656, 65 N. E. 1122; *Com. v. Swartz*, 40 Pa. Super. Ct. 375; *Hughes v. State*, 126 Tenn. 40, 148 S. W. 543, Ann. Cas. 1913D, 1202; *Missouri, K. & T. R. Co. v. Magee*, — Tex. Civ. App. —, 49 S. W. 928; *New York, S. & W. R. Co. v. Moore*, 45 C. C. A. 21, 105 Fed. 725; *Parker v. C. A. Smith Lumber & Mfg. Co.* — Or. —, 138 Pac. 1061.

It was not error to admit enlargements of original photographs of the scene of an accident without calling the maker of the enlargements as a witness. *Diller v. North-*

had full use of it at the elbow joint; the fingers were not deformed, but could be flexed and extended considerably; that the arm as a whole was in a very good condition and showed marked signs of improvement, with every reason to believe at the time that, if appellant's directions to flex and massage the fingers and elbow joint had been carried out, the use of the arm would have been restored. Dr. Letcher corroborates appellant in all respects as to the treatment of the boy's arm and its condition on February 14th, and states that the treatment of the arm by appellant was that which is usually given and required by good surgery in such cases.

Dr. Letcher further testified that, when he last examined the boy's arm on February

14th, there was very good motion in the elbow joint; no deformity of the arm at the point of the fracture nor in the hand; very good movement of the fingers and hand, with every indication that, if the improvement should continue, good use of the hand and arm would result; and that he joined appellant in urging upon appellee's father the importance of taking the boy to see the appellant at short intervals thereafter in order that he might see the injured arm and continue to advise as to future treatment. Dr. Letcher further says that he is satisfied the symptoms which developed in the arm could not have been produced from any bandage that had been applied, but was largely due to the general physical condition of the boy, which was poor; the mother

ern California Power Co. 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D, 908.

A photograph of a room in which a murder was committed is sufficiently authenticated by testimony of the person who took it that it was taken immediately after the shooting, and correctly represented the objects sought to be shown and their relative positions, though the photographer who finished the picture was not sworn. *People v. Ah Lee*, 164 Cal. 350, 128 Pac. 1035.

But in *MacFeat v. Philadelphia, W. & B. R. Co.* 5 Penn. (Del.) 52, 62 Atl. 898, a photograph of the scene of an accident was held inadmissible, apparently because it was not taken by the witness offered to authenticate it, and a different photograph taken by the witness was admitted.

To render a photograph competent, it is not necessary that it be taken by a skilled photographer, it being sufficient to show that it is a correct likeness of the objects it purports to represent. *Mow v. People*, 31 Colo. 351, 72 Pac. 1069.

And an amateur who has taken but few photographs, and makes no claim to being an expert, is nevertheless competent to testify as a photographer, the limited character of his experience going to the weight rather than to the admissibility of his evidence. *McGovern v. Hays*, 75 Vt. 104, 53 Atl. 326.

A witness, to verify the correctness of the representation of a photograph, need not have seen the photograph taken. *Huntington Light and Fuel Co. v. Beaver*, 37 Ind. App. 4, 73 N. E. 1002; *Hebbe v. Maple Creek*, 121 Wis. 668, 99 N. W. 442.

The only identification of a photograph of the scene of an accident necessary is testimony that it properly represents the scene, which could be sworn to by any witness who knew the fact. *Thompson v. Galveston, H. & S. A. R. Co.* 48 Tex. Civ. App. 284, 106 S. W. 910.

So, where the testimony of several witnesses tended to show that the appearance of a place was fairly represented by photographs, it was not error to admit them, though no one in terms testified to their 51 L.R.A.(N.S.)

accuracy. *Smith v. Central Vermont R. Co.* 80 Vt. 208, 67 Atl. 535.

Testimony by prosecutor's physician that certain photographs were of prosecutor, and that the wounds appeared upon the photographs as they were upon his body at the time he examined him, is a sufficient showing of the accuracy of the photographs. *Carter v. State*, 4 Ala. App. 72, 59 So. 222.

When photographs of a corpse are used only for purposes of identification, there is no necessity for showing when, where, by whom, or under what circumstances they were taken. *Lamb v. State*, 69 Neb. 212, 95 N. W. 1050.

Where a witness who took photographs of a railroad crossing testified that they were correct representations of the surroundings, they were admissible. *New York, C. & St. L. R. Co. v. Robbins*, 38 Ind. App. 172, 76 N. E. 804.

The point of view from which a photograph is taken may affect its value as evidence, but not its admissibility. *Ibid.*

Testimony by one who took photographs of land, that he made the photographs and that there were rocks and brush on the land as shown in them, is sufficient to warrant their admission. *Wicks v. German Loan & Invest. Co.* 150 Iowa, 112, 129 N. W. 744.

Testimony of plaintiff that a photograph correctly represents the scene of an accident is sufficient to render it admissible. *Accousi v. G. A. Stowers Furniture Co.* — Tex. Civ. App. —, 87 S. W. 861.

But where the correctness of the position of dummy figures in a photograph depended only upon the testimony of plaintiff, who was unconscious when in the position which the photograph is supposed to show, it should not have been admitted. *Riggs v. Metropolitan Street R. Co.* 216 Mo. 304, 115 S. W. 960.

And it was error to admit a photograph of a man's leg, showing an injury where plaintiff claimed he had been injured, in the absence of evidence identifying the photograph, or indicating when it was taken, or whose leg was shown, or whether

of the boy having been tubercular and the boy addicted to the use of cigarettes. He says that, of all the fractures of the body, a fracture at the point where this one occurred is most frequently attended by stiffness of the elbow joint.

Drs. Floyd, Watson, Poole, and Forward all corroborated the appellant and Dr. Letcher to the effect that the treatment of appellee's arm by appellant was the proper treatment under the circumstances.

Upon the trial the jury returned a verdict for \$3,000 damages and \$105 doctors' bills; but upon a motion for a new trial, the court having suggested to plaintiff that the verdict was for too much, and that he should remit a thousand dollars thereof, the plaintiff agreed that the remittitur might be

entered, whereupon the court reduced the judgment to \$2,105, and the motion for a new trial was overruled. To this ruling the appellant excepted and was granted an appeal.

Appellant assigns four grounds for a reversal: (1) Error in admitting the X-ray photographs in evidence; (2) newly discovered evidence; (3) the verdict is flagrantly against the evidence; and (4) the court having found the verdict to be excessive, the plaintiff could not avoid a new trial by remitting a part of the verdict.

Dr. Ford was introduced by appellee and testified that he first examined appellee's arm about April 4, 1912, and found the arm was swollen, distorted, and paralyzed, and that he operated on April 16th. He says

it truly represented the character of plaintiff's injury. *Hammond Packing Co. v. Dickey*, 106 C. C. A. 317, 183 Fed. 977.

Photographs of hoops from a vat were held inadmissible in the absence of satisfactory proof that they were the ones from the vat which burst and caused the injury sued for. *Hupfer v. National Distilling Co.* 114 Wis. 279, 90 N. W. 191.

But where, on a subsequent trial of the same case, satisfactory proof of the identity of the hoops was made, the photographs were held to have been properly admitted. 127 Wis. 306, 106 N. W. 831.

In a suit by a husband for divorce on the ground of adultery, photographs of a man and woman known by witnesses to be living as husband and wife were not properly verified where the only witness identifying the woman shown in the picture as plaintiff's wife was plaintiff himself, and the evidence of the other witnesses was indefinite as to the time they knew the persons shown in the picture to be living together. *Pessolano v. Pessolano*, 34 Misc. 16, 69 N. Y. Supp. 449.

f. Discretion of court.

Whether a photograph offered in evidence is a correct representation of the object or thing in question is a preliminary question for the trial court. *Dillar v. Northern California Power Co.* 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D, 908; *McGar v. Bristol*, 71 Conn. 652, 42 Atl. 1000; *State v. Cook*, 75 Conn. 267, 53 Atl. 589; *Temple v. Gilbert*, 86 Conn. 335, 85 Atl. 380; *Parker v. C. A. Smith Lumber & Mfg. Co.* — Or. —, 138 Pac. 1061.

And the same is true as to their practical instructiveness. *Carey v. Hubbards-ton*, 172 Mass. 106, 51 N. E. 521; *Halloran v. New York, N. H. & H. R. Co.* 211 Mass. 132, 97 N. E. 631; *Eldredge v. Mitchell*, 214 Mass. 480, 102 N. E. 69.

There is, however, some apparent conflict as to the finality of the ruling of the trial court upon the sufficiency of the preliminary proof for the admission of photographs in evidence.

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In some cases it is said that the sufficiency of the preliminary proof is largely within the discretion of the trial court. *Re Hayes*, — Colo. —, 135 Pac. 449; *State v. Miller*, 43 Or. 325, 74 Pac. 658; *Whaley v. Vidal*, 27 S. D. 642, 132 N. W. 248.

Some say his determination is final (*McKarren v. Boston & N. Street R. Co.* 194 Mass. 179, 80 N. E. 477, 10 Ann. Cas. 961), and is not open to exception (*Jameson v. Weld*, 93 Me. 345, 45 Atl. 299; *Stone v. Lewiston, B. & B. Street R. Co.* 99 Me. 243, 59 Atl. 56; *Babb v. Oxford Paper Co.* 99 Me. 298, 59 Atl. 290; *Pritchard v. Austin*, 69 N. H. 367, 46 Atl. 188).

It is apparent, however, that it was not the intention of the courts in the above cases to hold that the admissibility of photographs rested finally with the trial judge, for in the case of *Rodick v. Maine C. R. Co.* 109 Me. 530, 85 Atl. 41, the court said that, while it would have been wiser to have excluded the photographs in question, it was not such an abuse of discretion to admit them as to warrant the sustaining of exceptions. "It may have been error, but not such an exceptionable error as would justify the ordering of a new trial."

In *De Forge v. New York, N. H. & H. R. Co.* 178 Mass. 59, 86 Am. St. Rep. 464, 59 N. E. 669, 9 Am. Neg. Rep. 501, the court said that the discretion of the trial judge as to the admission of photographs is not unlimited, and he is not at liberty to exclude photographs in disregard of the rules of law.

And in *Everson v. Casualty Co.* 208 Mass. 214, 94 N. E. 459, the court says: "The general rule respecting the admission of photographs, plans, and models, is that whether they are to be received or not is a preliminary question resting largely, though not entirely, in the discretion of the trial court, whose duty is primarily to determine whether there is sufficient similarity between what is offered and the original, which is the subject of inquiry, to make it of any assistance to the jury in passing upon the issue before them. While the discretion of the trial judge in this regard is not unlimited, his action will

the result of the operation was as good as he had expected, considering the time the boy was under his treatment, but that his father took the boy away before Dr. Ford had time to secure the results that he thought he could have secured in the way of improving the boy's condition had he remained longer under his treatment. Dr. Ford also stated that, as he did not know the condition of the boy's arm at the time of the injury, he could not say positively whether there was anything connected with the fracture of the arm to prevent a good apposition or union, and that he could not say whether there was any negligence at the time the arm was set; but in his opinion the arm was neglected afterwards, if it had been properly set. He also stated his

first impression was that the trouble with the arm was due to a dislocation, but a closer examination showed a fracture of the humerus, and that, while it is not difficult to reduce such a fracture, it is hard to get good functional results, and that bad results often followed. In his opinion the operation was necessary for the purpose of correcting the deformity and taking the pressure off of the muscles, common nerves, and blood vessels, which was causing paralysis and obstructing the circulation.

As a part of his deposition Dr. Ford filed two X-ray photographs, one of which he took before the operation was performed, the other afterwards. These photographs were admitted in evidence over appellant's objection. Conceding the general rule to be

not be revised unless it appears to have been plainly wrong, or in disregard of some rule of law governing the rights of the parties."

In *Mitton v. Cargill Elevator Co.* — Minn. —, 144 N. W. 434, it was held that when a competent witness testifies that a photograph correctly represents the objects it purports to portray, it is not for the court to decide that the witness is unworthy of belief, or that the photograph is misleading.

And in *State v. Miller*, 43 Or. 325, 74 Pac. 658, the case was reversed because of the admission of certain photographs.

In *Consolidated Gas, E. L. & P. Co. v. State*, 109 Md. 186, 72 Atl. 651, it is held that preliminary verification and practical instructiveness are questions for the court, and his discretion in admitting photographs is not the subject of exception, unless it is plainly exercised in an arbitrary manner.

And the court's decision upon this preliminary question will rarely be reviewed. *Harris v. Ansonia*, 73 Conn. 359, 47 Atl. 672; *Hassam v. Safford Lumber Co.* 82 Vt. 444, 74 Atl. 197 (*dictum*).

When rejected photographs are not in the record, their rejection will not be reviewed on appeal. *Whaley v. Vidal*, 27 S. D. 642, 132 N. W. 248.

And when the ground for rejection does not appear, and may have been because of plaintiff's failure to make out some preliminary matter of fact to the judge's satisfaction, his decision will not be reversed. *Harris v. Quincy*, 171 Mass. 472, 50 N. E. 1042.

In *Kaufman v. National Lumber Ins. Co.* 231 Pa. 642, 81 Atl. 53, the court refused to review the discretion of the trial court in rejecting photographs of the *locus in quo*, where the objection to them was that they were taken without care by an inexperienced amateur, and that the jury had viewed the premises so that the photographs were unnecessary.

Where a statute made the allowance of a view of the premises involved discretionary with the court, it was held that the

admission of photographs of the premises was likewise discretionary, for to hold otherwise would involve the absurdity of placing the admission of the best evidence within the court's discretion, while the admission of secondary evidence would be beyond such discretion. *Morris v. Territory*, 1 Okla. Crim. Rep. 617, 99 Pac. 760, 101 Pac. 111.

IV. As secondary evidence.

See also *infra*, VII. a.

It is not error to exclude a photograph on the ground that the jury has viewed the premises. A photograph is at best secondary evidence, and, when direct observation has been had, is usually incompetent. *Dobson v. Philadelphia*, 7 Pa. Dist. R. 321.

Nor is the exclusion of photographs prejudicial where the testimony of witnesses is sufficiently full and explicit to enable the jury to understand what they were intended to show. *Kansas City Southern R. Co. v. Morris*, 80 Ark. 528, 98 S. W. 363, 10 Ann. Cas. 618.

And where personal injuries are perfectly capable of verbal description, it is error to admit photographs of them, as the only reason for offering them must have been to inflame the sympathies of the jury. *Cirello v. Metropolitan Exp. Co.* 88 N. Y. Supp. 932.

Photographs of gunshot wounds upon a body, which are subject to accurate oral description, being neither necessary nor instructive and tending to arouse the indignation of the jury, should be excluded. *State v. Miller*, 43 Or. 325, 74 Pac. 658.

But it has been held that the mere fact that the situation shown by a photograph may be verbally described is no ground for excluding it. *Zancanella v. Omaha & C. B. Street R. Co.* 93 Neb. 774, 142 N. W. 190.

And photographs of objects or places are sometimes admitted though the originals are also in evidence or have been viewed by the jury. Thus, in *Com. v. Best*, 180 Mass. 492, 62 N. E. 748, bullets and also photographs of them were put in evidence.

that photographs are admissible in evidence when their accuracy is shown, appellant insists there is no proof showing that either of the photographs admitted in this case correctly represented the condition of the arm at the time it was taken, or that the photograph taken before the operation was performed represented the condition of the arm as it was when it was last treated or seen by appellant. Did the circuit court err in admitting the photographs?

The general rule as to the admission of ordinary photographs is stated as follows in 17 Cyc. 417: "When, in an action for personal injuries or other action of tort, or in criminal prosecutions, it becomes material to know the location, surroundings, and condition of the premises upon which

the accident, injury, or crime in controversy occurred, photographs of the *locus in quo*, if verified by proof that they are true representations, are competent evidence. But the value and admissibility of the photograph, as in other cases, depend upon the fact that it is a correct representation of the place in question, and that the condition existing when it was taken was an exactly accurate reproduction of the condition existing when the accident, injury, or crime occurred. Hence, if the photographs are taken so long after the occurrence that the surroundings or conditions have changed, or whenever taken, if they do not for any reason appear to represent the subject or the conditions existing at the time of the occurrence in controversy in such a way as

Though plaintiff was in court, and there was no reason why his injured leg could not have been shown to the jury, the admission of photographs of it was not prejudicial error, where the descriptions by witnesses accorded with the photographs and defendant made no request for a view by the jury. *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644, 6 Am. Neg. Rep. 746.

The skull of deceased and a photograph thereof were properly admitted to be used by experts in explaining their testimony. *Savary v. State*, 62 Neb. 166, 87 N. W. 34.

It is not prejudicial error to admit in evidence a photograph of plaintiff's injured leg, though the leg was also exhibited to the jury. *Toledo Traction Co. v. Cameron*, 69 C. C. A. 28, 137 Fed. 48.

Where a plaintiff lives in another state, and is not present at the trial, the production of her photograph as secondary evidence is not objectionable. *Cunnius v. Reading School Dist.* 7 Lack. Leg. News, 177.

The trial court has discretion to admit a photograph of wearing apparel taken from a murdered body, although the apparel is in court at the time of the trial. *Com. v. Tucker*, 189 Mass. 457, 7 L.R.A. (N.S.) 1056, 76 N. E. 127.

And it was not error to admit a photograph of the pieces of a broken knife put together, though the original pieces were already in evidence. *Ibid.*

After a photograph of a letter has been admitted without objection to it on the ground that it is secondary evidence, it can be excluded only by a motion to strike. *Frank v. Berry*, 128 Iowa, 223, 103 N. W. 358.

V. Of persons.

a. In general.

A photograph may be admitted to show the appearance of a person at a certain time. *Hoyt v. Chicago City R. Co.* 166 Ill. App. 361.
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So, a photograph showing plaintiff in an action for personal injuries, walking to the courthouse, apparently in good physical condition, was evidence for the consideration of the jury, but it would have been error for the court to have directed particular attention to it. *Simpson v. Peoria R. Co.* 179 Ill. App. 307.

In *Davis v. Seaboard Air Line R. Co.* 136 N. C. 115, 48 S. E. 591, 1 Ann. Cas. 214, photographs of a child taken just before its injury, and also thereafter before its death, were admitted.

A full length photograph of deceased was properly admitted to rebut testimony of defendant that he was smaller than deceased, when the witness who identified the photograph was also represented in it and was about the same distance from the camera as deceased. *Com. v. Keller*, 191 Pa. 122, 43 Atl. 198.

Photographs of the body of a girl whose death it was claimed was caused by defendant's brutal treatment were properly admitted if measurably true representations of it as it appeared after death. *Young v. State*, 49 Tex. Crim. Rep. 207, 92 S. W. 841.

Negatives found near the scene of a burglary, and claimed to be photographs of defendants, who were on trial for the burglary, were properly admitted. *Russell v. State*, — Ala. —, 38 So. 291.

Photographs of an injured person which correctly represent his appearance shortly after the injury are not rendered inadmissible by the fact that his appearance as shown by them is likely to awaken sympathy in the minds of the jury. *People's Gaslight & Coke Co. v. Amphlett*, 93 Ill. App. 194.

But the introduction of the photographs of a beautiful woman for whose death her husband and children are suing could but introduce the personal element where pecuniary damages alone should be considered, and is reversible error. *Smith v. Lehigh Valley R. Co.* 177 N. Y. 379, 69 N. E. 729.

So, also, photographs showing a woman's injured foot in aggravated aspects, liable

to be instructive, they will be rejected. Moreover, where the photograph is not offered as a mere general representation of the *locus in quo*, but to show distances, relative sizes, or locations of objects, it may be very deceptive and misleading, and it seems that much more convincing proof of its accuracy is required than in ordinary cases."

The rule above announced is equally applicable to X-ray photographs. In the volume above quoted from, at page 420, it is said: "While a picture produced by an X-ray cannot be verified as a true representation of the subject in the same way that a picture made by a camera can be, the rule in regard to the use of ordinary photographs on the trial of a cause applies to photographs of the internal structure

and conditions of the human body taken by the aid of X-rays, when verified by proof that they are a true representation."

A photograph is only a pictured description of what the witness saw, and is therefore admissible, if the fact is relevant. The use of maps, models, diagrams, and photographs, as testimony to the objects represented, rests fundamentally on the theory that they are the pictorial communications of a qualified witness, who uses this method of communication instead of, or in addition to, some other method. 1 Wigmore, Ev. § 793.

In 1 Wigmore on Evidence, § 792 (3), it is further said: "The objection that a photograph may be so made as to misrepresent the object is genuinely directed against

to arouse the sympathy of the jury, are inadmissible in an action by her husband for nursing, medical attendance, and loss of services and society, where there was other evidence showing the expense and the extent of her impaired condition. *Selleck v. Janesville*, 104 Wis. 570, 47 L.R.A. 691, 76 Am. St. Rep. 892, 80 N. W. 944.

And where a homicide occurred as the result of mistreatment of defendant's sister by her husband, which it was claimed had made her a physical wreck in a few months, and defendant had put in evidence as to her physical condition and appearance before her marriage, it was not error to exclude a photograph of her, taken before her marriage, as a photograph of a beautiful woman, together with evidence offered that defendant brooded over this picture of his sister, would be likely to distract the attention of the jury from the main issues. *Willis v. State*, 49 Tex. Crim. Rep. 139, 90 S. W. 1100.

It was within the discretion of the trial court to exclude photographs of assured in an action on a life insurance policy, where the photograph was offered by defendant, and was taken under unfavorable circumstances by a person employed by defendant more than a year after the date of the policy, and when the condition of the assured's health had changed. *Dolan v. Mutual Reserve Fund Life Asso.* 173 Mass. 197, 53 N. E. 398. The nature of the photograph involved in this case is shown in a footnote by the reporter, which appears only in the official report.

Where a material issue was the appearance as to age of a young girl at the time of her employment, it was error to admit a photograph of her in her communion dress taken a year before she was employed, because it would necessarily be misleading on account of the rapid changes in persons of her age. *Dresch v. Elliott*, 137 App. Div. 252, 122 N. Y. Supp. 14.

A photograph of a testator is inadmissible upon the issue of testamentary capacity. *Varner v. Varner*, 16 Ohio C. C. 386, 9 Ohio C. D. 273.

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b. For identification.

The fact that a photograph used to identify accused was taken by a police officer after his arrest is no ground for excluding it. *Shaffer v. United States*, 24 App. D. C. 417.

In *State v. Hasty*, 121 Iowa, 507, 96 N. W. 1115, a prosecution for adultery, a photograph of defendant's paramour was held admissible to identify her as the female with whom he lived in another state.

A photograph of defendant taken from the Rogues' Gallery is admissible to identify him. *Com. v. Johnson*, 199 Mass. 55, 85 N. E. 188.

Where there was some testimony as to a change in the appearance of accused due to his wearing glasses, which he refused to remove, a photograph taken of him without glasses was admissible to aid in his identification. *People v. Carey*, 125 Mich. 535, 84 N. W. 1087.

In *State v. Fulkerson*, 97 Mo. App. 599, 71 S. W. 704, a photograph of defendant by which prosecuting witness had first identified him as her assailant was admitted in evidence.

Where a physician who performed an autopsy did not personally know deceased, a photograph of him in life was admissible to enable the physician to identify it as that of the person upon whom he performed the autopsy. *State v. Finch*, 54 Or. 482, 103 Pac. 505.

And where a trial was held four years after a burglary was committed, it was proper to admit photographs of those accused, which were shown to be good likenesses of them at about the time of the crime, to establish their identity by witnesses who testified that they were shown the photographs shortly after the burglary, and were then able to identify them as pictures of men they saw in the vicinity on the day the crime was committed. *Considine v. United States*, 50 C. C. A. 272, 112 Fed. 342, writ of certiorari denied in 184 U. S. 699, 46 L. ed. 765, 22 Sup. Ct. Rep. 938,

its testimonial soundness; but it is of no validity. It is true that a photograph can be deliberately so taken as to convey the most false impression of the object. But so also can any witness lie in his words. A photograph can falsify just as much and no more than the human being who takes it or verifies it. The fallacy of argument occurs in assuming that the photograph can come in testimonially without a competent person's oath to support it. If a qualified observer is found to say, 'This photograph represents the fact as I saw it,' there is no more reason to exclude it than if he had said, 'The following words represent the

fact as I saw it,' which is always in effect the tenor of a witness's oath. If no witness has thus attached his credit to the photograph, then it should not come in at all. Any more than an anonymous letter should be received as testimony. There can be no middle ground between these two consequences."

If, however, the photograph should not represent the fact as the witness saw it, it is not admissible; and the only person who can show that it does represent the fact as the witness saw it is the witness himself. It necessarily follows, therefore, that, where the witness fails to make an

But in *Stiasny v. Metropolitan Street R. Co.* 58 App. Div. 172, 68 N. Y. Supp. 894, affirmed without opinion in 172 N. Y. 656, 65 N. E. 1122, it was held that a photograph of plaintiff was inadmissible to contradict the description of him given by witnesses who claimed to have seen him at the time he was injured, without first showing it to the witnesses and asking them whether it was a photograph of the person they saw injured.

c. Of part of body.

Photographs of the head and face of deceased, taken shortly after discovery of the body, were properly admitted to show marks and bruises thereon corresponding to those which would be inflicted by the peculiar kind of hatchet used in the establishment where defendant worked. *People v. Rogers*, 163 Cal. 476, 126 Pac. 143.

Photographs of the body of deceased, showing the entrance and exit of a bullet, were admissible as illustrating how he was killed. *People v. Lee Nam Chin*, — Cal. —, 137 Pac. 917.

In *State v. Bailey*, 79 Conn. 589, 65 Atl. 951, where the skull of a murdered man was admitted in evidence, there was no error in admitting duly authenticated photographs of the skull, taken before the brain had been removed, for the purpose of showing the condition of the skull and its interior and the injury to the skull and brain.

Properly authenticated photographs of the body of a murdered person are admissible to show the location and nature of wounds thereon, and the fact that defendant admits the location and character of the wounds does not render them inadmissible. *State v. Powell*, 5 Penn. (Del.) 24, 61 Atl. 966.

Photographs of a person correctly showing the injury sued for are admissible. *Fuller v. Kelso*, 163 Ill. App. 576.

Photographs of part of plaintiff's body, showing the injury for which recovery is sought, are admissible when relevant and properly verified. *McKarren v. Boston & N. Street R. Co.* 194 Mass. 179, 80 N. E. 477, 10 Ann. Cas. 961.

In an action for injuries received on a 51 L.R.A.(N.S.)

defective sidewalk, a photograph taken some weeks after the injury, showing a sore which had developed, was held admissible. *Davis v. Adrian*, 147 Mich. 300, 110 N. W. 1084.

Photographs showing the wounds of deceased before they had been altered by surgeons are admissible in a prosecution for murder, they being illustrative and instructive in connection with the testimony of the doctor and other witnesses. *State v. Roberts*, 28 Nev. 377, 82 Pac. 100.

Photographs of plaintiff, a gymnast, showing his legs as they appeared before the injury complained of, were held admissible in *Cincinnati, H. & D. R. Co. v. De Onzo*, 87 Ohio St. 109, 100 N. E. 320.

Photographs of deceased showing the gunshot wounds from which he died are admissible to show the location and direction of the wounds, the position he was in at the time defendant shot him being material on the issue of self-defense. *Morris v. State*, 6 Okla. Crim. Rep. 29, 115 Pac. 1030.

Photographs of the wounds on the head of deceased, after proof of their accuracy, are admissible in a prosecution for murder. *Smith v. Territory*, 11 Okla. 669, 69 Pac. 805.

It was not error to admit, in connection with expert testimony, a photograph of the brain of deceased after part of the skull was removed, it being charged that he was killed by a blow on the head. *Monson v. State*, — Tex. Crim. Rep. —, 63 S. W. 647.

Photographs of the left hand of defendant, taken with his consent, after due warning, were properly admitted to show a correspondence between a peculiarly formed finger on the hand and marks left at the scene of a homicide. *Powell v. State*, 50 Tex. Crim. Rep. 592, 99 S. W. 1005.

It was not an abuse of the discretion of the court to admit photographs of prosecuting witness showing injuries received at the time of the robbery, they being shown to be correct representations of the injuries at the time they were inflicted, except as they would naturally change in five or six days. *State v. Fatch-Mohamed*, — Wash. —, 136 Pac. 676.

The admission of a photograph of a

X-ray photograph admissible by testifying to its accuracy, it is not admissible and should be rejected. This rule is recognized by all the authorities. See Stewart, Legal Medicine, § 13; 2 Wharton & M. S. Med. Jur. § 564; 3 Witthaus & B. Med. Jur. § 779.

In 1 Greenleaf on Evidence, 10th ed. § 439h, it is said: "The use of photographs taken by the vacuum tube—Röntgen rays—may involve slightly different principles. Since the operator will usually not have perceived the object, usually a concealed bone, which his ordinary organs of vision, he will not be able to put forward the pho-

tograph as corresponding to the results of his own observation; nevertheless, if he can testify that the process is known to him (by experience or otherwise) to give correct representations, the photograph is in effect supported by his testimony and stands on the same footing as a photograph of an object whose otherwise invisible details have been rendered discernible by a magnifying lens."

The rule above announced has been more than once approved by this court. See Louisville & N. R. Co. v. Brown, 127 Ky. 746, 13 L.R.A. (N.S.) 1135, 106 S. W. 795, and Bowling Green Gaslight Co. v. Dean,

young woman showing a rear view, nude from below the shoulders to mid-thigh, was grossly improper. If the condition of any private part of the body of any party male or female is material, it should be privately examined by experts out of court, and expert testimony given of it. Guhl v. Whitcomb, 109 Wis. 69, 83 Am. St. Rep. 889, 85 N. W. 142.

VI. Of places.

a. In general.

Properly authenticated photographs of land are admissible to enable a witness to explain his testimony as to the effect of the diversion of water upon the land. Pickett v. Atlantic Coast Line R. Co. 153 N. C. 148, 69 S. E. 8.

But in an action for flooding land, photographs of rivers tributary to the one causing the flood, without evidence as to the time the condition shown continued, or as to the depth or volume of the water shown, were held inadmissible. Zinser v. Sanitary Dist. 175 Ill. App. 9.

In an action for damages for changing the grade of a street, photographs of the place after the change was completed are admissible. Robinson v. St. Joseph, 97 Mo. App. 503, 71 S. W. 465.

A photograph of plaintiff's property, taken ten or eleven years before an injury thereto by a change of the grade of a sidewalk, was properly admitted to show the relative elevations of the property and the sidewalk. Grand Park v. Trah, 115 Ill. App. 291, appealed on other grounds, and affirmed in 218 Ill. 516, 75 N. E. 1040.

In Raab v. Roberts, 30 Ind. App. 6, 64 N. E. 618, 65 N. E. 191, it was held that a photograph of a house in front of which it was proposed to take a strip of land for improvement of a highway was admissible to show the width of the strip, its proximity to the highway, and the character of the improvement affected.

And in Beals v. Brookline, 174 Mass. 1, 54 N. E. 339, the admission of photographs of property before improvements were made, assessments for which were being resisted, was held a proper exercise of the court's discretion. 51 L.R.A. (N.S.)

Photographs taken at points not material to the controversy are properly excluded. Whaley v. Vidal, 27 S. D. 642, 132 N. W. 248.

And there was no error in excluding photographs of premises which did not fairly represent anything in a way that could be of assistance to the jury. Harris v. Ansonia, 73 Conn. 359, 47 Atl. 672; Schneider v. North Chicago Street R. Co. 80 Ill. App. 306.

While great care should be exercised in receiving photographs showing elevations, they may be received when properly verified. Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co. 24 N. D. 40, 138 N. W. 976.

b. Scene of accident.

1. Generally.

Photographs of the scene of a personal injury are, as a general rule, admissible when properly authenticated. Chicago & A. R. Co. v. Myers, 86 Ill. App. 401; Chicago & E. I. R. Co. v. Lawrence, 96 Ill. App. 635; Wabash R. Co. v. Praast, 101 Ill. App. 167; Vanarsdall v. Louisville & N. R. Co. 23 Ky. L. Rep. 1666, 65 S. W. 858; Sterling v. Detroit, 134 Mich. 22, 95 N. W. 986; Forseth v. Iron River Lumber Co. 142 Wis. 87, 124 N. W. 1036.

So, it is error to exclude photographs of the scene of an accident, taken at a time when the place was in the same condition as when the accident occurred, where there is nothing in the evidence or in the photographs themselves tending to discredit their accuracy. Lake Erie & W. R. Co. v. Wilson, 189 Ill. 89, 59 N. E. 573.

In Wabash R. Co. v. Farrell, 79 Ill. App. 508, it was held that a photograph of the scene of an accident should not be received in evidence in the absence of clear proof that the conditions were the same as when the accident occurred.

This, however, is a stricter rule than is adopted in most cases.

Thus, a fair representation of the general features of the place is sufficient. Warner v. Randolph, 18 App. Div. 458, 45 N. Y. Supp. 1112.

And photographs of the scene of an acci-

142 Ky. 686, 134 S. W. 1115. In the last-named case we said: "Of course, the accuracy of a photograph as a correct reproduction of what it purported to show should be established to the satisfaction of the court before being admitted as evidence, but when its accuracy is shown, we have no doubt of its admissibility. *Wigmore*, Ev. §§ 790-797; *Louisville & N. R. Co. v. Brown*, 127 Ky. 732, 13 L.R.A.(N.S.) 1135, 106 S. W. 795; *Higgs v. Minnesota*, St. P. & S. Ste. M. R. Co. 16 N. D. 446, 15 L.R.A.(N.S.) 1162, 114 N. W. 722, 15 Ann. Cas. 97; *Dederichs v. Salt Lake City R. Co.* 35 L.R.A.

802, and note, (14 Utah, 137, 46 Pac. 656; 2 Elliott, Ev. §§ 1224-1228." See also *Geneva v. Burnett*, 65 Neb. 464, 58 L.R.A. 287, 101 Am. St. Rep. 628, 91 N. W. 275, 12 Am. Neg. Rep. 104; *Mauch v. Hartford*, 112 Wis. 50, 87 N. W. 816, 11 Am. Neg. Rep. 63; *Miller v. Mintun*, 73 Ark. 183, 83 S. W. 918; *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. 445; *Elzig v. Bales*, 135 Iowa, 208, 112 N. W. 540; *Eckels v. Boylan*, 136 Ill. App. 265.

Applying this well-settled rule to the facts of this case, it is apparent that appellate failed to establish the preliminary re-

dent are admissible if there have not been such changes between the time of the accident and that when the photographs were taken as to destroy the substantial identity of the place. *Pruner v. Detroit United R. Co.* 173 Mich. 146, 139 N. W. 49; *Beardslee v. Columbia Twp.* 188 Pa. 496, 68 Am. St. Rep. 883, 41 Atl. 617.

Photographs of a portion of a railroad and highway near a crossing where an accident occurred were admissible, though they did not show every possible view of the crossing that might have been taken. *Illinois Southern R. Co. v. Hayer*, 225 Ill. 613, 80 N. E. 316, affirming 128 Ill. App. 315.

Photographs of the scene of an accident at a railway crossing, taken a month after the accident, changes, if any, being explained by the evidence, which would tend to show some things material to the case, should have been admitted. *Wabash R. Co. v. Jenkins*, 84 Ill. App. 511.

Photographs which correctly show the premises where an accident occurred, except that there was snow on the ground when they were taken, about a month after the accident, were held to be admissible in *Fitzgerald v. Hedstrom*, 98 Ill. App. 109.

And to the same effect is *Considine v. Dubuque*, 126 Iowa, 283, 102 N. W. 102, where ice and snow present at the time of the accident were gone when the photograph was taken.

Photographs which correctly represent an obstruction in a street are admissible in connection with other evidence, in an action for injuries resulting from such obstruction. *Huntington v. Lusch*, 33 Ind. App. 476, 70 N. E. 402.

Photographs of a defective street taken before any material change had been made in it, which the witnesses agreed fairly represented its condition at the time of the accident, were admissible. *Louisville v. Arrowsmith*, 145 Ky. 498, 140 S. W. 1022.

Photographs of a sidewalk taken several days after plaintiff's injury thereon should be admitted for what they are worth as illustrations of plaintiff's testimony, not as independent evidence. *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 402, 53 S. W. 921.

Photographs of a sidewalk where plaintiff was injured were not rendered inadmis-

sible because they showed 800 to 1,000 feet of the walk beside the actual spot where the injury occurred, especially as the instructions charged the jury to find that the injury occurred at the place specified. *Diel v. Ferguson*, 158 Mo. App. 286, 138 S. W. 545.

A photograph of a building where plaintiff was injured was admissible though taken a considerable time after the accident, there being no claim that the place had changed materially. *Leeds v. New York Teleph. Co.* 79 App. Div. 121, 80 N. Y. Supp. 114, reversed on other grounds in 178 N. Y. 118, 70 N. E. 219.

Photographs of a hallway, taken by flash light, were admissible to show the construction of a staircase and its situation in the hall way, though they could not aid the jury on the question of the sufficiency of the lighting of the hall way. *Bretsch v. Carsten*, 82 App. Div. 399, 81 N. Y. Supp. 868.

The objection to a photograph of a hole in a street, that it was taken several months after the accident, was rendered ineffectual by proof that it represented it as it was then, except that the hole did not appear to be quite so deep when the photograph was taken. *Miller v. New York*, 104 App. Div. 33, 93 N. Y. Supp. 227.

In *Morrow v. Gaffney Mfg. Co.* 70 S. C. 242, 49 S. E. 573, a witness was permitted to use a photograph of a room in another factory than the one in which an accident occurred, for the purpose of illustrating his testimony.

But photographs of the scene of an accident are inadmissible when they are not so taken as to correctly exemplify the actual situation and surroundings at the time of the accident. *Chicago & E. I. R. Co. v. Crose*, 214 Ill. 602, 105 Am. St. Rep. 135, 73 N. E. 865.

So, a photograph taken so long after an accident that it does not fairly represent the place where it occurred is inadmissible. *Iroquois Furnace Co. v. McCrea*, 191 Ill. 340, 61 N. E. 79, affirming 91 Ill. App. 337; *Chicago & A. R. Co. v. Corson*, 198 Ill. 98, 64 N. E. 739.

A photograph of the scene of an accident, taken by an amateur two years after the accident, which is at variance with testimony given by each party, should not be

quirements necessary to make the photographs admissible. Dr. Ford merely states that he took the photographs. He does not state that they correctly represent what he saw, or how they were taken, or that he had ever taken an X-ray photograph before, or knew anything about how they ought to be taken. We are given no assurance as to the character or accuracy of his X-ray machine, or its condition or working order. While it may not be necessary to establish all of these facts in order to make the photographs admissible under the rule above stated, it is clear the rule requires that the

accuracy of the photographs must be so established, for, if they do not show what the witness saw, they have no place in the case. In this respect the testimony of Dr. Ford is wholly insufficient; and, as no other witness testified upon this subject, the circuit court should have sustained appellant's objection to the admission of the photographs. In view of the conclusion reached, it is unnecessary to consider the other errors assigned.

For the error above indicated, the judgment is reversed, and the case remanded for a new trial.

admitted. *Chicago v. Vesey*, 105 Ill. App. 191.

And a photograph showing a stone pile, taken three months after an injury, is inadmissible where one of plaintiff's witnesses testified that the stone pile causing the injury was removed three days after the accident, so that if there was a stone pile there when the photograph was taken, it could not have been the one causing the injury. *Buck v. McKeesport*, 223 Pa. 211, 72 Atl. 514.

2. Railroad wrecks.

Photographs taken just after a derailment are admissible in an action for injuries received in the accident. *Bach v. Iowa C. R. Co.* 112 Iowa, 241, 83 N. W. 959.

And a photograph of a wreck, the accuracy of which is sworn to by the one who took them, is admissible in an action for personal injuries. *Louisville & N. R. Co. v. Brown*, 127 Ky. 732, 13 L.R.A. (N.S.) 1135, 106 S. W. 795.

Photographs correctly showing the condition of a trestle, track, and car shortly after an accident are admissible. *Kirkpatrick v. Metropolitan Street R. Co.* 211 Mo. 68, 109 S. W. 682.

It was proper to admit photographs of a wreck in which plaintiff was injured, showing the derailed train, overturned engine, and broken cars, and a derailed car of stone in front of the engine, where they were taken the same day and were correct representations of the situation. *St. Louis & S. F. R. Co. v. Nichols*, 39 Okla. 522, 136 Pac. 159.

Though some work has been done on a wreck, photographs of it are admissible to show the force of the impact, if the changes made are not so material as to destroy their value for that purpose. *Maynard v. Oregon R. & Nav. Co.* 46 Or. 15, 68 L.R.A. 477, 78 Pac. 983.

So, it was not error to admit a photograph of a car which was wrecked in a collision, taken soon thereafter, for the purpose of showing the force of the collision, though before the photograph was taken, the colliding engine had backed away and men were at work on the car. *Halloran v.* 51 L.R.A. (N.S.)

New York, N. H. & H. R. Co. 211 Mass. 132, 97 N. E. 631.

And photographs which tended to show physical conditions existing at the time, and also threw light on the rate of speed cars were traveling at the time of a collision, were properly admitted. *Edge v. Southwest Missouri Electric R. Co.* 206 Mo. 471, 104 S. W. 90.

Although the seriousness of a collision is not denied, plaintiff, who was injured in it, has a right to have photographs of it admitted when proved to be correct. *Denver & R. G. R. Co. v. Roller*, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738.

And though the only issue is the amount of damages, liability being admitted, photographs of a wreck are admissible to show the force of the impact and probability of injury to plaintiff, who was a passenger. *Taylor v. Spokane, P. & S. R. Co.* 72 Wash. 378, 130 Pac. 506.

3. Showing repairs after accident.

Generally, as to evidence of repairs made or precautions taken after an accident, see note in 32 L.R.A. (N.S.) 1127.

Where negligence was charged against an electric railway in not providing guard rails or other obstructions to prevent derailed cars from going into a pond, and photographs taken the day of the accident had been admitted, other photographs taken after a guard rail and fence had been erected were properly excluded, as their admission would have enabled plaintiff indirectly to get improper evidence before the jury. *Donovan v. Connecticut Co.* 84 Conn. 531, 80 Atl. 779.

But while photographs of a repaired sidewalk would not be admissible to show defendant's negligence, their admission would not be prejudicial when defendant had already given evidence that the repairs had been made. *San Antonio v. Talerico*, — Tex. Civ. App. —, 78 S. W. 28.

And where the extent of the hole was in issue, photographs of the place after repairs were made by a cement patch were admissible, in connection with other testimony, to show the extent of the hole. *Ibid.*

Photographs of the scene of an accident are admissible where the conditions have

not been changed; and where defendant offered photographs of such a place, evidence that a hole thereat, alleged to have caused the injury, had been filled since the accident, was competent to prove that the photographs were not true representations of the place at the time of the accident. *Sample v. Chicago, B. & Q. R. Co.* 233 Ill. 564, 84 N. E. 643.

c. Scene of crime.

Photographs of the scene of a homicide are admissible to assist the court and jury in understanding the testimony, they being, of course, properly authenticated. *People v. Phelan*, 123 Cal. 551, 56 Pac. 424; *State v. Nordmark*, 84 Kan. 628, 114 Pac. 1068; *Com. v. Chance*, 174 Mass. 245, 75 Am. St. Rep. 306, 54 N. E. 551.

Thus, photographs of a room taken six days after a homicide was discovered, but showing the articles therein substantially as they were at the time of the discovery of the homicide, are admissible. *People v. Grill*, 151 Cal. 592, 91 Pac. 515.

Photographs of the country between a cabin where a murder was committed, and the place where the body was buried, were admissible to show the nature of the ground traversed by the murderer, and especially for the purpose of showing the necessity for dismemberment of the body. *People v. Loper*, 159 Cal. 6, 112 Pac. 720, Ann. Cas. 1912B, 1193.

Where photographs of the scene of a homicide were admitted, it was not error to permit the photographer to speak of a certain spot shown as the place where deceased fell, when it was apparent that he meant only the place pointed out to him by witnesses as the spot where deceased fell. *State v. Baker*, — Iowa, —, 135 N. W. 1097.

A photograph of a room in which an assault was alleged to have been committed was properly admitted, where its correctness was certified to by witnesses and the jury visited and inspected the room for themselves. *State v. Hersom*, 90 Me. 273, 38 Atl. 160.

In a prosecution for arson it was not error to admit photographs of the burned building, though they also showed a dwelling owned by defendant which had been partially burned, there being no evidence as to the circumstances under which the dwelling was burned. *Com. v. Fielding*, 184 Mass. 484, 69 N. E. 216.

In an action on an insurance policy, defended on the ground of suicide, it was not error to admit a photograph showing an outside stair on the building in which deceased was found, to support the theory of murder and robbery by showing a possible means of escape of the murderer. *Kornig v. Western Life Indemnity Co.* 102 Minn. 31, 112 N. W. 1039.

Photographs of the scene of a homicide taken the next morning, shortly after its discovery, and showing a buggy with the body of deceased in it as it was found, were

properly admitted. *Sanchez v. State*, — Tex. Crim. Rep. —, 149 S. W. 124.

And photographs of the ruins of a house in which it was alleged a murder was committed and the body burned were admissible upon being shown to be correct representations of the premises. *Paulson v. State*, 118 Wis. 89, 94 N. W. 771, 15 Am. Crim. Rep. 497.

But where a photograph of the scene of a homicide could serve no useful purpose with the jury, but on the contrary might be confusing, it should be excluded. *Newcomb v. State*, 49 Tex. Crim. Rep. 550, 95 S. W. 1048.

d. Of attempted reproduction of scene.

Some courts look with disfavor upon photographs of the scene of a crime or accident showing persons, dummies, or other objects placed to illustrate the particular theory or contention of the party offering them, and hold that photographs so taken should not be admitted. *Babb v. Oxford Paper Co.* 99 Me. 298, 59 Atl. 290; *Rodick v. Maine C. R. Co.* 109 Me. 530, 85 Atl. 41.

Thus, in *Grant v. Chicago & N. W. R. Co.* 176 Ill. App. 292, it was held that photographs of the scene of an accident, taken in behalf of defendant, with engines and cars placed to represent their position at the time of the accident, were inadmissible for the reason that neither plaintiff nor anyone representing him was present when they were taken; that he had no control over the engine and cars so as to cause like pictures to be taken; and no opportunity to offer evidence as to whether they correctly represented the situation.

And, likewise, in *Ellis v. Flannigan*, 253 Ill. 397, 97 N. E. 696, involving the execution of a will, a photograph of the room in which it was executed was excluded, the furniture being arranged for the purpose by the contestant and her sister as they testified it was at the time the will was executed.

A photograph of the place of an accident, taken after a hole in question had been filled, and with a car placed where defendant claimed the one was at the time of the accident, and a crowbar placed at the supposed location of the hole, was properly excluded, as it could not aid the jury and might mislead it. *Stewart v. St. Paul City R. Co.* 78 Minn. 110, 80 N. W. 855, 7 Am. Neg. Rep. 80.

The admission of photographs of tableaux arranged by the chief witness for the state in a prosecution for murder, showing his version of the tragedy, was held to be ground for reversal in *Fore v. State*, 75 Miss. 727, 23 So. 710. And to the same effect is *Brett v. State*, 94 Miss. 669, 47 So. 781.

And in *People v. Maughs*, 149 Cal. 253, 86 Pac. 187, it was held to be error to permit the introduction of a woodcut made from a photograph of the porch where a homicide occurred, and showing a man lying thereon supposedly in the position in

which deceased was found, neither the one who took the photograph nor the man representing deceased having seen the body of deceased on the porch.

Objection to the admission of such photographs is by no means universal however, and in a number of cases they have been held admissible.

Thus, in *Hughes v. State*, 126 Tenn. 40, 148 S. W. 543, Ann. Cas. 1913D, 1262, a photograph of a room in which a homicide occurred, with the furniture arranged as it was and a person placed on the floor in the position deceased was found, according to the recollection of a witness who was in the room shortly before and immediately after the homicide, was admitted to illustrate the testimony of such witness. Another photograph was admitted in the above case, showing the room and furniture with a man sitting in a chair where deceased was when seen by the witness shortly before the homicide, and where, according to the prosecution's theory, he was when first shot, with marks on the neck of the person to show where the bullet entered the neck of deceased, and a mark on the window frame where the bullet lodged after passing through his neck.

The admission of photographs of a room in which an assault was alleged to have been committed, showing the furniture located according to the testimony of witnesses for the prosecution, not offered as proof of conditions on the day of the assault, but merely to visualize the testimony of such witnesses, is not error. *People v. Veld*, 154 App. Div. 752, 139 N. Y. Supp. 788.

Photographs of the scene of a homicide, showing objects placed by a witness to indicate where deceased and other objects lay when the place was first visited by the witness, were held to be admissible in *People v. Mahatch*, 148 Cal. 200, 82 Pac. 779.

And photographs of the scene of a murder, with persons placed to illustrate the position of deceased and defendant at the time of the killing, according to the evidence for the defense, are admissible, provided there is testimony that they faithfully represent the objects and situations portrayed. *Sellers v. State*, 91 Ark. 175, 120 S. W. 840, second appeal in 93 Ark. 313, 124 S. W. 770.

A somewhat similar case was the admission of photographs of the scene of a homicide, with marks to show where witnesses said deceased was lying and where defendant stood. *People v. Crandall*, 125 Cal. 129, 57 Pac. 785.

In *Harrison v. Green*, 157 Mich. 690, 122 N. W. 205, it was held proper to admit a photograph showing the machine where plaintiff was injured, with two witnesses and plaintiff placed where the two witnesses testified the three stood at the time of the accident.

And in *Bowling Green Gaslight Co. v. Dean*, 142 Ky. 678, 134 S. W. 1115, a photograph of a telephone pole with a man on it in the position deceased was in when he

received the shock was held to be admissible upon proof of its accuracy.

VII. Of documents.

a. In general.

A photograph of a hotel register showing signatures is admissible where the register is outside the jurisdiction of the court, in connection with the testimony of a witness that the signatures shown are signatures of the persons they purport to be. *Fuller v. Robinson*, 230 Mo. 22, 130 S. W. 343, Ann. Cas. 1912A, 938.

Photographic copies of records are admissible upon being properly verified, when the originals cannot be produced. *Re McClellan*, 20 S. D. 498, 107 N. W. 681.

And a photograph of a document which cannot be produced is admissible when shown to be a true copy. *Parker v. C. A. Smith Lumber & Mfg. Co.* — Or. —, 138 Pac. 1061.

But where photographs of a deed are mere duplicates of the original, which is in evidence, they are inadmissible. *Howard v. Illinois Trust & Sav. Bank*, 189 Ill. 68, 59 N. E. 1106.

Preliminary proof of a photograph is especially necessary when it is of handwriting, the genuineness of which is in question. *Re Hayes*, — Colo. —, 135 Pac. 449.

b. For comparison.

The admission of photographs of handwriting for the purpose of comparison is proper. *People v. Mooney*, 132 Cal. 13, 63 Pac. 1070.

So, an accurate photographic copy of a note is admissible for the purpose of comparing signatures, upon its being shown that the original is in the records of a court of another state. *Stitzel v. Miller*, 250 Ill. 72, 34 L.R.A.(N.S.) 1004, 95 N. E. 53, Ann. Cas. 1912B, 412.

Photographs of genuine signatures, to illustrate the testimony of an expert as to the difference between the genuine and alleged spurious signatures, are admissible. *State v. Ready*, 77 N. J. L. 329, 72 Atl. 445. And the photographs are not rendered inadmissible by the fact that they were taken so that they appeared upon a background of ruled squares to show the uniformity in the size and proportion of the letters.

Where original documents are in the possession of respondent in a prosecution for forgery, and he refuses to produce them upon demand, photographic copies may be introduced, and every intendment will be indulged in favor of their correctness. *Grooms v. State*, 40 Tex. Crim. Rep. 319, 50 S. W. 370.

c. Enlarged copies of handwriting.

Enlarged photographs of a disputed signature and of undoubtedly genuine ones are admissible upon proper proof of their accuracy. *First Nat. Bank v. Wisdom*, 111 Ky. 135, 63 S. W. 461; *Johnson v. Com.* 102 Va. 927, 46 S. E. 789.

Such enlargements are admissible though the original deed is in evidence. *Howard v. Illinois Trust & Sav. Bank*, 189 Ill. 568, 59 N. E. 1106; *State v. Skillman*, 76 N. J. L. 466, 70 Atl. 83.

Enlarged copies of an alleged forged signature and a signature offered as a standard for comparison are admissible in evidence, on proof by the photographer of the accuracy of the method pursued and the results obtained in making the copies. *United States v. Ortiz*, 176 U. S. 422, 44 L. ed. 529, 20 Sup. Ct. Rep. 466.

Where enlarged photographs of signatures are in evidence, it is within the discretion of the court as to whether to require a witness to point out on the enlargements the differences between the signatures alleged to be forgeries and the ones admitted to be genuine. *People v. Bird*, 124 Cal. 32, 56 Pac. 639, 11 Am. Crim. Rep. 442.

VIII. Of other things.

In *State v. Cook*, 75 Conn. 267, 53 Atl. 589, a new trial was granted for failure to permit defendant in a prosecution for improper care of horses, to introduce in evidence photographs of the horses taken two months after the date charged in the indictment, upon his offer to prove that the photographs were accurate, and that the horses were in the same condition of flesh when they were taken as on the dates alleged in the indictment.

In *People v. Jennings*, 252 Ill. 534, 43 L.R.A.(N.S.) 1206, 96 N. E. 1077, enlarged photographic copies of finger prints were admitted for the purpose of comparison with finger print records of defendant, but the objection thereto seemed to be to the admission of finger prints rather than to the photographs. See note to this case in 43 L.R.A.(N.S.) 1206, for finger prints as evidence.

In an action for injuries received in a corn shredder, photographs of another shredder of the same make were held admissible on behalf of plaintiff, where defendant's own proofs showed they were fair representations of the machine on which the accident occurred. *Smith v. Eichelberger*, 175 Ill. App. 231.

In *Henke v. Deere & M. Co.* 175 Ill. App. 240, the court said that photographs of a machine upon which plaintiff was hurt, taken shortly after the accident, and before any changes had been made, should have been admitted, but as they were only supplementary to the oral testimony, they would not reverse the judgment for that error alone.

In *Com. v. Best*, 180 Mass. 492, 62 N. E. 748, it was held that the fact that photographs of bullets were avowedly taken to bring out the likeness in the markings on them was not ground for rejecting them, inasmuch as the original bullets were also in evidence, so that the jury could correct the impression given by the photographs if there were other aspects more favorable to the defense.

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Enlarged photographs of sections of tools by one of which plaintiff was injured, and also of a typical piece of steel, enlarged 100 and 1,000 diameters, were properly admitted to illustrate the testimony of a chemist as to microscopical tests he had made. *Potvin v. West Bay City Shipbuilding Co.* 156 Mich. 201, 120 N. W. 613.

Photographs of a machine on which plaintiff was injured are admissible so that its operation may be properly explained by mechanical experts. *Brown v. Douglas Lumber Co.* 113 Minn. 67, 129 N. W. 161.

Or to illustrate statements of witnesses. *Record v. Chickasaw Cooperage Co.* 105 Tenn. 657, 69 S. W. 334.

But it was not error to exclude a photograph of a room showing the furniture on an issue as to the value of the furniture where the photograph, while showing the form and style of the furniture, did not show of what material it was made. *Davenport v. Crowell*, 79 Vt. 419, 65 Atl. 557.

IX. Extraneous matter on photographs.

The fact that distances were indicated and certain remarks explanatory of them written upon photographs did not render them objectionable, where witnesses verified every mark or notation that was material to the case. *Wade v. Southern R. Co.* 89 S. C. 280, 71 S. E. 859.

A photograph of defendant introduced for purposes of identification, and having on its back written statements likely to create unfavorable impressions (apparently memoranda of his conviction of another crime), should be excluded. *Com. v. Stirling*, 10 Pa. Dist. R. 437.

And the police history indorsed on the back of a photograph is sufficient to render it incompetent to go to the jury, if attention is called to it. But in the absence of objection on that ground, or of a showing that the jury saw the objectionable matter, a verdict will not be set aside on appeal because of it. *Com. v. Johnson*, 199 Mass. 55, 85 N. E. 188.

X. X-ray photographs.

X-ray photographs, when properly verified, are admissible to show internal conditions of the human body. *Elzig v. Bales*, 135 Iowa, 208, 112 N. W. 540; *Geneva v. Burnett*, 65 Neb. 464, 58 L.R.A. 287, 101 Am. St. Rep. 628, 91 N. W. 275, 12 Am. Neg. Rep. 104; *Tish v. Welker*, 5 Ohio S. & C. P. Dec. 725, 7 Ohio N. P. 472; *Brace v. Beall*, 99 Tenn. 303, 41 S. W. 445; *Houston & T. C. R. Co. v. Shapard*, 54 Tex. Civ. App. 596, 118 S. W. 596; *Miller v. Dumont*, 24 Wash. 648, 64 Pac. 804; *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816, 11 Am. Neg. Rep. 63.

Such photographs are admissible though they are not infallible and may be misleading, the jury being made aware of their fallibility. *Miller v. Mintun*, 73 Ark. 183, 83 S. W. 918.

It is not error to admit X-ray negatives

in evidence, instead of positive prints from the negatives. *Chicago, B. & Q. R. Co. v. Upton*, 115 C. C. A. 379, 194 Fed. 371.

When X-ray plates had been proved and interpreted by a physician, it was proper to permit him to show and explain them to the jury. *United R. & Electric Co. v. Dean*, 117 Md. 686, 84 Atl. 75.

And they may be taken to the jury room. *Brookman v. Chicago G. W. R. Co.* 116 Minn. 409, 133 N. W. 969.

If there is any difference between X-ray and ordinary photographs as to their admissibility in evidence, it is only in regard to the preliminary proof required.

Thus, in *Dean v. Wabash R. Co.* 229 Mo. 425, 129 S. W. 953, the court said: "The art of making photographs of the bones of a living man by use of the X-ray is yet still more in the keeping of science than the art of common photography, but that fact only requires more care in laying the foundation for the introduction of such photographs; it does not exclude them from evidence."

And in *Marion v. B. G. Coon Constr. Co.* 157 App. Div. 95, 141 N. Y. Supp. 647, it was said that the doctrine that an ordinary photograph is the best evidence of what it contains should not be applied to X-ray photographs. The opinion of the expert is the best evidence of what they contain.

But a consideration of the cases fails to show any essential difference between the preliminary proofs required by the courts for X-ray photographs and those required as to the ordinary kind.

To the objection that an X-ray photograph cannot be verified as can an ordinary photograph, the court says in *Eckels v. Boylan*, 136 Ill. App. 258: "Appellants say the ordinary photograph can be verified by the eye, and that this is the reason why an ordinary photograph can be proved by the statement of a proper witness that it is a correct representation of the object photographed. But so, in the present stage of the art, can an X-ray photograph be verified by the eye. By looking through the fluoroscope, the same things are shown to the eye as an X-ray photograph shows in a picture."

Such photographs must be identified as being of the person they are claimed to represent. *Lake Shore Electric R. Co. v. Hobart*, 32 Ohio C. C. 154.

Testimony of a physician who had never had any experience in taking X-ray photographs, that he was present when the one in question was taken and saw it before it was delivered to the photographer to be developed, and that the radiograph exhibited was the same as the impression on the glass which he saw just after it was taken, was sufficient proof of its accuracy and correctness to make it admissible. *Prescott & N. W. R. Co. v. Franks*, — Ark. —, 163 S. W. 180.

An X-ray photograph authenticated by the one who took it, who was an expert engaged in taking such photographs, is admissible to show the nature of the injury

to the internal organs of a plaintiff in an action for personal injuries. *Chicago & J. Electric R. Co. v. Spence*, 213 Ill. 220, 104 Am. St. Rep. 213, 72 N. E. 796.

Testimony of an experienced physician and surgeon, that he was experienced in making X-ray photographs, and was competent to make such views, and made the original negatives and prints therefrom, which were correct representations of what they purported to show, was sufficient preliminary proof to make such photographs admissible. *Chicago City R. Co. v. Smith*, 226 Ill. 178, 80 N. E. 716, affirming 124 Ill. App. 627.

A prima facie showing for the admission of an X-ray photograph is made by testimony of a witness that she was engaged in taking such photographs, that she made the exposure, developed the negative, and printed the picture therefrom, which is a correct representation of the negative. *Krauss v. Ballinger*, 171 Ill. App. 534.

And the fact that the witness was not a physician, and had no means of knowing that the picture was a correct representation of the bones of the hand, was not sufficient reason for excluding it, where plaintiff testified that she had not had any other accident or trouble with her hand from the time she was treated by defendants till the photograph was taken. *Ibid*.

Testimony by the physician who directed the taking of an X-ray photograph, and who was present when it was taken, that it correctly represented complainant's body, was sufficient identification, without calling the electrician who operated the machine. *State v. Matheson*, 142 Iowa, 414, 134 Am. St. Rep. 426, 120 N. W. 1036.

It was not necessary to show that an X-ray photograph was taken by a competent person, nor that the apparatus used was such as to insure accuracy, to render it admissible, where a physician who had made an X-ray examination of the injury testified that the photograph correctly represented its condition, and another physician testified to the same effect from an examination he made by manipulation. *Carlson v. Benton*, 66 Neb. 486, 92 N. W. 600, 1 Ann. Cas. 159.

It was not error to admit X-ray photographs of plaintiff's leg without proof as to the skill of the person taking them, when the surgeon in connection with whose testimony they were introduced testified that upon operating he found conditions to be as shown by the photograph. *Wallace v. Pennsylvania R. Co.* 222 Pa. 556, 128 Am. St. Rep. 817, 71 Atl. 1086.

Even if error was committed in admitting testimony concerning X-ray photographs of an injury, because of insufficient showing of expert knowledge of such photographs by the physicians testifying, it is harmless where the condition shown by the photographs did not differ from the testimony of the physicians based upon their observations. *Kimball v. Northern Electric Co.* 159 Cal. 225, 113 Pac. 156.

But X-ray plates which, according to the

testimony of the expert who took them, would be unintelligible to anyone but an expert, should not be admitted in evidence. *Colesar v. Star Coal Co.* 255 Ill. 532, 99 N. E. 709.

When an X-ray photograph of an injured arm has been admitted for plaintiff, it is error to exclude another X-ray photograph of a normal arm of another person, offered by defendant for comparison. *Mellwain v. Gaebe*, 128 Ill. App. 209.

After a proper foundation is laid, it is not error to admit X-ray photographs of plaintiff's injured foot, together with others of the foot of another person showing the normal position of the bones. *Haywood v. Dering Coal Co.* 145 Ill. App. 506.

X-ray photographs of plaintiff's hips, taken a year and five months after an accident, were properly admitted, their integrity being established and it being shown that plaintiff had sustained no intervening injury or illness. *Judejko v. Chicago City R. Co.* 166 Ill. App. 140.

In *State v. Matheson*, 130 Iowa, 440, 114 Am. St. Rep. 427, 103 N. W. 137, 8 Ann. Cas. 430, which was a prosecution for assault to murder, in which the direction that a bullet took after entering the body of the party assaulted became material, an X-ray photograph was held to be admissible to show the location of the bullet in his body, though the photograph was the only evidence of its location.

In *De Forge v. New York, N. H. & H. R. Co.* 178 Mass. 59, 86 Am. St. Rep. 464, 59 N. E. 669, 9 Am. Neg. Rep. 501, it was held error to exclude X-ray photographs offered by defendant for the purpose of showing that other X-ray pictures introduced by plaintiff were improperly marked as to which was plaintiff's left and right foot.

Where a verdict has been rendered for defendant, on the ground of contributory negligence, the exclusion of X-ray photographs of plaintiff's injury is harmless. *Fraser v. California Street Cable R. Co.* 146 Cal. 714, 81 Pac. 29, 18 Am. Neg. Rep. 5.

In *Dean v. Wabash R. Co.* 229 Mo. 425, 129 S. W. 953, it was held that there was no error in overruling a motion to compel plaintiff to submit to having an X-ray photograph taken of his injury, the court being advised that the process is sometimes dangerous to the subject. R. L. S.

MISSOURI SUPREME COURT. (Division No. 1.)

KATHERINE DEVINE, Appt.,
v.

CITY OF ST. LOUIS, Resp't.

(— Mo. —, 165 S. W. 1014.)

Appeal — granting new trial — discretion.

1. The discretion of the trial court in granting a new trial for excess of damages 51 L.R.A. (N.S.)

for a sprained ankle, the effect of which has extended over a period of two years, will not be interfered with on appeal, where the evidence is conflicting as to the painful and disabling quality of the injury.

Jury — constitutional rights — granting new trial.

2. The constitutional right to trial by jury is not infringed by the granting by the court of a new trial for the award of excessive damages by the jury.

(April 2, 1914.)

A PPEAL by plaintiff from an order of the Circuit Court of St. Louis setting aside a verdict in her favor and granting a new trial in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. Glendy B. Arnold for appellant.

Messrs. William E. Baird and Truman P. Young, for respondent:

A motion for a new trial is addressed to the sound discretion of the trial court.

Parker v. Britton, 133 Mo. App. 270, 113 S. W. 259; *Gould v. St. John*, 207 Mo. 619, 106 S. W. 23; *Rodan v. St. Louis Transit Co.* 207 Mo. 392, 105 S. W. 1061; *Morrell v. Lawrence*, 203 Mo. 363, 120 Am. St. Rep. 660, 101 S. W. 571, 11 Ann. Cas. 650; *Karnes v. Winn*, 126 Mo. App. 712, 105 S. W. 1098; *Crow v. Crow*, 124 Mo. App. 120, 100 S. W. 1123; *Handlan-Buck Mfg. Co. v. Wendelkin Constr. Co.* 124 Mo. App. 349, 101 S. W. 702.

The jurisdiction of this court is appellate. To undertake to reverse the case on the condition that a remittitur is entered would be to try the case *de novo*.

Ables v. Ackley, 126 Mo. App. 84, 103 S. W. 974; *Chandler v. Gloyd*, 217 Mo. 394, 116 S. W. 1073.

The ruling that the damages were excessive was not an abuse of the trial court's discretion.

Feddeck v. St. Louis Car Co. 125 Mo. App. 24, 102 S. W. 675; *Fairgrieve v. Moberly*, 39 Mo. App. 31, 29 Mo. App. 141; *Doherty v. Kansas City*, 105 Mo. App. 173, 79 S.

Note. — Granting new trial because of excessive verdict as interference with constitutional right to jury trial.

There seems to be no real dissent from the proposition that the granting of a new trial because of an excessive verdict does not violate the constitutional right of trial by jury. This is true as well where the common law permits the granting of a new trial upon that ground, as where such privilege has been granted by express statutory provision.

A great number of cases have dealt with the question of the general right of a court

W. 716; *Bragg v. Metropolitan Street R. Co.* 192 Mo. 331, 91 S. W. 527.

The power of the trial court to order a remittitur is well established.

Chitty v. St. Louis, I. M. & S. R. Co. 166 Mo. 435, 65 S. W. 959; *Cook v. Globe Printing Co.* 227 Mo. 471, 127 S. W. 332; *Clifton v. Kansas City Southern R. Co.* 232 Mo. 708, 135 S. W. 40.

The courts may also set aside verdicts as being inadequate.

Fischer v. St. Louis, 189 Mo. 567, 107 Am. St. Rep. 380, 88 S. W. 82; *McCarty v. St. Louis Transit Co.* 192 Mo. 396, 91 S. W. 132.

Brown, C., filed the following opinion:

The appellant seeks to recover damages for personal injury suffered by her in the city of St. Louis by falling through a cinder sidewalk on Brannon avenue. The cinder surface broke under her weight, so that her foot went through into an excavation beneath it in such a manner as to seriously sprain her ankle. This occurred on January 4, 1903, and the ankle was still weak at the time of the trial, on March 14, 1910. There was much conflicting evidence as to her disability during the time intervening between the injury and the trial. The jury returned a verdict for

\$2,000. The defendant in due time filed its motion for a new trial, stating, among other grounds therefor, the following:

(6) "The court erred in overruling the demurrer to the evidence at the close of the whole case."

(11) "The amount of the verdict is excessive, and is not supported or justified by the evidence."

(12) "The verdict is the result of sympathy, passion, and prejudice for the plaintiff on the part of the jury, and against the defendant."

The trial court afterwards announced that it would sustain the motion and grant a new trial, unless the plaintiff should, within ten days thereafter, remit from said verdict the sum of \$800. This she refused to do, and, after the expiration of the ten days allowed for that purpose, the court sustained said motion and granted a new trial on the ground that "the verdict of the jury is excessive." The appeal is taken from this order.

1. The appellant insists in her brief that the verdict is not excessive, that "no man who has ever carried a rheumatic pain in a joint for two years—just acute enough to keep one fully advised of its presence—will ever say that \$25 or even \$50 a month is excessive compensation for his suffer-

to interfere with a verdict for excessive damages (see, upon this general question, the note to *Burdick v. Missouri P. R. Co.* 26 L.R.A. 384), but comparatively few cases seem to have expressly passed upon the question as to whether the granting of a new trial for excessive damages interferes with one's constitutional right to trial by jury.

To the latter class of cases belongs *Devine v. St. Louis*, which adheres to the rule that the granting by the trial court of a new trial, the plaintiff having refused to remit a portion of the damages, does not work a denial of the constitutional right to trial by jury.

And in *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69, 32 L. ed. 854, 9 Sup. Ct. Rep. 458, it was held that making the denial of a motion for a new trial depend upon a remission of a part of the verdict was not in effect a re-examination by the court in a mode not known at common law of facts tried by the jury, and therefore was not a violation of the 7th Amendment of the Federal Constitution, which guarantees the right to have the question of damages tried by a jury. Mr. Justice Harlan, speaking for the court, said that the practice adopted by the trial court did not in any just sense impair the constitutional right of trial by jury, and that "it cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive. . . . 51 L.R.A. (N.S.)

But, in considering whether a new trial should be granted upon that ground, the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate, before passing upon the motion for a new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial unless, by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give him any cause for complaint. Notwithstanding such remission, it is still open to him to show, in the court which tried the case, that the plaintiff was not entitled to a verdict in any sum, and to insist, either in that court or in the appellate court, that such errors of law were committed as entitled him to have a new trial of the whole case."

And in *Atlantic Coast Line R. Co. v. Pipkin*, 64 Fla. 24, 59 So. 564, it was held that in directing that a remittitur be entered, and in the alternative that a new trial be granted, the court, whether trial or appellate, does not usurp the function of a jury, or deny to either party a right to a jury trial, the ground being that both the power and duty rest in the court to determine the validity of the verdict, both as to its nature and amount.

And in *Heimlich v. Tabor*, 123 Wis. 565, 68 L.R.A. 669, 102 N. W. 10, it was said

ing;" and expresses doubt that "the learned jurist nisi was ever a rheumatic, or had ever had a bone broken or an ankle sprained, else he would not have laid his heavy hand on this verdict." The inference is that some member or members of this court may have been favored with a broader experience, and therefore be qualified to check the exercise of the uneducated discretion of the trial judge. Whether or not we have that power in this case is the important question presented. In *Hewitt v. Steele*, 118 Mo. 463, 24 S. W. 440, we held that, "if the action of the court in granting the new trial can be sustained upon any ground set forth in the motion for that purpose, that it is our duty to do so." This language was approved in *First Nat. Bank v. Wood*, 124 Mo. 72, 76, 27 S. W. 554, 555, in which this court, after quoting it, said: "Circuit courts have large discretion in the matter of granting new trials, particularly upon the ground that the verdict is against the weight of evidence. This court has often ruled that, in law cases, where there is a conflict in the evidence, it would not review it and determine its weight, and it has as often declared it to be, not only

the right, but the duty, of circuit courts to supervise the verdicts of juries and grant new trials, if the verdict is, in their opinion, against the weight of evidence. When there is a substantial conflict in the evidence, we should no more interfere with the action of the circuit court in granting a new trial than we should in such case interfere with the verdict which has been approved by that court." In *McCarty v. St. Louis Transit Co.* 192 Mo. 396, 401, 91 S. W. 132, 133, Judge Lamm for this court, after quoting a number of our own cases to sustain him, said: "The wise exercise of this judicial discretion on the part of circuit judge has always been encouraged by this court." In *State ex rel. Bates v. Shaw*, 163 Mo. 191, 63 S. W. 371, we said that if, when the motion for a new trial is presented, the court was of the opinion that the finding of the jury on the merits of the case was against the evidence, "it was not only its province, but it was its plain duty, to do as it did, set aside its finding and grant a new trial;" and it cites many cases in support of that statement. Coming to our later cases, we said, in *Gould v. St. John*, 207 Mo. 619, 631, 632, 106 S. W.

that allowing an option to take judgment for a sum less than the verdict, or to submit to a new trial, did not violate the constitutional rights of either party as to trial by an impartial jury. To the same effect is *Willette v. Rhinelander Paper Co.* 145 Wis. 537, 130 N. W. 853.

And in *Southern Power Co. v. White*, 92 S. C. 219, 75 S. E. 459, it was held that the granting of a new trial because of excessive verdict does not deprive a party of his constitutional right of trial by jury.

So, in *Burdick v. Missouri P. R. Co.* 123 Mo. 221, 26 L.R.A. 221, 45 Am. St. Rep. 528, 27 S. W. 453, the majority of the Missouri supreme court held that they could allow the option of a reduction of the verdict or submission to a new trial. There was a strong dissent, however, upon the ground that such course violated the plaintiff's constitutional right of trial by jury.

But it seems that there is a limit to the number of times which a new trial will be granted upon the ground of excessive verdicts. See *Hazzard v. Savannah*, 77 Ga. 54, wherein it was said that to allow new trials *ad infinitum* upon this ground would oust the jury of its constitutional prerogative. In this case a "reasonable verdict" was permitted to stand, and the trial court's third order granting a new trial for excessive verdict reversed.

And see *Dale v. St. Louis, K. C. & N. R. Co.* 63 Mo. 455, 16 Am. Neg. Cas. 455, wherein it was said: "The verdict in this case on the first trial was set aside on account of the damages being, in the opinion of the court, excessive. A second verdict was for the same amount, which the court refused to set aside, and any interference

by this court would be a usurpation of the province of the jury."

As before stated, the general rule is the same where the right to a new trial for excessive verdict is expressly granted by statute.

Thus, an Alabama statute (Acts 1911, p. 587) which authorizes an affirmance of a judgment by the appellate courts with consent of the parties on remittitur of excess, where an excessive verdict is the only error, and provides that in case either party dissents to the reduction, the case shall be remanded for new trial, has been held not to be an unwarranted infraction of the right of trial by jury in respect to the assessment of damages. *Ex parte Stevenson*, 177 Ala. 384, 58 So. 992, affirming 3 Ala. App. 313, 57 So. 494. In the court of appeals the court, in upholding the statute, said: "The power of a trial court to set aside, upon a proper motion for a new trial, the verdict of a jury because the verdict was excessive, is undoubted. From the judgment of the trial court upon such motion, an appeal undoubtedly lies to the supreme court or to the court of appeals. The power to review such judgment is undoubtedly vested in these courts, and when the bill of exceptions shows that the judgment of the lower court was wrong, and that it should have granted the appellant a new trial because of the excessive verdict of the jury, the supreme court or the court of appeals not only has the power, but it is the duty of such court, to reverse the judgment of the lower court. The statute under consideration simply provides that, in such a case, the supreme court and court of appeals, with the consent of both the appel-

23, 26, that in granting new trials the courts have much discretionary power, and that, where the weight of the evidence is involved, this court will not interfere with that discretion, unless it has been unwisely exercised. We also said in that case, citing *McKay v. Underwood*, 47 Mo. 187, "that the granting of a new trial on the ground that the verdict is against the weight of the evidence rests peculiarly with the judge presiding at the trial." In *Rodan v. St. Louis Transit Co.* 207 Mo. 392, 406, 105 S. W. 1061, 1065, we said: "It must be assumed as a commonplace of the law, arising to the level of an axiom, that the granting of a new trial rests within the sound discretion of the trial court; and its action in that behalf will not be disturbed on appeal, unless it appears that its discretionary power was abused, *i. e.*, exercised in an arbitrary or improvident manner."

In *Morrell v. Lawrence*, 203 Mo. 363, 381, 120 Am. St. Rep. 660, 101 S. W. 571, 575, 11 Ann. Cas. 650, this court applied the same principle in a case where the ground assigned as a reason for granting a new trial was that the verdict was excessive. We said: "That is a point peculiarly with-

in the province of the trial judge; it is one that he is better qualified to judge than an appellate court. The law puts that important responsibility upon him, and it advances the cause of justice when the trial judge courageously performs that duty." In this case we see no reason for departing from this rule. The evidence was conflicting, at least in its coloring as to the painful and disabling quality of the injury. The trial court had the plaintiff and all the witnesses before it, and was much better qualified than we to determine whether justice will be promoted by another trial. It may be that, as in *Goetz v. Ambs*, 27 Mo. 28, cited by appellant, the verdict will be increased in another trial. If so, the statute (Rev. Stat. 1909, § 2023) which permits but one retrial for this cause will relieve the courts of much of their responsibility.

2. The appellant insists that the action of the trial court and also of this court in the many cases to which we have referred are all in violation of article 2, § 22, of the Constitution of our state, because they amount to a denial of the right of trial by jury as enjoyed before the adoption of that

lant and the appellee, may reduce the judgment to an amount which the members of the court may deem right and just under all the facts and circumstances of the case. If the appellant and the appellee do not consent to the reduction, the judgment of the trial court is reversed and the cause remanded for a new trial. If they do consent to the reduction, the judgment as reduced is affirmed. The above, in plain English, is all that the act under consideration does or undertakes to do, and it in no way offends any constitutional provision touching the right of trial by jury."

And the Texas statute (Rev. Stat. art. 1029a) which authorizes the court of civil appeals, upon finding a judgment excessive, to reverse or grant a new trial upon failure to remit a suggested excess, has been held not to be violative of the constitutional provision guarantying the right of trial by jury. *Texas & N. O. P. R. Co. v. Syfan*, 91 Tex. 562, 44 S. W. 1064.

So, in *Ingraham v. Weidler*, 139 Cal. 588, 73 Pac. 415, it was held that California Code Civ. Proc. § 657, which authorized the granting of a new trial where excessive damages had been awarded was not violative of the constitutional declaration that the right of trial by jury shall be secured to all, the court saying that the power to grant a new trial upon this ground was a long recognized part of the "right of trial by jury." In this case, like *DEVINE v. St. Louis*, the plaintiff had declined to consent to a modification of the amount of damages, and a new trial was granted upon the ground of excessive damages appearing to have been given under the influence of passion and prejudice.

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And in *Kennon v. Gilmer*, 131 U. S. 22, 33 L. ed. 110, 9 Sup. Ct. Rep. 690, it was said with respect to the provisions of the Montana Code authorizing the trial court to set aside a verdict and grant a new trial "for excessive damages appearing to have been given under the influence of passion or prejudice," that "under these statutes, as at common law, the court, upon the hearing of a motion for a new trial, may in the exercise of its judicial discretion either absolutely deny the motion or grant a new trial generally, or it may order that a new trial be had unless the plaintiff elects to remit a certain part of the verdict," etc., without infringing the constitutional right of trial by jury.

So, in *Louisville & N. R. Co. v. Fox*, 11 Bush, 495, it was held that a reversal by the court of appeals of an order of the trial court denying a new trial, upon the sole ground that the verdict was excessive, was not an infringement of the right of trial by jury, the Civil Code, § 369, providing that a verdict may be set aside by the trial court and a new trial granted "for excessive damages appearing to have been given under the influence of passion or prejudice," and § 15, giving the court of appeals appellate jurisdiction over such orders.

And in *Smith v. Times Pub. Co.* 178 Pa. 481, 35 L.R.A. 819, 36 Atl. 296, it was held that a Pennsylvania statute under which the supreme court reversed a judgment on a verdict for excessive damages, and ordered a new trial, did not infringe the constitutional right to a jury trial, although the trial court had denied a motion for a new trial.

G. J. C.

instrument in 1875, and that we should overrule our own more recent cases and turn to the good old doctrine which she thinks was held by us in *Gurley v. Missouri P. R. Co.* 104 Mo. 211, 16 S. W. 11, and *Rodney v. St. Louis Southwestern R. Co.* 127 Mo. 676, 28 S. W. 887, 30 S. W. 150. She says that we should do this if we are of the opinion that, under the common and statute law of this state as it existed prior to that time, our own and English courts did not assert or exercise the power now claimed. Acting upon the old theory that a recurrence to first principles is a great assistance to keep us from swerving from the right track, it is well enough to refer to the early history of the power to grant new trials. The first reported case on that subject which we have read is the *Slade Case*, Style 138, which was decided in the King's bench in 1648. It arose upon motion for judgment formerly stayed upon a certificate made by Baron Atkins that the verdict passed against his opinion. Baron, J., said, "Judgments have been arrested in the common pleas upon such certificates;" but Roll, J., held: "It ought not to be stayed, though it have been done in the common pleas, for it was too arbitrary for them to do it, and you may have your attain against the jury, and there is no other remedy in law for you; but it were good to advise the party to suffer a new trial for better satisfaction." The new trial was accordingly ordered. The next case we notice is *Wood v. Gunston*, page 466 in the same report, which was decided in 1655 in the King's bench. Wood sued Gunston for slander, and obtained a verdict for £1,500 damages. The defendant moved for a new trial on the ground that the damages were excessive. Glyn, J., said: "It is in the discretion of the court in some cases to grant a new trial, but this must be a judicial, and not an arbitrary, discretion, and it is frequent in our books for the court to take notice of the miscarriages of juries, and to grant new trials upon them, and it is for the people's benefit that it should be so, for a jury may sometimes by indirect dealings be moved to side with one party, and not to be indifferent betwixt them, but it cannot be so intended of the court; wherefore let there be a new trial the next term."

In 1773 the new trial seems to have got well into harness as appears from *Vernon v. Hankey*, 2 T. R. 113, 1 Revised Rep. 444. In the meantime, in 1757, *Bright v. Eynon*, 1 Burr. 391, came up in the King's bench, in which Lord Mansfield, in a long and in-

structive opinion concurred in by the other justices, and expressly indorsing *Wood v. Gunston*, said: "Trials by jury in civil causes could not subsist now without a power somewhere to grant new trials." His masterly argument in this opinion will well repay perusal. We have been greatly aided by the English cases collected and cited by the learned counsel for the appellant. They all recognize the power of the trial court, in the exercise of a proper discretion, to grant a new trial on the ground of excessive damages, and there is no instance on the part of an appellate court of an attempt to control that discretion. *Wilford v. Berkeley*, 1 Burr. 609, so cited, was an action for criminal conversation with plaintiff's wife, at the trial of which, in King's bench in 1758, Lord Mansfield presided. There was a verdict for £500 and a motion to set it aside because it was excessive. The report states: "The court were all three, clear and unanimous, that, although there was no doubt of the power of the court to exercise a proper discretion in setting aside verdicts for excessiveness of damages in cases where the quantum of the damage really suffered by the plaintiff could be apparent, or they were of such a nature that the court could properly judge of the degree of injury, and could see manifestly that the jury had been outrageous in giving such damages as greatly exceeded the injury, yet the case was very different where it depended upon circumstances which were properly and solely under the cognizance of the jury, and were fit to be submitted to their decision and estimate. And they held the case of criminal conversation with another's man's wife to be of this latter kind."

We think, with the court in that case, that the damages accruing to one for criminal conversation with his wife are so largely personal and sentimental in their nature that judicial experience affords little or no aid in estimating them, so that the judge, with respect to them, labors under all the difficulties that beset the jury. The most of the English cases cited by appellant are of that general character. *Benson v. Frederick*, 3 Burr. 1846, is, however, an action like this, for personal injury, and well repays notice in this connection. It was brought against the defendant, a colonel of the militia, for ordering the plaintiff, a common soldier, to be stripped, and receive twenty lashes from two drummers. Owing to the leniency of the drummers, he did not suffer much injury; but the jury assessed his damages at £150. The report

states: "Lord Mansfield said he had no doubt but that it might be right to give an opportunity of reconsidering verdicts where excessive damages had been given. But in the present case he was not dissatisfied with the verdict, for Sir Thomas had manifestly acted arbitrarily, unjustifiably, and unreasonably." Mr. Justice Wilmot, concurring, observed that "he had no doubt but that the court might look upon these damages to be too high in a common and ordinary case, and had power to set aside the verdict and award a new writ of inquiry; yet, as in this case the defendant had acted very arbitrarily, and was well able to pay for it, he did not think the court were obliged to set aside the verdict that the jury had found." Mr. Justice Aston, concurring, said: "He was very full in vindicating the discretion of the court to grant new trials, even when the damages were ideal; and cited the case of *Wood v. Gunston*. But as, in the present case, the defendant had acted very arbitrarily and unjustifiably, and under the circumstances that appeared upon the report he did not think this to be a proper occasion for the court to set the verdict aside," so it seems that in that case a new trial was refused on the sole ground that all the judges thought the defendant only got what was coming to him. It contains the whole pith of the matter, and vindicates the discretion of the court, even in cases where the action of the jury in the assessment of damages is "ideal." *Leith v. Pope*, 2 W. Bl. 1327, to which appellant's counsel directs our attention, is of the same character, and the court was influenced by a similar motive. The jury found a verdict in an action of malicious prosecution for £10,000. The defendant moved for a new trial "on account of the outrageousness of the damages, which exceeded (it was said) all example." Justices Gould, Blackstone, and Nares, in their opinion refusing a new trial, said: "A prosecution thus aimed at the life of the plaintiff, and proceeding from such wicked motives, must evidence a most depraved and corrupt heart, for which, had he had an associate, both might have been indicted for conspiracy, and have received the most infamous, called emphatically the villenous, judgment. In such a case the court cannot say that any sum assessed by the jury is too much, if the circumstances of the parties will warrant it. (2) Now the plaintiff is a man of family, a baronet, an officer in the army, and a member of Parliament; all of them respectable situations, and which may render the value of

an injury done to him, especially when directed against his life, adequate to £10,000. The court cannot enter into stories of private scandal, which have been liberally propagated on both sides. This is the light in which the plaintiff appears upon the record and the evidence. (3) The defendant appeared upon evidence to be exceeding wealthy, and well able to sustain such a verdict."

We can safely say that in England the practice of granting new trials at the discretion of the court for miscarriages of the jury, including the award of excessive damages, was firmly established in the eighteenth century, and has continued unabated. It is a part of the common law of England adopted in the territory of Missouri on the 19th day of January, 1816, and which has during the entire period of our statehood been a canon of constitutional and statutory interpretation to which we have had frequent recourse.

We have carefully read the numerous Missouri cases to which counsel for appellant has referred, and greatly appreciate the industry and learning he has brought to our aid. They all deal with the power and duty of this court with respect to the verdicts of juries; but we find in them no authority against the proposition that the granting or refusing of new trials on the ground that the verdict is against the weight of the evidence rests peculiarly with the judge presiding at the trial, and that this discretion will not be ordinarily interfered with, unless it appears that it has been unsoundly or arbitrarily exercised. This rule applies to the verdict in its entirety, without reference to whether the evidential weakness be in its amount or in some other controlling particular. In the former case justice commends the practice by which it may be corrected by the action of the party for whom it is rendered, without the cost and delay of a new trial.

It follows from what we have said that the order of the Circuit Court for the City of St. Louis granting a new trial must be affirmed, and the cause remanded for further proceedings.

Blair, C., concurs.

Per Curiam:

The foregoing opinion by Brown, C., is adopted as the opinion of the court.

All concur.

Motion to amend judgment denied April 13, 1914.

NORTH CAROLINA SUPREME COURT.

MARY MOORE, Admr., etc., of Lincoln Moore, Deceased,
v.

SOUTHERN RAILWAY COMPANY, Appt.

(165 N. C. 439, 81 S. E. 603.)

Master and servant — statutory liability — gunshot wound.

1. A statute rendering a railroad company liable for injury to a servant by the negligence, carelessness, or incompetence of a fellow servant covers an injury to one by a pistol shot from a weapon which had been placed in a drawer by another servant in such a manner that it must be handled to transact business, and was lifted by him

when going to the drawer for supplies, and held in such negligent manner while forcibly pulling open another drawer as to cause its discharge and the injury complained of.

Same — joint service — liability of either master.

2. That the joint agent of two railroad companies at a particular station was performing a service for one of them when he inflicted an injury upon a bystander does not relieve the other from liability for his acts.

Same — establishment of relation — employment and payment of salary.

3. That a baggage master at a union depot was appointed and paid by one of the companies does not prevent his negligent infliction of an injury while looking after baggage for another company using the

Note. — Liability of joint employers for torts of the employee.

As to, which of two or more persons is master of a third, see note to Hardy v. Shedden Co. 37 L.R.A. 33.

As to liability of a railroad company for negligence of one of its employees while running on the road of another company, subject to the orders of the latter's train despatcher, see note to Hamble v. Atchison, T. & S. F. R. Co. 22 L.R.A. (N.S.) 323.

As to liability of union depot company for negligence of its own or carrier's employees, see note to Union Depot & R. Co. v. Londoner, 33 L.R.A. (N.S.) 433. And as to liability of railroad company for injury to its servants by negligence of union depot employees, see Floody v. Great Northern R. Co. 13 L.R.A. (N.S.) 1196, and note appended thereto.

As to right of railroad company to delegate to independent contractor the maintenance of gates or a flagman at a street crossing, see note to Boucher v. New York, N. H. & H. R. Co. 13 L.R.A. (N.S.) 1177.

The present note is confined to cases wherein the question is as to the responsibility of joint employers for the torts of their common servants, as affected by the fact that such servants are in the employment of two or more persons or corporations.

The great weight of authority is to the effect that joint employers are liable both jointly and severally for the torts of an employee, and this notwithstanding the particular service being rendered was for one only of the employers, and notwithstanding such employee was paid directly by only one of the joint employers.

The general rule that joint employers are all liable for the torts of a common servant is laid down in Landers v. Felton, 73 Fed. 311, wherein it was held that the liability of two railroad companies which jointly owned a yard engine, for injuries caused by the negligent operation of such engine by one employed and under the control of both the companies, was both joint and several. So, in Williams v. Southern 51 L.R.A. (N.S.)

R. Co. 102 Miss. 617, 59 So. 850, where two carriers maintained a station in charge of a joint agent, and a passenger was injured by remaining therein a reasonable length of time when it was insufficiently heated, it was held that such carriers were jointly and severally liable for the injuries resulting from the failure of the joint agent to properly heat the station. And in Moling v. Barnard, 65 Mo. App. 601, where an animal was killed by a negligently operated railroad train, it was said that if the operation of such train was under the joint control of the officers and agents of the two railroad companies, then either or both of such companies are liable for the damages resulting from the negligence. And in American Cotton Co. v. Simmons, 39 Tex. Civ. App. 189, 87 S. W. 842, where an employee was injured by reason of the negligence of the common foreman of two corporations, it was held that the liability of the corporations was both joint and several. And in Western U. Teleg. Co. v. Rust, 55 Tex. Civ. App. 359, 120 S. W. 249, where a traveler on a highway was injured by the negligence of a messenger furnished by a telegraph company and a messenger company as joint masters, it was held that both companies were liable for the injuries. And in Chicago & N. W. R. Co. v. Snyder, 128 Ill. 655, 21 N. E. 520, where a train employee was injured in a collision between two trains resulting from the negligence of one employed and paid by the two defendant railroad companies, each of which owned one of such trains, to operate a semaphore in the interest of both companies, by one of which plaintiff was employed as a trainman at the time of the injury, it was held that it was proper to refuse an instruction that the semaphore operator at the time of the accident was the agent only of the railroad company which employed plaintiff, and not of the other defendant, where it appeared that such operator was directing the movements of both trains; and judgment against both railroad companies was sustained.

And the same rule has been adopted where the action was brought against one

depot, from rendering the former company liable, under a statute making railroad companies liable for injuries negligently inflicted by servants on fellow servants, if he was in fact the agent of both companies for the performance of such duties at that station.

(Brown and Walker, JJ., dissent.)

(April 29, 1914.)

APPEAL by defendant from a judgment of the Superior Court for Forsyth County in plaintiff's favor in an action brought to recover damages for the wrongful death of plaintiff's intestate, alleged to have been caused by the negligence of defendant's servant. Affirmed.

The facts are stated in the opinion.

of the joint employers only. Thus, in *Whit v. Fitchburg R. Co.* 136 Mass. 321, where a passenger on the train of one railroad company was injured as a result of the negligence of a brakeman employed and paid by another railroad company, while engaged in a service which the two companies had agreed should be performed for their joint benefit, it was held that the former railroad company was liable for such injuries, it being said that while performing the service in question he was acting for both companies. So, in *Roberts v. Wabash R. Co.* 153 Mo. App. 638, 134 S. W. 89, it was held that a railroad company was liable for an assault upon a passenger by its operator, although such servant was acting in the double capacity of operator for defendant and for a telegraph company, and though the passenger called to send a private message. And in *Illinois C. R. Co. v. King*, 69 Miss. 852, 13 So. 824, it was held that the fact that a station agent was acting for another railroad company as well as the defendant did not prevent a recovery by one unlawfully arrested by such agent while acting in the scope of his duties, the court saying that such fact merely showed that two might have been sued instead of one. So, in *Penfield v. Cleveland, C. C. & St. L. R. Co.* 26 App. Div. 413, 50 N. Y. Supp. 79, 4 Am. Neg. Rep. 449, it was held that the carrier of a passenger who was injured at a union station by reason of the wrongful act of the station officer was liable for such injuries, since, as between the defendant and its passengers, such officer was the defendant's servant. And in *Gulf, C. & S. F. R. Co. v. Shelton*, 96 Tex. 301, 72 S. W. 166, affirming 30 Tex. Civ. App. 72, 69 S. W. 653, on rehearing in 70 S. W. 359, where a switching crew were equally the servants of two railroad companies, although employed and paid by one, the other paying one half the cost, it was held that the company which merely bore one half the expense was liable for the torts of a member of such switching crew in ordering a passenger to alight from a moving train at night, to the same extent as if 51 L.R.A.(N.S.)

Messrs. Manly Hendren & Womble, for appellant:

A pistol in the hands of a grown young man, possessed and kept under the circumstances of this case, does not come within the category of a dangerous agency, so as to make his employer responsible for all damages that may be caused by its unintentional discharge, though negligently done.

Ship v. Fridenberg, 132 App. Div. 782, 117 N. Y. Supp. 599; *Pittsburgh, C. & St. L. R. Co. v. Shields*, 47 Ohio St. 387, 8 L.R.A. 464, 21 Am. St. Rep. 840, 24 N. E. 658; *Slater v. Advance Thresher Co.* 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133; *Shearm. & Redf. Neg.* § 63; *Euting v. Chicago & N. W. R. Co.* 116 Wis. 13, 60

he had been employed and directly paid by it.

And that the general rule of joint and several liability obtains notwithstanding the fact that the joint employee was performing a service for one of his employers only when the tort was committed was the holding in *MOORE v. SOUTHERN R. Co.* Another excellent case with regard to whether a joint employee is at the time of the commission of a tort the servant of both masters, or merely of the one for whom he is acting at the time, is *Buchanan v. Chicago, M. & St. P. R. Co.* 75 Iowa, 393, 39 N. W. 663, forceful language from which is quoted in *MOORE v. SOUTHERN R. Co.*, in which it was held that a flagman for three railroads at a point where they crossed a street was not acting solely for the company owning a certain track, and operating a train thereon, negligence in flagging which was the cause of injuries to plaintiff, a traveler upon the street. In this case, by agreement between the three railroads, one employed and paid a flagman at one street crossing; the second at another crossing; and the other at a third street, which all their tracks crossed, and the plaintiff brought action against the company which paid the flagman at the crossing where the accident occurred, and the defense was that at the time in question such servant was flagging for a train on one of the other roads, and therefore that that road was the only one liable; but as above set out this contention was held untenable. And see also *Roberts v. Wabash R. Co.* as set out supra.

And the holding in *MOORE v. SOUTHERN R. Co.*, to the effect that one railroad company cannot excuse liability for the negligent infliction of injury by proof that the negligent person was employed and paid by another railroad company, provided such person was in fact in the service of both companies, is supported by the decision in *Taylor v. Western P. R. Co.* 45 Cal. 323, wherein it was held that a railroad company which intrusted a servant employed and paid by another railroad company, at a junction point between the two railroads, with the business of attending to its trains

L.R.A. 158, 96 Am. St. Rep. 936, 92 N. W. 358, 13 Am. Neg. Rep. 234.

Wall was not acting within the scope of his employment so that his act in handling the pistol can be imputed to his employer.

Sanderson v. Collins [1904] 1 K. B. 628, 73 L. J. K. B. N. S. 358, 52 Week. Rep. 354, 90 L. T. N. S. 243, 20 Times L. R. 249; *Stephenson v. Southern P. Co.* 93 Cal. 558, 15 L.R.A. 475, 27 Am. St. Rep. 223, 29 Pac. 234; *Fleming v. Tarboro Knitting Mills*, 161 N. C. 436, 77 S. E. 309; *Galveston, H. & S. A. R. Co. v. Currie*, 100 Tex. 136, 10 L.R.A.(N.S.) 367, 96 S. W. 1073; *Evers v. Krouse*, 70 N. J. L. 653, 66 L.R.A. 592, 58 Atl. 181, 16 Am. Neg. Rep. 515.

In order to affect a master with liability,

at such junction, could not deny its liability for damages caused by such servant's negligence upon the ground that the servant was hired by the other company. The court said that it was immaterial by which company the servant was paid, if he was intrusted by the defendant with the responsibility of looking after its trains at the junction point. So, in *Denver & R. G. R. Co. v. Gustafson*, 21 Colo. 393, 41 Pac. 505, it was held that a railroad company may be liable for injuries to a traveler on a highway resulting from the negligence of a flagman at a railroad crossing, although such flagman was engaged and paid by another railroad company which also used the crossing, the flagman in question having acted at the crossing for both companies. In this case the court said: "Employment and payment of a person are not indispensable elements to charge one as a master for the negligence of such one who renders him service. When one knowingly and without objection receives the benefits of labor, or holds out to the public one as engaged in his service, he is liable as a master for the negligence of such servant, when the act or failure constituting the negligence comes within the apparent scope of the servant's employment, even though the person for whom the service is rendered has not employed or paid the servant. The facts of this case sufficiently show that the defendant knowingly availed itself of the services of the flagman for a long series of years, and held him out to the public as its servant." And in *Missouri P. R. Co. v. Bond*, 2 Tex. Civ. App. 104, 20 S. W. 930, it was held, assuming that the employee whose negligence caused injury to a trainman was employed jointly by two railroad companies, that such trainman could recover against one of the companies, although at the time of the accident the other company was paying the wages of the negligent employee. And in *Schulte v. Louisville & N. R. Co.* 128 Ky. 627, 108 S. W. 941, where a traveler on a highway was injured at a railroad crossing by reason of the negligence of a gate tender, it was held that all railroad companies using the

something more must be proved than that the wrongful act was in some way connected with the servant's authorized functions, or that he committed it at a time when he was occupied with the discharge of those functions.

Linville v. Nissen, 162 N. C. 95, 77 S. E. 1096; *Bowler v. O'Connell*, 162 Mass. 319, 27 L.R.A. 173, 44 Am. St. Rep. 359, 38 N. E. 498; *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597, 8 Am. Neg. Cas. 536; *Stephenson v. Southern P. Co.* 93 Cal. 558, 15 L.R.A. 475, 27 Am. St. Rep. 223, 29 Pac. 234; *Marlowe v. Bland*, 154 N. C. 142, 47 L.R.A.(N.S.) 1116, 69 S. E. 752; *Wood, Mast. & S.* § 279; 25 Cyc. 1533; *Jackson v. Chicago, R. I. & P. R. Co.* 102 C. C. A. 162, 178 Fed. 432;

crossing were jointly and severally chargeable with the negligence of the watchman in failing to close the gates, and where, as here, more than one railroad company used the crossing, it was immaterial who employed or paid the gate watchman. And in *Boucher v. New York, N. H. & H. R. Co.* 196 Mass. 355, 13 L.R.A.(N.S.) 1177, 82 N. E. 15, it was held that the fact that a gate tender at a point where two railroads cross a street was hired and paid by one of such railroad companies did not prevent a finding that the gate tender was also the servant or agent of the other company, so as to render it liable for injuries resulting from his negligence. And in *Usher v. Western U. Teleg. Co.* 122 Mo. App. 98, 98 S. W. 84, it was held that a telegraph company was liable for the tort of one acting jointly for it and for a railroad company, although the railroad company paid such agent's wages, the court saying that such circumstances was not controlling. And see *Brow v. Boston & A. R. Co.* 157 Mass. 399, 32 N. E. 362, wherein it was said that it did not necessarily follow from the fact that it might be inferred from the facts that one railroad company exercised the exclusive right of selecting the gateman whose negligence caused the injury in question, and of controlling and discharging him, and that it was in a legal sense his master, that the other railroad companies for whom he performed services might not also be liable, on the ground that the jury might find that such companies jointly with the first company employed a common agent, for whose torts in the performance of his duties each and all were responsible. And see also *White v. Fitchburg R. Co.* 136 Mass. 321, and *Gulf, C. & S. F. R. Co. v. Shelton*, 96 Tex. 301, 72 S. W. 165, as set out supra.

And the rule that the liability of joint employers for the torts of an employee is both joint and several is not necessarily obviated by the fact that there is no express contract between the companies as to such employment. This was the holding in *Brow v. Boston & A. R. Co.* supra, which is sufficiently set out in *MOORE v. SOUTHERN R. Co.*

Chicago, R. I. & P. R. Co. v. Smith, 10 Kan. App. 162, 63 Pac. 294; McClenaghan v. Brock, 5 Rich. L. 17.

Messrs. Louis M. Swink and Hastings & Whicker, for appellee:

The employer is chargeable with the duty of making a reasonable and proper inspection, so as to prevent the place where its employees are required to do their work from becoming dangerous and unsafe.

Chesson v. John L. Roper Lumber Co. 118 N. C. 59, 23 S. E. 925; Myers v. Concord Lumber Co. 129 N. C. 252, 39 S. E. 960; Britt v. Carolina & N. R. Co. 144 N. C. 253, 56 S. E. 910.

In handling the loaded pistol, the assistant baggage agent was required to use ex-

traordinary care in order to prevent injury.

Thomp. Neg. § 780.

The moving of the loaded pistol was necessary in order that the servant could more conveniently perform his duties, and the doctrine of *respondet superior* applies.

Cook v. Southern R. Co. 128 N. C. 333, 38 S. E. 925; Allison v. Western North Carolina R. Co. 64 N. C. 382; Palmer v. Winston-Salem R. & Electric Co. 131 N. C. 250, 42 S. E. 604; Williams v. Gill, 122 N. C. 967, 29 S. E. 879; Pierce v. North Carolina R. Co. 124 N. C. 83, 44 L.R.A. 316, 32 S. E. 399; Brendle v. Spencer, 125 N. C. 474, 34 S. E. 634, 7 Am. Neg. Rep. 142; Hayes v. Southern R. Co. 141 N. C. 196, 53 S. E. 847; Lipscomb v. Houston &

In some instances two or more masters which employ the same person to act for both have provided by contract that each party should alone be responsible for all loss or damage caused by the fault of such an employee while acting in its behalf. A contract of this character is undoubtedly binding between the parties thereto, as is illustrated by Louisville, H. & St. L. R. Co. v. Illinois C. R. Co. 29 Ky. L. Rep. 265, 93 S. W. 4, wherein it was held that, as between two railroad companies operating under such a contract, which also provided that one of such companies should select and hire and discharge flagmen, and that the other company should pay a certain portion of the compensation, the latter railroad company, for whom a flagman was acting at the time of a collision caused by his negligence, between defendant's train and a street car, must bear the whole loss.

But contracts providing that one of two masters shall be liable for the torts of persons in their joint employment are not controlling as between such employers and third persons. Thus, in Schoen v. Chicago, St. P. M. & O. R. Co. 112 Minn. 38, 45 L.R.A.(N.S.) 841, 127 S. W. 433, it was held that either or both of two companies which operated a switch engine as a joint enterprise were liable for injuries caused by the negligence of its operators, although by private contract one of such companies had assumed all liability for injuries caused by the operation of the engine.

Another class of cases which is of interest in connection with the present note is composed of those cases wherein two or more persons or corporations operate a business jointly. Of this character is Jones v. Pennsylvania R. Co. 8 Mackey, 178, affirmed on this point in 155 U. S. 333, 39 L. ed. 176, 15 Sup. Ct. Rep. 136, wherein it was held that several railroad companies operating jointly as one line, and each contributing to the expense and sharing in the profits, were jointly and severally liable for injuries caused by the negligence of the employees on one of the trains. In this case the employees were hired by the various companies, and were upon the individual pay rolls 51 L.R.A.(N.S.)

of the hiring company, but were all paid by a common agent. The court said that such employees were, as a matter of fact, each the agent of all the companies. So, in Louisville & N. R. Co. v. Breeden, 111 Ky. 729, 64 S. W. 667, it was held that where a train is run by two railroad companies on joint account, both companies are liable for the negligence of those in charge of the train, to third persons, whatever their rights may be as to each other. And in Nashville & C. R. Co. v. Carroll, 6 Heisk. 347, it was held that where the train which, because of negligent operation, injured plaintiff, was operated jointly by two railroad companies, both companies were liable. The train in this case was run by an engineer and brakeman in the employment of one company, and a conductor in the employment of the other company. And in Chesapeake & O. R. Co. v. Davis, 119 Ky. 641, 60 S. W. 14, where the track on which a train was negligently operated was owned by one railroad company and the engine by another, and the evidence as a whole warranted the conclusion that the train was operated by the two companies jointly, it was held that they were jointly liable for injuries to a person at a street crossing resulting from such negligent operation. And see also Smith v. New York, N. H. & H. R. Co. 96 Fed. 504, wherein it was held that railroad corporations created by the legislatures of adjoining states, to operate jointly a continuous line, are jointly liable for a tort committed by their employees in one of such states. Bissell v. Michigan S. & N. I. R. Cos. 22 N. Y. 258, is to the same effect as regards both conclusions and facts as the Smith Case, except that the tort in the former case was committed in a third state, where such companies jointly operated on the tracks of a third company.

In connection with the present note, see also Goodman v. Wilson, post, —, and note appended thereto, wherein will be found a treatment of cases involving the question of the liability of joint owners of an automobile or carriage for the torts of a common servant.

G. J. C.

T. C. R. Co. 95 Tex. 5, 55 L.R.A. 869, 93 Am. St. Rep. 805, 64 S. W. 923.

In the absence of rules prohibiting these agents from having a pistol, they were not violating any of the defendant's rules.

Pittsburgh, C. & St. L. R. Co. v. Shields, 47 Ohio St. 387, 8 L.R.A. 464, 21 Am. St. Rep. 840, 24 N. E. 658; Palmer v. Winston-Salem R. & Electric Co. 131 N. C. 250, 42 S. E. 604; Gruber v. Washington & J. R. Co. 92 N. C. 1; Ware v. Barataria & L. Canal Co. 35 Am. Dec. 198, note; Garretson v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405.

Clark, Ch. J., delivered the opinion of the court:

This is an action for the wrongful death of plaintiff's intestate through the negligence of a fellow servant. The baggage agent of the defendant left a loaded revolver in a drawer in the desk in the baggage room. It was lying upon some baggage checks, and the baggage agent, in removing the pistol from the drawer in order to get the checks, held it in one hand while pulling open another drawer, causing the pistol to fire. It was directed towards the deceased, a fellow servant in the employ of the defendant, and was discharged, thereby killing him.

The court charged the jury that, if they found that the defendant company through its agent left a loaded revolver in said desk, where it was necessary to be handled in order to transact the business of the department, and should also find that, in removing the pistol from the drawer in the course of his employment, said agent took hold of and handled the pistol without the exercise of ordinary care as to the manner in which he was handling it, and carelessly, and without the exercise of ordinary care, and without due regard to the direction in which it was pointed, pressed the trigger, and as a result of such careless conduct and want of care, the plaintiff's intestate was killed, and the jury should further find that by the exercise of ordinary care the injurious result ought reasonably to have been anticipated as a consequence of such conduct, to find the first issue, "Yes," otherwise to answer it, "No."

In this we find no error of which the defendant can complain. Indeed, in requiring, in addition to the last two circumstances, the jury to find further that there was negligence in leaving the pistol in the drawer, there was error; but of this the defendant cannot complain. It was an immaterial circumstance.

If the baggage agent had suddenly and forcibly pulled the drawer open without

observing the fact that another employee was standing close by, and by reason of such negligence and unusual and forcible manner of pulling open the drawer, the sharp corner of the drawer had struck the deceased on the temple, killing him, and by the use of ordinary care the agent could reasonably have anticipated such consequence, the defendant would have been liable for the negligence, just as if one employee had negligently thrown a crosstie or a lump of coal on another, as in Fitzgerald v. Southern R. Co. 141 N. C. 531, 6 L.R.A.(N.S.) 337, 54 S. E. 391, where the point is thoroughly discussed, or dropped a bar of iron on his foot. Horton v. Seaboard Air Line R. Co. 145 N. C. 132, 58 S. E. 993, and many similar cases.

The injury was an accident in the sense only that the killing was not intentional. The jury, under the last paragraph of the charge, must have found that the killing was in consequence of the negligence of the baggage agent from the careless manner in which he held the pistol while pulling open another drawer. He was in the discharge of his duties in the course of his employment. He was negligent, as the jury find, both in the manner of holding the pistol while pointed at another, and in pulling open the drawer at the same time. The statute is explicit that, for "injury caused by the negligence, carelessness, or incompetence of a fellow servant," the defendant is liable. Revisal 1905, § 2646. The able and experienced counsel of the defendant do not base their motion for a nonsuit upon the ground that the witness Wall was the agent solely for the Southern Railway, and that the death of the decedent was caused by him when acting solely as agent of the Norfolk & Western, either by exception on the trial, or by taking such point in their briefs. But, as the suggestion is made, it is well to refer to the testimony of Wall himself, who says: "I was the joint agent of the Norfolk & Western and the Southern Railway Companies. Lincoln Moore [the deceased] was employed to help me look after the baggage for the Southern and Norfolk & Western." He also says: "I was assistant baggage agent at the union station at Winston-Salem, and worked in the baggage room." On the motion to nonsuit, the evidence must be taken as true in the aspect most favorable to the plaintiff. According to the evidence above set out, it appears that Wall was the joint agent of the two railroads, and operating the joint baggage room of the union depot in their behalf. That being so, it cannot be said that any one service was done by him at the responsibility of one railroad, and the other service at the responsibility of the other. The

witness testified that he was the "joint" agent of both roads, operating the "joint" business of both roads. It follows, therefore, that the plaintiff could have sued either or both roads at her option. It was a joint employment, and he was a joint agent. There is no evidence tending to show, and it is unreasonable to suppose, that he was paid according to the trains he served. He was doubtless employed by the month, as is customary, and whatever work he did according to his testimony was as joint agent in the joint or common business of the two roads.

A case almost exactly in point is *Gulf, C. & S. F. R. Co. v. Dorsey*, 66 Tex. 148, 18 S. W. 444. In that case the plaintiff was employed by one railroad company to act as night switchman in a union yard jointly kept and used by that company and two others. While performing his duty upon a train and track of one of the latter companies, and because of some negligence of that company, he received personal injury, and it was held: (1) Between the plaintiff and his employer the relation of master and servant existed by express contract. Between the plaintiff and the other companies that relation arose by inference from the service and the connection of the companies. (2) No proof being offered as to the contract between the companies, their duties respecting the yard where the plaintiff was injured could only be inferred from the manner in which the premises were used. (3) It appearing that the plaintiff was employed to work in the 'union yard,' that it was used by the three companies in common, and the plaintiff was injured while performing his duty, it was not error to instruct the jury that, if the injury resulted from the negligence of either company, all were liable jointly and severally." This is a well-considered case, and there are many others like it. In *Vary v. Burlington, C. R. & M. R. Co.* 42 Iowa, 246, it did not appear whether the plaintiff was injured on the road of the defendant or of the company by which he was employed. His engagement was to serve both companies very much in the same way as the plaintiff's intestate in this case, and it was held that he could sue either or both, and it was said: "This principle is elementary, and needs no citation of cases in its support." Among other cases to the same purport is *Buchanan v. Chicago, M. & St. P. R. Co.* 75 Iowa, 393, 39 N. W. 663, in which it is said: "The idea that the employee was under the employment of one company for five minutes, and then another for a few minutes, and another for a short time, and that he changed his employers with the facility with which the kaleido-

scope exhibits an array of colors, involves an absurdity,"—and adds that this would make the service, "not only the ridicule of the public, but a system of deception, to the great peril of the most prudent and careful drivers." Another case is *Brow v. Boston & A. R. Co.* 157 Mass. 399, 32 N. E. 362, which held that in such cases, where an employee is in a common employment at a union station, rendering service first for one company and then the other, that one injured by the negligence of such servant could recover out of either or all of the companies, though there was no express contract between the companies as to his employment.

If, as Wall testified, he was the joint agent of both companies, they were jointly and severally liable. If, however, as he also testified (and which is not incompatible), he was appointed and paid by the Southern to attend to the joint business for both companies in the baggage room, both companies are liable. Certainly the Southern Railway which is the one sued here, cannot object that Wall was not in its service when he was handling baggage by its direction for the other company. Nor are we impressed with the suggestion that a farmer would not be held responsible for the negligence of his servant in a case of this kind, and therefore the railroad should not be. The railroad would not have been liable until the enactment of chapter 56, Laws 1897, now Revisal 1905, § 2646, which provides: "Any servant or employee of any railroad company operating in this state who shall suffer injury to his person, or the personal representative of any such servant or employee who shall have suffered death in the course of his services or employment with such company by the negligence, carelessness or incompetence of any other servant, employee or agent of the company or by any defect in the machinery, ways or appliances of the company shall be entitled to maintain an action against such company." This statute has been sustained by repeated decisions of this court, and, indeed, such statutes have been now almost universally adopted.

This being a motion for a nonsuit, the evidence must be taken as true. The witness testified that he was the joint agent of both railroads, and so was the deceased, who was his helper. The latter was killed "in the course of his services or employment," and the jury found that this was done "by the negligence, carelessness, or incompetence of the other servant." all testified that he was appointed and paid by the defendant, the Southern Railway; but he also says that he was the joint agent of both companies in their joint business

of looking after the baggage that came to the union depot.

No error.

Brown, J., dissenting:

I am of opinion that the conclusion reached by the majority of my brethren is in contravention of the previous decision of this court, and that the motion to nonsuit should be sustained. As the facts are not stated fully in the opinion, I set them out from the record. The only witness examined who testified to the facts was J. A. Wall, introduced by the plaintiff. After testifying that he was assistant baggage agent at the union station in Winston-Salem, the witness says: "About seven days before Lincoln Moore was killed I found a pistol in an old desk in the baggage room. This desk set on the back side, where we kept all our checks and some supplies. I found the pistol a few days after Mr. Minter the baggage agent, took charge. I took it out and rubbed it up, and got the dust off of it. Mr. Minter saw me when I found it. When I put the pistol in the drawer immediately after finding it, I did not put it in the drawer where we keep the baggage checks. The drawer in which I put it contained a book and some old circulars. On the morning that Lincoln Moore was killed the pistol was in the drawer on top of Norfolk & Western Railway checks. I put it there. It was put in that place the evening before Moore was shot. There was one cartridge in the pistol. Up to the time I put it in the drawer just spoken of, it had been in the drawer where the circulars and book were. Mr. Minter said to me, 'I found a cartridge I believe will fit your old gun.' When he told me about this cartridge, I took the pistol out and put the cartridge in it. Lincoln Moore had been working in the baggage room about two months and a half. He was hired by Victor Davis. His duties were to help load baggage going out and unload baggage coming in. He was under my instructions, and did what I told him to do. We were both at the station that morning getting the baggage off on the 5:40 Southern train. The next train that left after that was the 7:05 train over the Norfolk & Western for Roanoke. After getting the baggage off on the Southern, Lincoln Moore and I came around near my desk, and Lincoln Moore sat on a stool inside of the office and was combing his hair. I went to get some Norfolk & Western checks to put strings on them to prepare to check the baggage going out on the 7:05 Norfolk & Western. Opening the drawer, I found the pistol lying on top of the checks, and I picked it up with my right hand and was going to lift it back

into the other drawer, and just as I went to pull the drawer it got hung. I stepped back like this [indicating], and as I stepped back it went off; the bullet striking Lincoln Moore and killing him. I had pistol in my right hand, and was trying to open the drawer with my left hand, and in jerking the pistol went off."

It is not contended that the defendant or its officers either authorized or knew of the keeping of the pistol in the desk by the baggage agent, Wall. In my opinion, it was the unauthorized and personal act of Wall for which the defendant is not liable.

1. Wall was not acting within the scope of his authority or in furtherance of this defendant's business. He says his purpose in opening the drawer was to get checks to put on baggage for the 7:05 Norfolk & Western train, and that the pistol was lying on top of those checks, and that he picked it up for the purpose of putting it in the other drawer from which he had taken it. He was no more acting for the defendant when he took the pistol up to remove it to the other drawer and accidentally killed Moore than he would have been had he willfully and intentionally discharged it.

Suppose a merchant's clerk had placed a pistol in his desk without the knowledge or authority of his master, and, in going into the desk to get out papers in his master's business, he had taken the pistol off the needed papers, and in so doing had accidentally, but negligently killed a fellow clerk; does anyone for a moment suppose that this court would hold the merchant liable for such unauthorized act? If the merchant would not be held liable under such circumstances, then this defendant, although a railway company, ought not to be.

The test laid down by Justice Hoke in *Sawyer v. Norfolk & S. R. Co.* 142 N. C. 1, 115 Am. St. Rep. 716, 54 S. E. 793, 9 Ann. Cas. 440, is: "Where the question of fixing responsibility on corporations by reason of the tortious acts of their servants depends exclusively on the relationship of master and servant, the test of responsibility is whether the injury was committed by authority of the master, expressly conferred or fairly implied from the nature of the employment or the duties incident to it." And in the same case it is held that private corporations are liable for their torts (of this character) under such circumstances as would attach liability to natural persons. In this case a railway company was exonerated from liability for the tortious conduct of a superintendent when refusing employment to one who had applied to him for it. This case is cited and approved in *Marlowe v. Bland*, 154 N. C. 141, 47 L.R.A.(N.S.) 1116, 69 S. E. 752, where a farmer ordered

his servant to cut and pile cornstalks, who, after piling them, without authority from his master, set fire to them and caused damage. The master was held not liable.

This same idea is expressed by Wood in his work on Master & Servant, § 307, quoted in *Marlowe v. Bland*: "The simple test is whether they were acts within the scope of his employment, not whether they were done while performing the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him. By 'authorized' is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties intrusted to him by the master, even though in opposition to his express and positive orders."

In *Jones v. Seaboard Air Line R. Co.* 150 N. C. 475, 64 S. E. 206, it is said: "Certainly no one will seriously contend that a master is an insurer of his servant's conduct in respect to torts committed by him while in his employment, without regard to the pivotal question whether such conduct had any relation to or was in the scope of the employment."

This subject is so fully discussed in the cases I have cited, as well as by Justice Walker in *Jackson v. American Teleph. & Teleg. Co.* 139 N. C. 347, 70 L.R.A. 738, 51 S. E. 1015, and *Daniel v. Atlantic Coast Line R. Co.* 136 N. C. 517, 67 L.R.A. 455, 48 S. E. 816, 1 Ann. Cas. 718, that it is useless to cite other authorities.

It is true the pistol was on top of the checks; but the declared purpose in taking the pistol out of the drawer was not so much to get at the checks as to put the pistol back in the other drawer from which witness had taken it. The checks could easily have been taken out by lifting up the pistol, and not removing it from the drawer. It was not at all necessary, in order to accomplish the master's work, that the pistol should have been taken out of the drawer it was in. That was the personal act of Wall, for which the defendant should not be held liable, as it neither knew of it, nor could by any sort of means have prevented it.

2. There is another ground upon which it appears to me the motion to nonsuit should be sustained. This action is brought against the Southern Railway, and not against the Norfolk & Western. While under the statutes of North Carolina these two railway corporations are compelled to co-operate in maintaining a union station in Winston-Salem, they are not and cannot be in any sense copartners, and neither is liable for the contracts or torts of the other. The fact that the Southern Railway assisted in maintaining this union station, 51 L.R.A. (N.S.)

and employed Wall to load its baggage, did not make it responsible for Wall's acts when he was acting exclusively for the Norfolk & Western in checking and loading its baggage.

Wall testifies that the Southern Railway train had been loaded with baggage and had gone. At the time of the injury he was getting Norfolk & Western checks for the baggage on that train. He was performing no act whatever for the Southern Railway when he went in the desk and removed the pistol.

It is surely permissible for one person to act as agent for two others in performing separate and distinct duties at different times for each principal, without making both principals liable jointly for all his acts; there being no partnership or privity between the principals.

It is true that this particular reason for sustaining the nonsuit is not urged in the brief; but it is our duty to consider it when we pass on the sufficiency of the evidence to warrant a recovery of this defendant.

Walker, J., concurs in this dissent.

OKLAHOMA SUPREME COURT. (Division No. 1.)

JAMES DORMAN, Plff. in Err.,
v.

CONNECTICUT FIRE INSURANCE COMPANY.

(— Okla. —, 139 Pac. 262.)

Insurance — agent's authority to contract.

1. Ordinarily, a traveling soliciting agent, without actual authority to contract, who is furnished by his principal, an insurance company, with no indicia of authority other than printed blank forms of application for insurance, addressed to it, which either negative the idea of authority to contract, or, as in the present case, is signed by the applicant without actual knowledge of its contents, does not have the apparent authority to enter into a contract of insurance.

(a) Quere, where such forms, within the

Headnotes by THACKER, C.

Note. — Insurance: effect of delay in passing upon application.

The general rule laid down in the note to *Northwestern Mut. L. Ins. Co. v. Neafus*, 36 L.R.A. (N.S.) 1211, where the early cases upon the question under consideration are gathered, to the effect that mere delay in passing upon an application for insurance cannot be construed into an acceptance by the insurer, is supported by the result reached in *DORMAN v. CONNECTICUT F. INS.*

actual knowledge of the applicant, are free from specific limitation upon the authority of such agent, does he thus have the apparent authority to bind such principal, as inducement to the making of such application, by a temporary contract of insurance, until such principal may reject such application?

Same — essentials of contract.

2. There is no contract of insurance unless the minds of the parties have met in agreement as to (a) the subject-matter, (b) the risk insured against, (c) the period of risk, (d) the amount of insurance, and (e) the premium.

Same — retention of application.

3. An unaccepted application for insurance, accompanied by the premium, although retained without notice of objection for five days after its date, and until the applicant has suffered the loss against which he desired the insurance, is not a contract of insurance.

Same — absence of acceptance.

4. Acceptance of an application may ordinarily be inferred from the retention and application of the premium; but when there is evidence reasonably tending to show that there was no such acceptance in fact, the law does not imply acceptance from such retention; and the adverse finding and judgment in the trial court are conclusive against appellant's claim of acceptance.

(February 28, 1914.)

ERROR to the District Court for Grant County to review a judgment in defendant's favor in an action on an alleged contract of insurance upon a growing crop of wheat. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. C. S. Ingersoll and F. G. Walling, for plaintiff in error:

There was a sufficient contract of insurance.

Van Arsdale-Osborne Brokerage Co. v. Cooper, 28 Okla. 598, 115 Pac. 779; Hardwick v. State Ins. Co. 20 Or. 547, 26 Pac. 840; Putnam v. Home Ins. Co. 123 Mass. 324, 25 Am. Rep. 93; Preferred Acci. Ins.

Co. v. Stone, 61 Kan. 48, 58 Pac. 986; Campbell v. American F. Ins. Co. 73 Wis. 100, 40 N. W. 661.

Having received and accepted the application, having received and accepted and retained the premium, and having expressly stated when the insurance would become effective, through its authorized agents, the defendant company placed plaintiff in a position which resulted in injury, damage, and loss to him; for these acts on the part of its agents, the defendant company is certainly liable.

1 Am. & Eng. Enc. Law, 2d ed. 1131; Walker v. Farmers' Ins. Co. 51 Iowa, 679, 2 N. W. 583; Lindsay v. Pettigrew, 5 S. D. 500, 59 N. W. 726.

Messrs. Scothorn, Caldwell, & McRill for defendant in error.

Thacker, C., filed the following opinion:

Plaintiff in error was plaintiff, and defendant in error was defendant, in the trial court; and this action was upon an alleged contract of insurance upon a growing crop of wheat, for loss sustained by hail pending an application for a policy; judgment being for the defendant upon the evidence. Plaintiff, on May 19, 1909, voluntarily applied to defendant for insurance by voluntarily approaching its agents and signing, without actual knowledge of its contents, an application in printed form furnished by defendant and prepared for signature by and in the hands of Joel Mulligan and C. L. Nash, who were then acting as defendant's subagents under D. M. Sullivan. At the same time, plaintiff executed his note without full knowledge of its contents to said Nash, or to the Bank of Nashville, Oklahoma, under the impression that it was to defendant, which note said Nash cashed at said bank, for the full amount of the premium for such insurance. Mulligan and Nash, who had no actual authority to issue policies or enter into contracts of insurance, and were merely traveling solicitors for and takers of applications and

Co., and it is also supported by the only other case which has been disclosed passing upon the point since the writing of the note referred to.

Thus, in Shawnee Mut. F. Ins. Co. v. McClure, 39 Okla. 535, 49 L.R.A.(N.S.) 1054, 135 Pac. 1150, where a soliciting agent of limited authority did not mail an application and the premium for fire insurance until four days after he received them, and an investigation of the risk was being made by the insurer when the property was burned two days after the application was forwarded, the court said that it could not be contended that the insurer held the application and premium so long, or otherwise conducted itself in such a way in reference

thereto, as to be tantamount to an acceptance, remarking that it was not necessary to cite the many cases holding that mere delay in accepting an application does not raise a presumption of acceptance.

A recovery against insurers based upon negligence has been allowed by some courts because of a failure to use due diligence in acting upon an application. This question of the liability of an insurance company for negligent delay in passing upon or issuing a policy until after loss is covered in the note to Boyer v. State Farmers' Mut. Hail Ins. Co. 40 L.R.A.(N.S.) 164; and see the later case of Duffy v. Bankers' Life Asso. 46 L.R.A.(N.S.) 25.

J. T. W.

premiums in Grant county, Oklahoma, addressed to defendant for such insurance, on the next following day, May 20, 1909, at Pond Creek, in said county, presented said application to said Sullivan, an agent with office there, and authorized to accept or reject such applications and enter into contracts of insurance. On the third day next thereafter, May 23, 1909, plaintiff suffered the loss for which he sues. When Mulligan and Nash, on the third day before the loss, presented the application to Sullivan, the latter first objected to it, and marked it "Refused," because it was for insurance upon the equivalent of 60 acres of wheat on one section of land in excess of the 100-acre limit which the rules of the defendant imposed; but, upon the suggestion of Mulligan and Nash, Sullivan immediately indicated a willingness to hold it pending an opportunity to present it to Mr. Rushmore, defendant's state agent, for his instruction upon it, in the belief that he might consent to its acceptance notwithstanding such excess; and the said application was being so held, and was still not accepted by Sullivan nor presented to Rushmore on the fourth day after the day of its date, when plaintiff's loss occurred; the premium being held in the hands of Nash or Mulligan, or both.

It certainly cannot be, and apparently is not, contended that defendant expressly accepted the application and entered into a contract of insurance through its duly authorized agent, Sullivan; and if there was such contract, it must be found in an acceptance inferred from the retention of the premium, or in an actually or apparently authorized acceptance of the application by Mulligan and Nash, and in a contract made on the part of the defendant through them; but, allowing the presumption we must in favor of the judgment of the trial court, no such acceptance or contract appears.

The only evidence upon which we may assume plaintiff claims there was such a contract is found in the retention of the premium and in the following voluntary statement made by the plaintiff when one of his counsel asked him the day of the week on which he signed the application, to wit: "I asked when that policy would take effect; one or two of them, I could not say which, says, 'to-day noon at 12 o'clock; to-day noon at 12 o'clock.'" It is unnecessary to determine whether this should be understood to mean more than that, if the application was accepted and a policy issued it would relate back to noon of May 19, 1909; but we cannot assume the trial court either accepted as true any evidence which would tend to impeach the judgment, and is in 51 L.R.A.(N.S.)

conflict with other evidence, or construed any dubious testimony otherwise than as favorable to the judgment; and, further, if we should so assume, we cannot assume the trial court found the existence of facts from which the authority of Nash and Mulligan to make such a contract would appear. Neither Mulligan nor Nash, who were witnesses for plaintiff, and apparently not unfriendly, were questioned or testified in regard to this imputed statement; and one of them, without contradiction, testified that the application was taken in the afternoon of the day of its date.

A contract of insurance consists of an agreement between the insured and the insurer, including the following elements: (1) The subject-matter; (2) the risk insured against; (3) the amount; (4) the period of risk; and (5) the premium; and there is no contract until the minds of the parties meet in these respects. 1 Cooley, Briefs in Ins. 368, 392, 411, 513; 1 Beach, Ins. 507; 1 May, Ins. §§ 43-65; 1 Joyce, Ins. §§ 45-50; Kerr, Ins. § 40 pp. 73-77, Id. § 53, p. 113; Shawnee Mut. F. Ins. Co. v. McClure, 39 Okla. 535, 49 L.R.A.(N.S.) 1054, 135 Pac. 1150, and cases there cited; Hartford F. Ins. Co. v. Whitman, 75 Ohio St. 312, 79 N. E. 459, 9 Ann. Cas. 218, and notes; Bell v. Hudson Bay Ins. Co. 44 Can. S. C. 419, 21 Ann. Cas. 788, and notes; New York L. Ins. Co. v. Babcock, 104 Ga. 67, 30 S. E. 273, 42 L.R.A. 88, 69 Am. St. Rep. 134, and notes. As to an oral contract *in presenti*, see Van Arsdale-Osborne Brokerage Co. v. Cooper, 28 Okla. 600, 115 Pac. 779; Whitman v. Milwaukee F. Ins. Co. 128 Wis. 124, 5 L.R.A.(N.S.) 407, 116 Am. St. Rep. 25, 107 N. W. 291.

An application for insurance is not itself a contract, but is a mere proposal, which requires acceptance by the insurer through someone actually or apparently authorized to accept the same, to give it effect as to contract. 1 Cooley, Briefs on Ins. 413; 1 Joyce, Ins. § 54; 1 May, Ins. 3d ed. § 43H; Elliott, Ins. § 106; Kerr, Ins. §§ 51, 52; Richards, Ins. 3d ed. 282; Van Arsdale v. Young, 21 Okla. 151, 95 Pac. 778; Shawnee Mut. F. Ins. Co. v. McClure, 39 Okla. 535, 49 L.R.A.(N.S.) 1054, 135 Pac. 1150.

Nor does the mere retention of both application and the premium, without any action thereon, constitute a contract of insurance. Van Arsdale v. Young, 21 Okla. 151, 95 Pac. 778; Northwestern Mut. L. Ins. Co. v. Neafus, 36 L.R.A.(N.S.) 1211, and notes (145 Ky. 563, 140 S. W. 1026); 1 Beach, Ins. 499; 1 May, Ins. § 43H.

We have not overlooked the holding in Van Arsdale-Osborne Brokerage Co. v. Cooper, *supra*, that "independent of the issuance

and delivery of the policy, the approval of said application may be made . . . impliedly by the acceptance and application of the premium;" but in that case it was indisputable that the application was actually accepted. The policy was actually issued, the same was lost in the hands of the local agent of the insurer without having been delivered to the insured, and the latter had, in response to notification given by him that he had not received the policy, been advised that another policy would be issued and sent to him upon his signing and returning a lost policy affidavit furnished to him; and, further, in that case it is stated that the question was "whether any evidence tends to show the approval of the application."

In the present case, such an implication or inference of fact in respect to the application after it reached the hands of Sullivan on the day after it was signed is clearly negated by other evidence.

Ordinarily a traveling soliciting agent, without actual authority to contract, who is furnished by his principal, an insurance company, with no indicia of authority other than printed blank forms of applications for insurance, addressed to it, which either negative the idea of authority to contract, or, as in the present case, is signed by the applicant without actual knowledge of its contents, does not have the apparent authority to enter into a contract of insurance. *Kerr Ins. 203; Richards, Ins. 3d ed. 198; 1 Joyce, Ins. § 526.*

The blank form of application furnished by defendant does not expressly limit the authority of its soliciting agents, except by the following provision therein, to wit: "It is understood and agreed that a policy based on this application will in no event take effect sooner than noon of the day succeeding my having signed this application,"—and, in view of the fact that no good reason appears why such blank forms should not specifically limit the authority of such agents to that actually given, and such agents be instructed by their principal to furnish a copy to the applicant, we reserve decision as to whether such merely soliciting agents, furnished as in this case with such blank forms, might not be therefrom found to have the apparent authority, as inducement to the making of the application, to enter into a temporary contract of insurance, not inconsistent with the application itself, binding upon the insurer until the application is rejected by it, where the applicant has knowledge that such forms do not, in that respect, specifically limit the agent's authority (see *1 Cooley, Briefs on Ins. 382, and 3 Cooley, Briefs on 51 L.R.A.(N.S.)*

Ins. 2484, 2485; also 69 Am. St. Rep. 145); but, in the present case the applicant did not actually know the contents of the application, and had no knowledge as to whether the agent's authority was not further limited by the provisions thereof, and claims no contract of insurance other than a contemporaneous oral one somewhat inconsistent with the only limitation therein contained. The writing generally controls in such cases. *Joyce, Ins. 61; Elliott, Ins. 159, 160; 2 May, Ins. 579; Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 516, 5 Am. Rep. 64; Allen v. Massachusetts Mut. Acci. Assn. 167 Mass. 18, 44 N. E. 1053.*

Even if it had appeared that the application was such as the defendant was accustomed to accept, and that it probably would have been accepted if finally acted on by defendant before it had knowledge of the loss, which is not true, the overwhelming weight of authority is to the effect that mere delay in passing upon an application is not equivalent to its acceptance, as will appear from an examination of the authorities cited supra.

Although it has been held that where a policy is issued after loss of the crop intended to be insured, and it appears that it would have been issued in time to have operated as insurance thereon but for the unreasonable delay of the soliciting agent of the insurer taking the application in transmitting it to the proper officer to pass upon same and issue the policy, the insurer is liable for the loss (*Boyer v. State Farmers' Mut. Hail Ins. Co. 40 L.R.A.(N.S.) 167, and notes [86 Kan. 442, 121 Pac. 329]*); but in the present case it does not so much as appear that the application was acceptable, or would in any event have been accepted; and neither that case nor the case cited in the note thereto (in *40 L.R.A.(N.S.) supra*) tend to support plaintiff's contention in this case.

Except as already stated in this opinion, there was no evidence whatever, either of the authority of Mulligan and Nash to enter into a contract of insurance binding upon defendant, or of any agreement between the plaintiff and these soliciting agents which, if they had authority, could be construed as a contract of insurance; and we do not feel authorized to disturb the judgment of the trial court, which, in effect, includes a finding of fact against plaintiff upon both propositions.

For the reasons stated, the judgment of the trial court should be affirmed.

Per Curiam:

Adopted in whole.

WEST VIRGINIA SUPREME COURT
OF APPEALS.STATE OF WEST VIRGINIA
v.

JIM ANGELINA, Plff. in Err.

(— W. Va. —, 80 S. E. 141.)

Appeal — denial of continuance — error.

1. Before reversing a judgment for error in overruling a motion to continue, it should appear that the trial court abused its discretion, and that the mover of the motion has been prejudiced thereby.

Headnotes by MILLER, J.

Note. — Homicide: independent, intervening, or concurring cause of death as affecting criminal responsibility.

Cases dealing with the question as to which of two or more causes resulted in the infliction of the wound are not within the scope of this note. The question discussed is, conceding that the defendant inflicted a wound upon the deceased, What is the defendant's responsibility where other causes intervene and contribute to the wounded person's death?

As to homicide resulting from injuries by different persons acting independently, see the notes to Walker v. State, 87 L.R.A. 426, and Bennett v. Com. 43 L.R.A. (N.S.) 419.

As to the criminal responsibility of one who inflicts a wound on another resulting in the latter's death, as affected by negligence or lack of skill in treatment or care of the wounds, see the notes to Noble v. State, 22 L.R.A. (N.S.) 841, and Tibbs v. Com. 28 L.R.A. (N.S.) 665.

There are several notes in this series of interest in the present connection, which deal with civil liability for inflicting injury upon another. The question as to the extent and character of developments following the personal injury for which the person inflicting the injury is liable is discussed in note to Allison v. Fredericksburg, 48 L.R.A. (N.S.) 93. Therein will be found references to other annotation.

Generally.

One who maliciously inflicts a serious wound upon another, from which as the mediate, but not immediate, cause he dies, is criminally responsible for the death, though other causes contributed to the death. *Huckabee v. State*, 159 Ala. 45, 48 So. 796; *Smith v. State*, 50 Ark. 545, 8 S. W. 941.

As death is appointed to all the living, and must come to all sooner or later, every act of homicide only hastens the inevitable event. The law therefore does not permit a party charged with murder to speculate on the chances of the life of his victim, or to endeavor to apportion his own wicked

Evidence — expert witness — hypothetical question.

2. Hypothetical questions to expert witnesses, on a trial for homicide, need not cover all the undisputed facts proven. The opposite party may, if desired, protect himself by including all such facts in other hypothetical questions propounded to the same witnesses on cross-examination.

Homicide — concurrent cause of death — effect.

3. On a trial for homicide where the evidence tends to show a mortal wound by defendant, and a subsequently self-inflicted wound by deceased, which may or may not have been mortal, it is error to tell the jury in instructions propounded by the state, either (1) that defendant, who inflicted the first mortal wound, is guilty of

act by dividing its effects with the operation of natural causes on the body of the deceased. If such a defense were permitted, it would be impossible, in any case, to say with certainty that some fatal accident or sudden stroke of disease might not have terminated the life of the deceased in a few hours, or even minutes, if the homicidal act had not been committed. *Com. v. Fox*, 7 Gray, 585.

When a wound from which death might ensue has been inflicted with murderous intent, and has been followed by death, the burden of proof is upon the party inflicting the wound to establish, to the satisfaction of the jury, that the death did not result from such wound, but from some other cause. *State v. Briscoe*, 30 La. Ann. 433, followed in *Edwards v. State*, 39 Fla. 753, 23 So. 537. In the Louisiana case the court said that it understood the trial court's charge to that effect to mean that, the state having first shown a sufficient cause of death, due to the act of the accused, and followed by death, it is presumed that the death resulted from such cause, unless the accused rebuts the presumption by showing that the death was reasonably attributable to another cause. The court further said, while this rule goes to the extreme, it does not militate against the general doctrine of the presumption of innocence and reasonable doubt in favor of the accused.

Where the death is due to causes other than the wound inflicted by the defendant, the latter may be subject to conviction for assault with intent to murder, though not guilty of homicide. *Tomerlin v. State*, — Tex. Crim. Rep. —, 26 S. W. 66.

Predisposing influence.

One may be guilty of homicide by inflicting upon another a blow which, though not of itself mortal, accelerates death. The blow need be only a contributing cause. The fact that the deceased was at the time suffering from an affliction, or was in a condition which might have ultimately caused death, does not relieve the defendant from the consequences of aggravating the condition and thus hastening the death. *State v.*

first degree murder, notwithstanding the subsequently self-inflicted wound by deceased may have accelerated or been the immediate cause of his death; or (2) that defendant should be found so guilty, if upon the evidence the jury should find beyond a reasonable doubt, that deceased would have died from other causes, or would not have died from the wound inflicted by defendant had not other causes operated with it.

Same — proximate cause.

4. Instructions so limited ignore the well-established rules of homicide (a) that if, after a mortal wound is inflicted by one person, another independent responsible agent in no way connected in causal relation with the first intervenes, and wrongfully inflicts another injury, the proximate cause of the homicide, the latter, and not

the former, is guilty of murder; and (b) that if such intervening responsible agent wrongfully accelerates death, he, and not the agent first to wound, is guilty of the homicide.

Trial — instructions — homicide — concurring cause of death.

5. Where in such cases the evidence justifies it, and it is sought to hold the one inflicting the first blow or wound guilty of the homicide, because his act resulted in rendering the one on whom his mortal wound had been inflicted irresponsible, and to cause him to inflict upon himself another mortal wound, or a wound accelerating his death, the instructions given should be so framed as to present clearly that theory of the case.

(November 4, 1913.)

Morea, 2 Ala. 275 (fever); Winter v. State, 123 Ala. 1, 26 So. 949 (overheating while intoxicated); Smith v. State, 50 Ark. 545, 8 S. W. 941 (pneumonia); People v. Moan, 65 Cal. 532, 4 Pac. 545 (chronic alcoholism); People v. Lanagan, 81 Cal. 142, 22 Pac. 482 (peritonitis and pneumonia); Baker v. State, 30 Fla. 41, 11 So. 492 (blow hastening death from blood clot on brain, aggravated by deceased's getting drunk); King v. Greenwell, 1 Haw. 85 (sickness and exposure); Cunningham v. People, 195 Ill. 550, 63 N. E. 517, 13 Am. Crim. Rep. 653 (several organic affections and alcoholism); State v. Castello, 62 Iowa, 404, 17 N. W. 605 (consumption); State v. Smith, 73 Iowa, 32, 34 N. W. 597 (heart disease); State v. O'Brien, 81 Iowa, 88, 46 N. W. 752 (heart disease); State v. Baldes, 133 Iowa, 158, 110 N. W. 440 (heart disease); Hopkins v. Com. 117 Ky. 941, 80 S. W. 156, 4 Ann. Cas. 957 (consumption); State v. Matthews, 38 La. Ann. 795 (previous injury); Com. v. Fox, 7 Gray, 585 (lung fever); Com. v. Green, 1 Ashm. (Pa.) 289 (intermittent fever); Griffin v. State, 40 Tex. Crim. Rep. 312, 76 Am. St. Rep. 718, 50 S. W. 366, 11 Am. Crim. Rep. 461 (alcoholic brain); Gardner v. State, 44 Tex. Crim. Rep. 572, 73 S. W. 13, subsequent appeal in 45 Tex. Crim. Rep. 308, 77 S. W. 797 (nephritis); Hollywood v. State, 19 Wyo. 493, 120 Pac. 471, Ann. Cas. 1913E, 218 (morphinism), rehearing denied on other grounds in 19 Wyo. 523, 122 Pac. 588, Ann. Cas. 1913E, 227; Reg. v. Plummer, 1 Car. & K. 600, 8 Jur. 921 (diarrhea); Reg. v. Murton, 3 Fost. & F. 492 (different organic diseases); Rex v. Webb, 1 Moody & R. 405, 2 Lewin, C. C. 196 (smallpox); Reg. v. Towers, 12 Cox, C. C. 531 (death of teething infant from convulsions aggravated by fright caused by defendant's assault on nurse); Reg. v. Stowe, 8 N. S. 121 (intoxication).

Where a person in a weak state of health is so beaten as to endanger her life or do great bodily harm, and she dies from fever caused by the combined effect of the beating and the previous weak condition, the person inflicting the beating is guilty of either murder or manslaughter, depending

upon the presence or absence of malice aforethought. United States v. Woods, 4 Cranch, C. C. 484, Fed. Cas. No. 16,760.

In Wooten v. State, 99 Tenn. 189, 41 S. W. 813, the court held it error for the trial judge to refuse to charge that if the jury believed that the clot of blood on the brain of the deceased was produced by the use of stimulants and intemperance, and that this, and not the unlawful act of the defendant, caused the death, or if the jury had a reasonable doubt on the point, it should acquit. While this charge is technically correct in so far as it may be construed as meaning that if the blood clot that caused death was due entirely to previous intemperance, the defendant could not be responsible for the death, it ignores the question whether the blow inflicted by the defendant contributed to the production of the blood clot. According to the prevailing view of the courts, the defendant would have been responsible for contributing to the production of the blood clot, even though the defendant's condition was such as to render the formation of blood clots more easy than in a perfectly normal person.

Even though the wounds were at first trifling, the defendant cannot justify or minimize his criminal act by the fact, if a fact, that his victim was so diseased that he readily succumbed to the injuries so wrongfully inflicted. Dumas v. State, 159 Ala. 42, 133 Am. St. Rep. 17, 49 So. 224.

And the homicide cannot be excused upon the ground that the defendant was ignorant of the fact that his victim's feeble condition was such as to render him unable to resist the violence. State v. Castello, 62 Iowa, 404, 17 N. W. 605; State v. O'Brien, 81 Iowa, 88, 46 N. W. 752.

It was held in State v. Block, — Conn. —, 49 L.R.A.(N.S.) 913, 89 Atl. 167, that one who drives an automobile with criminal negligence, so that a passenger is thrown out and the resulting shock causes delirium tremens because of his alcoholic condition, which results in death, is guilty of manslaughter, if the illness would not have occurred and caused the death had the wounds from the fall not been received.

In Huffman v. Com. 6 Ky. L. Rep. 305

ERROR to the Circuit Court for Marion County to review a judgment convicting defendant of murder in the first degree. Reversed.

The facts are stated in the opinion.

Messrs. J. G. Pritchard and Rollo J. Conley, for plaintiff in error:

The motion for a continuance for three days in order to prepare for trial should have been granted.

9 Cyc. 188; *State v. Collins*, 104 La. 629, 81 Am. St. Rep. 150, 29 So. 180.

The fact that a competent jury was obtained is not conclusive against the prisoner upon a motion for a change of venue.

State v. Sheppard, 49 W. Va. 582, 39 S. E. 676.

It was error to omit important and undisputed facts.

Jones, Ev. § 371; *Vosburg v. Putney*, 80 Wis. 523, 14 L.R.A. 226, 27 Am. St. Rep. 47, 50 N. W. 403; *Lawson*, Expert & Opinion Ev. p. 261.

It must be proved beyond a reasonable doubt that the defendant inflicted the two wounds, and that they caused his death; if the deceased, by the self-inflicted wound, caused his own death, the defendant is not guilty as charged.

Wharton, Crim. Law, §§ 155, 155a, 159, 160; *Harvey v. State*, 40 Ind. 516; *State v. Wood*, 53 Vt. 560; *People v. Ah Fat*, 48 Cal. 61; *State v. Scates*, 50 N. C. (5 Jones, L.) 420.

(abstract), the court is represented as holding, where it appeared that the deceased had pneumonia, and that the wound, which was not necessarily or probably fatal, did not cause death until three months after it was inflicted, that, in order to convict, it must be found that the wound was the proximate cause of death.

In *Harvey v. State*, 40 Ind. 516, no objection appears to have been offered to the charge that if deceased died from a disease not brought on by a blow given by the defendant, the jury must acquit, no matter what violence the defendant may have inflicted upon the deceased, if it did not immediately or immediately accelerate her death.

In *Johnson's Case*, 1 Lewin, C. C. 164, the court directed an acquittal, saying that where death is occasioned partly by a blow and partly by predisposing circumstance, it is impossible to apportion the operations of the several causes, so as to be able to say with certainty that the death was caused by any one of them in particular.

In *Stockdale's Case*, 2 Lewin, C. C. 220, it was held that an indictment charging exposure as a cause of death was not supported by proof that it accelerated death.

Of course, nothing of value in the present connection is contained in cases like *United States v. Knowles*, 4 Sawy. 517, Fed. Cas. No. 15,540, holding that if the deceased, a sailor, was killed by a fall into the sea from the yardarm of a ship, the captain is not punishable as for homicide for failing to make any attempt to rescue him.

As to pre-existing disease or condition of person injured, as affecting recovery from one negligently causing the injury, see the note to *Jones v. Caldwell*, 48 L.R.A. (N.S.) 119.

As to liability under accident policy as affected by a previous disease condition of the insured, see the note to *Stanton v. Travelers' Ins. Co.* 34 L.R.A. (N.S.) 445.

Intervening influence—generally.

While, as has been seen above, a person who inflicts blows or injuries upon a person who is suffering from disease or injury 51 L.R.A. (N.S.)

may be convicted of homicide if he accelerated death, the person who inflicts the first injury may nevertheless be convicted if it appears that the injury or wound inflicted by him would have caused death but for an intervening cause. Thus, in *Com. v. Costley*, 118 Mass. 1, involving an indictment for killing with a pistol, the trial court was requested to instruct that, although the deceased may have received a mortal wound from a pistol, yet if before death had actually resulted therefrom, though the deceased remained entirely insensible, any other cause of death intervened so as to hasten her death in any degree, then, in contemplation of law, the pistol was not the cause of death, and the defendant should not be found guilty. But the trial court refused so to instruct, and instructed the jury in the following manner, which was upheld by the supreme court: The government must prove that the pistol wound given by the prisoner was the cause of the death, and if other circumstances came in to prevent any recovery that might otherwise have taken place, or to aggravate even the effect of the wound, yet if the wound was the cause of which he died, the fact that such other circumstances hastened or retarded the effect of the wound does not prevent the wound from being the cause of death; but if, while the deceased was alive, another cause came in, which, independently of the pistol wound, caused death, so that the death resulted from that, and not from the pistol wound, then the jury cannot find a verdict of homicide from the cause alleged in the indictment.

Livingston v. Com. 14 Gratt. 592, stands practically alone in holding that where a disease supervenes independently of the injury, and causes death, the assailant is not legally responsible, although death would not have come so soon but for the wound. The court conceded that one who accelerates the death of a person suffering from a mortal disease is responsible for homicide, since he cannot apportion his wrong; and that where gangrene or the like develops in a wound, the defendant is answerable, since the wound is the cause of the gangrene. But the court said that the situation is far

Messrs. A. A. Lilly, Attorney General, and John B. Morrison and J. E. Brown, Assistant Attorneys General, for the State:

It was not error to refuse to grant the continuance prayed for.

State v. Madison, 49 W. Va. 96, 38 S. E. 492; State v. Harrison, 36 W. Va. 729, 18 L.R.A. 224, 15 S. E. 982, 9 Am. Crim. Rep. 626.

There was no error in refusing a change of venue.

Wormcley v. Com. 10 Gratt. 658; Muscoe v. Com. 87 Va. 460, 12 S. E. 790; State v. Sheppard, 49 W. Va. 582, 39 S. E. 676.

The questioner is entitled to the witness's opinion on any combination of facts that

he may choose, and in such questions counsel may, without error, assume facts fairly inferable from the evidence, in accordance with their theory of them.

Wigmore, Ev. § 682, p. 778; Bowen v. Huntington, 35 W. Va. 682, 14 S. E. 217; State v. Cook, 69 W. Va. 717, 72 S. E. 1025; Stearns v. Field, 90 N. Y. 640; Jackson v. Burnham, 20 Colo. 532, 39 Pac. 577.

The fact being that the shot fired by the plaintiff actually caused death, instructions given, even if erroneous, cannot prejudice him, and in no event would there be ground for reversal.

State v. Lavin, 64 W. Va. 29, 60 S. E. 888; Hunter v. Jones, 6 Rand. 541; State v. Davis, 68 W. Va. 184, 69 S. E. 644.

different where disease supervenes independently of the injury, and that in such circumstances the blow and the death have no necessary or natural connection with each other as cause and effect, the blow being neither the proximate cause of death, nor linked with it in the regular chain of causes and consequences, though made by circumstances to accelerate the death.

It is the general rule that a person is criminally answerable for a homicide where he inflicts a wound upon another which develops into or initiates an affliction or a disease which ultimately results in death. It is not indispensable to a conviction that the wounds are necessarily fatal, and are the direct cause of death. It is sufficient that they cause death indirectly through a chain of natural effects and causes unchanged by human action. This rule is applied not merely where the consequential development is in the form of an immediate infection of the wound itself, such as erysipelas (Denman v. State, 15 Neb. 138, 17 N. W. 347), or septicemia or blood poisoning (Clements v. State, — Ga. —, 81 S. E. 1117; Com. v. Silcox, 161 Pa. 484, 29 Atl. 105; Hart v. State, 15 Tex. App. 202, 49 Am. Rep. 188); but also where the condition developing is anatomically dissociated from the mere external wound, as in the case of miscarriage (People v. O'Connell, 78 Hun, 323, 29 N. Y. Supp. 195), or pneumonia (Smith v. State, 50 Ark. 545, 8 S. W. 941; State v. Wilson, 114 La. 398, 38 So. 397; Quinn v. State, — Miss. —, 64 So. 738; State v. Chiles, 44 S. C. 338, 22 S. E. 339; State v. Foote, 58 S. C. 218, 36 S. E. 551; Burnett v. State, 14 Lea, 439); or where blows caused congestion of the brain resulting in death, or in exposure which caused death (Kelley v. State, 53 Ind. 311).

Where there is evidence that blows inflicted upon a pregnant woman were sufficient to produce the miscarriage of which she died, and there is no evidence of any other cause of the miscarriage, the person who inflicted the blows may be found guilty of homicide. People v. O'Connell, 78 Hun, 323, 29 N. Y. Supp. 195.

And where a party feloniously assaulted

is knocked down or falls down in an effort to escape the assailant, the latter may be convicted of murder if his attack was the primary cause of the death, although the death may have resulted from the fall. Thornton v. State, 107 Ga. 683, 33 S. E. 673; State v. Adams, 155 Iowa, 660, 136 N. W. 1051.

So, if the defendant's violence induced fright which caused death, he may be convicted under an indictment alleging that the prisoner caused death in some way and manner, and by the use of some means and instruments, to the jury unknown. Cox v. People, 80 N. Y. 500. The court said: "It was not necessary, in order to convict the prisoner, that it should appear that his actual personal violence was the sole and immediate cause of the death of the deceased. If his violence so excited the terror of the deceased that she died from the fright, and she would not have died except for the assault, then the prisoner's act was in law the cause of her death."

While the above proposition is true, it is also the law that if the wound is not in its nature mortal, and death results solely from an entirely independent cause, the person inflicting the wound cannot be held responsible for the death; and the accused is entitled to an acquittal unless it appears from the evidence beyond a reasonable doubt that the disease was not the sole cause of death, and that the death was caused or contributed to by the wound. Quinn v. State, — Miss. —, 64 So. 738.

There can be no conviction where the disease that caused death is not shown beyond a reasonable doubt to be traceable in any way to the wound. Treadwell v. State, 16 Tex. App. 560 (death from pericarditis, ten months after gunshot wound near navel); Bush v. Com. 78 Ky. 268 (scarlet fever).

No conviction can be had on evidence that the accused knocked the deceased down and that a horse jumped on him, it appearing that the blow struck by the defendant did not kill him. People v. Rockwell, 39 Mich. 503, 3 Am. Crim. Rep. 224.

And the striking of an intoxicated person upon some part of his body not shown

Miller, J., delivered the opinion of the court:

On an indictment defendant was found guilty of murder in the first degree and adjudged to be hung in expiation of the crime.

He was indicted August 14, 1912, about three weeks after the homicide, and put on his trial the next day, assisted by counsel then appointed by the court. Counsel then moved the court for a continuance to August 19, to enable them to confer with the prisoner, a young Italian who could not speak English, to consult expert medical men, and to prepare for the trial. This motion was supported by the affidavit of one of the counsel so appointed, and by

other evidence. If we had been sitting in the trial in place of the circuit judge, we would have granted the reasonable motion of counsel; but the trial judge has a discretion, and we cannot say from the record that he abused that discretion, or that the prisoner was prejudiced by the adverse ruling of the court. We ought to see prejudice before reversing for such error, so our cases hold. *State v. Madison*, 49 W. Va. 96, 38 S. E. 492; *State v. Harrison*, 36 W. Va. 729, 18 L.R.A. 224, 15 S. E. 982, 9 Am. Crim. Rep. 626.

The prisoner's motion for a change of venue based on local prejudice and threats of lynching was also overruled. As we have concluded the judgment must be reversed

cannot be found the cause of his death, where the blow did not fell him and he walked away and was later found unconscious near a railroad track, with bruises on his head, side, and hip, and died shortly afterward. *Com. v. Cozine*, 10 Ky. L. Rep. 412, 9 S. W. 289.

As to the criminal responsibility of one who inflicts a wound on another resulting in the latter's death, as affected by negligence or lack of skill in treatment or care of the wounds, see the notes to *Noble v. State*, 22 L.R.A.(N.S.) 841, and *Tibbs v. Com.* 28 L.R.A.(N.S.) 665.

As to the extent and character of developments following personal injury for which the person inflicting the injury is liable, see the note to *Allison v. Fredericksburg*, 48 L.R.A.(N.S.) 93.

As to duty with reference to the liability of a person causing personal injuries, of the person injured to follow the advice or instructions of his physician or surgeon, see the note to *Donovan v. New Orleans R. & Light Co.* 48 L.R.A.(N.S.) 109.

As to patient's own negligence or failure to follow instructions as affecting liability of physician or surgeon for malpractice, see the note to *Sauers v. Smits*, 17 L.R.A.(N.S.) 1242.

As to the liability of one causing personal injuries as affected by the negligence or unskillfulness of the attending physician or surgeon, see the note to *Hunt v. Boston Terminal Co.* 48 L.R.A.(N.S.) 116.

As to liability under an accident policy, for death or injury caused by medical treatment, see the note to *Gardner v. United Surety Co.* 26 L.R.A.(N.S.) 1004.

As to liability under an accident policy, for sickness or death caused by blood poisoning, see the note to *Cary v. Preferred Acci. Ins. Co.* 5 L.R.A.(N.S.) 926.

As to liability under an accident policy, for injury resulting in a felon or abcess, see the note to *Robinson v. Masonic Protective Asso.* 47 L.R.A.(N.S.) 924.

—subsequent acts of assailant.

One who fires a shot, necessarily fatal, in self-defense, is guilty of homicide in firing 51 L.R.A.(N.S.)

another shot which also would be fatal, after the other party has abandoned the conflict, where and only where the last shot contributes to hasten the death. *Rogers v. State*, 60 Ark. 76, 31 L.R.A. 465, 46 Am. St. Rep. 154, 29 S. W. 894.

In *Miller v. State*, 37 Ind. 432, where the defendant inflicted two series of blows upon the deceased, the court held that the defendant was entitled to have the court charge the jury that if the blows which caused the death were given in self-defense, and other blows were afterward given which were not given in self-defense, not mortal, the defendant should be found not guilty.

It was held under an early Texas statute that one who inflicted an injury upon another which would not of itself have proved fatal, was nevertheless liable as he would have been in the case of a fatal injury, if he wilfully failed or neglected to call in a physician or procure medical attendance for his victim, and the injury caused death as a consequence of such neglect. *Williams v. State*, 2 Tex. App. 271. It was further held that the fact that the deceased was wounded and died in the presence of his family did not relieve the defendant from the burden of procuring medical aid.

Generally, as to the effect of failure to provide medical attendance to render one guilty of manslaughter, see the notes to *Westrup v. Com.* 6 L.R.A.(N.S.) 635, and *Stehr v. State*, 45 L.R.A.(N.S.) 559.

—acts of person wounded.

The fact that one dying from a wound is induced by the pain, by remorse, or by a desire to shield his assailant, to end his life sooner than the wound would have done, will not, if the wound actually contributes to the death, relieve the one who inflicted it from being guilty of manslaughter. *People v. Lewis*, 124 Cal. 551, 25 L.R.A. 783, 57 Pac. 470.

In *Lewis v. Com.* 19 Ky. L. Rep. 1139, 42 S. W. 1127, holding that if the deceased's death was caused by poisoning from arsenic administered by herself, and not from the blow inflicted by the defendant, the latter should be acquitted, no question appears to

and defendant awarded a new trial, on other grounds, and as the same conditions may not now or hereafter exist in the county where the homicide occurred, we need not consider that question on this hearing.

Another ground of error is that hypothetical questions to physicians were allowed, calling for their opinions, which did not cover all the undisputed facts proven. The argument is made that these questions, propounded to the state's witnesses, elicited entirely different responses from those propounded to the witnesses for defendant, which included all the facts, wherefore defendant was prejudiced. The authorities concur in holding that such questions need not cover all the facts, even the undisputed facts, in the case. 1 Wigmore, Ev. § 682, pp. 778, 779; *Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217; *State v. Cook*, 69 W. Va. 717, 72 S. E. 1025; *Stearns v. Field*, 90 N. Y. 640; *Jackson v. Burnham*, 20 Colo. 532, 39 Pac. 577. The rule is different when it comes to instructions to the jury. Binding instructions may not without error omit facts or theories on which the case may turn. The remedy for the side opposing such hypothetical questions is on cross-examination to repeat the hypothetical questions to the witnesses with the omitted facts included, and elicit answers to the questions based thereon. *Williams v. State*, 64 Md. 384, 1 Atl. 887, 5 Am. Crim. Rep. 512.

Lastly, as to the instructions given and refused. We have examined them all. All the instructions given on behalf of the state, except those numbered 9 and 13, are clearly good. They propound only well-settled rules and principles of criminal law, and the objections thereto are not relied on here. And as to the instructions proposed by defendant, which were rejected, they were clearly inapplicable to the facts proven, and were rightly denied.

Defendant's exceptions to state's instructions numbered 9 and 13, overruled, are the errors mainly relied on. By number 9, the jury were told, in substance, that if defendant was found to have inflicted a mor-

tal wound on Shaver, wilfully, deliberately, and premeditatedly, and that within a minute or a minute and a half thereafter Shaver shot himself in the head inflicting a wound not necessarily fatal, and that in about twenty minutes after the infliction of the mortal wound by defendant, Shaver died, and that his death was not the result of the self-inflicted wound, but that if it had any effect only hastened his death, the result of said mortal wound, it was then their duty to find defendant guilty of first degree murder.

By instruction 13, the jury were told, substantially, that if in the manner stated in instruction 9 defendant inflicted on Shaver a mortal wound with like wilfulness, deliberation, and premeditation, and that thereafter in about twenty minutes he died, defendant was guilty of first degree murder, as charged, provided the shot fired by him really contributed either mediately or immediately to the death of Shaver, even though they might believe from the evidence, beyond a reasonable doubt, that Shaver would have died from other causes, or would not have died from the shot fired by defendant had not other causes operated with it.

We do not think that either of these instructions correctly propounded the law of the case. The attorney general does not much defend them. His contention is that though erroneous they were not prejudicial, if, on the evidence, defendant actually fired the fatal shot and was guilty of the crime. But we cannot concur in this view of the case. The jury, on proper instruction, not the court, are the triers of the fact of guilt. To accept the argument advanced on behalf of the state would be to put the court in a position to deny the prisoner a trial of the fact by the jury. This would not do in any case, particularly in a case of a capital crime. We cannot see that these erroneous instructions did no harm, and the authorities cited are inapt.

Both instructions, and particularly the latter, are in conflict with the well-established rule or principle of homicide, that

have been raised as to whether the taking of arsenic might have been induced directly or indirectly by the deceased's condition following the blow.

It is proper for an indictment to charge that death was caused by a blow, where laid under evidence that the accused inflicted the blow and that death resulted immediately from the act of the deceased while in a delirium caused by the blow, in tearing off the bandages after an operation to overcome the effects of the wound. *Stanton's Case*, 2 N. Y. City Hall Rec. 164.

Even if a person seriously wounded is removed elsewhere at his own request, and 51 L.R.A. (N.S.)

such moving causes the wound to produce death, the dying is by law attributed to the wound, and the guilt is imputed to him who inflicted it. *State v. Hambright*, 111 N. C. 707, 16 S. E. 411.

As to death from suicide as one caused by external, violent, and accidental means within the meaning of an accident policy, see the note to *Tuttle v. Iowa State Traveling Men's Asso.* 7 L.R.A. (N.S.) 223.

As to liability under an accident policy for death during delirium, see *Bohaker v. Travelers' Ins. Co.* 46 L.R.A. (N.S.) 543.

See also the notes cited in the preceding subdivision.

L. A. W.

if after a mortal blow or wound is inflicted by one person, another independent responsible agent in no way connected in causal relation with the first intervenes and wrongfully inflicts another injury, the proximate cause of the homicide, the latter, and not the former, is guilty of the murder. Wharton, Homicide, §§ 28-33; 1 Wharton, Crim. Law, § 160. The rule is different where the agent so interposing is irresponsible. 1 Wharton, Crim. Law, § 161; Wharton, Homicide, § 37. The rule violated is the same where the negligence of a responsible agent intervenes to cause the death, as in the case of surgeons, but not if death results from proper surgical or medical aid, for death resulting immediately from that cause is one of the consequences of the previous unlawful act, and does not excuse the one responsible therefore. Wharton, Homicide, § 35; 1 Wharton, Crim. Law, § 157. The rule respecting the intervention of an independent responsible agent has been applied where death resulted immediately from a self-inflicted injury, or from suicide. Wharton on Homicide, § 33, citing Lewis v. Com. 19 Ky. L. Rep. 1139, 42 S. W. 1127.

Instruction 9, moreover, violates another rule of homicide, that the intervening responsible agent who wrongfully accelerates death is guilty of the murder, and not the one who inflicted the first injury though in itself mortal, the law being that the one who thus hastens the death of another himself becomes the intervening agent and proximate cause of the death. Mr. Wharton says: "And one whose wrongful act hastens or accelerates the death of another, or contributes to its cause, is guilty of homicide, though other causes co-operate." And he adds pertinently to the proper theory of this case, we think: "And he is guilty if his act was the cause of the cause of the death." Wharton, Homicide, § 27.

Number 13, furthermore, is rather inconsistent within itself. In the first place it presupposes a mortal wound inflicted by defendant, and if guilty thereof, that defendant is guilty of first degree murder, provided, this mortal shot contributed mediately or immediately to Shaver's death, though the jury should find he would not have died from the mortal blow of defendant had not other causes operated with it. The only evidence of other cause or causes of death to which the instruction could have referred was the evidence of the self-inflicted wound by Shaver. If defendant's "mortal wound" would not have resulted in death, except as co-operating with the intervening act of deceased, defendant could not, upon the principle of a supervening responsible agency, above referred to, have been found guilty of murder. Besides this 51 L.R.A.(N.S.)

inconsistency the instruction was cloudy and misleading.

On the evidence before the jury at the trial, the proper theory of the state's instructions should have been a mortal wound by defendant, and that the self-inflicted injury by deceased, though it may have been the proximate cause of death, was not the act of an intervening responsible agent, but of one rendered irresponsible by the wound inflicted by defendant, and as the natural result of that wound, the causing cause of the immediate death of deceased.

Because of these erroneous and misleading instructions we are of opinion to reverse the judgment and award the prisoner a new trial.

WEST VIRGINIA SUPREME COURT OF APPEALS.

J. M. LAMON

v.

ROBERT GOLD et al.

and

MARIA E. JANNEY, Appt.

(— W. Va. —, 79 S. E. 728.)

Judgment — effect of bar of statute of limitations.

1. When a judgment becomes barred by the statute of limitations, it ceases to be a lien on the debtor's land and a court of equity will not enforce it.

Same — duration of lien.

2. The lien of a judgment continues so long as the right to have execution issued or to bring an action or scire facias on it is not barred.

Limitation of actions — judgment — suspension — absence from state.

3. Notwithstanding a debtor's departure

Headnotes by WILLIAMS, J.

Note. — Limitation of actions: absence from state as affecting running of statute against judgment.

This note is limited to questions that are peculiar or distinctive to judgments, as distinguished from other classes of claims. Therefore, it assumes that there is a general statutory provision suspending the running of the statute during the absence of the debtor; and that the particular case presents the other conditions essential to that provision if it applies to judgments. And so cases turning upon the general question as to what constitutes "absence" within the statutory provisions, or other questions not distinctive or peculiar to judgments, are not included, even though, as a matter of fact, they may have involved judgments.

LAMON v. GOLD, in holding that the absence of the judgment debtor from the state suspends the running of the statute of limi-

from and residence out of the state, after a judgment has been recovered against him, may not obstruct the creditor in the enforcement of his lien, it will suspend the running of the statute and preserve the lien of the judgment.

(June 17, 1913.)

APPEAL by defendant Janney from a decree of the Circuit Court for Berkeley County overruling her exceptions to the report of the master commissioner in a suit to subject property of Robert Gold to the payment of plaintiff's judgment, which gave plaintiff's claim priority over that of exceptant. Affirmed.

The facts are stated in the opinion.

Messrs. Faulkner, Walker, & Woods, for appellant:

A judgment lienor can plead the statute of limitation.

Callaway v. Saunders, 99 Va. 350, 38 S. E. 182; McCartney v. Tyrer, 94 Va. 198,

tations against an action on the judgment, has the practically unanimous support of the authorities.

It was so held in Davidson v. Simmons, 11 Bush, 330; Brittain v. Lankford, 110 Ky. 434, 61 S. W. 1000; Union Nat. Bank v. Ryan, 23 N. D. 482, 137 N. W. 449; Big-nold v. Carr, 24 Wash. 413, 64 Pac. 519.

And where the judgment becomes dormant because of failure to issue an execution within the time limited, the running of the statute of limitations as to an action to revive or for debt is suspended during the judgment debtor's absence. Spiller v. Hollinger, — Tex. Civ. App. —, 148 S. W. 338.

And in Seymour v. Deming, 9 Cush. 527, it was held that under statute a judgment debtor's absence and residence out of the state shall not be computed as part of the term of the limitation.

That removal of the judgment debtor from the state is an obstruction which will prevent the running of the statute of limitations while he remains away was held in Cheatham v. Aistrop, 97 Va. 457, 34 S. E. 57; Fisher v. Hartley (Hogg v. Hartley) 48 W. Va. 339, 54 L.R.A. 215, 86 Am. St. Rep. 39, 37 S. E. 578.

But Brown v. Butler, 87 Va. 621, 13 S. E. 71, while admitting the general rule, held that, as it appeared that there was no obstruction actual or constructive in this instance, absence of the judgment debtor did not prevent the running of the statute.

In Hill v. Snyder, 7 La. Ann. 557, an action of debt on a judgment obtained in Mississippi, it was held that the plea of the Mississippi statute of limitations in bar was bad, as under such statute the period of the debtor's absence from the state must be deducted.

And the same was held in Bull v. Chénault, 3 Tex. App. Civ. Cas. (Willson) 458, also an action on a Mississippi judgment.

In Conrad v. Nall, 24 Mich. 275, in hold-

26 S. E. 419; Monk v. Exposition Deep-water Pier Corp. 111 Va. 121, 68 S. E. 230; Brandenstein v. Johnson, 140 Cal. 29, 73 Pac. 744; De Voe v. Rundle, 33 Wash. 604, 74 Pac. 836; Boucofski v. Jacobsen, 36 Utah, 165, 26 L.R.A.(N.S.) 898, 104 Pac. 117.

When the right to sue out execution on a judgment, or to revive it by scire facias, is barred by statute, the lien of the judgment ceases.

Werdenbaugh v. Reid, 20 W. Va. 588; Shipley v. Pew, 23 W. Va. 487; Reilly v. Clark, 31 W. Va. 573, 8 S. E. 509; Maxwell v. Leeson, 50 W. Va. 366, 88 Am. St. Rep. 875, 40 S. E. 420; Paxton v. Rich, 85 Va. 378, 1 L.R.A. 639, 7 S. E. 531; Hutcheson v. Grubbs, 80 Va. 251.

No pleading should be required to challenge the right to audit, as liens, debts which are not liens.

Phillips v. Roberts, 26 W. Va. 783; Savings Bank v. Powhatan Clay Mfg. Co. 102

ing that absences must be deducted in computing the time of limitation of an action on a judgment, the court stated that, while the necessity or propriety for excluding absences may not be so general in cases of judgment debtors as in those of other debtors, yet there must be numerous instances where the reason for such exclusion is as strong for one as the other.

The statutory provision that the time of absence of the debtor from the state shall not be taken as any part of the time limited for the commencement of a personal action was held in Shelden v. Barlow, 108 Mich. 375, 66 N. W. 338, to apply to limitation to the right to execution for deficiency on mortgage foreclosure, although, as contended, a substituted service might have been ordered, since such substituted service would not be given extraterritorial effect, and it should not be held that the neglect to resort to such uncertain and incomplete remedy would constitute such laches as to bar a proceeding taken on a personal service.

And so, also, in Newlove v. Pennock, 123 Mich. 260, 82 N. W. 54, citing Shelden v. Barlow, supra, the statutory provision that the time of the debtor's absence shall be excepted from the period limited for the commencement of a personal action was held to apply by analogy to time limited with respect to proceedings to enforce judgment.

In Hartley v. Crawford, 12 Neb. 471, 11 N. W. 789, action on an Ohio judgment where both parties were at the date of the judgment, and at all times subsequent thereto, nonresidents of Nebraska, it was held that the statutory provision that "if, when a cause of action accrues against a person, he be out of the state, . . . the period limited for commencement of the action shall not begin to run until he come into the state," applied, and the action was not barred. The court stated that the con-

Va. 274, 46 S. E. 294, 1 Ann. Cas. 83; McCartney v. Tyrer, 94 Va. 198, 26 S. E. 419.

Removal from the state of a judgment debtor does not *proprio vigore* obstruct the prosecution of a suit to subject his real estate to the satisfaction of the *Mens* upon it.

Huffman v. Alderson, 9 W. Va. 616; Maslin v. Hiett, 37 W. Va. 22, 16 S. E. 437; 1 Rob. Pr. 109; 4 Minor, Inst. 622; Wilson v. Koontz, 7 Cranch, 202, 3 L. ed. 315; 26 Am. & Eng. Enc. Law, 2d ed. 633; Cohen v. Virginia, 6 Wheat. 418, 5 L. ed. 294; Louisville v. Louisville School Bd. 119 Ky. 574, 84 S. W. 729; Barton, Law Pr. 1st ed. 78; Brown v. Butler, 87 Va. 621, 13 S. E. 71; Markle v. Burch, 11 Gratt. 26; Lovett v. Perry, 98 Va. 604, 37 S. E. 33; Heflebower v. Detrick, 27 W. Va. 29.

Mr. J. O. Henson, for appellees:

One judgment creditor of a living debtor cannot assert the bar of the statute of limitations where the debtor declines to assert

struction contended for by counsel that such provision applied only to causes of action accruing in the state or in behalf of one of its citizens would be exceedingly forced. That the language was general, and if the legislature had intended that it should apply only to causes of action arising in the state or in favor of its own citizens, it is not at all likely that language of so general import would have been employed.

So, also, in Nicholas v. Farwell, 24 Neb. 180, 38 N. W. 820, an action on a foreign judgment where defendant subsequent to rendition of, and before the statute of limitations had run against, the judgment in the state where rendered, became a resident of Nebraska, it was held that the action would not be barred until defendant had resided in the state the full period limited for the commencement of the action.

On the other hand, it was held in Smalley v. Bowling, 64 Kan. 818, 68 Pac. 630, that as a judgment creditor can preserve his rights by causing execution to issue during a judgment debtor's absence, such absence will not prevent the running of the statute of limitations upon a domestic judgment.

The decision in Baker v. Hummer, 31 Kan. 325, 2 Pac. 808, as to when an action on a dormant judgment may be maintained, was grounded upon the fact of the absence of the judgment debtor from the state (Schuyler County Bank v. Bradbury, 50 Kan. 355, 43 Pac. 254); but, as pointed out in Smalley v. Bowling, 64 Kan. 818, 68 Pac. 630, the question in the Baker Case was whether an action could be maintained upon a judgment upon which an execution had been issued less than six years, but not within five years, before the suit was commenced, and the absence of the judgment debtor from the state would have afforded an additional reason for its decision if the contention that such absence would suspend the operation of the statute were tenable, 61 L.R.A.(N.S.)

it, as the bar is a privilege personal to the debtor.

Welton v. Boggs, 45 W. Va. 620, 72 Am. St. Rep. 833, 32 S. E. 232; Hickman v. Stout, 2 Leigh, 6; Clayton v. Henley, 32 Gratt. 65; McClaugherty v. Croft, 43 W. Va. 270, 27 S. E. 246; Dozier v. Arkadelphia Cotton Mills, 71 Ark. 407, 75 S. W. 469; Christie v. Bridgeman, 51 N. J. Eq. 331, 25 Atl. 939, 34 Atl. 29; Brookville Nat. Bank v. Kimble, 76 Ind. 195; Kennedy v. Powell, 34 Kan. 23, 7 Pac. 606; Hanchett v. Blair, 41 C. C. A. 76, 100 Fed. 817; Corbey v. Rogers, 152 Ind. 169, 52 N. E. 748; Anderson v. McNeal, 92 Miss. 542, 34 So. 1; Columbia Ave. Sav. Fund, S. D. Title & T. Co. v. Strawn, 93 Tex. 48, 53 S. W. 342.

Absence from the state of a judgment debtor is *proprio vigore* an obstruction within the meaning of the statute.

Ficklin v. Carrington, 31 Gratt. 219; Wilkinson v. Holloway, 7 Leigh, 277; Markle

but that, after stating the effect of such absence in the opinion, the court wholly ignored its own recital, and declined to say that the plaintiff in that action could avail himself of the absence of his adversary to reinstate a judgment which he had suffered to become dormant. And it was further said that, while some expressions in the Schuyler Case, in referring to the Baker Case, seem to give a negative support to the contention that the operation of the statute is suspended by absence from the state, yet they were not necessary to the decision in that case, and must be regarded as *obiter dicta*.

A provision that general statutes of limitation shall not run during nonresidence of a debtor has no application to the duration of a judgment lien. Albee v. Curtis, 77 Iowa, 644, 42 N. W. 508. And so it was held that the right to redeem from foreclosure sale was barred at the end of the time limited, though the purchaser at the sale was a nonresident.

And the exception was held inapplicable to nonresident defendants in Maitland v. Keith, 30 Miss. 499, and Clements v. Brown, 31 Miss. 93, actions on foreign judgments, because of an express provision following the exception, limiting the time for suing on foreign judgments to a specified time.

And although the defendant was a resident when the cause of action on which a judgment was rendered arose, it was held in Fisher v. Hartley (Hogg v. Hartley) 48 W. Va. 339, 54 L.R.A. 215, 86 Am. St. Rep. 39, 37 S. E. 578, that he was not within the exception suspending limitations where he removed from the state before the judgment was rendered.

Generally, as to effect of absence or nonresidence to suspend limitations, see Index to L.R.A. Notes, Limitation of actions, § 46.

J. H. B.

v. Burch, 11 Gratt. 26; Brown v. Butler, 87 Va. 621, 13 S. E. 71; Cheatham v. Aistrop, 97 Va. 457, 34 S. E. 57; Lovett v. Perry, 98 Va. 604, 37 S. E. 33; Abell v. Penn Mut. L. Ins. Co. 18 W. Va. 400; Heflebower v. Detrick, 27 W. Va. 16; Maslin v. Hiatt, 37 W. Va. 15, 16 S. E. 437; Fisher v. Hartley (Hogg v. Hartley) 48 W. Va. 339, 54 L.R.A. 215, 86 Am. St. Rep. 39, 37 S. E. 578; Davidson v. Simmons, 11 Bush, 331; Brittain v. Lankford, 110 Ky. 484, 61 S. W. 1000.

Williams, J., delivered the opinion of the court:

This is a judgment creditors' suit, and Maria E. Janney, a defendant and judgment creditor, has appealed from a decree overruling her exceptions to the report of a master commissioner, to whom the cause was referred to make report of the lands owned by the judgment debtor and the liens thereon.

In the years 1897 and 1898, a number of judgments were recovered against Robert Gold and his several indorsers on notes executed by him to different persons. Those judgments bear different dates. W. O. Nicklas, as administrator of Louisa Martin, deceased, recovered two judgments against said Gold on the 11th of January 1898, for \$984.86 and \$492.73, respectively. Maria E. Janney paid these two judgments and took an assignment of them. In November, 1897, George I. Pitzer, first indorser on a note held by the Citizens' National Bank, and joint judgment debtor with said Gold to said bank, having paid the judgment, instituted a suit in chancery against Gold and others, the purpose of which was to subject all his lands, except his estate in remainder in the dower lands of his mother, to the payment of the liens thereon. In that suit all his lands, except his said estate in remainder, were sold, and the proceeds derived therefrom were sufficient to pay only a portion of the liens. The purposes of that suit having been accomplished, it was retired from the docket by decree made on September 30, 1898.

J. M. Lamon, indorser for, and joint judgment debtor with, said Gold, having paid the judgment against him and his principal in favor of the Citizens' National Bank, brought the present suit on the 3d of June, 1909, the purpose of which is to subject Gold's undivided one-third interest in remainder in a tract of 69 acres; it being the tract which was assigned as dower to his mother out of the lands of which his father had died seised.

More than ten years had elapsed between the return days of the last executions issued on all of the judgments against said

Gold and the bringing of the present suit, except the two judgments now held by Maria E. Janney. Executions were issued upon those two judgments on January 4, 1907, and were returned not satisfied on February 4, 1907, which was within ten years from the return of the last executions that had been issued thereon. Notwithstanding executions had not been issued on the prior judgments for a period of more than ten years before the suit was brought, the commissioner reported them as liens superior in dignity to the lien of the judgments held by Maria E. Janney, and she excepted to the report, and the court overruled her exceptions. Appellant's judgments are subsequent in date, but she contends that the prior judgments have not been kept alive by having executions issued thereon within the time required by § 10, chap. 139, Code 1906, while she was diligent and did keep her judgments alive. She contends that her judgments are the only existing liens.

Robert Gold was a resident of the state at the time the judgments were recovered, but some time in the year 1890 he left the state and has ever since continued to be a non-resident. He was proceeded against, in this suit, by order of publication, but before final decree he filed his answer, admitting that the judgments reported in favor of appellees had not been paid.

Relying upon Welton v. Boggs, 45 W. Va. 620, 72 Am. St. Rep. 833, 32 S. E. 232, counsel for appellees insist that the statute of limitations is purely a personal defense to the debtor, and that, so long as he is living, one judgment creditor cannot rely upon it to defeat the lien of another judgment creditor. But counsel for appellant attack the soundness of that decision, and have presented very strong argument in their brief to show that it is inequitable and against the weight of authorities upon that question, and should therefore be overruled. In support of their argument they cite the following cases, viz.: Callaway v. Saunders, 99 Va. 350, 38 S. E. 182; McCartney v. Tyrer, 94 Va. 198, 26 S. E. 419; Monk v. Exposition Deepwater Pier Corp. 111 Va. 121, 68 S. E. 280; Brandenstein v. Johnson, 140 Cal. 29, 73 Pac. 744; De Voe v. Rundle, 33 Wash. 604, 74 Pac. 836; Boucofaki v. Jacobsen, 36 Utah, 165, 26 L.R.A.(N.S.) 898, 104 Pac. 117; 19 Am. & Eng. Enc. Law, 2d ed. 146. But we do not think that a decision of this question is essential to a determination of the case, for the reason that the suit is brought to enforce liens against the real estate of the debtor; and if the court can see that the liens ceased to exist before the bringing of the suit, it will not enforce them. The

court will not enforce a right which it sees does not exist. Although § 5, chap. 139, Code 1906, creating the lien of a judgment, does not expressly limit its duration, yet, in view of other provisions of the law, the lien ceases to exist after a time, if certain requirements for keeping it alive and in existence have not been complied with.

The lien of a judgment is a right created by statute, and the legislature has prescribed conditions and requirements for the preservation of such right, and noncompliance with those requirements will operate to divest the right. Ordinarily limitations relate to and affect the remedy without destroying the right. But a lien is a right; the enforcement of it is a remedy. If time has destroyed the lien, it cannot be restored by simple consent; it must be done by some kind of legal proceeding. So, while a barred judgment may furnish the basis of an action or scire facias on which another judgment may be obtained, if limitation is not pleaded, it is not evidence of a lien.

The creditor's right to the lien of his judgment is gone forever when his right to sue out execution on the judgment or to revive it by scire facias is barred. In *Wendenbaugh v. Reid*, 20 W. Va. 588, it was held that "the lien of a judgment ceases when the right to sue out execution on the judgment or to revive it by scire facias is barred by the statute of limitations." The same question was decided in *Shipley v. Pew*, 23 W. Va. 487, and in *Reilly v. Clark*, 31 W. Va. 573, 8 S. E. 509. In the latter case Judge Snyder, in his opinion at page 573 of 31 W. Va., says that it has been repeatedly decided and has become the settled law of this state. One who seeks the enforcement of a right must certainly satisfy the court that the right exists; and if his bill is brought to enforce a judgment lien which the court sees does not exist, because the creditor's right to sue out execution on, or to revive, his judgment by scire facias, is barred, it will not enforce it. It does not follow that, because a creditor obtained a judgment against his debtor, he may, at any time thereafter, enforce it as a lien against his debtor's land. If it is more than ten years old, he must show that he has kept it alive. But plaintiff alleges in his bill, and it is also an admitted fact, that Robert Gold left the state in 1899 and has ever since then been a nonresident.

This brings us to a consideration of the next question raised in the case, which is whether the debtor's absence from the state has prevented the running of the statute of limitations and has saved the liens of the judgments. Sections 10 and 11, chap. 139, Code 1906, prescribe limitations upon the time of issuance of an execution on a judg-

ment, and also upon an action, suit, or scire facias brought on a judgment within a period of ten years from its date, or if execution issued within two years from the date of the judgment, then in ten years from the return day of the last execution which has not been returned or which has been returned unsatisfied. Section 11 says no execution shall issue, and no action, suit, or scire facias shall be brought, on any judgment after the time prescribed in § 10, but it contains the following provision in regard to computing the time, *viz.*: "The period mentioned in the 4th section of chapter 136 of this Code, and any time during which the right to sue out execution on the judgment is suspended by the terms thereof, or by legal process, shall be omitted from the computation; and the 16th 17th, 18th and 19th sections of chapter 104 of this Code shall apply to the right to bring such action, suit or scire facias, in like manner as to any right, action, suit or scire facias, mentioned in those sections."

The terms of the judgments in question place no limitation upon the right to sue out execution, and we have already said more than ten years had elapsed between the issuance of executions on all of the judgments, except upon the two now owned by appellant, and the bringing of this suit. But the judgment debtor left the state in 1899 and has ever since resided elsewhere, and therefore counsel for appellees insist that the debtor's becoming a nonresident after the recovery of the judgments, and his continuance as such, stopped the running of the statute, not only against their right to bring an action or scire facias upon the judgment, but also against their right to sue in equity for the enforcement of their liens. Section 18 of chapter 104 is referred to in § 11, chap. 139, and is expressly made a part of it. So much of said last-named section as relates to the question under consideration reads as follows: "Where any such right as is mentioned in this chapter, shall accrue against a person who had before resided in this state, if such person shall, by departing without the same, or by absconding or concealing himself, or by any other indirect ways or means, obstruct the prosecution of such right, or if such right has been or shall be hereafter obstructed by war, insurrection or rebellion, the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted."

There is a very able and ingenious argument by counsel for appellant in their brief to demonstrate that the time of the debtor's absence from the state should not be omitted from the computation of time, unless his

absence actually prevented the bringing of the suit. Otherwise they say the creditor has not been obstructed, and the statute was intended to apply only when there has been an actual obstruction of the right. But the language of the statute is too plain, it seems to us, to admit of doubt that the legislature regarded absence from the state, in and of itself, such an obstruction of the creditor's right as to justify a suspension of the statute of limitation on that account, and did so suspend it. Whether, in all cases, absence from the state does operate as an obstruction or not, we think the legislature, by the clearest intendment, so regarded it. It is put on the same footing with a party's absconding or concealing himself, and then follow these words, "or by any other indirect ways or means, obstruct the prosecution of such right." The words quoted clearly indicate that a debtor's departing from the state suspends the running of the statute. It is true that the debtor's absence did not prevent the bringing of this suit; he was proceeded against by order of publication, and that could have been done at any time after he became a nonresident. The location of the land sought to be subjected to the lien conferred jurisdiction. But the statute, being designed to protect a right, is entitled to a liberal construction; and even if an actual obstruction were necessary to give it application, the obstruction of any of the creditor's remedies for the collection of his debt would be sufficient.

The word "obstruct," as here used, does not mean to prevent altogether, but it rather means to interrupt, to impede, or embarrass the creditor in the pursuit of any of his remedies, whether by execution, action, scire facias, or by suit in equity. So, while the creditors were not prevented, by Gold's absence, from proceeding to enforce their liens against his land, or from having executions issued on their judgments, they were certainly prevented from bringing an action on them or reviving them by scire facias, jurisdiction of the debtor's person being essential to those remedies. Hence his absence from the state has actually prevented the judgment creditors from pursuing some of their remedies.

The lien of a judgment remains so long as the right to bring an action on it or revive it by scire facias exists. If the debtor had returned to the state at the time this suit was brought, we do not think the right of his creditors to bring an action or scire facias on their respective judgments, and to exclude from the period of limitation the time of his absence, can be doubted. Having such right, their liens are preserved and may be enforced in this suit. It was 51 L.R.A. (N.S.)

not necessary to revive the judgments by actions or scire facias before bringing the suit. The liens of the judgments never ceased. Sections 10 and 11, chap. 139, authorize the bringing of a suit to enforce a judgment lien whenever and as long as the creditor has the right to bring an action or a scire facias. The statute treats them as alternative remedies; and if any one of them is saved to the creditor, all are saved.

The term "suit," as used in §§ 10 and 11, clearly means a suit in equity for the enforcement of a judgment lien.

Finding no error, we affirm the decree.

Petition for rehearing denied.

WEST VIRGINIA SUPREME COURT OF APPEALS.

JESSE ANDERSON

v.

BALTIMORE & OHIO RAILROAD COMPANY, Plff. in Err.

(— W. Va. —, 81 S. E. 579.)

Negligence — escape of railroad car.

1. Where a corporation engaged in mining coal for shipment accepts a car for use at its mines knowing it to be inadequately equipped with brakes, and in an effort to adjust the car to the tippie to receive its complement of coal, negligently permits it to escape, thereby inflicting injury on the property of another not its employee or an employee of the carrier furnishing the car, the carrier will not be held liable therefor, though the injury may not have occurred

Headnotes by LYNCH, J.

Note. — Liability of railroad company for injury resulting from act of shipper or consignee in setting car in motion.

Generally, as to proximate cause of injury caused by car or engine set in motion by third person, see note to *Baltimore & O. R. Co. v. Dever*, 26 L.R.A. (N.S.) 719.

As to liability of carrier for personal injuries to consignor or consignee or their employees, caused by unsafe car, see note to *Chicago, I. & L. R. Co. v. Pritchard*, 9 L.R.A. (N.S.) 857.

The carrier was relieved from liability in *ANDERSON v. BALTIMORE & O. R. Co.* because the proximate cause of the damage to plaintiff's property was not the inadequate brake, but the negligence of the agents of a coal mining corporation in setting the car in motion.

So, in *Logan v. Cincinnati, N. O. & T. P. R. Co.* 139 Ky. 202, 129 S. W. 575, the negligence of employees of a manufacturing company in moving a coal car to a place on a spur track to be unloaded, knowing that

had the car so furnished been equipped with brakes adequate to control its movements.

Proximate cause — intervening negligence — effect.

2. While the negligent act of one person may, as a natural consequence, cause injury to another, yet if, before the injury results, the negligent act of a third person intervenes and produces the injury, the latter alone is responsible therefor, though but for the first negligent act the injury could not have occurred.

Same — last act.

3. Where, by the intervening negligent act of a responsible agency, the causal connection between the first negligent act and the injury is broken, the last act, in legal contemplation, is regarded as the sole cause of the injury. The proximate cause thereof is the last negligent act contributing there-

to, and without which the injury would not have resulted.

(April 7, 1914.)

ERROR to the Circuit Court for Marshall County to review a judgment in plaintiff's favor in an action brought to recover damages for injuries to his property alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Hooton & Hooton for plaintiff in error.

Mr. D. B. Evans, for defendant in error:

Whether or not the intervening act of a third person will render the earlier act too remote depends simply upon whether the

the brake thereon was so defective that it would not control the movements of the car, and not the defective brake, was held the proximate cause of injury to another employee of the company mentioned, as a consequence of this car striking others on the same track. The decision in this case was put distinctly upon the ground that the act of the railway company in putting a car with defective brake on the spur tracks was not the proximate cause of the injury complained of, but that the efficient cause of the injury was the act of the employees of the coal company in negligently attempting to move the car with full knowledge of the fact that the brake was useless.

A railroad company which built, but neither owned nor controlled, a spur track running into a grain elevator building, was, in *Sauls v. Chicago, R. I. & T. R. Co.* 36 Tex. Civ. App. 155, 81 S. W. 89, held not liable for injury to a servant of the elevator company, injured by a car set in motion by a fellow servant of that company. The fellow servant rule applied in this case so as to relieve the elevator company also from liability.

In *Georgia P. R. Co. v. Underwood*, 90 Ala. 49, 24 Am. St. Rep. 756, 8 So. 116, the agents of a coal company, after unloading a car which was resting on a spur, pushed it so far back beyond the clearing posts showing the point beyond which the cars were not to be left, that it scraped a passenger coach on the main line, injuring a passenger whose arm happened to be protruding out of the window. The railway company was held liable, the court charging the jury "that the defendant is responsible in law for the wrongful acts or omissions of the servants of Moore & Wells in moving and placing the cars on the spur track; that the cars belonging to the defendant, and the spur track also belonging to the defendant, on its right of way, and connected with its main line, the defendant owed the duty to its passengers to keep such spur track clear of obstructions that might come in contact with passing trains; and that the negligence of the servants of Moore & Wells, if the evidence showed that

there was negligence in placing the cars on the spur track, was imputable in law to the defendant."

In the case just cited it will be observed that the decision did not turn upon any question as to proximate cause, but upon the point that the carrier was responsible to the passenger for the negligence of the company.

In *ANDERSON v. BALTIMORE & O. R. Co.* it appears to have been assumed without discussion that the railroad was not responsible for the negligence of the employees of the mining company, which was held to have been the proximate cause of the damage. Nor does there appear to have been any suggestion in *Logan v. Cincinnati, N. O. & T. P. R. Co.* or *Sauls v. Chicago, R. I. & T. R. Co.* supra, that the railroad company might be responsible for the negligence of the employees of the company using the car. In those cases, however, unlike the *ANDERSON CASE*, the plaintiff was himself an employee of the company using the car.

But in *Gulf, C. & S. F. R. Co. v. Bryant*, 30 Tex. Civ. App. 4, 66 S. W. 804, also a case where the plaintiff's deceased was an employee of the company whose agents negligently moved the car, the court said that the railroad company would be liable for injuries caused by persons moving the car with its consent. In this case, however, a judgment for the plaintiff was reversed because of error of the trial court in submitting the question of proximate cause to the jury, upon the hypothesis that deceased was well acquainted with the situation of the track and cars; and that they were liable to be moved, causing a loud noise calculated to frighten horses; and that he negligently left his horses unhitched; and that when, frightened at the noise of a car which had been set in motion, they started to run, he, without being frightened at the approach of the car, jumped into his wagon without regard to his own safety, and in so doing lost his balance and fell to the ground. The court said that such facts would necessarily be, if found to exist, the proximate cause of the injuries sustained.

J. D. C.

occurrence of such intervening act might reasonably have been anticipated by the defendant.

Watson, Damages for Personal Injuries, 75; Lane v. Atlantic Works, 111 Mass. 136; East Tennessee, V. & G. R. Co. v. Lockhart, 29 Ala. 315; Clark v. Chambers, L. R. 3 Q. B. Div. 127, 47 L. J. Q. B. N. S. 427, 38 L. T. N. S. 454, 26 Week. Rep. 613, 19 Eng. Rul. Cas. 28.

Where, though there may be some intervening cause or agency, such cause or agency and its probable consequence are such as could reasonably have been anticipated by the original wrongdoer, the causal connection between the original wrongful act and the subsequent injury is not broken, and an action will lie therefor.

Watson, Damages for Personal Injuries, 205; Baltimore & P. R. Co. v. Reaney, 42 Md. 117; Lane v. Atlantic Works, 111 Mass. 139; Beauchamp v. Saginaw Min. Co. 50 Mich. 163, 45 Am. Rep. 30, 15 N. W. 65; Hughes v. McDonough, 43 N. J. L. 459, 39 Am. Rep. 603; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Seale v. Gulf, C. & S. F. R. Co. 65 Tex. 274, 57 Am. Rep. 602.

The act of a third person intervening and contributing a condition necessary to the injurious effect of the original negligence will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury.

Lane v. Atlantic Works, 111 Mass. 139; Southern R. Co. v. Webb, 116 Ga. 152, 59 L.R.A. 109, 42 S. E. 395, 12 Am. Neg. Rep. 232; 29 Cyc. 498, 499, 501; Savannah, F. & W. R. Co. v. Booth, 98 Ga. 20, 25 S. E. 928; Siegel, C. & Co. v. Trcka, 218 Ill. 559, 2 L.R.A.(N.S.) 647, 109 Am. St. Rep. 302, 75 N. E. 1053, 19 Am. Neg. Rep. 166; Ahern v. Oregon Teleph. & Teleg. Co. 24 Or. 276, 22 L.R.A. 635, 33 Pac. 403, 35 Pac. 549; Carterville v. Cook, 129 Ill. 152, 4 L.R.A. 721, 16 Am. St. Rep. 248, 22 N. E. 14; Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 481, 10 L.R.A. 696, 23 Am. St. Rep. 688, 25 N. E. 799.

Lynch, J., delivered the opinion of the court:

The answer to the question, Who is directly responsible for the injury to plaintiff's property? solves the only important inquiry presented on this writ of error.

The declaration avers that the railroad company, as a common carrier and as operator of a spur track or switch from its main line to a coal mine, furnished the coal company a car which, because of defective brakes, escaped from its employees, ran down an incline, and collided with and injured plaintiff's wagon and team. The 51 L.R.A.(N.S.)

defect alleged was want of a brake on the colliding car sufficient to enable the employees of the coal company to check and control its movements, in order to adjust it to the coal dumps from which to receive coal for shipment. That injury occurred in the manner averred is not denied; nor is the fact that the coal company's agents failed, either by the brakes or by the use of any other adequate appliances, to control the movements of the car while attempting to adjust it to the coal tipples, though at the time they knew the brakes were insufficient for the purpose; nor is the further fact that plaintiff was rightfully engaged in the act of loading another car, placed on the spur track for that purpose by the defendant at plaintiff's instance.

While there is some evidence tending to show that the brakes were sufficient to check and control the movements of the car, yet, in view of the other facts appearing in the record and of the conclusion reached on this review, it may be conceded that the brakes were inadequate. If so, both the coal company and defendant knew of the defect, because the same car escaped the mine employees the day prior to the accident of which plaintiff complains, and, at their instance, the defendant again replaced the car near and above the tipple. With this knowledge, the coal company's agents and employees undertook to move the car after it was partially loaded, when it again escaped and ran down the incline to the place of injury. Hence the query whether the negligence of the railroad company, which placed the car on the switch, or that of the coal company in failing to control the car, caused the injury. Whose was the negligent act without which the injury would not have occurred?

Proximate cause, the courts have said, is that which naturally led to, and which may have been expected to be directly instrumental in producing, the loss. State v. Manchester & L. R. Co. 52 N. H. 552; Topsham v. Lisbon, 65 Me. 449; Ætna F. Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395. Or, as differently stated, it is that act which directly produced or concurred in producing the injury. The construction or interpretation of the oft-recurring legal maxim most frequently adopted is that, "in determining what is the proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligent act." Hoag v. Lake Shore & M. S. R. Co. 85 Pa. 293, 27 Am. Rep. 653; West Mahanoy Twp. v. Watson, 116 Pa. 344, 2 Am. St. Rep. 604, 9 Atl. 430; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; Putnam v. Broadway & S. Ave. R. Co. 55 N. Y. 108, 14 Am. Rep. 190; Sharp v. Powell,

L. R. 7 C. P. 253, 41 L. J. C. P. N. S. 95, 26 L. T. N. S. 436, 20 Week. Rep. 584.

But it may be urged, in dissent from the application of this construction to the facts of this case, that the coal company could not, by the exercise of ordinary prudence or due and reasonable care, have foreseen that the movements of the car would pass beyond the control of its agents, and thereby cause the injury. Evidently neither company intended to injure plaintiff's property. However, it is not essential, to raise a liability, that the injury should have been intended or contemplated by either of them. The active agency in the production of the wrong may nevertheless be held liable for any injury which, after its completion, appears to have been the natural and probable consequence of his act. The general character of the act is that to which the law looks to determine the real agent of the wrong. "Where there is danger . . . of a particular injury, which actually occurs, we must surely say that it is the usual, ordinary, natural, and probable result of the act exposing the person or thing injured to the danger." *West v. Ward*, 77 Iowa, 323, 14 Am. St. Rep. 284, 42 N. W. 309; *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197, 3 Am. Neg. Cas. 197; *Hill v. Winsor*, 118 Mass. 251; *Bunting v. Hogsett*, 139 Pa. 363, 12 L.R.A. 268, 23 Am. St. Rep. 192, 21 Atl. 31, 33, 34; *Alabama G. S. R. Co. v. Chapman*, 80 Ala. 615, 2 So. 738. The proximate cause is the one without which the accident would not have occurred. *Taylor v. Baldwin*, 78 Cal. 517, 21 Pac. 124.

The railroad company and the coal company knew the spur track was constructed on an ascending grade, the highest point being near the tipple; and that, uncontrolled, the car would run violently down the grade in the direction of defendant's main track, and thus probably cause injury. But, notwithstanding defendant's negligence in placing on the switch a car improperly or defectively equipped, was such negligence on its part the proximate or the remote cause of the injury? Whose negligence was it which in fact caused the injury? When defendant replaced the car at or near the tipple, it secured it by brake and by blocks. The car there remained until released by the coal company's agents, released by them, of course, to adjust it to the tipple for the purpose of receiving its complement of coal. But it is immaterial whether defendant was or was not negligent in the first instance; he is not the real actor whose negligence in fact resulted in the production of the injury.

It has been held that if a traveler on the highway erects and insecurely props a fallen

telephone pole which obstructs his passage, but which later, because of insufficient support, again falls and injures another traveler then passing, the owner and operator of the line is not liable for the injury, although the duty imposed by law required it to use a high degree of care in the selection and frequent inspection of its wire-carrying appliances in order to make secure against accident those using the highway. *Harton v. Forest City Teleph. Co.* 146 N. C. 429, 14 L.R.A. (N.S.) 956, 59 S. E. 1022, 14 Ann. Cas. 390. It was the intervention of another which became the superseding or responsible cause. Had he permitted the pole to remain where he found it, the accident would not have occurred, however negligent the company may have been in the performance of its legal obligations to the public. The defendant's negligence in failing properly to secure its poles was not deemed the proximate cause of the injury, because its connection with the injury was broken by a responsible intervening cause. So, in this case, the defendant is not liable for the injury, unless the injury was, in the natural and ordinary course of things, to be anticipated as the direct consequence of its negligent act, so that its negligence was an essential link in the chain of causation. In other words, had not the coal company negligently permitted the car to escape, would the mere negligent act of the defendant have resulted in producing the injury inflicted upon plaintiff's property?

A railroad company was held not liable in damages for injury to a boy of tender age who released the brake on a car standing upon a side track, which ran down grade and killed him, because the accident was not such that the company could have reasonably anticipated it, although the company knew other cars standing upon the same branch had been released and set in motion in a similar way by other boys. See also *Norfolk & W. R. Co. v. Cromer*, 101 Va. 667, 44 S. E. 898; *Mars v. Delaware & H. Canal Co.* 54 Hun, 625, 8 N. Y. Supp. 107.

As stated in 1 *Thomp. Neg.* 59: "If, subsequent to the original wrongful or negligent act, a new cause has intervened, of itself sufficient to stand as the cause of a misfortune, the former must be considered as too remote. . . . The proximate cause of an injury is that act or omission which immediately causes or fails to prevent the injury, and without which the injury would not have happened, notwithstanding other acts or omissions concurrent therewith."

It is a maxim of the law that the immediate, not the remote, cause of an event, is regarded; and in applying the maxim, the law rejects, as not constituting ground of action, damages not flowing proximately

from the act complained of. *Gilson v. Delaware & H. Canal Co.* 65 Vt. 213, 36 Am. St. Rep. 802, 26 Atl. 70. Or, as said by Wharton, Neg. § 134: "Supposing that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff; is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent in a particular subject-matter. Another person, moving independently, comes in and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable." This statement of the rule aptly applies to the facts of this case. See *Winfree v. Jones*, 104 Va. 39, 1 L.R.A. (N.S.) 201, 51 S. E. 153.

In *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256, Justice Strong said: "The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the . . . wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

"When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through consequences resulting therefrom, this consequence must not only be shown, but it must be so connected, by averment and evidence, with the act or omission, as to appear to have resulted therefrom, according to the ordinary course of events, as a proximate result of a sufficient cause." *Cooley, Torts*, 74.

By remote cause is intended that which may have happened, and yet no injury have occurred, notwithstanding that no injury could have occurred if it had not happened. *Baltimore & O. R. Co. v. State*, 33 Md. 542; *Troy v. Cape Fear & Y. Valley R. Co.* 99 N. C. 298, 6 Am. St. Rep. 521, 6 S. E. 77. 51 L.R.A. (N.S.)

In *Washington v. Baltimore & O. R. Co.* 17 W. Va. 190, this court has said: "The cause of an injury, in the contemplation of law, is that which immediately produces it as its natural consequence; and therefore, if a party be guilty of an act of negligence which would naturally produce an injury to another, but, before such injury actually results, a third person does some act which is the immediate cause of the injury, such third person is alone responsible therefor, and the original party is in no degree responsible therefor, though the injury could never have occurred but for his negligence. The causal connection between the first act of negligence and the injury is broken by the intervention of the act of a responsible party, which act is in law regarded as the sole cause of the injury according to the maxim, *In jure non remota causa sed proxima spectatur*." See also *Fawcett v. Pittsburg, C. & St. L. R. Co.* 24 W. Va. 755.

In *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914, 5 Am. Neg. Rep. 496, it is held that "the proximate cause of an injury is the last negligent act contributing thereto, and without which such injury would not have resulted." In that case an instruction was held erroneous which told the jury that if it believed from the evidence the defendant was negligent, and such negligence was the proximate cause of the injury, it must find for the plaintiff, although it believed that another person's negligence intervened between the negligence of the defendant and the injury.

In *Risiek v. Chesapeake & O. R. Co.* 104 Va. 476, 51 S. E. 730, it was held that if a railroad company delivers, on a siding, to a company operating an iron furnace, cars without brakes or with unsound brakes, in consequence of which defect a servant of the receiving company is injured, his remedy is against the latter, and not against the railway company. The court held the ore company liable, because it permitted the use of the car when it knew, or by inspection could readily have ascertained, the car's defective condition, in either of which events it should have declined to accept it, or to permit its employees to use it, or have repaired the defect.

But, in contravention of the principles announced by the authorities cited, plaintiff relies on *Lane v. Atlantic Works*, 111 Mass. 136; *Seale v. Gulf, C. & S. F. R. Co.* 65 Tex. 274, 57 Am. Rep. 602; *Hughes v. McDonough*, 43 N. J. L. 459, 39 Am. Rep. 603; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117, and other cases, the facts of which materially differ from those found in the case now under review.

The facts of the *Lane Case* may be stated as a fair illustration of the facts of each

of the other cases. There the defendant company carelessly left, in a public street, a truck so unskillfully loaded that the shipment of loose iron could easily be dislodged, and, in falling, result in injury to persons using the highway. A child climbed on the truck and dislodged the iron and caused it to fall on and injure another child attracted by the first, and at whose invitation he approached the truck. But, even under these facts, the court said that if the plaintiff actively participated in the dislodgment of the iron, or approached the truck as actor for the purpose of encouraging his associate, he could not recover damages for the injury, unless he went there attracted by curiosity or upon invitation, and was in the exercise of due care; and further that "in an action to recover for . . . defendants' negligence, to which the fault of another person contributed, the defendants' liability is not affected by the fact that the fault of such person was not negligence, but voluntary wrongdoing, if it was conduct which they should have apprehended and provided against." This case, when properly analyzed, does not conflict with the general trend of other authorities heretofore cited by us.

In the Texas case, a locomotive of the railroad company, by the emission of sparks, ignited combustible material which the company permitted to accumulate on its right of way, and from which, when ignited, a strong wind caused the fire to spread in the direction of property belonging to the plaintiff, whose daughter's clothing caught fire while she was engaged in an effort to save his property, thus inflicting injuries from which she died. But the court said: "If, subsequently to the original wrongful or negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the misfortune, the former must be considered as too remote. The original wrongful or negligent act will not be regarded as the proximate cause, where any new agency, not within the reasonable contemplation of the original wrongdoer, has intervened to bring about the injury;" but "where, however, the intervening cause and its probable or reasonable consequences are such as could reasonably have been anticipated by the original wrongdoer, the causal connection between the original wrongful act and the subsequent injury is not broken, and an action may lie therefor." This holding, in view of the facts, does not contravene the rule we have announced.

In the Hughes Case, plaintiff was a blacksmith, and skillfully shod a horse. Defendant, in order to produce the belief in the mind of the owner "that the work of the

plaintiff was badly done, privily loosened such shoe," and drove a nail in horse's foot, whereby plaintiff lost the custom of the owner. "The contention was that the wrong was done to Van Riper [the owner]; that it was his horse whose shoe was loosened, and whose foot was pricked, and that the immediate injury and damage were to him; and that, consequently the damages of the plaintiff were too remote to be made the basis of a legal claim." But the court said: "The illegal act of the defendant had a close causal connection with the hurt done to the plaintiff, and such hurt was the natural and almost direct product of such cause. Such harmful result was sure to follow, in the usual course of things, from the specified malfeasance. The defendant is conclusively chargeable with the knowledge of this injurious effect of his conduct, for such effect was almost certain to follow from such conduct, without the occurrence of any extraordinary event, or the help of any extraneous cause. The act had a twofold injurious aspect. It was calculated to injure both Van Riper and the plaintiff; and, as each was directly damnified, I can perceive no reason why each could not repair his losses by an action."

In the Reaney Case, the last point in the syllabus shows, without a statement of the facts, the inapplicability to the facts of this case. It is: "Whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences be immediately and directly brought about by intervening causes, if those intervening causes were set in motion by the original wrongdoer."

An examination of other cases cited by plaintiff will show a tendency to support, rather than to contravene, the principles announced by the authorities cited in support of the finding on this review.

Our conclusion, therefore, is to reverse the judgment of the Circuit Court, set aside the verdict of the jury, and enter a *nil capiat*, the latter because from the proof it clearly appears that plaintiff has no cause of action against the defendant.

IDAHO SUPREME COURT.

PACIFIC PACKING COMPANY, Appt.,
v.
BRADSTREET COMPANY et al., Respnts.

(25 Idaho, 696, 139 Pac. 1007.)

Libel — report by mercantile agency — suit against corporation.

1. It is libelous *per se* for a mercantile

agency falsely to report in writing to its customers that a business corporation has been sued for "money advanced" in an amount in excess of its capital.

Same — privilege — mercantile reports.

2. Reports by a mercantile agency to its customers, as to the financial standing of a business corporation, are not privileged communications.

(February 17, 1914.)

APPEAL by plaintiff from a judgment of the District Court for Ada County sustaining a demurrer to the complaint in an action brought to recover damages for the publication of an alleged libel. Reversed. The facts are stated in the opinion.

Note. — Libel and slander: stating that one has been sued or judgment recovered against him.

Generally, as to injury in business or professional relations from libel and slander, including charges affecting financial standing, see Index to L.R.A. Notes, "Libel & Slander," §§ 14, 16, and 17.

As to measure of damages for libel or slander reflecting on integrity or responsibility of merchant, see note to Wolkowsky v. Garfunkel, 44 L.R.A. (N.S.) 351.

And as to report of mercantile agency as a privileged communication, see notes in 36 L.R.A. (N.S.) 452, and 2 B. R. C. 215.

In Harman v. Delany, 2 Strange, 898, it was said: "The law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action, that will not be actionable in the case of another person; and if bare words are so, it will be stronger in the case of a libel in a public newspaper, which is so diffusive."

It has been said with reference to the publication by a commercial agency to its subscribers that a tradesman has been sued, that the rule is that, if the statement is untrue and is published owing to negligence, it may give rise to an action, but there must be actual injury shown. *Giacona & Son v. Bradstreet Co.* 48 La. Ann. 1191, 20 So. 706. The court apparently regarded a publication in this instance, that a firm had been sued, whereas in fact a suit was brought against one member only of the firm, as not libelous *per se*.

A distinction has been made between the false publication that a judgment has been recovered against a merchant, and a statement that his property has been taken in attachment, the court, while conceding that the former publication might not be libelous, holding that the latter was. *McKenzie v. Denver Times Pub. Co.* 3 Colo. App. 554, 34 Pac. 577, a case sufficiently set forth in *PACIFIC PACKING CO. v. BRADSTREET CO.*

A publication by a mercantile agency to its subscribers, under the heading "Writs and Summonses," of the following words:

Messrs. Wood & Driscoll, for appellant:

The words are not privileged by reason of the fact that they are the communication of a mercantile agency to its patrons.

Macintosh v. Dunn, 99 L. T. N. S. 64, 2 B. R. C. 203, [1908] A. C. 390, 77 L. J. P. C. N. S. 113, 24 Times L. R. 705, 52 Sol. Jo. 580; *Douglass v. Daisley*, 57 L.R.A. 475, 52 C. C. A. 324, 114 Fed. 628; 25 Cyc. 468.

Messrs. Richards & Haga and McKee F. Morrow, for respondents:

An article written of and concerning a corporation is not libelous *per se* unless the necessary result of the publication of the language used, without proof of extrinsic facts, is to affect the financial stand-

"Defendant. Lion Brewing Co. et al., Plaintiff. Mara, John Andrew. Foreclosure of mortgage," when the brewing company was in fact joined in the action only because it held a second mortgage upon the property, has been held libelous as implying that the company's property was mortgaged, and that it was unable or unwilling to satisfy the debt, and was about to be deprived of its property on that account. *Lion Brewing Co. v. Bradstreet Co.* 9 B. C. 435.

A publication in a trade journal as to a brickmaker, that he is in the hands of the sheriff, has been held libelous *per se*. *Hermann v. Bradstreet Co.* 19 Mo. App. 227.

But in *Woodruff v. Bradstreet Co.* 116 N. Y. 217, 5 L.R.A. 555, 22 N. E. 354, it was held that the publication by a commercial agency that a judgment for \$4,000 had been recovered against a brick manufacturer was not libelous *per se*, so as to entitle the latter to recover for its publication without proof of special damages.

It was also held in *Woodruff v. Bradstreet Co.* supra, that the question whether the publication was libelous *per se* was one of law for the court; and that this rule was not affected by the fact that the publication was by a commercial agency engaged in collecting information as to the financial standing of persons engaged in business, although its apparent authenticity might therefore be greater.

In holding the publication not libelous *per se*, the court in *Woodruff v. Bradstreet Co.* supra, said: "The recovery of a judgment does not necessarily import conceded default in payment of a debt. It is a matter of frequent observation that controversies arising apparently out of an honest difference of opinion go into the courts for determination. Litigation also not infrequently comes from causes in which is involved no personal credit or default. There is nothing in the defendant's report to indicate that the judgment was produced by any cause prejudicial to the credit of the plaintiff, and there is no presumption in that respect upon the subject in aid of the action. There is nothing for the consideration of the jury bearing upon the question whether the publication was

ing of the corporation, and cause it pecuniary loss.

Revised Codes, Idaho, § 6737; 25 Cyc. 337, 341; Newbold v. J. M. Bradstreet & Sons, 57 Md. 38, 40 Am. Rep. 426; Fry v. McCord Bros. 95 Tenn. 678, 33 S. W. 568; Memphis Teleph. Co. v. Cumberland Teleph. & Teleg. Co. 76 C. C. A. 436, 145 Fed. 904; Warner Instrument Co. v. Ingersoll, 157 Fed. 311; Kemble & Mills v. Kaighn, 131 App. Div. 63, 115 N. Y. Supp. 809.

Whether or not words charged as libelous are actionable *per se*, or whether they are uttered on a privileged occasion, are questions for the court.

Bodine v. Times-Journal Pub. Co. 26 Okla. 135, 31 L.R.A. (N.S.) 147, 110 Pac.

1096; Velikanje v. Millichamp, 67 Wash. 138, 120 Pac. 876; Fry v. McCord Bros. 95 Tenn. 678, 33 S. W. 568; Woodruff v. Bradstreet Co. 116 N. Y. 217, 5 L.R.A. 555, 22 N. E. 354.

As the language alleged to have been used is not libelous *per se*, its meaning cannot be extended or modified by an attempted innuendo.

13 Enc. Pl. & Pr. 49, 51; Barham v. Nethersall, Yelv. 22; Simons v. Burnham, 102 Mich. 189, 60 N. W. 477; Legg v. Dunleavy, 80 Mo. 553, 50 Am. Rep. 512; Denney v. Northwestern Credit Assn. 55 Wash. 331, 25 L.R.A. (N.S.) 1021, 104 Pac. 769; Memphis Teleph. Co. v. Cumberland Teleph. & Teleg. Co. 76 C. C. A. 436, 145 Fed. 904; Dun

libelous; and we think the trial court properly held, as matter of law, that it was not such *per se*."

A false publication by a commercial agency to its subscribers, that a judgment for \$129 had been recovered against a merchant, was held libelous in Bradstreet Co. v. Oswald, 96 Ga. 396, 23 S. E. 423, where, however, special damages were alleged. The declaration did not allege malice, but since special damages resulting from the negligence of the defendant were alleged, the court said the defendant would be liable for actual damage though not guilty of an evil design.

In Hayes v. Press Co. 127 Pa. 642, 5 L.R.A. 643, 14 Am. St. Rep. 874, 18 Atl. 331, where, in connection with the publication of a notice that judgment had been entered against a hotel proprietor, a paper published the heading "Hotel Proprietors Embarrassed," the court said: "It was the common right of anyone to publish the fact that a judgment . . . had been entered against the plaintiff substantially as shown by the record of the court; but it was neither the right nor the privilege of the defendant . . . to publish in connection with the declaration, in the form of a headline or otherwise, that the defendants in the judgment were embarrassed."

A false statement concerning a brewer that he "was in a sponging house for debt within the last fortnight" has been held slanderous, without proof of special damage. Jones v. Littler, 7 Mees. & W. 422. It was said that the imputation of insolvency must be injurious, for if a tradesman is incapable of paying all his debts, whether in or out of trade, his credit as a tradesman must be injured.

In Loftus v. Bennett, 68 App. Div. 128, 74 N. Y. Supp. 290, a publication in a newspaper regarding a merchant was regarded as libelous *per se*, but the publication included, in addition to a statement that an attachment had been procured against a merchant and that his stores were in the hands of the sheriff, other allegations, such as that "a remarkable condition of affairs" was disclosed, and also a distinct charge of swindling.

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Also, in Beardsley v. Tappan, 1 Blatchf. 588, Fed. Cas. No. 1,188, a statement regarding a merchant which was held defamatory included, besides the allegation that he had been sued, other apparently libelous matter.

Where a commercial agency published a statement that a judgment for \$360 had been recovered against a grocer, whereas in fact a verdict for this amount had been rendered against him, but the judgment subsequently entered thereon was reversed, the trial court in Hessel v. Bradstreet Co. 141 Pa. 501, 21 Atl. 659, instructed the jury that if the publication was made maliciously with the intention to injure the merchant in his business, the agency was liable, but that if the publication was not made maliciously, but pursuant to what the agency considered to be its duty, erroneously supposing that a verdict was equivalent to a judgment, it was not liable. On appeal, the judgment was affirmed, only questions as to admission of evidence, however, being considered.

In Stubbs v. Russell [1913] A. C. 386, it was held that the publication in a trade paper of an extract from the court records, under a column entitled "Extracts from the Court Books of Decrees in absence in the small debt courts," of a decree against a merchant, accompanied by a note that "the following extracts from the court books have been received since our last issue . . . It is probable that some of the decrees have been sisted, settled, or paid; and in no case does publication of the decree imply inability to pay on the part of anyone named, or anything more than the fact that the entry published appeared in the court books," was not libelous as inferring that the merchant was unable to pay his debts. It was said that an injurious inference might no doubt have been drawn if inability to pay a just debt were the only reason which could account for such a decree; but that it might happen from a variety of causes consistent with solvency, and that a publication is not libelous because one out of various possible inferences from the facts which it states might be injurious while others are harmless;

v. Maier, 27 C. C. A. 100, 52 U. S. App. 381, 82 Fed. 169; 25 Cyc. 449, 450; State v. Sheridan, 14 Idaho, 222, 15 L.R.A. (N.S.) 497, 93 Pac. 656; Verbeck v. Duryea, 36 Misc. 242, 73 N. Y. Supp. 346.

Where it is necessary to resort to an innuendo to show that the language used is libelous, such language is not actionable *per se*, and special damage must be alleged.

Chiatovich v. Hanchett, 88 Fed. 873; Morrison v. Dean, — Tex. Civ. App. —, 104 S. W. 505.

The communication alleged to have been libelous is shown by the complaint to have been sent to patrons of respondent company, who were interested in the publication, and it was therefore privileged.

Hubbard v. Cowling, 36 Okla. 603, 129 Pac. 714; Trussell v. Scarlett, 18 Fed. 214; Locke v. Bradstreet Co. 22 Fed. 771; Sunderlin v. Bradstreet Co. 46 N. Y. 188, 7 Am. Rep. 322; Ormsby v. Douglass, 37 N. Y. 477; Rothholz v. Dunkle, 53 N. J. L. 438, 13 L.R.A. 655, 26 Am. St. Rep. 432, 22 Atl. 193; State ex rel. Lanning v. Lonsdale, 48 Wis. 348, 4 N. W. 390; Erber v. Dun, 4 McCrary, 160, 12 Fed. 526; Bradstreet Co. v. Gill, 72 Tex. 115, 2 L.R.A. 405, 13 Am. St. Rep. 768, 9 S. W. 753.

also that the test was not whether some people might put a harmful meaning upon the words, however strained or unlikely that construction might be. The court distinguished the case of Crabbe v. Stubbs, 22 Rettie, 860, holding to the contrary, on the ground that the explanatory statement was lacking in the latter case.

It was held also in Stubbs v. Russell, supra, that the question whether the publication was capable of the libelous inference alleged was one for the court, and should not be submitted to the jury; as, when read in connection with the explanatory note, the alleged libelous imputation was not a reasonable construction.

But in Williams v. Smith, L. R. 22 Q. B. Div. 134, 58 L. J. Q. B. N. S. 21, 59 L. T. N. S. 757, 37 Week. Rep. 93, 52 J. P. 823, a publication under a general heading of a trade paper, among such subheadings as "Bills of Sale," "the Bankruptcy Act," "County Court Judgments," etc., of a statement under the latter heading, containing the plaintiff's name and address, followed by the words "Hatter, 427 L. I. s. O p., Oct. 13," was held to support an innuendo that on the date the paper was published there was an unsatisfied judgment against the plaintiff in the county court for the amount named, which had been obtained on the date indicated in the statement, and that the plaintiff was unable to satisfy the judgment, and was a person unwilling or unable to pay his debts, and was therefore libelous, the judgment having in fact been satisfied.
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No facts are alleged to show actual malice, and thus defeat the privilege which appears on the face of the complaint, and the mere charge that the publication was malicious is wholly insufficient for this purpose.

13 Enc. Pl. & Pr. 591; Warner v. Missouri P. R. Co. 112 Fed. 114; Gosewisch v. Doran, 161 Cal. 511, 119 Pac. 656, Ann. Cas. 1913D, 442; Garr v. Selden, 4 N. Y. 91; Henry v. Moberly, 6 Ind. App. 499, 33 N. E. 981; Denver Public Warehouse Co. v. Holloway, 34 Colo. 432, 3 L.R.A. (N.S.) 696, 114 Am. St. Rep. 171, 83 Pac. 131, 7 Ann. Cas. 840; Noonan v. Orton, 32 Wis. 106; McDavitt v. Boyer, 169 Ill. 475, 48 N. E. 317; Bradley v. Heath, 12 Pick. 163, 22 Am. Dec. 418; Beeler v. Jackson, 64 Md. 589, 2 Atl. 916; Livingston v. Bradford, 115 Mich. 140, 73 N. W. 135; Strode v. Clement, 90 Va. 553, 19 S. E. 177; Spielberg v. A. Kuhn & Bro. 39 Utah, 276, 116 Pac. 1027.

Allshie, Ch. J., delivered the opinion of the court:

This action was instituted for the recovery of damages caused by the publication of an alleged libel of and concerning the plaintiff by the defendant. The trial court sustained a demurrer to the complaint, and a judgment of dismissal was

And in M'Nally v. Oldham, 16 Ir. C. L. Rep. 298, it was held that it was no defense to an action for libel for publishing in a paper called "The Black List" the record of a judgment obtained a week previous against a trader, meaning that the judgment was an existing liability against him, that the court record showed the judgment as unsatisfied, when in fact it had been paid where the trader sustained special damages from the false publication. The court, while admitting the right to publish the court record of a judgment, took the position that the publisher did so at his peril if he represented the judgment as still outstanding when in fact it had been paid, and the fact that the record did not show the satisfaction was not a justification; so that although there was no actual malice, the publisher was liable for actual damages. It was said that "a judgment may be obtained against a trader in an action which he resists because he thinks the demand ill founded; but the effect would be different if it appeared that he allowed the demand to remain unpaid after his liability to it was decided, and a judgment obtained."

But it has been held that it is not libelous *per se* of the maker of a note, though he is engaged in business, for its holder to cause a trustee in a trust deed held as security for the note, to give notice of the sale of the property for nonpayment, although in fact the note has been paid.
Spurlock v. Lombard Invest. Co. 59 Mo. App. 225.

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thereupon entered, and this appeal was prosecuted under the judgment.

The complaint alleges the corporate existence of the plaintiff and defendant, and that it was duly authorized to conduct business in the state of Idaho, and that it was engaged in business in Ada, Canyon, and Washington counties; and alleged that the defendant the Bradstreet Company was engaged in the state of Idaho and in the counties of Ada, Canyon, and Washington, in furnishing for a valuable consideration reports and information concerning the credit and financial standing and rating of business men and corporations engaged in business and commercial transactions, and it is alleged that Leslie L. Long was its managing officer, agent, and representative in the state of Idaho.

Paragraph 5, 7, & 8, and a part of 9, are as follows:

"That, acting as such agent, and in the scope of his employment as such agent for the said defendant the Bradstreet Company, and in behalf of the Bradstreet Company, and in the transaction of the aforesaid business of the said defendant the Bradstreet Company, the said defendant Long, on or about the 23d day of September, 1912, maliciously, wantonly, recklessly, and well knowing the premises, did write, compose, and publish in the aforesaid counties of Ada, Canyon, and Washington, in the state of Idaho, to its patrons, and among the said growers and packers of fruit in said counties, whose names are unknown to plaintiff, concerning and in reference to this plaintiff and the credit, financial, and business standing of this plaintiff, certain words in writing, and plaintiff is informed and believes, and hence, on information and belief, alleges, that the tenor of the said words was as follows, to wit: The Pacific Packing Company has been sued in the superior court of Los Angeles county, California, by the Pacific Fruit Auction Company for the sum of \$230,000 for money advanced, and the plaintiff alleges that the said words were read by the said patrons, and the said growers and packers of fruit. . . .

"Plaintiff further alleges that the defendant Leslie L. Long and the said defendant the Bradstreet Company meant to convey and communicate to the said third parties to whom the words hereinbefore set forth were published, that the plaintiff was not financially sound, solvent, and responsible, and was not able to pay all its financial obligations, and was not worthy of credit; and that the said words were so understood by the said parties to whom they were published. . . .

"Plaintiff alleges that the said words were 51 L.R.A. (N.S.)

false; and plaintiff further alleges that the plaintiff is, and at all times herein mentioned was, financially sound, solvent, and responsible, and that the plaintiff is, and at all times herein mentioned was, able to pay its financial obligations, and the plaintiff, at all times herein mentioned, was worthy of credit.

"That, prior to the publication of the words set forth in paragraph 5, the plaintiff corporation was engaged in the business of marketing fruit in Ada, Canyon, and Washington counties, Idaho, as the agent of such growers and packers of fruit in the said counties as desired to employ the plaintiff; that the fruit packing and marketing season of 1912 was the first season in which the plaintiff company had been engaged in the said business in the aforesaid counties, and, in preparation for the transaction of its business for the said season and the introduction of its business in the new field, consisting of the counties aforesaid, plaintiff had advertised its said business extensively in the said counties, and had sent its agents among the said growers and packers of fruit in said counties, to solicit business and establish the reputation and good will of its said business and, as a result of plaintiff company's said efforts, and prior to the said publication, the plaintiff company had created a valuable asset for itself in the form of good will for itself among the growers and packers of fruit in said counties, and in the form of a good reputation for solvency and financial reliability among said growers and packers."

It is claimed by the appellant that a publication which is made "maliciously, wantonly, and recklessly, and which is false and untrue," stating and charging that an individual or company "has been sued in the superior court of Los Angeles county of California, by the Pacific Fruit Auction Company in the sum of \$230,000 for money advanced," is of itself actionable, and that it is the duty of the court to take judicial knowledge of the fact that such a statement has the direct effect of injuring and damaging the individual or corporation concerning which it is published. The respondent, on the other hand, insists, and the trial court agreed with it, that such a publication is not *per se* libelous, and that no recovery could be had without alleging special damages. Respondent cites many authorities in support of its contention, among which the following are the most important: *Newbold v. J. M. Bradstreet & Son*, 57 Md. 38, 40 Am. Rep. 426; *Fry v. McCord*, 95 Tenn. 678, 33 S. W. 568; *Memphis Teleph. Co. v. Cumberland Teleph. & Teleg. Co.* 76 C. C. A. 436, 145 Fed. 904;

Warner Instrument Co. v. Ingersoll (C. C.) 157 Fed. 311; Kemble & Mills v. Kaighn, 131 App. Div. 63, 115 N. Y. Supp. 809; Bodine v. Times-Journal Pub. Co. 26 Okla. 135, 31 L.R.A.(N.S.) 147, 110 Pac. 1096; N. S. Sherman Mach. Co. v. Dun, 28 Okla. 447, 114 Pac. 617; Bradstreet Co. v. Oswald, 96 Ga. 396, 23 S. E. 423; Victor Safe & Lock Co. v. Deright 77 C. C. A. 437, 147 Fed. 211, 8 Ann. Cas. 809; 25 Cyc. 337.

The general purport of the foregoing authorities is stated by the text of the last citation (25 Cyc. 337), as follows: "Every wilful and unauthorized imputation, spoken, written, or printed, which imputes to a merchant, manufacturer, or other business man, conduct which is injurious to his character and standing as a merchant, manufacturer, or business man, is libelous or slanderous as the case may be. But to be actionable without proof of special damages, the words must contain an imputation such as is necessarily hurtful in its effect upon plaintiff's business, and must touch him in his special trade or occupation. . . . The law carefully guards the credit of merchants, traders, and business men, and oral or written words imputing to them insolvency, bankruptcy, or want of credit are actionable *per se* the rule applying to anyone to whom credit is important in the prosecution of his business. . . . The words, to be actionable *per se*, must in their common and ordinary meaning necessarily impute insolvency or want of credit. Thus, it is not actionable to say of a merchant that he has been sued, that judgment has been recovered against him, that he has sold or mortgaged his property, or that he has refused to pay a certain promissory note."

Appellant opens the argument in his brief on the sufficiency of the allegations of damages by the following statement: "There is no dispute between the parties as to the general rule on this subject in this class of actions, namely, that, where the words are libelous *per se*, no damages need be alleged, but where not libelous *per se*, special damages must be alleged and proven," and in support of this contention cites Dunn v. Maier, 27 C. C. A. 100, 52 U. S. App. 381, 82 Fed. 169, in which it is said: "The question presented for consideration is whether the words used in the publication are libelous *per se*. If they are, the uniform current of authority authorizes the recovery of general damages, and no special damage need be averred. If, however, the words published are not actionable *per se*, it was incumbent on the defendants in error to make the necessary averments of special damage to warrant a recovery." 51 L.R.A.(N.S.)

Appellant bases his argument in favor of the sufficiency of the complaint upon two grounds: First, that the language charged is libelous *per se*, and therefore actionable, without alleging anything other than general damages; and, second, he contends that, if not libelous *per se*, "the complaint does sufficiently allege special damages." In support of appellant's contention, counsel cite the following authorities: 25 Cyc. 336; Odgers, Libel & Slander, p. 66; McKenzie v. Denver Times Pub. Co. 3 Colo. App. 354, 34 Pac. 577; Hayes v. Press Co. 127 Pa. 642, 5 L.R.A. 643, 14 Am. St. Rep. 874, 18 Atl. 331; Smith v. Bradstreet Co. 63 S. C. 525, 41 S. E. 763; Sewall v. Catlin, 3 Wend. 292; Maldonado & Co. v. Yglesias, 154 App. Div. 520, 139 N. Y. Supp. 102; Minter v. Bradstreet Co. 174 Mo. 444, 73 S. W. 665; Evans v. Harries, 1 Hurlst. & N. 251, 26 L. J. Exch. N. S. 31; Ratcliffe v. Evans, 61 L. J. Q. B. N. S. 535, [1892] 2 Q. B. 524, 40 Week. Rep. 578, 66 L. T. N. S. 794, 56 J. P. 837; Weiss v. Whittemore, 28 Mich. 366; Trenton Mut. L. & F. Ins. Co. v. Perrine, 23 N. J. L. 402, 57 Am. Dec. 400.

In McKenzie v. Denver Times Pub. Co. supra, the publication was as follows: "Business changes. McKenzie Lumber Company, Denver, attached." The court, in considering the question as to whether this was actionable *per se*, said: "To say that a judgment has been recovered against a man, without more, suggests no impugnement of his solvency or his integrity; and the plain sense of the words cannot be enlarged by innuendo. In this case, however, the words clearly imply embarrassment in the plaintiffs' partnership business. They will bear no other construction. If they convey the truth, there must have been a suit against the firm; the suit must have been brought upon an alleged firm liability, and the property of the firm must have been taken in attachment. Not only is suspicion cast upon the solvency or integrity of the firm, but its property, which, together with its reputation, is the foundation upon which its credit rests, is said to be in the custody of an officer. . . . The words are clearly actionable, and, for the purpose of maintaining the suit, it was unnecessary to allege or prove special damages." The other authorities above cited support the holding in the Times Pub. Co. Case.

It certainly seems that the publication of a false report that a company with but \$50,000 capital stock has been sued for \$230,000 on account of "money advanced" can have no other effect than that of casting doubt and suspicion on the financial standing and integrity of such company, and would undoubtedly tend to injure its business. It is

clear to us that, under the liberal rule of pleading adopted by our Code, the allegations of the complaint under consideration are sufficient to put the defendant on its defense. The proofs as to the amount and nature of the damages sustained will be quite another thing. The plaintiff will have to make its proofs sufficient to satisfy court and jury.

As for the contention that these reports on the financial standing of business concerns are privileged, we are unable to give to such a doctrine the sanction of the court. We agree that some courts have so held, but we do not believe it to be a sound or just rule, and it would certainly be demoralizing to business and open a ready and safe way for the unscrupulous, the blackmailer, or grafter, to ruin the business standing and credit of an individual or corporation at pleasure and without recourse. The only safe and just rule, either in law or morals, is the one that exacts truthfulness in business as well as elsewhere, and places a penalty upon falsehood, making it dangerous for a mercantile, commercial, or any other agency to sell and traffic falsehood and misrepresentation about the standing and credit of men or corporations. The company that goes into the business of selling news or reports about others should assume the responsibility for its acts, and must be sure that it is peddling the truth. There cannot be two standards of right nor two brands of truth, one for moralizing, and one for business. The law ought to look with a stern, cold eye upon the liar, whether he be incorporated or just an everyday man. If a mercantile agency can safely make false reports about the financial standing and credit of the citizen, and destroy his business, it can then take the next step with equal impunity and destroy his reputation, leaving him shorn and helpless.

As recently as 1908, in the case of *Macintosh v. Dun* [1908] A. C. 390, 2 B. R. C. 203, on appeal from the high court of Australia, the privy council of England, speaking through Lord Macnaghten on the alleged privileged character of mercantile reports on the standings of business and commercial institutions, said: "Is it in the interest of the community, is it for the welfare of society, that the protection which the law throws around communications made in legitimate self-defense, or from a bona fide sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters of other people? The trade is a peculiar one; still there seems to be much competition for it; and in this trade, as in most others, success

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will attend the exertions of those who give the best value for money, and probe most thoroughly the matter placed in their hands. There is no reason to suppose that the defendants generally have acted otherwise than cautiously and discreetly. But information such as that which they offer for sale may be obtained in many ways, not all of them deserving of commendation. It may be extorted from the person whose character is in question, through fear of misrepresentation or misconstruction if he remains silent. It may be gathered from gossip. It may be picked up from discharged servants. It may be betrayed by disloyal employees. It is only right that those who engage in such a business, touching so closely very dangerous ground, should take the consequences if they overstep the law." The doctrine there advanced is wholesome, and ought to apply here.

We think the complaint in this case is sufficient to put the defendant on its defense.

The demurrer should have been overruled, and the defendant should be required to answer on the merits. Costs awarded to appellant.

Sullivan and Stewart, JJ., concur.

Petition for rehearing denied April 10, 1914.

KANSAS SUPREME COURT.

JOHN A. WETHERLA

v.

MISSOURI PACIFIC RAILWAY COMPANY, Impleaded, etc., Appt.

(90 Kan. 702, 136 Pac. 221.)

Carrier — duty of passenger on platform.

A passenger on a railroad train who leaves the train at an intermediate station for a temporary purpose is, in the exercise of ordinary care in crossing the station

Headnote by SMITH, J.

Note. — Duty and liability of carrier to passenger who alights temporarily at intermediate point.

I. Introduction, 900.

II. Alighting at regular stations.

a. Continuation of relationship of carrier and passenger, 900.

b. Duty and liability of carrier.

1. In general, 901.

2. Duty to furnish safe means of egress and ingress, 902.

3. Duty to warn and wait for passenger, 902.

c. Contributory negligence of passenger, 903.

platform, bound to look upon the platform to avoid collision with any object usually or necessarily thereon, which may impede his progress and do him injury; if without any sufficient reason he neglects so to do, and he receives injury by coming in contact with an obstruction, he is guilty of contributory negligence and cannot recover damages from the railroad company for the injury.

(November 8, 1913.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Wyandotte County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

III. Alighting at points other than regular stations.

- a. Continuation of relationship of carrier and passenger, 904.
- b. Duty and liability of carrier.
 1. In general, 904.
 2. Duty to furnish safe means of egress and ingress, 905.
 3. Duty to warn and wait for passenger, 905.
- c. Contributory negligence of passenger, 905.

IV. Alighting at point other than regular station, believing it to be regular intermediate station.

- a. Continuation of relationship of carrier and passenger, 906.
- b. Duty and liability of carrier, 906.
- c. Contributory negligence of passenger, 906.

I. Introduction.

The present note does not include cases where a passenger is waiting at a junction for another train. Nor does it include cases where a passenger leaves the train temporarily to avoid anticipated danger.

And as to the duty and liability of carrier to one who leaves car for purpose of boarding another, see note to Killmeyer v. Wheeling Traction Co. 48 L.R.A.(N.S.) 683.

II. Alighting at regular stations.

a. Continuation of relationship of carrier and passenger.

It has been held that a passenger does not lose his character as such—

—where he alights temporarily at an intermediate station, *Layne v. Chesapeake & O. R. Co.* 66 W. Va. 607, 67 S. E. 1103;

—by alighting temporarily from a street car, *Zeccardi v. Yonkers R. Co.* 190 N. Y. 389, 17 L.R.A.(N.S.) 770, 83 N. E. 31, reversing on other grounds 113 App. Div. 649, 99 N. Y. Supp. 636 (*obiter*);

—by alighting temporarily for the transaction of business, from a steamer which is not expected to leave its landing for two 51 L.R.A.(N.S.)

Messrs. W. P. Waggener and J. X. Baird, for appellant:

Plaintiff's negligence was the proximate cause of the injuries complained of, and the demurrer to the evidence should have been sustained.

State v. Grand Trunk R. Co. 58 Me. 176, 4 Am. Rep. 258; *Walthers v. Chicago & N. W. R. Co.* 72 Ill. App. 354; *De Kay v. Chicago, M. & St. P. R. Co.* 41 Minn. 178, 4 L.R.A. 632, 16 Am. St. Rep. 687, 43 N. W. 182, 4 Am. Neg. Cas. 233; *Hunter v. Cooperstown & S. Valley R. Co.* 126 N. Y. 12, 12 L.R.A. 429, 26 N. E. 958, 5 Am. Neg. Cas. 289, 112 N. Y. 371, 2 L.R.A. 832, 8 Am. St. Rep. 752, 19 N. E. 820, 5 Am. Neg. Cas. 280; *Paulitsch v. New York C. & H. R. R. Co.* 102 N. Y. 280, 6 N. E. 577, 5 Am. Neg. Cas.

hours, Keokuk Northern Line Packet Co. v. True, 88 Ill. 608, 2 Am. Neg. Cas. 617;

—where he alights temporarily at an intermediate station from motives of business or curiosity, *Parsons v. New York C. & H. R. R. Co.* 113 N. Y. 355, 3 L.R.A. 683, 10 Am. St. Rep. 450, 21 N. E. 145, affirming 48 Hun, 615;

—where he alights temporarily to exercise upon the station platform, *Gannon v. Chicago, R. I. & P. R. Co.* 141 Iowa, 37, 23 L.R.A.(N.S.) 1061, 117 N. W. 966;

—where the conductor cannot change a bill offered in payment of fare to an intermediate station beyond which the passenger expects to ride on a pass, and the latter leaves the train temporarily at the intermediate station to procure the change, although his pass is void, if he is ignorant of that fact, and is willing to pay his fare to his destination when his attention is called to it, *St. Louis, B. & M. R. Co. v. Fielder*.

—*Tex. Civ. App.* —, 163 S. W. 806, on former appeal not involving this point, 51 *Tex. Civ. App.* 244, 112 S. W. 699;

—where he alights from a mixed train at an intermediate station to engage in conversation while the train is switching cars, *Arkansas C. R. Co. v. Bennett*, 82 Ark. 393, 102 S. W. 198;

—where, for the purpose of conversation, he leaves the train temporarily while it is waiting upon a switch close to the station platform, *Texas Midland R. Co. v. Ellison*, 39 *Tex. Civ. App.* 172, 87 S. W. 213 (the court assigns the following reason for its decision: "Now, while the train upon which appellee was a passenger went upon a switch track, and at the time he alighted therefrom had not reached the precise point at which passengers were regularly received and discharged at the station, yet we think the place where he did alight was so near such point that the same must be regarded as at said station, and that the rule applicable to passengers alighting at intermediate stations proper must control." See *infra* III. a.; *Chicago, R. I. & P. R. Co. v. Sattler*, 64 Neb. 636, 57 L.R.A. 890, 97 Am. St. Rep. 666, 90 N. W. 649; *De Kay v. Chicago, M. & St. P. R. Co.* 41 Minn. 178, 4 L.R.A. 632,

256; *Denver, S. P. & P. R. Co. v. Pickard*, 8 Colo. 163, 6 Pac. 149, 2 Am. Neg. Cas. 216; *Ricks v. Georgia Southern & F. R. Co.* 118 Ga. 259, 45 S. E. 268; *Spannagle v. Chicago & A. R. Co.* 31 Ill. App. 460; *Knight v. Pontchartrain R. Co.* 23 La. Ann. 462, 3 Am. Neg. Cas. 510; *Harvey v. Eastern R. Co.* 116 Mass. 269, 3 Am. Neg. Cas. 790; *Bacon v. Delaware, L. & W. R. Co.* 143 Pa. 14, 21 Atl. 1002, 6 Am. Neg. Cas. 338; *Galveston, H. & S. A. R. Co. v. Gierse*, 51 Tex. 189, 6 Am. Neg. Cas. 476; *Chaffee v. Old Colony R. Co.* 17 R. I. 658, 24 Atl. 141, 6 Am. Neg. Cas. 411; *Warren v. Southern Kansas R. Co.* 37 Kan. 468, 15 Pac. 601, 3 Am. Neg. Cas. 442; *Hays v. Wabash R. Co.* 51 Mo. App. 438, 4 Am. Neg. Cas. 436; *Lauterer v. Manhattan R. Co.* 63 C. C. A.

38, 128 Fed. 540; *Murphy v. St. Louis, I. M. & S. R. Co.* 43 Mo. App. 342, 4 Am. Neg. Cas. 383; *Raben v. Central Iowa R. Co.* 73 Iowa, 579, 5 Am. St. Rep. 708, 35 N. W. 645, 3 Am. Neg. Cas. 379.

Mr. J. M. Challiss also for appellant.

Messrs. Angevine, Cubbison, & Holt for appellee.

Smith, J., delivered the opinion of the court:

In this case forty-six special questions were prepared to be submitted to the jury; to thirty-one of the questions, the counsel for the parties, by agreement, appended answers, and fifteen questions were submitted to be answered by the jury, the foreman affixing his signature to each question so

16 Am. St. Rep. 687, 43 N. W. 182, 4 Am. Neg. Cas. 233; *Galveston, H. & S. A. R. Co. v. Cooper*, 2 Tex. Civ. App. 42, 20 S. W. 990, 6 Am. Neg. Cas. 624;

—where he leaves the train temporarily to go to an eating station provided by the railroad for the accommodation of its passengers, *Atchison, T. & S. F. R. Co. v. Shean*, 18 Colo. 368, 20 L.R.A. 729, 33 Pac. 108;

—where he leaves the train temporarily to get refreshment at an intermediate station where it is customary for passengers to get lunch, *Texas & P. R. Co. v. Gray*, — Tex. Civ. App. —, 71 S. W. 316;

—where he leaves his steamer at an intermediate port to go on shore to get his breakfast, *Dodge v. Boston & B. S. S. Co.* 148 Mass. 207, 2 L.R.A. 83, 12 Am. St. Rep. 541, 19 N. E. 373, 3 Am. Neg. Cas. 843;

—where, after leaving the train temporarily to purchase a cigar at a point where passengers are invited by the railroad to leave the train for refreshments, he returns from the restaurant and stands on the platform beside the train, *Jeffersonville, M. & I. R. Co. v. Riley*, 39 Ind. 568.

And it is said in *St. Louis & S. F. R. Co. v. Coulson*, 8 Kan. App. 4, 54 Pac. 2, 4 Am. Neg. Rep. 629, that it cannot be held as a matter of law that, where a train stops at a station for dinner, one who, after returning to the coach from dinner, goes out upon the station platform, loses his status of passenger.

"A through passenger who has left the train at an intermediate station has a right to re-enter the train, and, when attempting to do so at a proper time and place and in a proper manner, he must be regarded as a passenger and entitled to protection as such. His motive in leaving the train is immaterial." *St. Louis Southwestern R. Co. v. Humphreys*, 25 Tex. Civ. App. 401, 62 S. W. 791. It is further said that it cannot be held as a matter of law that an untraveled woman is not justified in attempting to board her train, which she has left temporarily at an eating station to buy a stamp, and upon which she has left her ticket and trunk, where she sees it moving 51 L.R.A. (N.S.)

off and is ignorant of the fact that it is not leaving the station.

If a passenger, without objection by the railroad company, alights from a mixed train about 1,500 feet from the station, at a point where passengers are customarily discharged from such trains, and proceeds to the station house to inquire for a telegram, he is still a passenger; but if he has no business at the station, and alights merely to loaf in the yards, he is not a passenger. *Alabama G. S. R. Co. v. Coggins*, 32 C. C. A. 1, 60 U. S. App. 140, 88 Fed. 455, 5 Am. Neg. Rep. 534.

b. Duty and liability of carrier.

1. In general.

Where a through passenger who has left the train temporarily at an intermediate station attempts, at a proper time and place, to re-enter the train, the railroad owes her such care as very prudent and competent persons would use under the circumstances; and, in an action by such passenger for personal injury, an instruction to find for her if the jerk which shook her from the train as she was boarding it constituted negligence was proper. *St. Louis Southwestern R. Co. v. Humphreys*, supra.

The duty to use the utmost care and diligence is imposed upon a railroad with respect to a passenger who, having temporarily left his train, is making his way across intervening tracks to an eating station provided by the railroad for its passengers. *Atchison, T. & S. F. R. Co. v. Shean*, 18 Colo. 368, 20 L.R.A. 729, 33 Pac. 108.

So, the utmost care and diligence are due from a steamship company to a passenger who leaves the steamer temporarily at an intermediate port for the purpose of getting his breakfast. *Dodge v. Boston & B. S. S. Co.* 148 Mass. 207, 2 L.R.A. 83, 12 Am. St. Rep. 541, 19 N. E. 373, 3 Am. Neg. Cas. 843.

And it is held in *Keokuk Northern Line Packet Co. v. True*, 88 Ill. 608, 2 Am. Neg. Cas. 617, that a packet company is required to use the "utmost practicable care"

answered. This, although novel, is regarded as good practice, as it relieves the jury from forming answers to questions of fact not really in dispute.

The undisputed and agreed facts are that appellee became a passenger upon appellant's passenger train at Kansas City, Kansas, about 4:30 P. M., November 9, 1909, with a ticket entitling him to ride to Horaniff, a station in Wyandotte county. The train arrived at the intermediate station of Bethel at from 5 to 5:08 P. M., at which place appellee desired to inquire of the station agent about a shipment of potatoes. He spoke to the conductor about this, and the conductor said, "All right." The train stopped at Bethel from thirty seconds to one minute. There was a station platform

at Bethel, extending from the railroad track to the station building, about 18 feet wide and about 150 feet long. A mail sack was unloaded from the mail car of the train about 6 feet east of the west end of this platform, and lay thereon 3 or 4 feet from the train. The train was running in a westerly direction. When appellee stepped off the train he walked toward the agent, who was standing on the platform 10 or 12 feet from the train, asked the agent if the shipment of potatoes was there, and was told there was nothing there for him. In attempting to again board the train appellee stumbled and fell towards the train and on the rail, and his thumb and parts of two fingers were cut, and had to be amputated. The appellee was sixty-four years old, 6

for the safety of a passenger who temporarily leaves its steamer at an intermediate point for the transaction of business.

Regardless of its diligence and good faith, a railroad is liable for the failure to perform its contractual duty of immunity from intentional injury at the hands of its employees, to a passenger who is shot by a railroad employee while on the platform at an intermediate station at which he has alighted with the intention of returning to the train to continue his journey. *Layne v. Chesapeake & O. R. Co.* 66 W. Va. 607, 67 S. E. 1103.

A street railway owes no duty, however, to a passenger who leaves the car temporarily to stop a fight between the conductor and another passenger. *Zeccardi v. Yonkers R. Co.* 190 N. Y. 389, 17 L.R.A. (N.S.) 770, 83 N. E. 31, reversing 113 App. Div. 649, 99 N. Y. Supp. 636.

2. Duty to furnish safe means of egress and ingress.

A passenger on a boat has a right to go ashore on business at an intermediate point, and the transportation company is obliged to provide him a safe means of egress from the boat. *Dice v. Willamette Transp. & Locks Co.* 8 Or. 60, 34 Am. Rep. 575, 6 Am. Neg. Cas. 202.

And a railroad is liable for breach of its duty to furnish its passengers an easy and safe mode of going to and from its trains at eating stations, where an injury results from its failure to light the platforms and to inform passengers who are returning from the dining room of a change in the location of their train. *Peniston v. Chicago, St. L. & N. O. R. Co.* 34 La. Ann. 777, 44 Am. Rep. 444, 3 Am. Neg. Cas. 517.

But where a steamship company has provided a safe and convenient place for landing passengers, it is not bound to provide for the safety of a passenger who attempts to land at another place in disobedience of the regulations of the company. *Dodge v. Boston & B. S. S. Co.* 148 Mass. 207, 2 L.R.A. 83, 12 Am. St. Rep. 541, 19 N. E. 373, 3 Am. Neg. Cas. 843. 61 L.R.A. (N.S.)

Watson v. Oxanna Land Co. 92 Ala. 320, 8 So. 770, was an action by a passenger who was injured by stepping into a hole in a bridge as he was returning to the train, which he had temporarily left to go to a hotel used as an eating house for passengers. The railroad was held liable, no question being raised, however, concerning the passenger's right to leave his train.

In *Clusman v. Long Island R. Co.* 9 Hun, 618, affirmed without opinion in 73 N. Y. 606, the railroad was held liable for injuries to a passenger who alighted from his train temporarily, and was injured while on the station platform on his way to the railroad office to send a telegram. Inasmuch as the status of the passenger is not discussed, it seems that the liability of the railroad is based upon the general duty owed to anyone coming upon the premises to send a message.

3. Duty to warn and wait for passenger.

It is the duty of a railroad to give a reasonable time to board a train after giving the signal to start, and to use the utmost care in operating the train on behalf of a passenger who has left it temporarily at an intermediate station to procure the lunch which is customarily furnished passengers at that place. *Texas & P. R. Co. v. Gray*, — Tex. Civ. App. —, 71 S. W. 316.

And where a train is started too soon after the conductor's call to get aboard to permit a passenger who has alighted for exercise to get on before it starts, the railroad is guilty of negligence. *Texas & P. R. Co. v. Mayfield*, 23 Tex. Civ. App. 415, 56 S. W. 942.

Where a railroad knows that a passenger has temporarily alighted upon the station platform with the intent of resuming his journey, it is negligent and liable for the natural consequences of its act in starting the train without giving him reasonable warning and opportunity for getting on. *Gannon v. Chicago, R. I. & P. R. Co.* 141 Iowa, 37, 23 L.R.A. (N.S.) 1061, 117 N. W. 966.

Thus, where one who boards a train with-

feet and 2 inches tall, weighed 225 pounds, and was receiving a salary of \$65 per month. The jury returned a general verdict in favor of appellee, and assessed his damages at \$2,500. Judgment was rendered for that amount and costs.

The jury, in answer to special questions, found that appellee alighted from the train immediately after it stopped; that darkness was approaching at the time; that appellee was from 8 to 10 feet from the train when it started to go on, and that he moved rapidly towards it for the purpose of again boarding it; that there was nothing to prevent him from seeing the mail sack if he had looked for it; that the train had moved 30 feet from where it had stopped, and was moving 4 miles per hour when appellee at-

tempted to board it; that appellee attempted to board the train at the front end of the rear passenger car; that appellee had hold of the hand rail of the car when he fell, but stumbling caused him to get an insecure hold; that appellee stumbled over the mail sack when he started for the train; that the conductor knew appellee was attempting to board the train when he fell, and knew this when he heard footsteps behind him; that when appellee was talking to the station agent, the agent was standing east of the mail sack; that appellee took hold of the hand rails of the car in attempting to board the train immediately south of the west end of the depot.

Two questions were involved in the case: First, was the railroad company guilty of

out a ticket is directed by the conductor to pay his fare to the next station, and to get off there and purchase a ticket for the remainder of his journey, and is told that he will have time to get back on the train, the company is negligent in not holding the train long enough for him to purchase his ticket and get back on. *St. Louis Southwestern R. Co. v. Germany*, — *Tex. Civ. App.* —, 56 S. W. 586.

It is the duty of a railroad to exercise reasonable care in holding a train a reasonable time for a passenger who has left it at an eating station; and an instruction that there is no obligation to hold the train for the passenger to purchase cigars is improper because it does not take into account the duty of the company to hold the train a reasonable time after passengers are warned to get aboard. *Choctaw, O. & G. R. Co. v. Hickey*, 81 Ark. 579, 99 S. W. 839.

But, although a railroad permits passengers to alight at an intermediate station for the purpose of refreshment, it is not thereby put under the obligation of warning them and giving them time to return to the train regardless of their distance therefrom. *Larson v. Chicago, M. & P. S. R. Co.* 31 S. D. 512, 141 N. W. 353.

And an inquiry on the part of a passenger as to the length of time the train stops at an intermediate station is not notice to the conductor that he intends to alight temporarily at such station, and no obligation is imposed upon the railroad to hold the train for the length of time stated in the answer to the inquiry. *Missouri P. R. Co. v. Foreman*, 73 Tex. 311, 15 Am. St. Rep. 785, 11 S. W. 326, 6 Am. Neg. Cas. 580.

In *Texas Trunk R. Co. v. Mullins*, — *Tex. App.* —, 18 S. W. 790, an action by a passenger who was left at an eating station by reason of his train leaving sooner than was announced, the court, without stating all the evidence, held that it was not sufficient to support a verdict for the plaintiff.

c. Contributory negligence of passenger.

It cannot be held as a matter of law 51 L.R.A.(N.S.)

that, where a train stops at a station for dinner, one who, after returning to the coach after dinner, goes out upon the station platform, is negligent in so doing. *St. Louis & S. F. R. Co. v. Coulson*, 8 Kan. App. 4, 54 Pac. 2, 4 Am. Neg. Rep. 629.

Neither is a passenger negligent in leaving his train temporarily to purchase a cigar at a point where passengers are invited to leave the train for refreshments; nor is he negligent in standing on the platform near his train upon his return. *Jeffersonville, M. & I. R. Co. v. Riley*, 39 Ind. 568.

One who leaves his train temporarily, and is crossing intervening tracks on his way to an eating house provided for passengers, may rely upon the railroad to perform its duty, and is not negligent in failing to look and listen. *Atchison, T. & S. F. R. Co. v. Shean*, 18 Colo. 368, 20 L.R.A. 729, 33 Pac. 108.

A passenger taking exercise upon the platform at an intermediate station is not conclusively negligent in attempting to mount the steps of the train after it has started, where he does so with the assistance and approval of a railroad employee. *Gannon v. Chicago, R. I. & P. R. Co.* 141 Iowa, 37, 23 L.R.A.(N.S.) 1061, 117 N. W. 966.

But a passenger who leaves his train at a switch near a station to converse with a friend is guilty of contributory negligence in trying to board the train after it is in motion, where the danger in such act is known to him; and he cannot excuse himself by showing the brakeman's invitation to get on, where it is extended before the train starts. *Texas Midland R. Co. v. Ellison*, 39 Tex. Civ. App. 172, 87 S. W. 213.

In *Krieg v. Lehigh Valley R. Co.* 4 Walk. (Pa.) 268, the court sustains the charge of the lower court that one who alights from his train at an intermediate station for refreshments, and afterward, while in search of a water-closet, walks around the guard rail at the end of the station platform, is guilty of negligence.

And see *WETHERLA v. MISSOURI P. R. CO.* in this connection.

negligence which caused or contributed to the injury to the appellee? Second, was the appellee guilty of contributory negligence? The general verdict in favor of appellee is, in effect, a decision in his favor upon both of these questions, if such verdict is supported by competent evidence. Each is a question of fact for the jury, and compels an affirmance of the judgment if, as aforesaid, the evidence is sufficient, and unless the jury has made a special finding of fact inconsistent with the general verdict, which special finding is supported by competent evidence.

Numerous objections are made to the instructions given by the court, and especially to instructions Nos. 7 and 15. Instruction No. 7, although requiring a high

degree of diligence, is practically in accord with the decisions of this and many other courts as to the duty of the railroad company in safeguarding its passengers, and the rule should not be relaxed as to passengers while on trains.

Instruction No. 7 reads: "The jury are instructed, as a matter of law, that it is the duty of a railroad company to use the highest degree of care and caution consistent with the practical operation of the road, to provide for the safety and security of the passenger while being transported, and by the 'highest degree of care,' as used in this instruction, is meant that the railroad company, as a common carrier of passengers, is required to do all that human care, vigilance, and foresight can reasonably do,

III. Alighting at points other than regular stations.

a. Continuation of relationship of carrier and passenger.

A passenger upon the platform of a crowded street car does not cease to be such by momentarily stepping to the ground to enable other passengers to leave the car. *Tompkins v. Boston Elev. R. Co.* 201 Mass. 114, 20 L.R.A.(N.S.) 1063, 131 Am. St. Rep. 392, 87 N. E. 488.

Where a shipper of live stock who is a passenger in the caboose of the train carrying the stock leaves the train temporarily, at the conductor's request, to go forward to assist in saving his stock, which has been placed in a hazardous position by a wreck, he does not thereby lose his rights as passenger. *Austin v. St. Louis & S. F. R. Co.* 149 Mo. App. 397, 130 S. W. 385.

So, where a train stopped to permit another train to pass at a place which was not a regular station, but which was designated as "Rockway Junction" on the signboard, one who, becoming sick, and being unable to procure water on the train, alighted temporarily to get a drink, could not be held as a matter of law to have abandoned his status of passenger. *Wandell v. Corbin*, 49 Hun, 608, 1 N. Y. Supp. 795.

It is held in *Galveston, H. & S. A. R. Co. v. Cooper*, 2 Tex. Civ. App. 42, 20 S. W. 990, 6 Am. Neg. Cas. 624, that one who alights temporarily at a flag station where the train has stopped to take water does not come within the rule "holding that, when the train stops elsewhere than at a station, as at a water tank or upon a side track, when the stop is made for the purposes of the railroad alone, and the passenger leaves the cars, he acts at his peril, and that his own negligence will prevent recovery" for injuries sustained while in such position.

And one who temporarily leaves a train upon a switch at a station does not lose his character as passenger. *Chicago, R. I. & P. R. Co. v. Sattler*, 64 Neb. 639, 57 L.R.A. 890, 97 Am. St. Rep. 666, 90 N. W. 649. 51 L.R.A.(N.S.)

However, it is held in *De Kay v. Chicago, M. & St. P. R. Co.* 41 Minn. 178, 4 L.R.A. 632, 16 Am. St. Rep. 687, 43 N. W. 182, 4 Am. Neg. Cas. 233, that one who leaves his train temporarily at an intermediate station and remains there until the train has moved onto a siding at the station does no illegal act, but he surrenders his status as a passenger with the right of resuming it by returning to his place on the train.

See, in connection with the cases immediately preceding, *Texas Midland R. Co. v. Ellison*, 39 Tex. Civ. App. 172, 87 S. W. 213, supra, II. a.

One who leaves his train temporarily while it is standing upon a side track does no illegal act, but he surrenders his status as passenger with the right of resuming it by returning to his place in the train. *State v. Grank Trunk R. Co.* 58 Me. 176, 4 Am. Rep. 258.

"As to a through train, carrying only through passengers, the passenger who leaves the train without the knowledge, consent, or invitation of the company, at an intermediate station at which the train stops only for some purpose in connection with its management and operation, as for the purpose of taking water or coal, and not to receive or discharge passengers, must be deemed to have abandoned his relation as a passenger, and to take upon himself for the time being all risks incident to his movements." *Lemery v. Great Northern R. Co.* 83 Minn. 47, 85 N. W. 908.

One who alights from a street car just before it reaches the stables loses his status as passenger in spite of his intention of returning and resuming his place in the car before the horses have been changed, where the conductor is not apprised that his leaving is temporary. *Central R. Co. v. Peacock*, 69 Md. 257, 9 Am. St. Rep. 425, 14 Atl. 709.

b. Duty and liability of carrier.

1. In general.

Where a conductor invites a passenger to leave his train temporarily to assist with a

in view of the character and mode of conveyance adopted, to prevent accidents to passengers; and this rule of law is applicable to all cases where the relation of passenger and carrier exists."

A passenger on a moving train is in the custody of the railroad company and its employees. He is helpless to avert any of the many dangers to which he is exposed. His utmost effort in safeguarding himself is to refrain from any act that increases his peril. On a platform, however, he has full control of his own movements; he is generally free to observe his surroundings, and may generally avoid coming in collision with any object which may cause him injury. We think instruction No. 15 correctly instructed the jury that at the time

of the accident appellee was a passenger, and entitled to the care of a passenger.

It is claimed in the petition that it was dark at the depot platform at the time of the accident, yet the evidence indicates, and the jury found in its special findings Nos. 25 and 28, as follows:

"Q. 25. Was it light at the time plaintiff was injured? A. Approaching darkness."

"Q. 28. What was there to have prevented him from seeing said mail sack if he had looked? A. Nothing if he had looked for it."

It was the duty of the appellee to exercise reasonable care for his own protection, as well as it was the duty of the railroad company to protect him from injury. From

wreck, the railroad owes the latter the duty to exercise such a high degree of foresight and prudence as would be used by very cautious, prudent, and competent persons under similar circumstances; and evidence that such a passenger alighted upon a high, narrow embankment covered with ice, without warning from the conductor, is sufficient to warrant a finding of negligence. *Austin v. St. Louis & S. F. R. Co.* 149 Mo. App. 397, 130 S. W. 385.

And where the conductor consents to the passenger alighting from the train while it is standing upon a side track, the carrier is bound to observe the highest degree of care possible to see that the passenger is not in the act of boarding the car, before starting the train. *Birmingham R. Light & P. Co. v. Jung*, 161 Ala. 461, 49 So. 434, 18 Ann. Cas. 557.

And the railroad is liable for injuries inflicted upon one who gives up his rights as passenger by leaving the train temporarily at a switch, if the injuries are the result of negligence on the part of the railroad. *State v. Grand Trunk R. Co.* 58 Me. 176, 4 Am. Rep. 258.

In *Pitcher v. Lake Shore & M. S. R. Co.* 55 Hun, 604, 8 N. Y. Supp. 389, an action for injuries caused by the sudden starting of a train which plaintiff was trying to board, where it appeared that he had returned in twenty-five minutes to the train upon which he was a passenger, accompanying stock, and which he had left at the invitation of the conductor, who said he would have forty-five minutes for supper, and where there was evidence that the engineer saw him apparently coming to his car for the purpose of getting board, a nonsuit was reversed on the ground that the negligence of the railroad should be considered by the jury.

2. Duty to furnish safe means of egress and ingress.

Where a train is stopped at night for the purpose of permitting another train to pass by, the railroad does not owe the duty of safe egress and ingress to one who 51 L.R.A.(N.S.)

leaves the car and walks into an open cattle guard. *Frost v. Grand Trunk R. Co.* 10 Allen, 387, 87 Am. Dec. 668, 3 Am. Neg. Cas. 759.

And, as to passengers who alight temporarily from a through train which stops at an intermediate station only for some purpose connected with its operation, it is not negligence for the railroad to fail to exercise vigilance as to the proper construction and lighting of the station platform. *Lemery v. Great Northern R. Co.* 83 Minn. 47, 85 N. W. 908.

So, it is held, in *De Kay v. Chicago, M. & St. P. R. Co.* 41 Minn. 178, 4 L.R.A. 632, 16 Am. St. Rep. 687, 43 N. W. 182, 4 Am. Neg. Cas. 233, that, while a railroad is bound to use reasonable diligence to avoid exposing to any unnecessary dangers those temporarily leaving a train standing upon a side track at a station, it is not bound to make the side track as safe a place of egress and ingress as a station platform.

3. Duty to warn and wait for passenger.

Where a passenger, without objection from the conductor, who knows thereof, alights at a point between stations to go ahead to view a wreck which is obstructing the track, the action of the conductor in starting the train without giving him timely warning is such negligence as will sustain a recovery. *Gulf, C. & S. F. R. Co. v. Roundtree*, — Tex. Civ. App. —, 25 S. W. 989.

4. Contributory negligence of passenger.

A passenger who temporarily leaves his train standing upon a side track at a station is guilty of contributory negligence where, in crossing an intervening track to return to the train, he fails to exercise reasonable care to avoid injury from passing trains. *De Kay v. Chicago, M. & St. P. R. Co.* 41 Minn. 178, 4 L.R.A. 32, 16 Am. St. Rep. 687, 43 N. W. 182, 4 Am. Neg. Cas. 233.

One voluntarily becoming a passenger on

the two findings of the jury it is evident that if he had looked where he was going, he would have seen the mail sack, and it is a fair presumption that if he had seen the mail sack, he would not have stumbled over it. He did stumble over it, and it follows as a reasonable presumption that he did not look, did not see it, and did not

exercise reasonable care to avoid injury to himself. On the cross-examination of the appellee as a witness, numerous questions were asked as to whether he looked on the platform in going to take the train, to each of which he gave an evasive answer, evidently to avoid saying whether he did or did not see the mail sack. Finally the

a street car so crowded that he is compelled to ride in the vestibule, with knowledge of a rule that persons riding upon platforms do so at their own risk, assumes the risk of injury by having the car negligently started before he resumes a safe position after being compelled temporarily to alight to enable other persons to leave the car. *Tompkins v. Boston Elev. R. Co.* 201 Mass. 114, 20 L.R.A. (N.S.) 1063, 131 Am. St. Rep. 392, 87 N. E. 488.

And a passenger who alights temporarily from a train upon a switch at a station must assume all ordinary risks incident to his action, inasmuch as such a place is not intended for the discharge of passengers. *Chicago, R. I. & P. R. Co. v. Sattler*, 64 Neb. 636, 57 L.R.A. 890, 97 Am. St. Rep. 666, 90 N. W. 649.

IV. Alighting at point other than regular station, believing it to be regular intermediate station.

a. Continuation of relationship of carrier and passenger.

Where a passenger alights at an intermediate point other than a regular station, as the result of a mistake induced by the action of railroad employees, it seems that, since he intends no act which will cause his rights as passenger to cease, he must be still considered as a passenger, irrespective of the fact that he alights at a place where he might not otherwise retain his rights as such.

In an action for damages by one who stepped from a train standing upon a trestle, in reliance upon the action of the porter in calling the name of an intermediate station just before the train stopped, it is said: "A passenger is not required to remain upon a train from the starting point to the point of destination, and permitted to alight at an intermediate station only for some purpose connected with his journey. Getting off at intermediate stations from motives of either business or curiosity has been held not to deprive one of his character as a passenger, or of his right to precautions for his safety as such. . . . We conceive the correct rule to be that he remains a passenger on getting off at intermediate stations so long as his object in doing so is not inconsistent with the character of passenger." *Missouri, K. & T. R. Co. v. Overfield*, 19 Tex. Civ. App. 440, 47 S. W. 684, 5 Am. Neg. Rep. 102.

Thus, it is held in *St. Louis, I. M. & S. R. Co. v. Glossup*, 88 Ark. 226, 114 S. W. 247, that where an intermediate station is 51 L.R.A. (N.S.)

called and the train stops upon a trestle, one who steps off intending to go forward to the next coach to get a seat is still a passenger.

And a passenger who alights from his train at a water tank, upon the conductor's representation that it is a certain station and that he will have time for lunch, does not lose his character as passenger. *Missouri, K. & T. R. Co. v. Price*, 48 Tex. Civ. App. 210, 106 S. W. 700.

b. Duty and liability of carrier.

Where a conductor represents that a water tank is a certain station, and tells a passenger that he will have time to get lunch, it is his duty, in the exercise of care for the passenger's safety, to delay the train for the passenger's return in accordance with his representation. *Missouri, K. & T. R. Co. v. Price*, 48 Tex. Civ. App. 210, 106 S. W. 700.

And it is held in *Watters v. Philadelphia, B. & W. R. Co.* 239 Pa. 492, 86 Atl. 1021, that where a passenger falls through a trestle at a water tank in attempting to alight from his train, temporarily at a stop, following the announcement of an intermediate station by a trainman, he is entitled to recover for a breach of the protection due him as a passenger.

And in *Foley v. Detroit & M. R. Co.* — Mich. —, 146 N. W. 186, where a passenger who had left his train at an intermediate station under the false impression that it was his destination attempted to board it again, it was held that the railroad company owed him the same duty which it owed to any passenger who left the train temporarily at an intermediate station.

c. Contributory negligence of passenger.

A passenger who leaves his train at an intermediate station, believing it to be his destination, is under the obligation of using the same care for his own safety in boarding the train as any other passenger who leaves his train temporarily at an intermediate station. *Foley v. Detroit & M. R. Co.* — Mich. —, 146 N. W. 186.

It cannot be said as a matter of law that a passenger who alights and goes in search of food at a water tank upon the representation of the conductor that it is a certain station, and that he will have time to do so, is negligent in attempting to board his train as it moves off without warning and without waiting the length of time represented. *Missouri, K. & T. R. Co. v. Price*, supra.

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question was asked him, "You weren't paying any attention to anything that was on the ground?" (Evidently meaning the platform, as he was being interrogated about going on the platform.) He answered, "I did not look to see what was there."

The answer to special question No. 28, by the jury, indicates that appellee did not look, and did not see the mail sack on the platform. If he did not, he was guilty of contributory negligence. It was his duty to take all reasonable precautions to avoid any obstructions that might be upon the platform. It is a matter of common knowledge that baggage trucks, mail sacks, and sometimes other obstacles are necessarily for a time upon depot platforms, and it is the duty of the passenger having to pass thereupon to use his senses, especially his sense of sight, to prevent contact therewith, and to save himself from injury. The special finding of the jury, in effect, finds the appellee guilty of contributory negligence, and such special finding controls the general verdict, which should have been in favor of the appellant.

The judgment is reversed, and the case remanded, with instructions to render judgment for the defendant.

Burch, Mason, Porter, Benson, and West, JJ., concur.

Johnston, Ch. J.:

I concur in the judgment on the ground that no negligence of the railroad company was shown.

Petition for rehearing denied.

KENTUCKY COURT OF APPEALS.

W. H. BOONE et al., Appts.,

v.
J. F. COE.

(153 Ky. 233, 154 S. W. 900.)

Conflict of laws — statute of frauds — contract to be performed in other states.

1. An action brought on a local parol

Note. — Conflict of laws as to statute of frauds.

This note is supplementary to notes on the same subject appended to *Wolf v. Burke*, 19 L.R.A. 792, and *Third Nat. Bank v. Steel*, 64 L.R.A. 119.

These notes, being confined to conflict of laws as regards matters covered by the statute of frauds, do not cover cases like *Musser v. Stauffer*, 192 Pa. 398, 43 Atl. 51 L.R.A. (N.S.)

contract to let land lying in another state is governed by the local statute of frauds. **Landlord and tenant — invalid lease — expense incurred in attempt to take possession — liability.**

2. No recovery can be had for time lost and expenses incurred in an attempt to take possession of a leasehold under a contract void under the statute of frauds, which the property owner refused to carry out.

(March 28, 1913.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Monroe County sustaining a demurrer to and dismissing the petition in an action brought to recover damages alleged to have resulted from defendant's breach of a parol contract of a lease of land for one year. **Affirmed.**

The facts are stated in the Commissioner's opinion.

Messrs. Allen Sandidge, Sherman Spear, and Porter & Sandidge for appellants.

Messrs. Baird & Richardson for appellee.

Clay, C., filed the following opinion:

Plaintiffs, W. H. Boone and J. T. Coe, brought this action against defendant, J. F. Coe, to recover certain damages, alleged to have resulted from defendant's breach of a parol contract of lease for one year to commence at a future date. It appears from the petition that the defendant was the owner of a large and valuable farm in Ford county, Texas. Plaintiffs were farmers, and were living with their families in Monroe county, Kentucky. In the fall of 1909 defendant made a verbal contract with plaintiffs, whereby he rented to them his farm in Texas for a period of twelve months, to commence from the date of plaintiffs' arrival at defendant's farm. Defendant agreed that if plaintiffs would leave their said homes and businesses in Kentucky, and with their families, horses, and wagons, move to defendant's farm in Texas, and take charge of, manage, and cultivate same in wheat, corn, and cotton for the twelve months next following plaintiffs' arrival at said farm, the defendant would have a dwelling completed

1018, and *Hinkly v. Freick*, — N. J. —, — L.R.A. (N.S.) —, 90 Atl. 1108, involving the question as to the governing law relating to the admissibility of parol evidence of a contemporaneous transaction as affecting a written contract.

The difficulty not infrequently encountered in determining the value of precedents on questions in relation to conflict of laws, arising from the coincidence of the situs of different elements of the contract, is espe-

on said farm and ready for occupancy upon their arrival which dwelling plaintiffs would occupy as a residence during the period of said tenancy. Defendant also agreed that he would furnish necessary material at a convenient place on said farm out of which to erect a good and commodious stock and grain barn, to be used by plaintiffs. The petition further alleges that plaintiffs were to cultivate certain portions of the farm, and were to receive certain portions of the crops raised, and that plaintiffs, in conformity with their said agreement, did move from Kentucky to the farm in Texas, and carried with them their families, wagons, horses, and camping outfit, and in going to Texas they traveled for a period of fifty-five days. It

is also charged that defendant broke his contract in that he failed to have ready and completed on the farm a dwelling house in which plaintiffs and their families could move, and also failed to furnish the necessary material for the erection of a suitable barn; that on December 6th defendant refused to permit plaintiffs to occupy the house and premises, and failed and refused to permit them to cultivate the land or any part thereof; that on the ——— day of December, 1909, they started for their home in Kentucky, and arrived there after traveling for a period of four days. It is charged that plaintiffs spent in going to Texas, in cash, the sum of \$150; that the loss of time to plaintiffs and their teams in making the trip to Tex-

cially troublesome as regards the particular question now under consideration. For example, a contract, though made in another state, may relate to real property situated in the state in which the action is brought, and if the law of the latter state is applied, it is not always clear whether the decision was upon the ground that the *lex fori*, as such, or the *lex rei sitæ*, as such, governs. Even if the court employs the phrase *lex fori* or the phrase *lex rei sitæ* to describe the governing law, the coincidence nevertheless somewhat impairs the value of the decision as a precedent for the purposes of another case involving an action in one state on a contract in relation to land in another.

As between law of forum and substantive law.

It will be observed that, though the land to which the contract involved in *Boone v. Coe* related was in Texas, the court applied the Kentucky statute of frauds, providing that "no action shall be brought" on a parol contract for the sale or leasing of real estate, upon the ground that the statute relates to the remedy or mode of procedure. From the citation of *Kleeman v. Collins*, 9 Bush, 460, in support of its decision, it is to be inferred that the court recognizes the distinction originally made in *Leroux v. Brown*, 12 C. B. 801, 22 L. J. C. P. N. S. 1, 16 Jur. 1021, 1 Week. Rep. 22, discussed in the earlier notes, based upon the difference in phraseology between the 4th and 17th sections of the original statute of frauds, and the statutes modeled thereon, in describing the consequences of the failure to reduce the contract to writing. The earlier notes show the reasoning upon which the distinction rests, and the extent to which it has been adopted or repudiated in cases dealing with conflict of laws.

The distinction was also recognized in *Exchange Bank v. McMillan*, 76 S. C. 561, 57 S. E. 630, holding that the South Carolina statute providing that "no action shall 51 L.R.A. (N.S.)

be maintained" to charge one upon a ratification, not in writing, of a promise made during infancy, governed in an action in that state upon a contract made in another state. The court suggested that even if the mode of enforcing a contract were to be regarded as part of its obligation, comity must yield to the express provision of the statute. As to the latter ground, see note in 64 L.R.A. page 120.

In *Daniels v. Rogers*, 108 App. Div. 333, 90 N. Y. Supp. 642, it was held that a provision in the Texas statute that "no action shall be brought in any of the courts . . . upon any contract for the sale of real estate, unless in writing," did not render a parol contract void, and the inhibition referred simply to the courts of Texas, and did not preclude a suit in New York for the specific performance of a contract for the purchase of land in Texas. It does not appear where the contract was made.

In *Reilly v. Steinhart*, 161 App. Div. 242, 140 N. Y. Supp. 534, an action in New York on a contract or option made in Cuba with reference to real and personal property there situated, failure to "protocolize" the contract as required by the law of Cuba was held fatal to the action, upon the ground that, both as a question of law, and according to the testimony of an expert witness, the failure to protocolize went not merely to the evidence of the contract, but to its sufficiency, and therefore was substantive, and not remedial merely.

In *Marvel v. Marvel*, 70 Neb. 498, 113 Am. St. Rep. 792, 97 N. W. 640, a suit in Nebraska to establish a parol trust in land in Illinois, the agreement or transaction relied on having been made in Illinois, the Nebraska statute of frauds, requiring an express trust to be evidenced by writing, was applied, with the result of defeating the action, upon the ground that the statute does not strike at the contract or transaction itself, but at the manner and method of proving it, and that the proof must conform to the law of the state where the

as was reasonably worth \$8 a day for a period of fifty-five days, or the sum of \$440; that the loss of time to them and their teams during the period they remained in Texas was \$8 a day for twenty-two days, or \$176; that they paid out in actual cash for transportation for themselves, families, and teams from Texas to Kentucky the sum of \$211.80; that the loss of time to them and their teams in making the last-named trip was reasonably worth the sum of \$100; that in abandoning and giving up their homes and businesses in Kentucky, they had been damaged in the sum of \$150, making a total damage of \$1,387.80, for which judgment was asked. Defendant's demurrer to the petition was

sustained and the petition dismissed. Plaintiffs appeal.

Under the rule in force in this state, the statute of frauds relates to the remedy or mode of procedure, and not to the validity of the contract. Though the land is located in Texas, the parol contract of lease was made here, and here it is sought to enforce it. If unenforceable under our statute, it cannot be enforced here. *Kleeman v. Collins*, 9 Bush, 460. If the statute requires the contract to be in writing, and the petition does not allege it to be in writing, defense may be presented by demurrer. *Bull v. McCrea*, 8 B. Mon. 423; *Smith v. Fah*, 15 B. Mon. 446; *Smith v. Theobald*, 86 Ky. 141, 5 S. W. 394.

The statute of frauds (§ 470, subsecs.

action is tried. The court cited *Leroux v. Brown*, and apparently approved the distinction there made between the substantive and remedial form of the different provisions. But even if the distinction based upon differences in phraseology between the 4th and 17th sections of the original statute were to be repudiated, and both provisions held to be substantive, and not remedial, it would seem that a provision not cast in the form of either of those sections, but in the form that the contract or trust must be "evidenced" in writing, might still be regarded as remedial, and so applicable to foreign transactions.

In *C. W. Rantoul Co. v. Claremont Paper Co.* 116 C. C. A. 125, 196 Fed. 305, an action commenced in the Federal court for the district of New Hampshire, the court said that as to the statute of frauds a number of decisions of the courts of New Hampshire had been cited; and there was no doubt, at least with reference to the sale of goods, that any question arising under the statute of frauds, as well as any question arising under the general statute of limitations, is to be settled by the law of the forum. The contract in this case, however, was held to be one for the manufacture of goods, and not of sale, and therefore not within statute. The opinion does not cite the New Hampshire cases referred to, nor show the form of the New Hampshire statute of frauds in relation to the sale of goods. It may be noted, however, that contracts for the sale of goods were covered by the 17th section of the original statute of fraud, which, unlike the 4th section, was substantive and not remedial in form; and therefore, according to the distinction referred to, would not apply to a foreign contract. However, as shown in the earlier notes, some cases take the view that the statute of frauds whatever its form is remedial, and not substantive.

And so, in *Buhl v. Stephens*, 84 Fed. 922, holding the statute of frauds of the forum as to contracts not to be performed within a year applicable to a contract to be performed in another state, although valid by the law of that state, the court apparently

rejected the distinction made in *Leroux v. Brown*, based on differences of phraseology between the 4th and 17th sections of the original statute of frauds, and took the view that both sections are remedial, and not substantive. The court cited with approval the case of *Heaton v. Eldridge*, 50 Ohio St. 87, 36 L.R.A. 817, 60 Am. St. Rep. 737, 46 N. E. 638 (set out at page 119 of the note in 64 L.R.A.). Assuming that the local statute of frauds with reference to contracts not to be performed within a year followed the form of the 4th section of the original statute, providing that "no action shall be brought," the actual result in the *Buhl* Case was not different from what it would have been if the distinction had been recognized. It will be noted that the same observation applies to the *Heaton* Case.

(It may be observed that some courts of high authority, in cases not involving conflict of laws, have repudiated the distinction based upon differences in phraseology between the 4th and 17th sections, and have in effect characterized both sections as remedial rather than substantive. Thus, *Lord Blackburn in Maddison v. Alderson*, L. R. 8 App. Cas. 488, a case not involving conflict of laws, said: "I think it is now finally settled that the true construction of the statute of frauds, both the 4th and 17th sections, is not to render the contracts within them void, still less, illegal, but is to render the kind of evidence required indispensable, when it is sought to enforce the contract." And this language is quoted with approval in *Maloughney v. Crowe*, 26 Ont. L. Rep. 579, also a case not involving any question as to conflict of laws.)

In *Fruit Dispatch Co. v. Gilinsky*, 84 Neb. 821, 122 N. W. 45, an action in Nebraska for the purchase price of a carload of bananas, it was stated in the fourth syllabus by the court, that "where the Iowa statute of frauds is pleaded in Nebraska to defeat an Iowa contract, the law of that state controls as to such defense." Upon a rehearing (85 Neb. 475, 123 N. W. 1018) the decision was placed upon the ground that the case was tried below on the theory

6 and 7, Kentucky Statutes) provides as follows: "No action shall be brought to charge any person: 6. Upon any contract for the sale of real estate, or any lease thereof, for longer term than one year; nor 7. Upon any agreement which is not to be performed within one year from the making thereof, unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or by his authorized agent; but the consideration need not be expressed in the writing; it may be proved when necessary, or disproved by parol or other evidence." A parol lease of land for one year, to commence at a future date, is within the stat-

ute. *Greenwood v. Strother*, 91 Ky. 482, 16 S. W. 138.

The question sharply presented is: May plaintiffs recover for expenses incurred and time lost on the faith of a contract that is unenforceable under the statute of frauds?

In the case of *Hurley v. Woodside*, 21 Ky. L. Rep. 1073, 54 S. W. 8, Woodside made a parol lease with Hurley for 25 acres of timber land for a period of five years. Under the contract Hurley was to clear 5 acres of the land in the winter of 1897 and 1898, 10 acres in the winter of 1898 and 1899, and 10 acres in the winter of 1899 and 1900, and was to have free use of the land so cleared up for three years thereafter. Woodside agreed to erect a

that the transaction was controlled by the law of Iowa, and that nowhere in the record was there evidence that the defendant presented the Nebraska statute of frauds as a defense. The court added that the Nebraska statute of frauds was immaterial in view of the defendant's conduct in the trial court; that whether the Iowa statute should control, had defendant below insisted upon the protection of the Nebraska statute, was immaterial and would not be determined. It will be noted, however, that, assuming that the Nebraska and Iowa statutes in relation to the sale of goods follow the form of the 17th section of the original statute, the result in this case would follow either from the adoption of the distinction made in *Leroux v. Brown*, supra, or from the repudiation of that distinction and the adoption of the view that the statute, regardless of the form in which it is expressed, is in effect substantive, and not remedial.

The same observation applies to *Brockman Commission Co. v. Kilbourne*, 111 Mo. App. 542, 86 S. W. 275, holding that the Missouri statute of frauds is not applicable to a contract in Illinois for the sale of butter to be delivered in that state, and to *Jones v. National Cotton Oil Co.* 31 Tex. Civ. App. 420, 72 S. W. 248, in which the court applied the law of Arkansas, where the contract for the sale of goods was made and to be performed, declaring that no contract for the sale of goods, wares, and merchandise for the price of \$30 or upward "shall be binding" unless in writing, notwithstanding that the contract would have been valid if made in Texas.

Upon the assumption that, in the three cases just cited, the statute of the forum in relation to sales of goods follows the form of the 17th section of the original statute, i. e., is substantive in form, the only theory upon which the *lex fori* could have been applied would have been that (suggested in the *Buhl Case*) which not only repudiates the distinction based upon the difference between the 4th and 17th sections, but adopts the theory that both provisions, regardless of form, are essen-

tially remedial, and not substantive; or else the theory that the enforcement of the contract would be contrary to the public policy of the forum. The latter ground is one rarely taken with regard to the statute of frauds; but see *Emery v. Burbank*, 163 Mass. 326, 28 L.R.A. 57, 47 Am. St. Rep. 456, 39 N. E. 1026 (discussed in note in 64 L.R.A. at page 120).

As between law of place where contract is made and that of place where it is performable.

Supplementing note in 64 L.R.A. 122.

As shown in the note just referred to, the majority of the cases in which it has been held or assumed that the *lex fori* as such did not control have held that the statute of the state where the contract was made, rather than that of the place where it was to be performed, governs in case of a conflict between the two in relation to matters comprehended by the statute of frauds.

In the subsequent case of *D. Canale & Co. v. Pauly*, 155 Wis. 541, 145 N. W. 372, the majority of the court took the position that the law of Tennessee, where the contract for the sale of goods was made, rather than the law of Wisconsin, where the goods were to be delivered, controlled, and accordingly held that a contract made in Tennessee for the sale of goods to be delivered in Wisconsin was governed by the law of Tennessee, by which it was valid, rather than by the law of Wisconsin, by which it would have been invalid because not in writing. Both majority and dissenting opinions seem to have regarded the intention of the parties as the ultimate criterion. The majority opinion held that the presumption that the parties intended to contract with reference to the law of the place of performance was overcome in this instance by other circumstances, including the circumstance that the contract was valid by the law of the place where made, but invalid by the law of the place of performance. The court below held that the law of Wisconsin governed, and it is stated

dwelling house, smoke house, kitchen, and stable on the leased premises for Hurley's occupancy, and was to furnish a team of oxen with which to break up the land as soon as it was cleared. He was also to remove the logs lying upon the land at the time of the lease, and to erect a tobacco barn for Hurley's use. Moreover, it was a part of the agreement that the contract was to be put in writing. Relying upon Woodside's promise to do so, Hurley moved his personal effects into an old house located upon the land, which he was to occupy until the new house was finished, and gave up the premises previously occupied by him. After such removal Woodside denied that he had agreed to furnish the cattle to break up the land or to re-

move the logs or to erect a tobacco barn, and refused to sign a contract embracing these stipulations. This refusal necessitated Hurley's abandonment of the leased premises. Alleging that as a result of Woodside's failure to carry out the contract, he had been damaged in the sum of \$100, the cost of removing his effects, \$50 for time lost in hunting up another place, \$200 in prospective profits which he would have realized by reason of his bargain, and \$300 by reason of having been induced to surrender the premises formerly occupied by him, Hurley brought suit against Woodside to recover the aforesaid item of damages, aggregating the sum of \$650. The trial court sustained a demurrer to the petition, and the petition was dismissed. On

in the majority opinion that, had the trial judge determined the intention as a matter of fact from an evidentiary standpoint, instead of disposing of the case upon the ground that, since the place of performance was Wisconsin, as matter of law the contract was a Wisconsin contract, his decision might not have been disturbed; but that, looking at the matter without the aid of an initial finding, the evidentiary circumstances, inconsistent with the presumption arising from the agreed place of performance, clearly overcame the latter; and it was so held notwithstanding the finding that the parties contemplated that the oral agreement would be reduced to writing.

While the scope of the present note precludes a discussion of the point, it may be doubted whether the question as to the governing law ought to have been referred to the intention of the parties, since the statute of frauds, if it does not relate to the remedy or procedure,—and the court seems to have assumed that the *lex fori* as such did not govern,—relates to the formal validity of the contract; and, as elsewhere pointed out, the better view seems to be that matters that pertain to the preliminary question whether the parties have been brought into contractual relations, including the question of the capacity of the parties and the formal validity of the contract, do not fall within the general principle which, as to many matters, accepts the intention of the parties as the criterion of the governing law. See in this connection, discussion in the note to Mayer v. Roche, 26 L.R.A.(N.S.) 764, on "Conflict of laws as to capacity of married woman to contract." See also Wharton, Conf. L. 3d ed. §§ 427e, 427k.

In *Garnea v. Frazier*, — Ky. —, 118 S. E. 998, an action based on a contract for services not to be performed within a year, the court said that the fact that the contract was made in West Virginia could not prevent the application of the Kentucky statute of frauds, as it was admitted that the contract was to be performed in Kentucky. The court added that if it were not true that the laws of Kentucky would govern the rights of the parties under the 51 L.R.A.(N.S.)

contract, it is not sufficiently alleged in the petition that the contract is not within the statute of frauds. The court does not suggest that the law of Kentucky should be applied as the *lex fori*; but it would seem, in view of the other Kentucky cases, that the decision might have been put upon that ground, assuming that the Kentucky statute in relation to contracts not to be performed within a year follows the form of the 4th section and declares that "no action shall be brought."

As between law of place where contract is made and that of place where property is situated.

Supplementing note in 64 L.R.A. 122.

It should be noted that the question as to the governing law as between the law of the place where the contract is made as such, and that of the place where the property is situated as such, presupposes or assumes that the law of the forum as such does not control; the question as between the *lex fori* and the *lex rei sitæ* being treated under the heading, "As between the law of forum and substantive law." As stated at page 123 of the note in 64 L.R.A., most of the cases cited in that and the earlier note, in which there was an actual conflict between the *lex loci contractus* and the *lex rei sitæ* have held, without reference to the particular question involved or to the character of the action, that a contract relating to real property is governed by the statute of frauds of the place where the property is situated, rather than by the statute of frauds of the place where the contract is made (assuming, of course, that the *lex fori* does not control).

So, in the subsequent case of *Meylink v. Rhea*, 123 Iowa, 310, 98 N. W. 779, it was held that a contract for the conveyance of real property is governed by the *lex rei sitæ*, rather than by the law of the place where the contract was made. In this case the suit was for specific performance of a contract made in South Dakota for the conveyance of land in Iowa. While the court said that the South Dakota statute strikes at the contract itself, and renders it void, and that under the law of Iowa the ques-

appeal here the judgment was affirmed. After setting out the statute of frauds, the court said: "Under this provision of the statute the alleged verbal contract was not binding or enforceable upon the parties thereto, for the reason that it was a contract for the lease of real estate for a longer term than one year, and was an agreement which was not to be performed within one year from the making thereof; and, as the contract itself was not enforceable between the parties, no action for damages for refusing to execute it or to reduce it to writing can be maintained, as 'it would leave but little, if anything, of the statute of frauds, to hold that a party might be mulcted in damages for refusing to execute in writing a verbal agreement which, unless in writing, is invalid under the statute of frauds.' Chase v. Fitz, 132 Mass. 361; Lawrence v. Chase, 54 Me. 196."

In the case of *Brumley v. Broyles*, 22 Ky. L. Rep. 830, 58 S. W. 984, it was held that a tenant with a parol agreement for a lease for another year, which was within the statute of frauds, could not recover as damages for breach of the contract the loss sustained by him in making preparations for raising a crop.

In the case of *King v. Cheatham*, 31 Ky. L. Rep. 1176, 104 S. W. 751, King sued upon a writing signed by himself alone, in

which he bound himself to buy from Cheatham certain trees standing on her land, to be severed in the future. It appears that he cut some 263 trees from the land before he was ousted. He asked damages for his labor and profit. There was a judgment below for defendant. On appeal the judgment was affirmed. In discussing the validity of the contract and the right of plaintiff to recover damages thereon, the court said: "The statute merely withholds a right of action upon them as against the party who has not signed them. The prohibition of the statute must reach the spirit of its purpose. As a suit to recover damages for the breach of such a contract would be an indirect enforcement, such actions are held to be within the inhibition of the statute. *McCampbell v. McCampbell*, 5 Litt. (Ky.) 92, 15 Am. Dec. 48; *Brumley v. Broyles*, 22 Ky. L. Rep. 830, 58 S. W. 984. Nor does part performance of the party signing affect the matter. *Hunter v. Simrall*, 5 Litt. (Ky.) 62; *Hambell v. Hamilton*, 3 Dana, 501; *Montague v. Garnett*, 3 Bush, 297; *Mannen v. Bradberry*, 81 Ky. 153; *Graves County Water Co. v. Ligon*, 112 Ky. 775, 66 S. W. 725. Although a recovery of purchase money paid on such contract may be recovered if the party not bound refused to execute it, that is not in any sense an action upon the contract, but is for money had and received

tion is one of evidence, and the statute does not apply where, as in the case at bar, the purchase money or some portion thereof has been received by the vendor, yet the decision is expressly referred to the rule that the validity of transfers of real estate is determined by the *lex rei sitæ*, and is not upon the ground that the *lex fori* as such governs, although in this case the *lex rei sitæ* and *lex fori* were, of course, coincident.

In *Boone v. Cox*, the result is not attributable to the predominance of the *lex loci contractus* over the *lex rei sitæ*, but to the view that the local statute relates to the remedy or procedure.

As pointed out in the note in 64 L.R.A. 124, there is a serious question whether the general rule that contracts relating to real property are governed by the *lex rei sitæ* is applicable to the exclusion of the *lex loci contractus* and the *lex loci solutionis* in case of executory contracts in relation to real property or contracts that only collaterally relate to real property. See generally as to this question, Wharton, *Confli. L.* 3d ed. § 276d.

In *Callaway v. Prettyman*, 218 Pa. 293, 67 Atl. 418, it was held that the New Jersey statute requiring contracts of employment of brokers for the sale of real estate to be in writing did not apply to a contract made in Pennsylvania with reference to land in New Jersey, upon the ground 51 L.R.A. (N.S.)

that the matter related to the formalities of the contract, and was governed by the *lex loci contractus*.

So, in the syllabus by the court in *Hatton v. Morton & Co.* 13 Ga. App. 469, 79 S. E. 371, it is stated that the contract to pay commissions for the sale of real estate, upon which the suit was brought, was made and was to be performed within the state of Georgia; hence, its validity, form, and effect were to be controlled by the law of Georgia. It does not appear where the real estate to which the contract related was situated, though it would seem that unless it were situated in another state, there would have been no question as to conflict of laws.

As previously shown, the decision in *Exchange Bank v. McMillan*, 76 S. C. 561, 57 S. E. 630, applying the law of South Carolina to a contract made in Georgia relating to land in South Carolina, was not attributable to the predominance of the *lex rei sitæ* over the *lex loci contractus*.

In *Howell v. North*, 93 Neb. 505, 140 N. W. 779, the law of Colorado by which a contract for the payment of commissions to a broker for the sale of land in that state was valid, although the amount of the commissions was not named in the writing, was applied upon the ground that the land was situated in Colorado and the contract was to be performed in that state.

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for which the consideration has failed, and for which the law implies a promise to repay. But nothing was paid by appellant as consideration on this contract."

The same doctrine is applied in the case of *Greenwood v. Strother*, supra. Indeed, it is the general rule that damages cannot be recovered for violation of a contract within the statute of frauds. *Alabama Mineral Land Co. v. Jackson*, 121 Ala. 172, 77 Am. St. Rep. 46, 25 So. 709; *Dunphy v. Ryan*, 116 U. S. 497, 29 L. ed. 703, 6 Sup. Ct. Rep. 486; *Franklin v. Matoa Gold Min. Co.* 16 L.R.A. (N.S.) 381, 86 C. C. A. 145, 158 Fed. 941, 14 Ann. Cas. 302.

To this general rule there are certain well-recognized exceptions. Thus, in *Speers v. Sewell*, 4 Bush, 239; *Myles v. Myles*, 6 Bush, 237; *Usher v. Flood*, 83 Ky. 552; *Thomas v. Fesse*, 21 Ky. L. Rep. 206, 51 S. W. 150; *Story v. Story*, 22 Ky. L. Rep. 1731, 61 S. W. 279; *Doty v. Doty*, 118 Ky. 204, 2 L.R.A. (N.S.) 713, 80 S. W. 803, 4 Ann. Cas. 1064, and in a number of other cases, it has been held that, where services have been rendered during the life of another, on the promise that the person rendering the service should receive at the death of the person served a legacy, and the contract so made is within the statute of frauds, a reasonable compensation may be recovered for the services actually rendered. It has also been held that the vendee of land under a parol contract is entitled to recover any portion of the purchase money he may have paid, and is also entitled to compensation for improvements. *Fox v. Longly*, 1 A. K. Marsh. 388; *McCracken v. Sanders*, 4 Bibb, 511; *Grimes v. Shrieve*, 6 T. B. Mon. 557; *Dean v. Cassidy*, 88 Ky. 572, 11 S. W. 601.

And under a contract for personal services within the statute, an action may be maintained on a *quantum meruit*. *Kleeman v. Collins*, 9 Bush, 460; *Myers v. Korb*, 21 Ky. L. Rep. 163, 50 S. W. 1108. The doctrine of these cases proceeds upon the theory that the defendant has actually received some benefits from the acts of part performance, and the law therefore implies a promise to pay. In 29 Am. & Eng. Enc. Law, 2d ed. 836, the rule is thus stated: "Although part performance by one of the parties to a contract within the statute of frauds will not, at law, entitle such party to recover upon the contract itself, he may nevertheless recover for money paid by him, or property delivered, or services rendered, in accordance with and upon the faith of the contract. The law will raise an implied promise on the part of the other party to pay for what has been done in the way of part performance. But this right of recovery is not absolute. The plaintiff is en-

titled to compensation only under such circumstances as would warrant a recovery in case there was no express contract; and hence it must appear that the defendant has actually received, or will receive, some benefit from the acts of part performance. It is immaterial that the plaintiff may have suffered a loss because he is unable to enforce his contract."

In *Browne on Statute of Frauds*, § 118a, the rule is announced in the following language: "The rule that where one person pays money or performs services for another upon a contract void under the statute of frauds, he may recover the money upon a count for money paid, or recover for the services upon a *quantum meruit*, applies only to cases where the defendant has received and holds the money paid or the benefit of the services rendered. It does not apply to cases of money paid by the plaintiff to a third person in execution of a verbal contract between the plaintiff and defendant, such as by the statute of frauds must be in writing."

The foregoing rule is supported by the following cases: *Kimmins v. Oldham*, 27 W. Va. 265; *Emery v. Smith*, 46 N. H. 161; *Marcy v. Marcy*, 9 Allen, 8; *Pierce v. Paine*, 28 Vt. 34; *Hambell v. Hamilton*, 3 Dana, 501; *Montague v. Garnett*, 3 Bush, 297; *Mannen v. Bradberry*, 81 Ky. 153.

In the case under consideration the plaintiffs merely sustained a loss. Defendant received no benefit. Had he received a benefit, the law would imply an obligation to pay therefor. Having received no benefit, no obligation to pay is implied. The statute says that the contract of defendant made with plaintiffs is unenforceable. Defendant therefore had the legal right to decline to carry it out. To require him to pay plaintiffs for losses and expenses incurred on the faith of the contract, without any benefit accruing to him, would, in effect, uphold a contract upon which the statute expressly declares no action shall be brought. The statute was enacted for the purpose of preventing frauds and perjuries. That it is a valuable statute is shown by the fact that similar statutes are in force in practically all, if not all, of the states of the Union. Being a valuable statute, the purpose of the lawmakers in its enactment should not be defeated by permitting recoveries in cases to which its provisions were intended to apply.

The contrary rule was announced by this court in the case of *McDaniel v. Hutcherson*, 136 Ky. 412, 124 S. W. 384. There the plaintiff lived in the state of Illinois. The defendant owned a farm in Mercer county, Kentucky. The defendant agreed with plaintiff that if plaintiff and his family

would come to Kentucky and live with defendant, the defendant would furnish the plaintiff a home during defendant's life, and upon his death would give plaintiff his farm. It was held that, although the contract was within the statute of frauds, plaintiff could recover his reasonable expenses in moving to Kentucky, and reasonable compensation for loss sustained in giving up his business elsewhere. Upon reconsideration of the question involved, we conclude that the doctrine announced in that case is not in accord with the weight of authority, and should be no longer adhered to. It is therefore overruled.

Judgment affirmed.

TEXAS COURT OF CRIMINAL APPEALS.

WILL HEMPHILL, Appt.,

v.

STATE OF TEXAS.

(— Tex. Crim. Rep. —, 165 S. W. 462.)

Trial — instruction — weight of evidence.

1. An instruction that there is evidence that prosecutrix failed to recognize accused on the night of an alleged offense, and, if she stated next morning on seeing him that he was the person who committed

the crime, this cannot be considered as evidence of guilt, but might be considered in determining the weight to be given to the testimony of prosecutrix, is not erroneous as being on the weight of the evidence.

Appeal — argument to jury — justification of conviction of innocent persons.

2. A statement by the prosecuting attorney in a rape case, that unless the jury assessed the death penalty, the people would take the law into their own hands in the future; that "if you turn the defendant loose, you cannot blame the people for taking the law into their own hands," and that it would be much worse than convicting an innocent man, to turn this defendant loose and then in a week or two for him to rape one of your wives, sisters, or daughters, is reversible error.

On Motion for Rehearing.

Same — attacking bystander's bill of exceptions.

3. A bill of exceptions attested by bystanders, as provided by statute, upon the refusal of the judge to do so because he does not remember the facts set out, which is not contested in the trial court, cannot be contested upon affidavit in support of a motion for rehearing in the appellate court.

(Davidson, J., dissents from proposition 1.)

(November 12, 1913.)

Note. — Argument by prosecuting attorney that an acquittal would encourage lynch law as ground for reversal.

For a general discussion as to reversal of conviction because of the unfair or irrelevant argument or statement of facts by a prosecuting attorney, see *People v. Fielding*, 46 L.R.A. 641, and note thereto.

Reference by counsel for the state in a criminal prosecution to the probability of an acquittal encouraging lynch law is universally condemned by the courts, and, when it is permitted to go unrebuked by the trial court, is generally regarded as ground for reversal, as was the case in *HEMPHILL v. STATE*. In the few cases where the appellate court merely condemned the use of such argument without reversing the judgment, they apparently regarded the remarks as not being actually prejudicial to defendant. In some cases the courts have regarded such argument as so highly prejudicial as to require reversal though the remarks were promptly condemned and the jury instructed to disregard them.

In *State v. Hess*, 240 Mo. 147, 144 S. W. 489, the court said: "To hold up before a jury the horrors of mob law is not a proper method of securing verdicts of conviction. Juries should convict on evidence that crimes have been committed, and not through a fear that all law will be set aside and a reign of anarchy substituted." 51 L.R.A. (N.S.)

In *State v. Busse*, 127 Iowa, 318, 100 N. W. 536, where counsel for the state told of a case in another state where a member of the jury which acquitted defendant afterward took part in lynching him, the court said: "We do not think counsel intended to impress upon the jurors the possibility of a lynching in case they should acquit, but enough was said to suggest to them that an acquittal might create such a feeling of condemnation in the public mind as to produce a like result. What its influence upon the jury might have been we cannot say, but it needs no argument or citation of authority to show that jurors should not consider such matters, or that the prosecution should never, directly or indirectly, suggest the thought to them; and this is especially true in cases calculated to arouse public excitement and indignation. While we would not consider it necessary to reverse this case on account thereof, we see no justification or excuse for the statement, and cannot refrain from this criticism of it."

In *Ferguson v. State*, 49 Ind. 33, 1 Am. Crim. Rep. 582, it was held that remarks of the prosecuting attorney that murders were frequent in the community, that vigilance committees and mobs had formed because of the lax administration of the laws, and that the jury should make an example of defendant, were improper, and where the court, upon objection being made, in-

APPEAL by defendant from a judgment of the District Court for Guadalupe County convicting him of rape. Reversed.

The facts are stated in the opinion.

Mr. H. E. Short for appellant.

Messrs. Lester Holt, E. T. Simmang, and C. E. Lane, Assistant Attorney General, for the State.

Davidson, J., delivered the opinion of the court:

This negro was convicted and given the death penalty for rape on a woman whose age is shown by the testimony to be fifty-six years.

stead of rebuking the counsel and telling him to keep his argument within the facts and the evidence, overruled the objection and said within the hearing of the jury that such matters were proper to be commented upon, the judgment of conviction was reversed.

In *State v. Jackson*, 95 Mo. 623, 8 S. W. 749, where the prosecuting attorney in his closing argument said, "Escape of criminals at the hands of juries brings on lynch law," a majority of the court, after discussing cases which were reversed because the prosecuting attorney urged conviction on the ground that, if the jury did err that way, the appellate court would correct the error, said: "The only difference between the case referred to and the one at bar is that in the former an attempt was made to induce the jury to find a verdict of guilty upon the ground that, if they committed any error, it would be corrected by an appellate court, while here a similar attempt was made to induce a verdict of guilty by an intimation, amounting almost to a covert threat, that, if they failed to find a verdict of guilty, their error would be corrected by an outside tribunal acting independently of and in defiance of all law. Language fails to express in terms sufficiently strong the condemnation which should always promptly attend the utterance of such unworthy words when a human being is on trial for his life before a tribunal organized for the purpose, and for the sole purpose, of administering the law," and held that the remark concerning lynch law was ground for reversal.

In *Thompson v. State*, 33 Tex. Crim. Rep. 472, 26 S. W. 987, it was held that a remark of counsel assisting the prosecution, that "the friends of the prosecutrix had not in their anger taken the law in their own hands and lynched or applied the torch to defendant, therefore the life of this demon of human flesh on trial should pay the penalty," was ground for reversal.

In *Fredrickson v. State*, 44 Tex. Crim. Rep. 288, 70 S. W. 754, a prosecution for rape, the court reversed a conviction because the prosecuting attorney said to the jury: "There are many communities and counties where this negro would have already been mobbed, but the good people of this community have chosen to let the law

After giving an account of her trip leaving her residence in search of a horse that she wanted, supposed to be somewhere around the neighborhood or close by, prosecutrix says she met a negro, and told about his movements; that he passed her a time or two.

We quote her testimony in this connection from the record:

I went up there to the west fence, and I looked around, and then I started back and was picking flowers and looking at the flowers, and all of a sudden the same negro I met on the road was in the pas-

take its course, and they expect you to give the defendant the highest penalty," the court saying it was a menace and threat to the jury that should not have been permitted.

In *Parker v. State*, 43 Tex. Crim. Rep. 526, 67 S. W. 121, a conviction for cattle theft was reversed because of the failure of the trial court to direct the jury to disregard the argument of the district attorney in saying: "Gentlemen of the jury, we have what is known as 'mob law' in this country, and in my mind the failure to enforce the law is the cause of mob law. Sometimes jurors acquit a defendant who is guilty, and when the evidence shows he is guilty; and before they get out of the courtyard they say that the reason we have mob law in this country is because the officers fail to enforce the law. And I want to tell you that it is my opinion that it is the failure of the juries to enforce the law and do their duty that causes mob law, and not the officers. The officers in this case have done their duty, and the evidence shows that the defendant is guilty, and if you turn this defendant loose, I don't want you to be going around here telling that the officers have not done their duty, and that is the cause of mob law, when it is you."

In *Smith v. State*, 44 Tex. Crim. Rep. 137, 100 Am. St. Rep. 849, 68 S. W. 995, a prosecution for statutory rape in which the prosecutor in making his closing speech said: "This is the most horrible crime so far as my long experience at the bar has brought to my attention. I am surprised that this case was ever brought here; and it ought not to have been brought here; that while I do not believe in mob law as a rule, yet in a case like this the law ceased to be a virtue. I will be doing my duty as a citizen and a father if I can induce this jury to hang defendant as high as Haman, and then go to my home and tell my wife what I have done, and hear her remark, 'Well done, thou good and faithful servant; you have performed your duty,'" the court held that it was ground for reversal, though the court had reprimanded him and instructed the jury to disregard the remarks.

And likewise in *Powell v. State*, — Tex. Crim. Rep. —, 70 S. W. 218, 14 Am. Crim.

ture. I could see him very plain in the face. He was about as far as from here to that second window there from me; and, when I saw the same negro that I had met on the road, I got so scared I turned around. I didn't want to meet him, and I turned around and went to the fence, and when I was at the fence I looked back, and he still was after me, and then I went under the fence, and then I thought, "What shall I do?" and then I thought that I had talked about that horse two times with him, so he might want nothing else only he might want some money out of me for bringing that horse, and I didn't want to show how scared I was, and so I came back and asked him what he wanted, and he didn't say anything. So I offered him a dollar and a half if he brings my horse back. He didn't say anything about that. He didn't say a word to that, and he came to me and grabbed me on my arm, and then he said something what he wanted. I didn't know what it was. I told him, "I don't know what that is," and then he said it again, and then I thought what it was, and I said, "Oh, God! what do you want with an old woman like I am?" Then he caught me on my neck, and I cried out, and then I asked him to let me go, and he said, "No," and

when he said, "No," I got so scared and I was so excited that I was half dead, and that is nearly all I can tell you. Then I closed my eyes, and he dragged me in some bushes and some trees.

Q. Just state to the jury what he did then.

A. I don't know. I couldn't tell you very plain, because I was so excited. I was nervous, I don't know what—

Q. You will have to state just exactly what he did.

A. When I felt him I got unconscious.

Q. What do you mean by "feeling." Just tell these gentlemen here.

A. I can't tell that; no, I can't. I could tell it to women, but I can't tell it to men.

Q. After he grabbed hold of you, you say he dragged you a piece from the fence. Now just state to the jury whether or not he threw you down.

A. I don't know. When he caught me on my arm and said, "No," then I lost all control over me. I thought he would first assault me and then he would kill me too. I lost all my nerves and everything. When I looked up again he was gone already. He was going toward the south and had gone a good piece when I opened my eyes. When I regained control over myself, I was lying on my back and my dress was up.

Rep. 5. where, on the trial of a negro for wife murder, the prosecuting attorney said: "Gentlemen of the jury, if you don't hang this negro, we will have such scenes as we are going to have at Lancing," and it was shown that at the time a negro rapist was about to be, and shortly afterward was, burned by a mob at the place mentioned, a near-by town, and that the jury were aware of what was taking place there, the court held that it was ground for reversal, though the court had promptly admonished the attorney and instructed the jury to disregard the statement.

In *Turner v. State*, 4 Lea, 206, the attorney general in his closing argument said that there was a regular band of thieves in the neighborhood, that defendant was one of them, and that unless the jury would convict the defendant, he would not blame the people for taking the law into their own hands. The court reversed the judgment because of these remarks generally, but it does not appear whether the court would have reversed the case because of the remark in regard to mob law, had it stood alone without the statement in regard to defendant being one of a band of thieves, as to which there had been no evidence introduced. The court did say, however, that the implied threat of mob violence was improper, and should not have been permitted by the court, whether objection was made thereto or not.

In *Scott v. State*, 7 Lea, 232, where accused was convicted of manslaughter, the 51 L.R.A. (N.S.)

court said that remarks of the attorney general that "if the juries don't punish crime, the people will rise up and should rise up and punish it," were very reprehensible, and the court ought to have rebuked him in the presence of the jury; but that they did not think it would justify the granting of a new trial. The court said, however, that the defendant had no ground for complaint against the verdict as it was a merciful one, and the facts warranted a much severer punishment than was imposed.

In *Northington v. State*, 14 Lea, 424, the court discusses the two preceding cases and says that the principle deducible is that while a suggestion as to what the people might do in case of failure to convict is not reversible, though highly reprehensible, yet a statement of facts in relation to the defendant, affecting the issue and tending to influence the minds of the jury, when not in proof, is sufficient ground for reversal. This statement, however, is *dictum* as to references to mob violence, no such remarks being involved in the case, and there is but little in the cases referred to upon which to base it.

In *State v. Cook*, 132 Mo. App. 167, 112 S. W. 710, a prosecution of a negro for carrying concealed weapons, the prosecuting attorney said: "What causes white people to rise in a mob in a community? It's a white jury backing up a burly negro in such offenses as packing a pistol. The experience you all have had is that such

Q. Just state to the jury whether or not he actually had intercourse with you?

A. Yes, he did.

Q. Are you positive of that?

A. Yes, he did. I felt him. It sure went through me, and then I was gone, and after I got up everything was in my clothes. I felt him and it was in my clothes. After I came to myself, I saw him going off south, and then I got up and went to the gate of the pasture where I had come in. I did not give him my consent or permission to do anything like that; and I couldn't get away from him. I was too scared. I was shivering. I couldn't lift my arm or nothing. I couldn't do it. I didn't have the strength to get away.

This is perhaps enough of the testimony in regard to the immediate facts, and in fact it is about the substance in the concrete. This is the language of the alleged outraged woman. Shortly after she says this occurred, she passed one neighbor's house whom she said was not at home, and reached another neighbor's residence and told at that house that she had been assaulted by a negro. There is evidence going to show that appellant was in the neighborhood and could have had the oppor-

tunity. For instance, he had gone from his residence up to an uncle's to get a horse; that he went to the residence of this uncle, got his horse, and returned home. The distance between the two places was about 4 miles. Upon his return home, approximately about 3 o'clock, he hitched his horse to a buggy, and he and his wife went to visit her father's, some 8 or 9 miles away. The evidence shows that he reached that place about 4 o'clock, perhaps a little after. Defendant testified in his own behalf that he went to his uncle's after the horse, and returned home, and hitched the horse to a buggy, and he and his wife went to her father's on an invitation that day received through the mail. It was shown by his employer he received the invitation through the mail. The employer testified to that, and defendant, having no horse, went to his uncle's after a horse for the purpose of this visit. One or two witnesses in an indirect, rather indefinite, way, gave evidence tending to show that they saw defendant between his home and the residence of his uncle; but, as that is not a disputed point, it is unnecessary to mention this testimony. Of course, he traveled the distance from his house to his uncle's and back in getting the horse, and to this he himself testifies, and in fact

dives as this defendant was running causes the mobs." The court characterized the remark as very objectionable and prejudicial, but refused to reverse conviction because, while defendant's counsel objected to the remark, the record failed to show what ruling, if any, the court made upon it.

In *State v. Petit*, 119 La. 1013, 44 So. 848, where counsel for a negro accused of assault with intent to rape a white woman argued that defendant was not guilty because he had not been lynched, and the state's attorney in reply pointed out that, inasmuch as there was no longer negro domination, there was no necessity for lynching, the court said: "While this discussion of matters outside of the record was highly improper, and should have been, in its inception, repressed by the trial judge, we fail to perceive in the remarks of the district attorney any appeal to racial prejudice for the purpose of influencing the jury. We may add that this inference is re-enforced by the fact that the verdict acquitted the accused of the crime of criminal assault as charged in the indictment."

In *State v. Mircovich*, 35 Nev. 485, 130 Pac. 765, it was held that it was not error for the district attorney to quote and comment upon the testimony of a witness, implying that the witness thought accused should have been lynched, which testimony was brought out by defendant's attorney on cross-examination apparently to show the animosity of the witness. The court

said, however, that if such testimony had been introduced by the state and commented upon by the district attorney, the situation would have been different.

Sanders v. People, 124 Ill. 218, 16 N. E. 81, which has been cited as supporting the proposition that a reference to the possibility of mob violence as the result of acquittal, while improper, is not reversible error, was a prosecution for perjury, and the reference was to the destruction of a courthouse in another state a number of years previously as illustrating the effect of public indignation when aroused by the unjust escape of criminals through perjured evidence, so it is apparent that the appeal to the jury was as to the necessity for a fearless enforcement of the law generally, and that the reference to mob violence could not possibly be construed into a suggestion that an acquittal of the prisoner on trial was liable to arouse such violence.

In *Jackson v. State*, 136 Ala. 22, 34 So. 188, which was a trial of a negro for participating with a mob in hanging a negro murderer, a statement by the state's attorney that "mob law must be stopped. If a crowd of negroes take a negro out and hang him, and if the jury acquit the defendant where they have evidence to convict him, as they have in this case, then, the first thing you know, they will be taking a white man out and hanging him," was held not to exceed the bounds of legitimate argument.

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there is no question about that matter. He denies the whole transaction testified by the prosecutrix. He says he did not have intercourse with her; he did not see her under the circumstances and at the place that she mentions. He proves an alibi, and in fact he denies the matter from every standpoint of his testimony. He also testifies that while he was going back from his uncle's he met another negro who was riding a similarly colored horse to his, except that negro's horse had some white in his face, or bald-faced. So he puts this negro in the neighborhood with practically the same opportunity that he (the defendant) had, or as the witnesses' testimony goes to show that he had.

This matter occurred on Saturday. Appellant reached his father-in-law's house something like 4 o'clock in the evening Saturday, and Sunday morning before day, about 4 o'clock, he was arrested and carried into the presence of prosecutrix. She declined to recognize him and gave her reasons why. She says: "I remember them bringing the defendant to my house that night, and I examined him closely and had him to take off his coat and stand up, and I said at that time it was the figure and the color of the man that assaulted me, but he didn't have his hat on, so I said he didn't look that way that night. I said I couldn't state that he was the man. I said the other man's face was more round, but I told them it was the figure of the man and it was the color. I didn't say that the man that assaulted me was taller than the defendant. I said the face looked different to me then; but at night I couldn't see; my eyes are not good." On the next morning she took another look at him and recognized the defendant as being the man. In connection with her failing to recognize him definitely at night, and her recognition of him the following day, there was quite a lot of questions asked and answers elicited. He did not have his hat on at night was one of the main reasons why she says she failed to recognize him, and he did have on his hat the next day.

Appellant reserved a lot of bills of exception. He excepted to the following charge: "There is evidence before you to the effect that the witness Annie Dittmar stated, when the defendant was carried before her on the night of the alleged rape, that the defendant was not the person who raped her, and if there is evidence before you that the next day, with the defendant before her, she stated that he was the person who committed the rape, you are instructed that you must not consider the latter statement of said witness as evidence
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tending to show the alleged guilt of the defendant, but you may consider it for what you may think it worth, in determining the weight to be given the testimony of the said Annie Dittmar as a witness in this cause upon that point." Various objections were urged to this charge; among others, that it is on the weight of evidence, etc. We are of opinion the charge is upon the weight of evidence. It selects out the fact that, on the morning after she had failed to recognize the defendant the previous night, she did recognize him on the following morning and so testified before the jury. Now the court instructed the jury they could not consider this as any evidence of guilt, but they could give it what credit they thought it was worth in passing on the credibility of the prosecutrix upon that particular point. What point? Evidently the identification of the defendant the next morning when he was brought before her. Appellant had introduced evidence tending to show that she did not recognize him the previous night. The state met this to some extent at least, or sought to do so, by showing she did recognize him the next day in the daylight. Her testimony was not attacked as to her recognition of him in the daytime. She had been to some extent attacked by showing that she failed to recognize the negro the night before. The fact that she testified to identify the next morning was a circumstance in the case and evidently used by the jury against the defendant. The court undertook to limit this in passing on the weight of her testimony upon the question of identity. This was a charge, it occurs to us, on the facts on a particular question, one phase of the evidence culled from the other testimony, and called direct attention to the jury, and they were told they might consider that testimony upon the question of identity. Identity was one of the crucial points of the case; it was the point about which the issue of this case hung. The old woman identifying the defendant as best she could, and he denying his presence at the time and place, and proved by facts and circumstances, and his own positive testimony, and that of his wife, that he was at a different place. If the old woman was certain of her identity of the man, then the case was made out, or at least it was cogent evidence going to show that he was the man who had outraged her. If she was not correct about this, then in that event appellant may not have been the man. So it will be seen that one of the crucial questions and points in this case was the identity of this defendant as being the man whom the old woman says outraged her

person. It occurs to us this was not introduced to attack her credibility, but to corroborate. Had the charge limited the question of credibility to failure to recognize, there might have been no error. As given, the charge virtually instructs the jury that the "next morning" identification of defendant corroborated prosecutrix's evidence on trial.

Another bill of exceptions recites that the prosecuting attorney in his closing argument to the jury continually referred to mob violence in such cases, and repeatedly held up before the jury and threatened them with the statement that, unless they assessed the death penalty in this case, then the people would take the law in their own hands in the future, and that such rape fiends as the defendant would be dealt with at the hands of a mob; and then the prosecuting attorney, Mr. Holt, made use of such expressions as the following, over the protest of the defendant: "It is true that the people often take the law in their own hands and mob persons that commit rape, and I want to tell you why that is true. Such attorneys as Mr. Short, who represents the defendant, pull the wool over the eyes of a jury and get them to return a verdict of not guilty. I tell you that, if you turn this defendant loose, then you cannot blame the people for taking the law in their own hands. Mr. Short has tried to frighten you with a picture of a scaffold; but, gentlemen, do not allow yourselves to become frightened. It would be much worse than convicting an innocent man for you to turn this defendant loose, and then in a week or two for him to rape one of your wives, sisters, or daughters." This argument and the like expressions of the district attorney were promptly objected to by the defendant through his counsel, and the court was requested to stop the district attorney from using such expressions, and to instruct the jury not to consider such argument, because the same were highly inflammatory and reasonably calculated to prejudice the minds of the jury against the defendant. The court signs the bill with this qualification: "This bill is disallowed. The court cannot recall the argument of the district attorney, but at no time was the court called upon to stop him, or requested to instruct the jury not to consider such argument."

Then follows an approval by bystanders of the bill:

We, the undersigned citizens of the state of Texas, hereby attest that we are fully informed and understand the contents of the foregoing bill of exceptions; that we were bystanders in the court, and present 51 L.R.A. (N.S.)

when the matters related in said bill of exceptions occurred, and we are fully cognizant of said matters, and the said bill of exceptions, which the judge presiding at said trial has refused to sign, is correct, and truly presents the facts as they really transpired. Witness our signatures on this the 24th day of June, A. D. 1913.

[Signed] Chas. A. Wyman.
P. H. Ransome.
R. B. Mays.

This was properly sworn to before the clerk of the district court. This bill seems to be in compliance with the statute; it was in no way contested. The statute provides means and methods by which a contest may be had under such circumstances, but it was not had in this case. We therefore take the bill as we find it. Of course, such speeches, arguments, and remarks as are found in this bill of exceptions ought not to occur. The defendant's life, if it is to be taken, should be taken under the forms and solemnities of the law. Rape is considered by our people, we may be justified in saying, as one of the heinous crimes, and one which seems to excite our people sometimes beyond the bounds of reason, eventuating in the fury of mob violence even to burning at the stake. Therefore the prosecution and the court should look well that the feelings of the "people" should not be dragged into the courts and before juries in trial of cases under charges of rape. Here was a negro charged with rape upon an elderly white woman. The passions of the mob feeling were held up by the prosecution in his speech before the jury, and the jury urged to convict this man to prevent mob law, and he appealed to the jury, if they should turn this defendant loose, they could not blame the people from taking the law into their own hands. Taking the law into their own hands about what, and against whom? Against the negro if he was acquitted, or against the jury for acquitting him. The juries are not to try the accused and hang him to keep mobs from hanging them or him. If the accused in a capital case is to forfeit his life, it should be done under the most solemn forms of the law. The court room and the courthouse and the judicial system are organized, not to convict upon mob law or by mob violence, but to convict under the due process of law guaranteed by the Constitution and laws of our country. No man's life, liberty, or property shall be taken except under due process of the law of the land. This is one of the solemn guarantees reserved in the Bill of Rights. We call especial attention to this sentence: "It would be much worse than convicting an

innocent man for you to turn this defendant loose," etc. We do not know of a worse condition that could possibly arise in a civilized community and in the enlightened jurisprudence of this country than the proposition to convict an innocent man rather than turn this defendant loose. If he should be innocent, then under this statement of the district attorney it would be better to convict him than to turn him loose for fear that in a week or two one of the wives, daughters, or sisters of some jurymen might be insulted. Expressions like this should not be indulged in a court room, and should not be approved by either the trial or appellate court. The courts of this country cannot subscribe as a part of its jurisprudence that it is better to convict an innocent man than to return a verdict of not guilty against an accused person. In other words, apply that directly to this case: It would be worse to turn this defendant loose for fear he might ravish somebody else than it would be to convict him though he be innocent. If prosecuting officers will continue to make such appeals and to use such arguments, if they be arguments, before a jury, it will be the duty of this court at all times under such circumstances to reverse the judgment, and see that the accused is convicted only under the due process of the law of the land. Branch's Crim. Law, § 62; Smith v. State, 44 Tex. Crim. Rep. 142, 100 Am. St. Rep. 849, 68 S. W. 995; Powell v. State, — Tex. Crim. Rep. —, 70 S. W. 218, 14 Am. Crim. Rep. 5; Thompson v. State, 33 Tex. Crim. Rep. 475, 26 S. W. 987; Conn v. State, 11 Tex. App. 400; and other cases cited by Mr. Branch.

The judgment is reversed and the cause is remanded.

Harper, J., and Prendergast, P. J.:

We do not think any error is shown in the charge of the court, and if error, it would be error in favor of the defendant; but agree to the reversal of the case solely on the remarks of the district attorney.

A motion for rehearing having been filed, Davidson, J., on February 4, 1914, handed down the following additional opinion:

The state has filed a motion for rehearing, and attaches a lot of affidavits attacking a bill of exceptions found in the record. It is unnecessary to repeat this bill of exceptions, as it is fully set out and discussed in the original opinion. We are of opinion there is no such merit in the motion for rehearing as would authorize or require this court to change its ruling. The affidavits attached to the motion for new trial cannot be considered. This is an appellate court, and matters of the character 51 L.R.A. (N.S.)

ter sought to be brought in review before this court are *dehors* the record and not permissible. This has been the rule in Texas, and was thoroughly gone over in the opinion by Judge Harper in *Pye v. State*. — Tex. Crim. Rep. —, 154 S. W. 222. The *Pye* Case has been followed in several subsequent decisions, some of which have been rendered at the present term of the court.

We are of opinion that the bill of exceptions is sufficient to present the question set forth and contained in it. The bill of exceptions was presented to the judge, and he refused it, stating that he did not know what the remarks of the district attorney were, but that he knew the matter was not called to his attention. Based on this refusal, appellant proved up his bill by bystanders. This was in accordance with the statute. It was filed within the thirty days allowed by law. There was no contest over it, and no attempt to contest it in the court below. That contest is sought to be made here by the affidavits connected with the motion for rehearing. This bill of exceptions is within the provisions of the statute, and is almost, if not identically, the same question decided in *Johnson v. State*, 42 Tex. Crim. Rep. 298, 59 S. W. 898, in an opinion by Judge Brooks. See also Branch's Crim. Law, § 52, for other cases.

The motion for rehearing is overruled.

WASHINGTON SUPREME COURT. (Department No. 2.)

MANZA MATSUDA, Resp't.,

v.

JENNIE H. HAMMOND, Doing Business as
Hammond & Company, et al., App'ts.

(77 Wash. 120, 137 Pac. 328.)

Appeal — exclusion of evidence — error.

1. Exclusion of evidence that after an assault and the starting away of the assailant, the victim picked up a rack containing a small roll of wrapping paper, in an action to recover damages for the assault, is not reversible error, although the act might be regarded as *res gestæ*.

Note. — Liability of master for assault by servant or agent in collecting debts.

The master's liability in such circumstances depends upon familiar question whether the servant while making the assault was acting within the scope of his employment.

The seller of goods is not liable for an assault by its instalment collector while attempting to seize the goods, where he was instructed not to take goods when pay-

Trial — remittitur — permitting verdict to stand.

2. The court may permit a verdict to stand on condition of a remittitur, although it finds that it is the result of passion or prejudice, if such finding is based entirely on the amount of the verdict.

Master and servant — assault on customer — liability.

3. A merchant is not liable for the act of his general manager authorized to collect for goods sold, or settle for goods taken wrongfully, in assaulting a customer to whom he has gone to collect for goods which he claims were taken by the customer, contrary to the contention of the latter, unless he ratifies the act or retained the manager in his employ with knowledge that he was likely to commit it.

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ment of instalments was refused. *Fineran v. Singer Mfg. Co.* 20 App. Div. 574, 47 N. Y. Supp. 284.

And the same is true where he is instructed not to take the goods without the purchaser's consent, and the assault is committed in an attempt to seize them without such consent. *McGrath v. Michaels*, 80 App. Div. 458, 81 N. Y. Supp. 109.

Likewise, where the collector had instructions, if he failed to get the amount due, to report to the employer the reasons for the debtor's failure to pay, and the assault was committed in seizing the goods. *Murphy v. Buckley Newhall Co.* 151 App. Div. 520, 136 N. Y. Supp. 309.

So, a driver of a beer wagon, who is authorized to deliver beer for cash only, and who is himself charged with the price of any that is delivered without receiving cash, but who, after making a delivery without obtaining payment, endeavors to collect it the next day from the employee of the customer, upon whom he makes an assault in the endeavor to collect the money, is not in so doing acting within the scope of his employment, and does not thereby render his employer liable for the assault. *McDermott v. American Brewing Co.* 105 La. Ann. 124, 52 L.R.A. 684, 83 Am. St. Rep. 225, 29 So. 498.

Likewise, the master has been held not liable, because the servant was not acting within the scope of his authority, where a collector beat a third person to whom the debtor referred him as having witnessed payment in full (*Callahan v. Hyland*, 59 Ill. App. 347); and where a lock keeper, before demanding tolls, assaulted a boat owner under the pretext that they had not been paid (*Ware v. Baratara & L. Canal Co.* 15 La. 169, 35 Am. Dec. 180).

In *Hamberg v. Singer Mfg. Co.* 2 N. Y. Supp. 185, a complaint against a master for assault by his instalment collector, following an altercation concerning nonpayment, was held insufficient for want of an allegation that the assault was committed for the purpose of forwarding the master's interest and carrying out the work which 51 L.R.A.(N.S.)

APPEAL by defendants from a judgment of the Superior Court for Pierce County in plaintiff's favor in an action to recover damages for an assault and battery. Affirmed in part.

The facts are stated in the opinion.

Messrs. Frank H. Kelley and Ralph Woods, for appellants:

There was no evidence that Bell had authority to use unlawful or forceful methods to make collections, and certainly no authority to punish by personal assault one of appellant's debtors who refused to pay. Unless Bell has such authority, appellant is not responsible for his act.

Johanson v. Pioneer Fuel Co. 72 Minn. 405, 75 N. W. 719, 4 Am. Neg. Rep. 409; *Collette v. Rebori*, 107 Mo. App. 711, 82 S. W. 553; *Davis v. Houghtellin*, 33 Neb.

he was employed to do, or that the act was such as was required by his employment.

In *Baylis v. Schwalbach-Cyclé Co.* 38 N. Y. S. R. 492, 14 N. Y. Supp. 933, the court said that it matters not that the servant exceeded his powers, and that he did an act that the master was not authorized to do, so long as he acted in the line of his duty, or, being engaged in the master's service, attempted to perform a duty which pertained, or which he thought pertained, to that service. The court held that the owner of a cycle store might be found liable for assault by a person at the time in charge of the store, upon one to whom a hirer of a cycle turned the same over to use and return to the store, and who, because unable to pay the full charge for rental, was subjected to the assault.

In *Bergman v. Hendrickson*, 106 Wis. 434, 80 Am. St. Rep. 47, 82 N. W. 304, involving an action against a saloon keeper for assault by a bartender upon the plaintiff, who refused to pay for drinks which he had ordered, the court, while in effect conceding that no recovery could be had if the assault was personal to the bartender, because committed solely in resentment of a vile epithet applied to him by the plaintiff,—held that if the assault was committed for the purpose of collecting payment for the liquor, the bartender was within the scope of his employment. The court said: "It was his method of performing the duty delegated to him, and, although the method may not have been either expressly authorized or even contemplated,—nay, although it may have been expressly prohibited,—yet the master is liable for the damages caused thereby, provided he has intrusted to the servant the duty he was attempting to perform." It was contended that, although the bartender may have been acting within the scope of his duties, the master was not liable if the plaintiff, by words or acts, conducted himself in such an improper manner as was calculated to arouse and bring on a personal altercation with the bartender, and

582, 14 L.R.A. 737, 50 N. W. 765; Meehan v. Morewood, 52 Hun, 566, 5 N. Y. Supp. 710; Lytle v. Crescent News & Hotel Co. 27 Tex. Civ. App. 530, 66 S. W. 240; Murphy v. Buckley Newhall Co. 151 App. Div. 520, 136 N. Y. Supp. 309; McDermott v. American Brewing Co. 105 La. 124, 52 L.R.A. 684, 83 Am. St. Rep. 225, 29 So. 498; Brown v. Boston Ice Co. 178 Mass. 108, 86 Am. St. Rep. 469, 59 N. E. 644.

Where the whole verdict is tainted by passion and prejudice, a new trial should be granted as a matter of right.

Tunnel Min. & Leasing Co. v. Cooper, 50 Colo. 390, 39 L.R.A.(N.S.) 1064, 115 Pac. 901, Ann. Cas. 1912C, 504; Clark v. Great Northern R. Co. 37 Wash. 537, 79 Pac. 1108, 2 Ann. Cas. 760.

Facts and circumstances immediately after the blow was struck were admissible as *res gestæ*.

McKelvey, Ev. 277; 1 Greenl. Ev. 14th ed. p. 144; Lambert v. La Conner Trading & Transp. Co. 30 Wash. 346, 70 Pac. 960; Roberts v. Port Blakely Mill Co. 30 Wash. 25, 70 Pac. 111, 12 Am. Neg. Rep. 372; Britton v. Washington Water Power Co. 59 Wash. 440, 33 L.R.A.(N.S.) 109, 140 Am. St. Rep. 858, 110 Pac. 20.

that the assault complained of was wholly or in part the result of such misbehavior on the plaintiff's part. But the trial court refused a requested instruction to that effect, and charged, on the contrary, that if the bartender was impelled to the assault, whatever words may have passed, by a purpose to enforce payment of the liquor bill that he was trying to collect, and committed the assault as incidental to such efforts, plaintiff should recover. In upholding this charge, the court said that the rule thus laid down by the trial court is sanctioned by the authorities, and that the exception thereto, involved in the defendant's contention, in the case of misconduct or verbal provocation on the part of the plaintiff, is nowhere recognized. "Such an exception," said the court, "would ignore the principle on which the liability is founded, namely, that the tortious act of the servant, when within the scope of his duty, is the act of the master himself. That being the principle, the tort, when so committed by the servant, can be justified on no grounds less cogent than those which would serve as justification of the same act if committed by the master."

Collette v. Rebori, 107 Mo. App. 711, 82 S. W. 552, is sufficiently set out in MATSUDA v. HAMMOND.

Cases involving the liability of a carrier for an assault by an employee upon a passenger for nonpayment of fare and peculiar to themselves, and have been excluded.

It will also be observed that, although one case is discussed above in which the servant made the assault in seizing goods 51 L.R.A.(N.S.)

Messrs. Edwin F. Masterson and John E. Owen, for respondent:

The testimony offered by appellant Hammond was immaterial and irrelevant.

Grant v. Singer Mfg. Co. 190 Mass. 469, 6 L.R.A.(N.S.) 567, 77 N. E. 480, 20 Am. Neg. Rep. 351; 2 Street, Foundations of Legal Liability, 468.

Where the agent begins a quarrel while acting within the scope of his agency, and immediately follows it up by violent assault, the master will be liable, as the law under the circumstances will not undertake to say when, in the course of the assault, he ceases to act as agent, and acts upon his own responsibility.

New Ellerslie Fishing Club v. Stewart, 123 Ky. 8, 9 L.R.A.(N.S.) 475, 93 S. W. 394.

Fullerton, J., delivered the opinion of the court:

This action was brought by the respondent against the appellants to recover damages for personal injuries received in an assault and battery committed upon the respondent's person by the appellant John Bell. For some time prior to the assault, the appellant Hammond conducted a produce commission business in the city of Tacoma.

for which his master had not been paid, no attempt has been made here to discuss the question of assault in seizing goods generally, the note being concerned only with cases in which the servant had authority to collect money, but no authority to seize the goods. As to liability of master for assault by servant sent to recover property, see the note to Grant v. Singer Mfg. Co. 6 L.R.A.(N.S.) 567.

As to responsibility of master to a third person for acts of an employee in attempting to recover possession of goods which he had delivered at his own risk without receiving payment of charge against the same, see the note to Steinman v. Baltimore Antiseptic Steam Laundry Co. 21 L.R.A.(N.S.) 884.

As to whether an assault growing out of a quarrel commenced while the employee was acting within the scope of his authority may be regarded as a personal act of the employee for which the employer is not liable, see the note to New Ellerslie Fishing Club v. Stewart, 9 L.R.A.(N.S.) 475.

As to liability of innkeeper or restaurant keeper for assault by a servant upon a patron, see the note to Chase v. Knabel, 12 L.R.A.(N.S.) 1155.

As to liability of private person or corporation for acts of special police officer appointed by public authority, see the notes to McKain v. Baltimore & O. R. Co. 23 L.R.A.(N.S.) 289; Pennsylvania R. Co. v. Kelly, 30 L.R.A.(N.S.) 481; and Taylor v. New York & L. B. R. Co. 39 L.R.A.(N.S.) 122.

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The appellant Bell was her manager, and at the time of the assault had full charge of her business; Mrs. Hammond then being away from Tacoma on a visit to the eastern states. The respondent conducted a fruit and vegetable stall in the Tacoma public market. He traded somewhat extensively at Mrs. Hammond's place of business, always paying cash for the produce purchased. He was at her place of business on the evening preceding the day of the assault making certain purchases, and when he left the appellant Bell conceived the idea that he had carried away a crate of strawberries for which he had not paid. Bell told one of the delivery men to call upon the respondent on his return that evening and demand payment for the crate. The delivery man on his return reported that he was not able to collect the amount demanded, as the respondent denied taking the berries. The appellant Bell on the next day went himself to the respondent's place of business and demanded that the respondent pay for the berries, telling him that if he did not pay for them at once he would have him arrested for larceny. The respondent again denied taking the berries, and during the altercation which followed Bell became abusive, whereupon the respondent told him to go away. Bell then struck him in the face with his fist, breaking his nose, and causing it to bleed somewhat freely. After striking the blow, Bell immediately left the place, going back to his employer's place of business. The injury caused the respondent some suffering, kept him away from his place of business for some three weeks, and left his nose deformed. On the trial of the action the jury returned a verdict in the respondent's favor for the sum of \$556. A motion for a new trial was filed, on the hearing of which the court held the verdict excessive, and gave the respondent an option to take a judgment for \$400 or submit to a new trial, reciting in its order that the verdict "appeared to have been given under the influence of passion and prejudice." The respondent accepted the first alternative, and judgment was entered in his favor for \$400 against both appellants.

The appellants first assign that the court erred in the exclusion of evidence. A witness on behalf of the appellants testified that, after Bell had struck the respondent, the respondent picked up a paper rack on which there was a small roll of wrapping paper, when he was seized by someone standing near. On motion of the respondent, this evidence was withdrawn from the jury on the ground of immateriality. The appellants argue that it was a part of the *res geste*, and hence its exclusion is error under all circumstances. But the rule is not thus

broad. While matters pertaining to the *res geste* are usually admissible, they must bear some material relation to the principal fact in question before it is error to exclude them. When they are not closely related, the court may exercise a discretion in their admission or exclusion, and its ruling will be reviewed for error only when it is evident that its ruling has operated to the prejudice of the complaining party. Under the facts disclosed by the record, we are unable to say that the court did not properly exercise its discretion in this instance. Prior to the commission of the act attempted to be shown, the assault and battery had been completed, and the appellant had started away from the scene. The respondent's subsequent conduct could hardly be so closely related to the principal question in issue as to make its exclusion reversible error.

It is next assigned that the court erred in refusing to set aside the verdict after it found that the verdict appeared to have been entered under the influence of passion and prejudice. Unquestionably, the court could, without committing reversible error, have set the verdict aside and granted a new trial for the reason assigned, but under our practice it was not compulsory upon it to do so. From the order as a whole it is evident that the judge was led to the belief expressed in the order solely because of the size of the verdict, as he found no fault with the conclusion of the jury that the respondent was entitled under the evidence to some recovery. It was therefore within his province either to grant a new trial unconditionally, or to grant it on the condition that the respondent refused to accept a judgment in such sum as he conceived the jury were warranted in finding as compensation for the injury. In so far therefore as the judgment affects the appellant Bell, we find no reversible error in the record.

On behalf of the appellant Hammond, the additional contention is made that the appellant Bell, when he assaulted and beat the respondent, was not acting within the scope of his authority. This contention we think is well founded. The authority of Bell as shown in the record was to act as general manager of Mrs. Hammond's business. This grant of authority would unquestionably authorize Bell to make collections for goods sold from her place of business, and to exact settlements for goods wrongfully taken therefrom, but it would not, without something more, render her liable for unlawful acts of Bell committed while making such collections or settlements. An employer is liable for the unlawful and criminal acts of his employee only when he directly authorizes them, or ratifies them when committed, or, perhaps,

continues an employee in his employment after he has knowledge that the employee has committed, or is liable to commit, unlawful acts while in the pursuit of his employer's business. The liability does not arise from a mere contract of employment to do a legitimate and lawful act.

In *Johanson v. Pioneer Fuel Co.* 72 Minn. 405, 75 N. W. 719, 4 Am. Neg. Rep. 409, the corporation owned a coal dock in the city of Duluth, where it stored, cared for, and handled coal, which, in the course of its business, it sold to its customers. It employed a person to attend to its business at the dock, and the employee sold a ton of coal to a purchaser who took a part of it away at two different times. When the purchaser returned for the remainder, the employee charged him with having procured larger sacks than he had at first used, and of wrongfully attempting thereby to obtain more coal than he was entitled to. This the purchaser denied, whereupon the employee became enraged and assaulted and beat the purchaser. The assault and beating were held to be an independent tort on the part of the employee, not within the scope of his employment, and one for which the employer was not liable. In the course of the opinion the court said: "The time and place of the transaction in this case do not constitute the test of the master's liability. In order to hold the master liable, the act causing the injury must pertain to the duties which the servant was employed to perform. When the relation of master and servant ceases, all liability for the act of the persons employed ceases also. *Wood, Mast. & S.* 538. And the test of liability of the master depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it. *Id.* 535. We hold that the assault by McKee upon plaintiff was an independent tort, for which the Pioneer Fuel Company was in no way liable; that the bald statement in the complaint that it was done by the servant while in the course of his employment is not, taken in connection with the other facts stated in the complaint, sufficient to charge the master. *Campbell v. Northern P. R. Co.* 51 Minn. 488, 53 N. W. 768."

In *Collette v. Rebori*, 107 Mo. App. 711, 82 S. W. 552, Rebori employed one Sansone as his agent for collecting bills. An account against Collette which Collette disputed was given him to collect. In endeavoring to make the collection, the agent got into an altercation with the debtor, during the course of which he assaulted and beat him. It was held that the employer 51 L.R.A. (N.S.)

was not liable; the court saying: "The best considered cases hold that the master is liable to third persons for the negligent, fraudulent, or tortious acts of his agent or servant when it is shown that the agent or servant was acting within the scope of his employment, and that the act complained of was done as a means or for the purpose of doing the work assigned him by the master. To assault and beat a debtor is not a recognized or usual means resorted to for the collection of a debt, nor is it one likely to bring about a settlement of a disputed account. The evidence shows that, when plaintiff returned to the store for the purpose (as he says) of amicably settling the disputed account, and made known to Sansone his purpose, Sansone did not take up the settlement of the account with him, but without the least provocation assaulted and beat him, not for the purpose of settling or collecting the account, but to gratify his private malice against the plaintiff. He was not therefore about his master's business nor acting within the scope of any authority delegated to him by defendant. For these reasons the rule of *respondere superior* does not apply." To the same effect are the cases of *Meehan v. Morewood*, 52 Hun, 566, 5 N. Y. Supp. 710; *Lytle v. Crescent News & Hotel Co.* 27 Tex. Civ. App. 530, 66 S. W. 240; *Murphy v. Buckley Newhall Co.* 151 App. Div. 520, 136 N. Y. Supp. 309; *Brown v. Boston Ice Co.* 178 Mass. 108, 86 Am. St. Rep. 469, 59 N. E. 644. See also from this court, *Thorburn v. Smith*, 10 Wash. 482, 39 Pac. 124; *Linck v. Matheson*, 63 Wash. 593, 116 Pac. 282.

Cases cited from this and other courts, holding common carriers liable for assaults committed upon the persons of passengers by the carrier's employees while in the course of transportation, rest on a different principle, and are not in point. Carriers owe to their passengers the nondelegable duty of protecting them not only from assaults by their own employees, but from the assaults of persons generally. The rule rests upon principles of public policy, not on the relation of employer and employee. On the same principle, our own case of *Chase v. Knabel*, 46 Wash. 488, 12 L.R.A. (N.S.) 1155, 90 Pac. 642, is distinguished from the case at bar.

The cases cited holding an employer liable for the acts of an agent employed to retake articles sold on conditional bills of sale, which have not been paid for according to the contract of sale, are not so easily distinguished on principle. The liability seems to be made to rest on the peculiar character of the employment, which from its nature is liable to create disputes and con-

sequent breaches of the peace. But without specially reviewing the cases, we think they may be regarded as exceptions to the general rule announced, rather than as establishing a contrary rule.

The judgment is affirmed as to the appellant Bell, and reversed and remanded, with instructions to dismiss as to the appellant Hammond.

Crow, Ch. J., and Mount, Parker, and Morris, JJ., concur.

Petition for rehearing denied.

CALIFORNIA SUPREME COURT.
(Department No. 2.)

FILIPPO POGGI, Appt.,
v.

C. A. SCOTT.

(— Cal. —, 139 Pac. 815.)

Trover — mistake as to value of property — effect on liability.

That a purchaser of property who, upon taking possession, disposed of barrels of a tenant found on the premises, thought they were mere rubbish, does not relieve him from liability for the full amount of loss in case they were in fact filled with valuable material.

(March 11, 1914.)

APPEAL by plaintiff from a nonsuit granted by the Superior Court for San Diego County in an action brought to recover damages for alleged unlawful conversion of wine. Reversed.

The facts are stated in the opinion.

Mr. E. S. Torrance for appellant.

Messrs. Haines & Haines for respondent.

Henshaw, J., delivered the opinion of the court:

Plaintiff sued to recover from defendant the sum of \$2,000 damages suffered by him by reason of the unlawful conversion, by defendant, of some 200 barrels of plaintiff's wine. A nonsuit was granted upon the ground that plaintiff had failed to prove a

sufficient case for the jury, and from the judgment which followed he appeals.

The primary and essential consideration therefore is, What facts did plaintiff by his evidence establish? He showed that his wine was stored in barrels in the cellar of a building situated at Twelfth and K streets in the city of San Diego. There were about 210 barrels of wine, and some empty barrels. He rented the whole building from Judge Mouser, the agent of the owner, but used only the cellar. Subsequently Judge Mouser leased the whole building to the Sanitary Laundry Company, and thereafter the plaintiff paid rent for the use of the cellar to the laundry company. He was a stockholder in the laundry company, and the laundry company was paying dividends. In practice the laundry company deducted the amount of the rent from the dividends due to plaintiff upon his stock. The wine was stored in a room in the cellar, which room plaintiff kept locked. The empty barrels were near the door, the filled barrels in tiers along the wall. Plaintiff lived in the country, visited San Diego about twice a month, and upon the occasion of each visit looked after his wine. Once a year he racked it off. It was sound wine, seven years old, and of the value alleged. During the tenancy of the Sanitary Laundry Company Judge Mouser sold the property to the defendant Scott. Mr. Scott was informed of the tenancy of the laundry company at the time of the sale, and also of the fact that plaintiff was a subtenant of the laundry company, paying rent to it for the use of the cellar. "It is my recollection," testifies Judge Mouser, "that I informed Mr. Scott that Mr. Poggi was occupying those basement rooms and had been paying the laundry company \$2, and that he could have the rent from August 1, 1908." Poggi was not informed of this change in ownership. In due course the laundry company vacated the premises, Poggi's wine remained in the cellar, and he, himself, knowing nothing of the change of ownership, understood that he was liable for his rent of \$2 per month to Judge Mouser. In November, 1909, Mr. Daneri, a friend of plaintiff's, phoned to him at the latter's home, about 15 miles from San Diego, asking him if he still owned the wine, and telling him that it was being carted off,

Note. — While it seems to be well settled that the essence of conversion is the wrongful deprivation of an owner of his property (38 Cyc. 2007), and that, as stated in *Poggi v. Scott*, "neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action" (see also 38 Cyc. 2011), no case has been found, aside from *Poggi v. Scott*, upon the question of mistake as to the character or value of property, as affecting liability for the conversion thereof. Upon this point, however, the decision in *Poggi v. Scott* seems clearly to be correct, under the general rules above stated, as no mistake of this kind could have any bearing upon the primary question as to the owner's wrongful deprivation of his property, which renders the wrongdoer liable in trover for the conversion thereof.

A. C. W.

and that it would be better for him to come to town and see about it. Poggi came to town the next day, found that his wine had been carried away, and went immediately to Judge Mouser to ask about it. Then for the first time he knew, being informed by Judge Mouser, that the latter no longer had any connection with the property, and that it had been sold to the defendant. Plaintiff immediately called upon defendant, and was by him told that he knew nothing about the wine, but that he had sold some old barrels in the cellar. It appears that a fraud and theft had been perpetrated in the following manner, and this is the testimony of the defendant: Two Italians, Bernardini and Ricci, called upon him and told him that there were some empty barrels in the cellar of his laundry building which they desired to buy. Scott replied that he did not know that there were any barrels there, and made an appointment with them to visit the place the next day. He did so, meeting Bernardini alone. Bernardini took him to where the barrels were stored. There was no lock on the door, and exposed to view were a number of broken barrels, "back further were some more barrels, apparently whole. I went back and tapped them, and so far as I could discover they were empty." He told Bernardini that he knew nothing of the value of the barrels, and asked what they were worth. Bernardini said they were worth \$10 or \$15. He regarded the barrels as old junk, and told him that he would sell them for \$15, provided Bernardini would clean the whole cellar out. "I said, further, that I would sell him those barrels for \$15, but if anything should be in the barrels, the trade should be different, to which Mr. Bernardini consented." "The thought just came in my mind that possibly upon going into the thing there might be something there, and, there being anything in them, you would not expect to sell them at that price,—that was all, and he so understood." Bernardini and his companions carted off the wine in barrels and shipped it away. They were arrested, and it was upon their preliminary examination that defendant gave the testimony above referred to and quoted from. This, with sufficient detail, presents the case of the plaintiff.

In support of the nonsuit respondent argues that Scott thought he was disposing of so much junk or rubbish in the form of barrels; that therefore he cannot be held for the conversion of full barrels of wine, or for the value of wine in barrels. Further it is said that it is fallacious to argue that the loss of the wine was the consequence of any act of Scott, or that any act of Scott produced it, or that there was any

chain of connection, broken or unbroken, between Scott's act and the injury to Poggi, or that the loss to Poggi of his wine was the result, proximate or otherwise, of any act of Scott, or that Scott's act caused it in any sense at all.

If respondent's premises, as here stated, are correct, the conclusion of his nonliability is unassailable. But are they correct? The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff, from which injury to the latter results. Therefore neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action. "The plaintiff's right of redress no longer depends upon his showing, in any way, that the defendant did the act in question from wrongful motives, or, generally speaking, even intentionally; and hence the want of such motives, or of intention, is no defense. Nor, indeed, is negligence any necessary part of the case. Here, then, is a class of cases in which the tort consists in the breach of what may be called an absolute duty; the act itself (in some cases it must have caused damage) is unlawful and redressible as a tort. 1 Bigelow, Torts, p. 6. And says Judge Cooley (Cubit v. O'Dett, 51 Mich. 347, 16 N. W. 679: "Absence of bad faith can never excuse a trespass, though the existence of bad faith may sometimes aggravate it. Everyone must be sure of his legal right when he invades the possession of another." And without further quotation, reference may be made to 1 Street, Foundations of Legal Liability, pp. 231 et seq.; 38 Cyc. 2015; Horton v. Jack, 4 Cal. Unrep. 758, 37 Pac. 653, s. c. 126 Cal. 526, 58 Pac. 1051; Build v. Multnomah Street R. Co. 12 Or. 271, 53 Am. Rep. 355, 7 Pac. 99; Bolling v. Kirby, 24 Am. St. Rep. 795, Prof. Freeman's note; Isle Royale Min. Co. v. Hertin, 37 Mich. 332, 26 Am. Rep. 520; Galvin v. Bacon, 11 Me. 28, 25 Am. Dec. 258; Donahue v. Shippee, 15 R. I. 453, 8 Atl. 541; Hobart v. Hagget, 12 Me. 67, 28 Am. Dec. 159; Davis v. Tacoma R. & Power Co. 35 Wash. 203, 66 L.R.A. 802, 77 Pac. 209, 16 Am. Neg. Rep. 621; Cook v. Monroe, 45 Neb. 349, 63 N. W. 800; Gibbs v. Chase, 10 Mass. 128.

In consonance with the principles of law thus declared, no question can arise of the defendant's responsibility under the evidence. Conceding all that may be argued as to the absence of improper motives on the part of the defendant, the all-important fact yet remains, under his own testimony, that he sold barrels that did not belong to him, and which did with their contents be-

long to the plaintiff. That he did not know that the barrels contained wine did not excuse his conduct. He had no legal right to sell the barrels whether or not they contained wine. He was exercising an unjustifiable and unwarranted dominion and control over the property of another, and from his acts great loss resulted to that other. If he did not, in fact, know that the barrels contained wine, at least his suspicions were aroused that they were not empty, as is evidenced by his statement to Bernardini that if the barrels were not empty and did contain something, they would make a different bargain. And while the conduct of the defendant as thus established was sufficient to make him liable for this tortious act of dominion over the property of another, there is the added fact in the testimony of Judge Mouser that the defendant was informed by him of the tenancy of plaintiff and ownership of the barrels and of the wine, and that they were in the cellar of the building which defendant had purchased.

An appellate court is always reluctant to review evidence the primary duty of weighing which rests with a jury. It does so only, as here, under compulsion. The views which it is forced to express are not to be taken as conveying anything beyond what the necessities of the consideration require. So here, those views are to be considered as expressing merely this court's conviction that the evidence offered by plaintiff demanded the consideration of the case by the jury, and that the trial court was therefore in error in withholding that consideration from the jury and in granting a nonsuit.

The judgment appealed from is therefore reversed.

We concur: Melvin, J.; Lorigan, J.

COLORADO SUPREME COURT.

RE ESTATE OF GEORGE STRACHAN CAREY, Deceased.

RICHARD JOHN CAREY, Appt.,

v.

RICHARD PRICE.

(— Colo. —, 136 Pac. 1175.)

Wills — probate — proof of signature.

1. The failure of attesting witnesses to remember whether a will bore testator's signature or not at the time of its attestation will not preclude its probate, where the statute makes the will, and not the signature of the testator, the subject of attestation and acknowledgment.

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Same — supplying proof of signature by circumstantial evidence.

2. Where, owing to the failure of the memory of the subscribing witnesses, after the lapse of a long time, it is impossible to obtain direct testimony that the testator's signature was attached to his will at the time of its attestation, resort may be had to circumstances to supply the deficiency; and the uncontradicted testimony of one of the witnesses that the testator came into the room where the witnesses were with pen, ink, and the paper in his hand, sat down for a moment at the table, arose, and, handing the pen to the first witness, said it was his will and asked them to sign it, is sufficient to this end.

Same — undue influence — insufficiency of evidence.

3. Where all that the evidence discloses as to the alleged undue influence exerted by the chief beneficiary of a will was that he was a warm personal friend of the testator, and transacted considerable business for him, and that they visited one another frequently, the court is warranted in directing the jury to find against the contestant.

Same — capricious disposition.

4. A will cannot be said to be unnatural and capricious because the bulk of testator's estate is left to an intimate friend instead of to a brother in a distant country, with whom testator had no communication for forty years, and who he said had done him a great wrong.

(December 1, 1913.)

APPEAL by contestant from a decree of the District Court for Adams County affirming a decree of the County Court admitting to probate the will of George Strachan Carey, deceased. Affirmed.

The signatures appeared upon the will as follows:

George S. Carey

Witnessed by

William Topham

Sumpter Patterson.

Note. — Proof of will where attesting witnesses have forgotten circumstances attending its execution.

- I. Introductory, 928.
- II. General rule, 928.
- III. Rule under Illinois statute, 932.
- IV. Some witnesses dead or absent, 934.
- V. Lapse of time, 936.
- VI. Where there is an attestation clause.
 - a. In general, 939.
 - b. Where clause is not read, 945.
- VII. Absence of attestation clause, 946.
- VIII. Holographic wills, 949.
- IX. Experience of testator, 951.
- X. Presence of attorney or experienced scrivener as a subscribing witness or otherwise, 952.
- XI. Habit of witness, 954.
- XII. Signature by mark, 955.
- XIII. Miscellaneous, 957.

The further facts are stated in the opinion.

Messrs. Frank Prestidge, George L. Hodges, and George A. Garard for appellant.

Messrs. Edward Ring and Harrie M. Humphreys, for appellee:

There was due execution of the will.

Hobart v. Hobart, 154 Ill. 610, 45 Am. St. Rep. 151, 39 N. E. 581; Harp v. Parr, 168 Ill. 459, 48 N. E. 113; Gould v. Chicago Theological Seminary, 189 Ill. 282, 59 N. E. 536; Webster v. Yorty, 194 Ill. 408, 62 N. E. 907; Re Barry, 219 Ill. 391, 76 N. E. 577; Illinois Masonic Orphans' Home v. Gracy, 190 Ill. 95, 60 N. E. 194; Canatsey v. Canatsey, 130 Ill. 397, 22 N. E. 595; More v. More, 211 Ill. 268, 71 N. E. 988;

Mead v. Presbyterian Church, 229 Ill. 526, 14 L.R.A. (N.S.) 255, 82 N. E. 371, 11 Am. Cas. 426; Abbott v. Abbott, 41 Mich. 540, 2 N. W. 810; Holloway v. Galloway, 51 Ill. 159; Elston v. Montgomery, 242 Ill. 348, 26 L.R.A. (N.S.) 420, 90 N. E. 3; Dickie v. Carter, 42 Ill. 376; Brownfield v. Brownfield, 43 Ill. 147; Allison v. Allison, 46 Ill. 61, 92 Am. Dec. 237; Re Shapter, 35 Colo. 578, 6 L.R.A. (N.S.) 575, 117 Am. St. Rep. 216, 85 Pac. 688; United States Fidelity & G. Co. v. People, 44 Colo. 557, 85 Pac. 828; International Trust Co. v. Anthony, 45 Colo. 474, 22 L.R.A. (N.S.) 1402, 101 Pac. 781, 16 Ann. Cas. 1087; Schouler Wills, 1900, ed. p. 347, note, 2; Huckvale's Goods, L. R. 1 Prob. & D. 375, 36 L. J. Prob. N. S. 84, 16 L. T. N. S. 434, 16

I. Introductory.

The fundamental rule on this subject is that the proof of the execution of a will does not depend upon the memory of the subscribing witnesses.

And it is a general rule that the validity of the execution of a will may be shown by other evidence than that of the subscribing witnesses.

In Illinois, however, the peculiar statute is construed as limiting the evidence allowable in the probate court to that of the subscribing witnesses, unless they are dead or their testimony cannot be procured.

This note does not deal with the questions as to what the statutory requirements are, or from what definitely proven circumstances their observance may be inferred. It is intended to include only cases where the attempt to prove execution encounters imperfect or erroneous memory on the part of the subscribing witnesses. Thus, the general questions of presumption *omnia esse rite acta* where there is or where there is not an attestation clause are not here generally discussed. It is, of course, often difficult to draw the line between lack of memory and failure to observe the facts of execution as they occur, and some cases may be included which involve failure of observation rather than of memory.

The arrangement of many cases under what is hardly more than a single legal proposition is necessarily arbitrary. Almost every probate case involving defective recollection has several features or elements bearing more or less upon the result, and it is often difficult to say which of several features of a case has had the greatest influence in the decision.

Cases where the statute does not require that the will be witnessed are excluded, as are also cases concerning lost or destroyed wills.

For proof of signature of a testator by a mark where the subscribing witnesses are forgetful, see note to Wienecke v. Arbin, 44 L.R.A. 145; as to necessity of attestation clause to will, see the note to Mead v. Presbyterian Church, 14 L.R.A. (N.S.) 255; as to necessity of procuring deposition 51 L.R.A. (N.S.)

of attesting witnesses to will, who are beyond the jurisdiction of the court, see note to Wells v. Thompson, 47 L.R.A. (N.S.) 722; as to necessity that witnesses see testator sign or that they see his signature, see note to Dougherty v. Crandall, 38 L.R.A. (N.S.) 161; for the question whether the competency of an attesting witness to a will is to be determined as of the time of attestation or of probate, see note to Bruce v. Shuler, 35 L.R.A. (N.S.) 686.

II. General rule.

As heretofore stated, the fundamental rule on this subject is that the proof of the execution of a will does not depend upon the memory of the subscribing witnesses.

"The law does not allow proof of the valid execution and attestation of a will to be defeated at the time of probate by the failure of the memory on the part of any of the subscribing witnesses." *Gillis v. Gillis*, 96 Ga. 1, 30 L.R.A. 143, 51 Am. St. Rep. 121, 23 S. E. 107.

"Where there is good reason to suppose the will has been duly executed, and that no fraud or want of testamentary capacity existed at the time it was made, justice to the dead as well as to the living requires that the declared wishes of the testator should not be defeated by the imperfect recollections of the attesting witnesses; or by reason of their deaths or removal beyond the jurisdiction of the state. It is for this reason that the most liberal presumption in favor of the due execution of wills are sanctioned by courts of justice, where, from lapse of time or otherwise, it may be impossible to give positive evidence on the subject. A will may therefore be sustained even in opposition to the positive testimony of one or more of the subscribing witnesses who, either mistakenly or corruptly, swear that the formalities required by the statute were not complied with, if from other testimony in the case the court or jury is satisfied that the contrary was the fact. And where any of the witnesses are dead, or in such a situation that their testimony can-

Week. Rep. 64; *White v. British Museum*, Bing. 310; *Gillis v. Gillis*, 96 Ga. 1, 30 L.R.A. 143, 51 Am. St. Rep. 121, 23 S. E. 37; *Gable v. Rauch*, 50 S. C. 95, 27 S. E. 55; *Dewey v. Dewey*, 1 Met. 349, 35 Am. Dec. 367; *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21; *Orser v. Orser*, 24 N. Y. 51; *Week v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *McHiggins v. Higgins*, 24 N. Y. 553; *Ela v. Edwards*, 8 Gray, 91; *Re Kellum*, 52 N. Y. 517; *McSullivan*, 114 Mich. 189, 72 N. W. 135.

It was incumbent upon appellant to prove, by a preponderance of the evidence, certain acts, before he could avoid the will on the ground of undue influence.

Re Shell, 28 Colo. 167, 53 L.R.A. 387, 9 Am. St. Rep. 181, 63 Pac. 413; *Brown-*

field v. Brownfield, 43 Ill. 147; *Roe v. Taylor*, 45 Ill. 485; *Snell v. Weldon*, 239 Ill. 279, 87 N. E. 1022; 1 Redf. Wills, 522-525.

The alleged confidential relations existing between the testator and Mr. Price did not give rise to a fiduciary relation between them.

Snodgrass v. Smith, 42 Colo. 60, 94 Pac. 312, 15 Ann. Cas. 548.

When there is nothing in the evidence offered to show that the devisee suggested the making of the will, or did anything to bring about its execution, it is irrelevant to the issue of undue influence.

Bauchens v. Davis, 229 Ill. 557, 82 N. E. 365.

It will be presumed that a testator has

not be obtained, proof of their signatures as received as secondary evidence of the acts to which they have attested by subscribing the will as witnesses to the execution thereof. The same rule is frequently applied to the case of a subscribing witness who is called and sworn, but who, from defect of memory, has no recollection of the transaction except that his signature to the will is genuine." *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424. The court here is speaking generally. There was in the case an attestation clause, which, however, omitted the request, but there seems to have been ample proof by all the subscribing witnesses of the request.

That this rule has been long recognized is shown in *Dayrell v. Glascock*, Skinner, 113, where the report of the case is as follows: "At a trial at bar, it was ruled per Holt, Chief Justice, that if there are three subscribing witnesses to a will, this is sufficient within the statute of frauds and perjuries, though, upon the trial, one of them would not swear that he saw the testator seal and publish his will; for otherwise it would be in the power of a third person to defeat the will of the deceased, and therefore, if it be proved to be his hand, and that he set it as a witness to the will, it is sufficient to satisfy the statute."

There is no rule of law which makes the probate of a will depend upon the recollection or veracity of the subscribing witnesses. *Abbott v. Abbott*, 41 Mich. 540, 2 N. W. 810.

In *Pearson v. Wightman*, 1 Mill, Const. 336, 12 Am. Dec. 636, the court recognized the principle of proving the handwriting of a witness, even though he denied his signature and the handwriting, but reversed a judgment for a will nine years old, sending the case back for a new trial, on the ground that there was not sufficient testimony as to the handwriting, there being none as to that of one of the witnesses who denied his signature.

The provision as to the forgetfulness of subscribing witnesses to a will in the New York Code of Civil Procedure (§ 2620) does not seem to have added anything to the pre-existing common law of the subject.

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Thus, in *Wright's Estate*, 67 How. Pr. 117, the court states that the provision of the Code does not materially differ from that contained in chap. 460 of the Laws of 1837. But the provision as to forgetfulness was not in the earlier statute. This Code provision (§ 2620, in part) is as follows: "If all the subscribing witnesses to a written will are, or if a subscribing witness, whose testimony is required, is dead, or incompetent, by reason of lunacy or otherwise, to testify or unable to testify; or if such a subscribing witness is absent from the state, or if such subscribing witness has forgotten the occurrence, or testifies against the execution of the will; the will may nevertheless be established, upon proof of the handwriting of the testator, and of the subscribing witnesses, and also of such other circumstances, as would be sufficient to prove the will upon the trial of an action."

The witnesses need not all remember.

Where there was some contradiction, owing to lack of recollection or to perversion of the facts, it was held that it is not necessary that the facts be testified to by both of the attesting witnesses. *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650.

Thus, in *Welch v. Welch*, 9 Rich. L. 133, where one of the witnesses did not remember some of the necessary formalities of the execution, five years before, the court, in holding that the will was properly proved by the other two attesting witnesses, and that it was not necessary that they should all recollect, said: "It cannot be maintained as a sound legal proposition that each witness must recollect and prove the fact of signature or testator's acknowledgment. Such a principle would place the validity of wills on a very precarious basis, depending mainly on the selection of persons of retentive memories. The guard which the statute seeks to throw around the testator by requiring at least three witnesses, on such a view, would greatly multiply the hazard of disappointment, and yet more startling is the idea that such defect can only be supplied by testimony derived otherwise than

just cause for making the disposition of his property he does.

Meeker v. Meeker, 75 Ill. 260.

In the absence of other competent proof of undue influence, the inequality of a testamentary disposition cannot be urged as proof of undue influence.

Rutherford v. Morris, 77 Ill. 397.

A person can dispose of his property by will as he may choose, if he be of sound mind and memory.

Floyd v. Floyd, 3 Strobb. L. 44, 49 Am. Dec. 626; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Miller v. Miller*, 3 Serg. & R. 267, 8 Am. Dec. 651; *Leverett v. Carlisle*, 19 Ala. 80; *Gardner v. Gardner*, 22 Wend. 526, 34 Am. Dec. 340; *Den ex dem. Trumbull v. Gibbons*, 22 N. J. L. 117, 51

Am. Dec. 253; *Dickie v. Carter*, 42 Ill. 377; *Roe v. Taylor*, 45 Ill. 485; *Yoe v. McCord*, 74 Ill. 33; *Martin v. Teague*, 2 Speers, L. 268; 1 Redf. Wills, 514.

There must be some testimony, either direct or circumstantial, to show that undue influence not only existed, but that it was exercised with respect to the making of the will.

Re Shell, 28 Colo. 167, 53 L.R.A. 307, 89 Am. St. Rep. 181, 63 Pac. 413; *Snodgrass v. Smith*, 42 Colo. 60, 94 Pac. 312, 15 Ann. Cas. 548.

Musser, Ch. J., delivered the opinion of the court:

By this appeal it is sought to reverse a judgment of the district court admitting

from the remaining subscribing witnesses. It is supposed a less stringent rule would amount to a virtual repeal of the statute, when a single witness might alone establish a will. To sustain the proposition contended for would to my mind subvert the plainest rules of evidence. The dishonesty of a witness, the casualty of death, as well as the frailty of memory, would then become not only a serious, but often an insurmountable, obstacle in offering the required proof." There was here testimony confirming the fact that the paper propounded was according to the testator's previously expressed wishes, but the report is silent as to any attestation clause. This case is cited in *Gable v. Rauch*, 50 S. C. 95, 27 S. E. 556.

So, in *Jesse v. Parker*, 6 Gratt. 57, 52 Am. Dec. 102, the court, in approving a verdict of the jury for the will where there was some failure of recollection, but more a difference of observation, the testimony of the witnesses being reasonably clear, said: "The court is further of opinion that, although there must be satisfactory proof that every statutory provision has been complied with in order to establish a will, the law does not prescribe the mode of proof; nor that the will shall be proved, as well as attested, by a specified number of witnesses. If such proof were to be required from each subscribing witness, the validity of wills would be made to depend upon the memory and good faith of a witness, and not upon reasonable proof that all the requirements of the statute had in fact been complied with." In this case the will and the signature of the testator, and the signatures of the three attesting witnesses, were all written by the testator's physician, who was one of the witnesses; whether there was an attestation clause does not appear.

In *Re Higgins*, 94 N. Y. 554, where the court seems to have considered that the testimony of each witness was sufficient, and where there was an attestation clause, it was said: "The authorities are numerous which sustain the position that where one witness testifies positively to the due execution of a will, the want of memory of

another cannot overcome the positive testimony, and the proof will be regarded as sufficient."

Other testimony than that of subscribing witnesses.

For cases under the Illinois statute, see *infra*, III.

It is not intended here to do more than illustrate the rule that the validity of the execution of a will may be shown by other evidence than that of the attesting witnesses.

The testimony of another person present on the execution of a will may cure deficiencies or contradictions due to lack of clear recollection on the part of the subscribing witnesses. *Gillis v. Gillis*, 96 Cal. 1, 30 L.R.A. 143, 51 Am. St. Rep. 121, 23 S. E. 107, *infra*, XI; *Montgomery v. Perkins*, 2 Met. (Ky.) 448, 74 Am. Dec. 414, *infra*, XII; *Tappen v. Davidson*, 27 N. J. Eq. 459, *infra*, VI. a; also the following cases, *infra*, X.: *Bloom v. Terwilliger*, 5 N. J. Eq. 221, 78 Atl. 742; *Re Voorhis*, 25 N. Y. 765, 26 N. E. 935; *Bennett v. Sharp*, Jur. N. S. 456.

Thus, wills have been admitted where the evidence of a nonsubscribing witness present at the execution has supplied the want of proof, due wholly or in part to defective recollection of subscribing witnesses,—

—where one witness was dead, another without the state, and the third did not remember the performance of all the requirements in the execution of a holographic will two or three years old, having an attestation clause, *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831;

—where the surviving subscribing witness remembered nothing of the matter four years afterward, but proved the signature to the attestation clause of both witnesses, *Miller v. Van Dyk*, — N. J. —, 9 Atl. 372.

—where one of the subscribing witnesses had forgotten what had occurred, at least as to the declaration and requests of the testator (the report is silent as to any attestation clause), *Thompson v. Seastedt*, 6

to probate a paper writing purporting to be the last will of George Strachan Carey. The judgment of the district court was a result of an appeal from the county court, where the writing had been admitted to probate as a will. The date of the purported will was February 26, 1900, and the subscribing witnesses fixed the time that they signed the paper at about that date.

The appellant calls attention to §§ 4653 and 4670, *Mills's Anno. Stat.* 1st ed. The 1st section is as follows: "All wills, by which any lands, tenements, hereditaments, annuities (or) rents are devised, shall be reduced to writing, and signed by the testator or testatrix or by some one in his or her presence, and by his and (or) her direction, and attested in the presence of the

testator or testatrix, by two or more credible witnesses." This section appears as § 2 of chapter 90, *Rev. Stat.* 1868; § 2789, *Gen. Laws* 1877; § 3482, *Gen. Stat.* 1883. In 1903, the law with reference to wills was revised, and the substance of that section now appears in *Rev. Stat.* 1908, § 7071, as follows: "All wills by which any property, real or personal, is devised or bequeathed, shall be reduced to writing and signed by the testator, or by some one in his presence and by his direction, and attested in the presence of the testator, by two or more credible witnesses." Section 4670, *Mills's Anno. Stat.* 1st ed. is as follows: "If, upon the hearing of such proof, it shall satisfactorily appear by the testimony of two or more of the subscribing witnesses to such

Thomp. & C. 78, also reported briefly in 3 *Luin*, 395;

—where one subscribing witness to a recent will having an attestation clause testified positively that the witnesses signed before the testator, and the other was hazy on the matter, perhaps having an impression to the same effect, and the scrivener, who was not a subscribing witness, testified positively that the testator signed first, *Re Lewis*, 51 *Wis.* 101, 7 *N. W.* 829;

—where one of the subscribing witnesses to a will two years old, having a full attestation clause, did not recall any declarations or request by the testator to him, but admitted that he was asked to sign by the person who superintended the execution, who testified fully as to the requirements, and who was experienced in such matters. *Re Johnson*, 7 *Misc.* 220, 27 *N. Y. Supp.* 649.

The same was held in the case of a will two or three years old, with a full attestation clause, where there was distinct testimony by the executor, an experienced person, that all the legal requirements were observed, and particularly that the testator signed before the witnesses, although one subscribing witness, after stating that the testator signed after him, appeared to have doubt on the subject, and said that he might be mistaken, and the other subscribing witness did not remember that the testator signed last, and stated in the course of his examination that he, the witness, was the last one who signed. *Rugg v. Rugg*, 83 *N. Y.* 592.

In *Re Schweigert*, 17 *Misc.* 186, 40 *N. Y. Supp.* 979, a will was admitted to probate seventeen years after its date, where the experienced scrivener had no recollection of the execution, but knew the handwriting of the witnesses, and was willing, from his manner of doing business, to swear that the attestation clause was read over to the witnesses in presence of the testator, although such clause did not state that the will was signed in the presence of the witnesses, one of whom stated that, to the best of his recollection, such signing took place, but the other did not testify as to any 51 *L.R.A.* (N.S.)

declaration or signing by the testator, but thought a part of the will was read over.

In *Re Langtry*, 1 *Silv. Sup. Ct.* 524, 5 *N. Y. Supp.* 501, a sixteen-year-old will was held properly admitted to probate although the subscribing witnesses did not remember distinctly that the testator acknowledged his signature, but the scrivener testified that he did so, and the attestation clause so stated, and the surrogate was of the opinion that the paper was so folded that the witnesses must have seen the attestation clause and the signature of the testator, which unquestionably was upon the instrument when they signed.

In *Bayliss v. Sayer*, 3 *Notes of Cases*, 22, it was held that a will having the usual attestation clause had been properly proved, although the subscribing witnesses thought that the testator signed after they did, where a third person testified that the testator signed before the witnesses, and that one of the witnesses had made a remark as to the necessity for it, as the court might consider all the circumstances, rather than trust to the recollection of the witnesses upward of a year and a half after the execution of the will.

In *Meurer's Will*, 44 *Wis.* 392, 28 *Am. Rep.* 591, it was held that a will which had a full attestation clause was shown to have been sufficiently executed where, so far as can be gathered from the confused report of the case, the two subscribing witnesses did not remember or did not testify to matters supplied by the testimony of nonattesting witnesses who were present.

—judicial explanations.

In *Hall v. Hall*, 38 *Ala.* 131, where it was held proper to take the testimony of the scrivener, who was present at the execution, as to the identity of the will, the court said: "The law makes two subscribing witnesses indispensable to the formal execution of a will; but it by no means follows that the testimony of these witnesses is the only evidence by which the due execution of the will can be established. On the contrary, it is laid down as undoubted law that if,

will, that they were present and saw the testator sign such will, and attested the same at his request, or that he acknowledged the same to be his last will, and that they believe the testator to be of sound mind and memory at the time of signing and acknowledging the same, the court shall admit the same to probate and record; provided, that no proof of fraud, compulsion or other improper conduct be exhibited, which, in the opinion of the court, shall be deemed sufficient to invalidate or destroy the same, and every will, testament or codicil, when thus proven, shall be recorded by the clerk of the county court, in a book to be provided by him for that purpose, and shall be good and available in law, for the granting, conveying and assuring the lands,

from forgetfulness, the subscribing witnesses should fail to prove the formal execution of the will, other evidence is admissible to supply the deficiency; or if the subscribing witnesses all swear that the will was not duly executed, they may be contradicted, and the will supported by other witnesses or by circumstances." Quoted in *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831.

In *Haynes v. Haynes*, 33 Ohio St. 598, 31 Am. Rep. 579, where the probate was reversed on another ground, the court said: "That, while the due execution of a will cannot be assumed in the face of positive evidence to the contrary, merely because it has been signed and attested in due form, yet mere failure of the attesting witnesses, or their denial of the facts, will not defeat it, if it can be established by other evidence. Neither failure of memory, nor the corrupt or false swearing of attesting witnesses, will be allowed to defeat the will, if its due execution can be shown by other testimony." See also *Hildreth v. Marshall*, 51 N. J. Eq. 241, 27 Atl. 465, *infra*, V.

In *Hopf v. State*, 72 Tex. 281, 10 S. W. 589, the court, in affirming the receipt of evidence of a nonsubscribing witness who was present on the execution of a will a few months old, said: "The statute further provides the mode of proof when all the subscribing witnesses are dead, or when the will was wholly written by the testator, but none of the statutory provisions on the subject forbid the introduction of other than the statutory proof; and cases may arise in which it would be the duty of a court to probate a will even in opposition to the testimony of the subscribing witnesses. If, from defect of memory or from corrupt purpose, subscribing witnesses should be unable or unwilling to testify to the facts bearing on the due execution of a will, this ought not to be permitted to defeat the will, if other evidence admissible under the ordinary rules of law to establish facts be introduced sufficient to satisfy the court that the testator executed the will with the formalities and solemnities and under the circumstances required by law to make a valid will."

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tenements and hereditaments, annuities, rents, goods and chattels therein and thereby given, granted and bequeathed." That section appeared in chapter 90, Rev. Stat. 1868, as § 19, § 2806, Gen. Laws 1877, § 3499, Gen. Stat. 1883, and with some verbal modifications, not important in the case, it now appears as § 7088, Rev. Stat. 1908.

The appellant first contends that the paper writing in question was not executed or proven as provided by these statutes. He intimates that the evidence of one of the subscribing witnesses shows affirmatively that the signature of the testator was not on the paper writing at the time they signed it as witnesses. This cannot be said to be a correct statement of the result of

—distinction between absence of facts and absence of memory.

Where there is no lack of memory the testimony of a third person supplying almost every deficiency in the testimony of the attesting witnesses, together with an attestation clause not read to or by them, will not overbear the clear recollection of the witnesses. *Re Hitchler*, 25 Miss. 365, 55 N. Y. Supp. 642.

III. Rule under Illinois statute.

In Illinois the statute provides that the will shall be sufficiently proved if "attested in the presence of the testator or testatrix by two or more credible witnesses, two of whom declaring on oath or affirmative before the county court of the proper county that they were present," etc. This is held to confine the testimony in the county (or probate) court, as to execution, to that of the attesting witnesses, but if the probate is refused, on an appeal the will may be proved by any evidence competent to prove a will in chancery.

In *Kaul v. Lyman*, 259 Ill. 30, 102 N. E. 212, where one of the witnesses testified to the matters of the execution and the other witness recollected nothing about it, it was held that the probate court, being confined to the testimony of subscribing witnesses, properly refused to admit the will, but that the appellate court, having the power to hear other testimony, had properly admitted the will to probate, receiving evidence of persons not present at the execution. There was here no attestation clause, but the word "witness" was written just before the signature of each witness.

Cases subject to the statutory requirement

The cases here cited are those where there was a probate of the will in the county court, and an affirmance on appeal, and consequently they were subject to the requirement of the statute as construed.

The cases are confusing and apparently contradictory on the question of the amount

the testimony. The only inference that can be drawn from the testimony of each of the subscribing witnesses is that at the time they testified they did not remember whether the signature of the testator was there or not when they affixed their signatures. They did not testify that it was there, neither did they testify that it was not there. Accepting this as the effect of their testimony, we understand the position of the appellant to be that such testimony was not sufficient to admit the will to probate. His position, as stated in the language of the brief, is as follows: "The primary contention upon which our arguments will rest as to this branch of the case is that, in order that the paper writing here under consideration may be held to constitute a legal will, it

must be established by legal proofs that the signature of George Strachan Carey was affixed thereto at the time the attesting witnesses affixed their signatures thereto, or before the attesting witnesses separated on the occasion of the alleged execution of the paper as a will."

The deceased was a bachelor and lived alone on and operated a large ranch in Adams county. Each of the subscribing witnesses testified that about the date of the paper writing, to wit, February 26, 1900, they were present with Mr. Carey in the kitchen of his ranch house. Mr. Carey went into another room and returned with pen and ink and the paper in question in his hand, and told them that it was his last will, and requested them to sign it as wit-

of proof required in the probate court where there is a lack of memory on the part of the subscribing witnesses. In *Greene v. Hitchcock*, *infra*, and (*obiter*) in *Kaul v. Lyman*, *supra*, it seems to be held that the county court should refuse probate unless two subscribing witnesses remember the observance of the legal requirements. The contrary seems to be held in *Canatsey v. Canatsey*, *infra*, and (*obiter*) in *Hill v. Kehr*, *infra*.

In *Greene v. Hitchcock*, 222 Ill. 216, 78 N. E. 614, where the county court admitted a will having a full attestation clause, one of the witnesses having testified fully as to the requirements of the statute, while the other witnesses could not remember the occasion of signing, it was held by the supreme court to be error under the statute to admit in evidence his answer to the effect that he would not have signed the will had not the requirements of the law, with which he was familiar, been complied with, as this answer could not supply the statutory requirements.

But in *Canatsey v. Canatsey*, 130 Ill. 397, 22 N. E. 595, a will signed by mark, and having an attestation clause, was held sufficiently proved where one of the witnesses testified to the legal facts, but was a little uncertain as to his memory, and the other witness, an experienced man, did not remember the transaction, but stated that he had never witnessed a will except when he was duly requested, and it was duly signed and acknowledged. The lawyer who drew the will testified that he signed it for the testator.

And in *Hill v. Kehr*, 228 Ill. 204, 119 Am. St. Rep. 425, 81 N. E. 848, where the testimony of one witness covered the statutory requirements, but the testimony of the other witness was indefinite as to some of them, and he had not heard nor read the attestation clause, it seems that the court would have affirmed the decree of probate as far as the execution of the will was concerned, if there had not been doubt expressed by the witness, or lack of knowledge, as to the sanity of the testatrix.

In *Hobart v. Hobart*, 154 Ill. 610, 45 Am. St. Rep. 151, 39 N. E. 581, referred to in 51 L.R.A. (N.S.)

the opinion in *RE CAREY*, it was held that the will was sufficiently proved although the surviving attesting witness did not remember whether she saw the signature of the testator upon the instrument or not, she having testified that he did not sign it in her presence, or to that effect, but that he acknowledged it to be his will and requested her and the other witnesses to sign, which they did in his presence. The court stated that there was a presumption that the testator had signed the will, arising from his declaration that it was his will and his request to the witnesses to sign it, and that there was proof that the signature to the will was his, and that the two subscribing witnesses signed the attestation clause in his presence, and that there was thus a *prima facie* case in favor of due execution. The attestation clause in this case consisted of the words "written, signed, and sealed in the presence of."

Cases not limited by the statute.

The cases here cited are those where probate was refused in the county or probate court, and therefore the circuit court on appeal was not limited by the statute. See statement at the beginning of the subdivision.

In *Crowley v. Crowley*, 80 Ill. 469, *infra*, a will was rejected, both in the county court and on appeal, where both the witnesses signed by mark, and they could not identify the paper as the one which they had signed, and neither of them was satisfied as to the sanity of the testator or his soundness of mind, although the scrivener testified that the testator was of sound mind, and that he executed the will in the presence of the attesting witnesses, the court holding that, although in this case the testimony was not limited by law to that of the attesting witnesses "the law is imperative that there must be the concurring evidence of two witnesses to authorize probate of the will;" but this question is probably no longer the law in Illinois.

In *Thompson v. Owen* 174 Ill. 229, 45 L.R.A. 682 51 N. E. 1046, it was held to

nesses, which they did in the presence of Mr. Carey and each other. They both testified that they believed Mr. Carey was of sound mind and memory at that time. One of the witnesses, Mr. Patterson, testified that Mr. Carey sat down at the table and got up and requested them to sign it. As said before, each of the witnesses testified that he did not remember whether the signature of Mr. Carey was there or not at the time they signed it. The signature could have been seen by them at the time, if it was there. The testimony showed that the body of the writing, as well as Mr. Carey's signature thereto, was in the handwriting of Mr. Carey. Mr. Carey died in November, 1908. After his death, the writing was found in his ranch house, among his per-

sonal effects, inclosed in a sealed envelope on which was written, in the handwriting of Mr. Carey, a direction that it was to be sent to a named attorney in Denver. The trial at which the subscribing witnesses testified occurred in the district court in September, 1909, nearly ten years after they had written their names on the paper. The testimony, as stated above, was not contradicted in any way.

The witnesses did not see Mr. Carey sign the paper. The evidence shows a sufficient acknowledgment of it as the last will of the testator, if it was a will at the time the witnesses subscribed their names thereon. The question is: Was the evidence, in the absence of anything to the contrary, sufficient to establish that the signature of

be error for the circuit court on appeal to reject as incompetent the recitals of a full attestation clause, when the witnesses remembered nothing of the transaction, but identified their signatures, there being also proven the signature of the testator, the preparation of the will, and its delivery by the testator to the custodian, who produced it. The court distinguished *Crowley v. Crowley*, supra, on the ground that there was no attestation clause in that case, and concluded that other Illinois cases referred to were not contrary to the decision in the *Thompson Case*; but it would seem that this case gives a different idea to the meaning of the statute than what had theretofore prevailed.

In *Re Kohley*, 200 Ill. 189, 65 N. E. 699, the court declined to disturb the judgment of the circuit court ordering probate, which had been refused by the county court, where the lawyer who drew the will, who was not a subscribing witness, testified fully to all the necessary facts, and the attestation clause was in due form, although one of the attesting witnesses testified that he had practically no recollection of the occurrence except that he was called into the office of lawyers to witness a will, and understood that the paper was a will of the testatrix, and the other witness, the partner of the lawyer who drew the will, testified that the testatrix did not sign in his presence, and that she said nothing and did not do anything to acknowledge the paper, and that there was not a word spoken when the other witness signed. The court pointed out that the evidence of the subscribing witnesses alone was not sufficient, but that the failure of a witness to remember would not destroy the presumption arising from the attestation clause.

In *Mead v. Presbyterian Church*, 229 Ill. 526, 14 L.R.A.(N.S.) 255, 82 N. E. 371, 11 Ann. Cas. 426, it was held that a will should be admitted to probate where one of the witnesses remembered only that he signed the will at the request of the testatrix at a certain place, and the other witness did not remember the facts of the execution. It was shown by nonsubscribing witnesses

that the testator was of sound mind and memory, that his signature was genuine, that the instrument was holographic, and that it was signed by the two subscribing witnesses as witnesses. In the margin opposite the signatures of the witnesses was the word "witnesses" written by the testatrix, and after the name of the first witness was the word "witness" in his handwriting, and after the name of the other witness were ditto marks. The court said: "It has . . . been held that where the instrument offered for probate bears the genuine signature of the testator, and is properly witnessed, it is entitled to be admitted to probate if the attestation clause recites all the facts necessary to a legal execution of the will, although the subscribing witnesses are unable to recollect that all the formalities prescribed by the statute and recited in the attestation clause were actually complied with. *Thompson v. Owen*, supra. *Gould v. Chicago Theological Seminary*, 187 Ill. 282, 59 N. E. 536; *Hobart v. Hobart*, supra. . . . In this case, while there was no attestation clause attached to the instrument reciting all the acts necessary to be done that the will might be legally executed, we think the evidence found in this record clearly supplies the presumption arising from the presence of an attestation clause."

IV. Some witnesses dead or absent.

There are many cases where wills have been admitted where some of the witnesses were dead or absent, and some or all of those testifying were deficient in recollection of the circumstances. (The reference following the citation is to the subdivision where the case is set out.)

Barnewall v. Murrell, 108 Ala. 366, 18 So. 831, supra, II.; *Gillis v. Gillis*, 96 Ga. 1, 30 L.R.A. 143, 51 Am. St. Rep. 121, 23 S. E. 107, infra, XI.; *Pate v. Joe*, 3 J. J. Marsh. 113, infra, XI.; *Welty v. Welty*, 8 Md. 15, infra, V.; *Eliot v. Eliot*, 10 Allen, 357, infra, VII.; *Hennes v. Huston*, 81 Minn. 30, 83 N. W. 439, infra, VI. 1.; *Fatherree v. Lawrence*, 33 Miss. 585, infra,

the testator was on the paper at that time, for there is no evidence that it was placed thereon by the testator after the witnesses had signed it and before they separated? This question has not been heretofore determined by this court.

In *Hobart v. Hobart*, 154 Ill. 610, 45 Am. St. Rep. 151, 39 N. E. 581, it is pointed out that some local statutes, particularly in New York, require that there must be an acknowledgment of his signature by the testator, while, in Illinois, it was sufficient when the witnesses did not see him sign the paper that the testator acknowledged the will to be his act and deed, and the court was inclined to think that decisions from those states that require an acknowledgment of the signature were not appli-

cable in Illinois. This difference in statutes is pointed out in *Schouler on Wills*, § 321, where the author states that one line of statute expression follows the old English statute of frauds, which made the will the subject of acknowledgment, while the other follows the statute of Victoria, which made the signature the subject of acknowledgment, and it is said that when the statute makes the signature, and not the will, the subject of acknowledgment, a stricter rule of construction has been adopted.

The appellant, in his brief, admits that under the old statute of frauds a more liberal construction was adopted than under the Victorian statute. It must be borne in mind that our statute requires the will, and not the signature, to be the subject of

XII.; *Mundy v. Mundy*, 15 N. J. Eq. 290, *infra*, VI. a.; *Miller v. Van Dyk*, — N. J. —, 9 Atl. 372, *infra*, VII.; *Vernon v. Vernon*, 69 N. J. Eq. 759, 61 Atl. 409, the same; *Verdier v. Verdier*, 8 Rich. L. 135, *infra*, VIII.; *Hopf v. State*, 72 Tex. 281, 10 S. W. 589, *supra*, II.; *Dean v. Dean*, 27 Vt. 746, *infra*, VII.; *Grant's Will*, 149 Wis. 330, 135 N. W. 833, *infra*, XII.; *Lloyd v. Roberts*, 12 Moore P. C. C. 158, *infra*, VI. a.; *Thomas's Goods*, 1 Swabey & T. 255, 28 L. J. Prob. N. S. 33, 5 Jur. N. S. 104, 7 Week. Rep. 270, *infra*, VII.; *Torre's Goods*, 8 Jur. N. S. 494, *infra*, VIII.; *Cheaney v. Arnold*, 18 Barb. 434, *infra*, V.; *Re Townley*, 1 Connolly, 400, 4 N. Y. Supp. 455, *infra*, VI. a.; *Morris v. Kniffin*, 37 Barb. 337, *infra*, XII. See also *Wright v. Rogers*, L. R. 1 Prob. & Div. 678, 38 L. J. Prob. N. S. 67, 21 L. T. N. S. 156, 17 Week. Rep. 833, *infra*, X.; *Re Brissell*, 16 App. Div. 137, 45 N. Y. Supp. 122, the same; *Re Walker*, 67 Misc. 6, 124 N. Y. Supp. 615, the same; *Orser v. Orser*, *infra*, VI. a.

Thus, wills have been held sufficiently proved where the surviving subscribing witness—

—remembered nothing of the circumstances about twenty years afterwards, but was positive that he would not have signed unless he had known that every part of the full attestation clause was true, *Wright's Estate*, 67 How. Pr. 117, 2 Dem. 482;

—identified his signatures to a will and codicil sixteen and eighteen years old, with full attestation clauses, but remembered only that the testatrix asked him to witness her will, the court assuming that the deceased witness to both papers, who was a lawyer, had superintended the execution of both, *Re Brissell*, 16 App. Div. 137, 45 N. Y. Supp. 122;

—Eight years after execution, recollected that the other witness stated in the presence of the testator that the paper they were to sign was a codicil, and that he asked him to sign the testator's codicil, and there was nothing to rebut the *prima facie* case made by the attestation clause, *Elkinton v. Brick*, 44 N. J. Eq. 154, 1 L.R.A. 161, 15 Atl. 391.

In *Re Tyler*, 121 Cal. 405, 53 Pac. 928, 51 L.R.A. (N.S.)

it was held that a will was sufficiently proved where the surviving subscribing witness twelve years after did not recollect that the testatrix signed the will in the presence of the subscribing witnesses, or acknowledged her signature in their presence, or that she declared to them that the instrument was her will, or that she requested the deponent to sign his name as a witness. There was no attestation clause, but the last clause of the will read as follows: "In witness whereof I have hereunto set my hand and seal in the presence of John Heard and —, who I request to sign their names hereto as subscribing witnesses." Heard was the deceased witness.

In *Mock v. Garson*, 84 App. Div. 65, 82 N. Y. Supp. 310, the court declined to set aside the verdict of a jury sustaining a will eleven years old, where the surviving subscribing witness had very deficient recollection on the subject, and the weight of the testimony seemed to show that the name of the deceased witness was in the same handwriting as the name of the surviving witness, who, upon the probate some time before the trial, had sworn to the statutory requirements. The instrument was "drawn" by the testator, who knew the formalities of due execution, but we are not informed whether there was any attestation clause.

In *Re Gillmor*, 117 Wis. 302, 94 N. W. 32, the court approved the probate of a will with a full attestation clause where one of the subscribing witnesses was dead and the testimony of the other was indefinite. The surviving witness was inclined to think that he signed before the testator signed, but he said, eleven years afterward at the time of the probate, that there was nothing which enabled him to state the order of the signing except that, having drawn the will and the form for execution, and with pen in hand, he would naturally sign his name before turning over the papers to the other parties. It does not appear that he was a lawyer.

In the insufficiently reported case of *Barnes v. Barnes*, 66 Me. 286, the court declined to disturb the verdict of the jury in favor of a will over eight years old, with

acknowledgment. Our statute does not say that the will shall be acknowledged to be the act and deed of the testator, as in Illinois, but simply that he shall acknowledge it to be his last will. In the face of these differences as to construction in the two lines of statutes, our legislature adopted a statute expression more in conformity with the old statute of frauds than with the Victorian statute. Our statute is the guide that our courts have as to the legislative intent in his state. It must have been intended thereby that the courts of this state should adopt a construction in harmony with that adopted under similar statute expressions by other courts, rather than a construction adopted under essentially different statutes.

a full attestation clause, where one of the witnesses was dead, and the other two were nonresidents of the state, and one of them testified that he never signed a will unless it was in the presence of the other subscribing witnesses and of the testator and at his request, and that he was satisfied this was no exception to the usual course, although he had no distinct recollection of the matter. One of the witnesses was a lawyer, but whether he was the one who testified does not appear.

In *Pate v. Joe*, 3 J. J. Marsh. 113, it was held that a will about twenty-five years old was sufficiently proved where it was witnessed by A, B, and C, and it was proven that the will and the signature of the testator were in the handwriting of B, who was dead, and that the signature of C was in the handwriting of A, who was her husband. A had no recollection whatever of the circumstances, but stated that it was his habit never to witness any instrument without seeing the party who executed it make his signature, or hearing him acknowledge the instrument; that he would not have put his wife's name to the paper without her consent, and that sometimes, as he believed, he signed her name to papers as a witness. C stated that she could write her name, but the signature was not hers, and that she had no recollection whatever of the execution of the instrument, or of having authorized her husband to sign her name as a witness. The report is silent as to any attestation clause.

In *Butcher v. Butcher*, 21 Colo. App. 416, 122 Pac. 397, it was held that the statement of the only surviving witness that he signed the full attestation clause would be sufficient to show that he and the other subscribing witness signed it in the presence of the testator, he testifying to the other matters therein. In this case the testimony was taken by deposition, and there is not any reference as to want of recollection. The will was twenty-seven years old.

But a will was rejected in *Jackson ex dem. LeGrange v. LeGrange*, 19 Johns. 386, 10 Am. Dec. 237, where in ejectment a will twenty-five years old that had never been

It appears to us that the authorities upon which the appellant relies have reference to statutes wherein the signature, and not the will, is the subject of attestation and acknowledgment. Such cases can be authority here only by way of analogy, and when the facts are analogous also. His principal cases are from New York, where it seems the statute has particular reference to the signature of a testator.

In *Re Mackay*, 110 N. Y. 611, 1 L.R.A. 491, 6 Am. St. Rep. 409, 18 N. E. 433, the testator told the subscribing witnesses that the paper was his will. He handed it to them so folded that they could see no part of the writing except the attestation clause. They did not see either his signature or his seal. The direct evidence was that the wit-

proved before a surrogate was sought to be offered, and one of the witnesses was dead, one resided in the state, but was not called, and the third proved the signature of the dead witness and his own signature, but said that he had never known the testator, and had no recollection of anything about the paper. It does not appear whether there was any attestation clause or not.

See also *Worden v. Van Gieson*, *infra*, XII.

V. Lapse of time.

While, of course, the lapse of time is a material element in weighing the testimony of witnesses to wills, the courts in practice seem ready to consider that defects of recollection are frequent, even a short time after the execution.

Thus, there are examples of such defective recollection where the evidence was taken shortly after the date of the will. *Re Lewis*, 51 Wis. 101, 7 N. W. 829, *supra*, II.; *Re Jones*, 85 N. Y. Supp. 294, *infra*, VI. b; *Cooper v. Bockett*, 3 Curt. Eccl. Rep. 648, 2 Notes of Cases, 391, *infra*, VIII.; *Newhouse v. Godwin*, 17 Barb. 236, *infra*, XII.; see also *Re Gahagan*, — N. J. —, 89 Atl. 771, *infra*, VI.

So, where the time between the date of the will and the taking of the testimony was only a few months (*Robbins v. Robbins*, 50 N. J. Eq. 742, 26 Atl. 673, *infra*; *Young v. Barner*, 27 Gratt. 96, *infra*, VII.; *Chambers v. Queen's Proctor*, 2 Curt. Eccl. Rep. 415, *infra*, VI. a; *Re Attridge*, 6 Notes of Cases, 597, *infra*, VII.; *Gregory v. Dyke*, 4 Notes of Cases, 620, *infra*, VI. a); or where it was less than a year (*Re Carey*, 24 App. Div. 531, 49 N. Y. Supp. 32, *infra*; *Swain v. Edmunds*, 54 N. J. Eq. 438, 37 Atl. 1117, *infra*, VII.; *Woolley v. Woolley*, 95 N. Y. 231, *infra*, X.); or about a year (*Re Stockwell*, 17 Misc. 108, 40 N. Y. Supp. 734, *infra*, VII.; *Neiheisel v. Toerge*, 4 Redf. 328, *infra*, X.; *Walsh v. Walsh*, 4 Redf. 165, *infra*, X.; *Wright v. Rogers*, L. R. 1 Prob. & Div. 678, 38 L. J. Prob. N. S. 67, 21 L. T. N. S. 156, 17 Week. Rep. 833, *infra*, X.).

nesses did not see the signature, and could not see it. At the close of the opinion it is said: "The formalities prescribed by the statute are safeguards thrown around the testator to prevent fraud and imposition. To this end the witnesses should either see the testator subscribe his name, or he should, the signature being visible to him and to them, acknowledge it to be his signature." If the paper had been so placed that the witnesses could have seen the signature, and ten years thereafter they testified that they could not remember whether the testator's name was there or not, but that they could remember that he told them that it was his will and wanted them to witness his signature, the facts would be analogous to the facts here; but the case does not

inform us what the court would have done under the changed circumstances.

In *Lewis v. Lewis*, 13 Barb. 17, on page 25, the paper was so folded that the witnesses could not see the signature if it was there. The court bore down on the fact that the attestation and acknowledgment of the signature were required by the statute. If the facts had been that the paper was so placed that the signature could have been seen, but the witnesses did not remember whether it was there or not, the opinion does not disclose what the result would have been. The court, however, says: "The law of evidence, in its application to the proof of the several facts which, united, constitute a valid will, is the same as it is in its application to the proof of any other

Probate was sustained of a will a few months old with a full attestation clause, where one of the subscribing witnesses, the testator's physician, did not recollect anything about the declaration, while testifying as to other matters; and the other subscribing witness, who was the lawyer who drew the will, testified to its due execution. *Robbins v. Robbins*, 50 N. J. Eq. 742, 28 Atl. 673, where the court concluded that, notwithstanding the comparatively short time, the witness had forgotten.

In *Re Carey*, 24 App. Div. 531, 49 N. Y. Supp. 32, affirming 14 Misc. 486, 36 N. Y. Supp. 817, the court, in affirming the holographic will of an experienced testator, having a full attestation clause, concluded that a subscribing witness had forgotten the details of the execution of the will, less than a year old, he being a very busy man, who had forgotten entirely that he was a witness to the testator's will until the fact was stated to him. This witness testified that there was no publication in his presence by the testator, who was deaf, but that the other subscribing witness had said in a low tone that the paper was the testator's will; the witness was contradicted as to the tone of voice, and it was shown that the deafness of the testator was not great, and the other witness testified to the due execution of the will.

In *Hildreth v. Marshall*, 51 N. J. Eq. 241, 27 Atl. 465, the court stated in effect, as to the execution of a will less than a year old, that the vague uncertainty of the testimony of the subscribing witnesses was not sufficient to overcome the testimony of an interested person, together with the attestation clause; but the instrument was rejected on the ground of fraud.

But the court may not think that the witnesses' omissions to state certain formalities are due to forgetfulness when the will was executed only three months before. See *Wilson v. Hetterick*, 2 Bradf. 427, *infra*, VI. b.

And in *Ludlow v. Ludlow*, 36 N. J. Eq. 597, it was apparently held that there was no failure of memory in the case, where the will was three years old.

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See also for definiteness of recollection six years after execution, *Re Simmons*, 30 N. Y. S. R. 446, 9 N. Y. Supp. 352, *infra*, VI. b.

And absence of the recollection of the performance of certain formalities ten or more than ten years before does not necessarily mean that such formalities have been performed and forgotten. See *Re De Haas*, 9 App. Div. 561, 41 N. Y. Supp. 696, *infra*, VI. a; *Re Berdan*, 65 N. J. Eq. 681, 55 Atl. 728. See also *Adams v. Rodman*, 102 Wis. 456, 78 N. W. 588, 759, *infra*, X.

By way of illustration, it may be stated here that wills with a full attestation clause have been admitted to probate where—

—ten years after the execution, the recollection of one of the witnesses was somewhat faint as to certain circumstances, *Van Hooser v. Van Hooser*, 1 Redf. 365;

—fifteen or sixteen years after execution, the witnesses did not recollect the fact of publication and of request to sign, and the will was executed under the supervision of the attorney, although he was not allowed to testify, *Re Sears*, 33 Misc. 141, 68 N. Y. Supp. 363; .

—eight years after execution, one of the witnesses to the will of a solicitor testified to the effect that the testator signed before both of the attesting witnesses, but the court attached little weight to his evidence, and the other witness swore that not only did the deceased not sign in his presence, but that the signature was not on the paper at all when the witness signed,—the court considering that it could not rely on the memory of the last witness, *O'Meagher v. O'Meagher*, Ir. L. R. 11 Eq. 117.

A will ten years old was admitted in *Re Boardman*, 46 N. Y. S. R. 444, 20 N. Y. Supp. 60, where one of the subscribing witnesses was explicit in testifying that the testator signed the will in their presence, while the other had no definite recollection, but an impression that it was not signed by the testator in their presence, and that he did not observe the testator's signature. This witness had written the date of the will immediately preceding the signature of the testator, and the court thought that

fact. The evidence may be direct and positive, or it may be circumstantial, and presumptive; for the law of evidence in regard to wills, as well as in regard to deeds and documentary proof generally, must have reference to the casualties of human life and the infirmities of human memory."

This is a general declaration of law that is applicable here, in view of the fact, that the subscribing witnesses could not remember, after ten years, whether Mr. Carey's signature was on the will when they signed it. In the case of *Sears v. Sears*, 77 Ohio St. 104, 17 L.R.A. (N.S.) 353, 82 N. E. 1067, 11 Ann. Cas. 1008, it appears that the statute required that the will should be signed by the testator at the end thereof. At the end of the will, before the attestation clause,

he would have noticed the omission of the testator's signature had there been any omission, and that he had forgotten the details. The report is silent as to any attestation clause.

It was held that a will forty years old with a full attestation clause was sufficiently proven where two of the three witnesses were dead, and the third witness testified that the testator asked him to come to his house and witness his will, and he proved his signature to the instrument, but stated that the testator did not sign it in his presence, that this was the only occasion on which he had ever witnessed a document for the testator, that to the best of his knowledge when he signed his name the testator and one of the other witnesses were present, but that he had no recollection that the other witness had signed at the same time. *Welty v. Welty*, 8 Md. 15.

In *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424, the court sustained a will made ten years before probate, where, of the three witnesses to the will, one recollected that the statutory formalities had been performed, another did not remember that he knew that the paper was a will, or that the testator said that it was, and the third was not sure that the testator's signature was on the paper, but believed that the testator had said it was a will. The attestation clause was incomplete as to a requirement not in controversy, but the court apparently did not place much weight upon it one way or the other.

In *Cheaney v. Arnold*, 18 Barb. 434, affirmed in 15 N. Y. 345, 69 Am. Dec. 609, it was held that a will twenty-five years old was sufficiently proved where one witness was dead, another was about ninety years old, nearly blind, and testified that he wrote the will according to the directions of the testator and read it over to him as he wrote it, that the witnesses subscribed their names in the presence of the testator and in the presence of each other, and the third witness, who was fifteen or sixteen years old at the time of the execution of the will, recollected that he signed his name thereto, that the other witnesses also signed their

appeared a blank space where the name should have been written. It was not there. The only place where the name did appear was in the attestation clause. Under such a statute and such a state of facts, the court held that the will was not properly executed. Other cases cited could be analyzed to show such a difference in statutes or in facts as to render them inapplicable to the case at bar. On the other hand, in *Orser v. Orser*, 24 N. Y. 51, in a case where one of the subscribing witnesses was dead and the other could not remember that the decedent declared the instrument to be his will or acknowledged his signature, the court said: "The result of the authorities upon the probate of wills is that the question of the due execution of a will is to

names as witnesses in his presence and at the same time, that the other surviving witness asked him to sign the will in the presence of the testator, and that he understood that the instrument was a will, but he imperfectly recollected what occurred. There was an attestation clause which omitted that the witnesses signed at the request of the testator, but the court does not refer expressly to this.

In *Re Duffy*, 127 App. Div. 174, 111 N. Y. Supp. 491, reversing 51 Misc. 543, 101 N. Y. Supp. 974, the appellate court refused to subscribe to the doctrine that witnesses could not remember what occurred at the execution of a will thirty years before, and reversed the decision of the surrogate denying probate, and directed that a trial be had before a jury. The testimony of the witnesses satisfied the statutory requirements, and one of them was the lawyer who drew the will, which contained the usual attestation clause, but the surrogate had taken the view that the witnesses could not remember the circumstances after thirty years, and therefore they could not recollect at all.

In *Allaire v. Allaire*, 37 N. J. L. 312, affirmed in 39 N. J. L. 113, where one of the witnesses, eight years after the will was executed, remembered practically nothing about it except that he signed his name to some document for the testator, and nine years later, on another examination, he remembered fully the circumstances, the court was of the opinion that his early forgetfulness was of little impeaching value as against his later recollection, he having stated that, by reason of litigation over the matter, he had recurred to it often and his memory had been refreshed.

Reference may here be made for convenience to the approximate time which had elapsed between the date of the will and the examination of witnesses in various cases throughout this note, viz.—

—between one and two years, *Baylies v. Sayer*, 3 Notes of Cases, 22, *infra*, VI. a; *Cregreen v. Willoughby*, 6 Jur. N. S. 590, *infra*, XIII.; *Leech v. Bates*, 6 Notes of Cases, 699, *infra*, VI. a; see also *Wymas*

be determined, like any other fact, in view of all the legitimate evidence in the case; and that no controlling effect is to be given to the testimony of the subscribing witnesses. Their direct participation in the transaction must, of course, give great weight to their testimony; but it is liable to be rebutted by other evidence, either direct or circumstantial. A will, duly attested upon its face, the signatures to which are all genuine, may be admitted to probate, although none of the subscribing witnesses are able to swear, from recollection, that the formalities required by the statute were complied with; and even although some of them should swear positively that they were not, if the other evidence warrants the inference that they were."

In Schouler on Wills, § 322, it is said that the result of the cases under the statute of Victoria, as to whether the testator's signature was on the will when it was produced to the witnesses for their attestation, appears to be: "That in the absence of direct evidence on the point one way or the other, the court may, independently of any positive evidence, investigate the circumstances of the case, and may form its own opinion from these circumstances and from the appearance of the document itself, whether the name of the testator was or was not upon it (or rather might not have been seen), at the time of the attestation. But the court should mainly consider whether the witnesses did not see, or at least have an opportunity of seeing, the tes-

v. Wyman, 118 App. Div. 109, 103 N. Y. Supp. 64, affirmed in 197 N. Y. 524, 90 N. E. 1167, *infra*, VIII.;

—from two to three years, *Rugg v. Rugg*, 83 N. Y. 592, *supra*, II.; *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831, *supra*, II.; *McCurdy v. Neall*, 42 N. J. Eq. 333, 7 Atl. 566, *infra*, VI. a.; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220, *infra*, VI. a.; *Re Cottrell*, 95 N. Y. 329, *infra*, VI. a.; *Peebles v. Case*, 2 Bradf. 226, *infra*, VI. a.; *Re Johnson*, 7 Misc. 220, 27 N. Y. Supp. 649, *infra*, VI. a.; *Keating v. Brooks*, 4 Notes of Cases, 253, *infra*, VI. a.; *Dewey v. Dewey*, 1 Met. 349, 35 Am. Dec. 367, *infra*, VI. a.; *Brenchley v. Still*, 2 Rob. Eccl. Rep. 162, *infra*, VI. a.; *Re Engler*, 56 Misc. 218, 107 N. Y. Supp. 222, *infra*, VI. a.; *Thomson v. Hall*, 2 Rob. Eccl. Rep. 426, VI. b.; *Gwillim v. Gwillim*, 3 Swabey & T. 200, 29 L. J. Prob. N. S. 31, *infra*, VII.; *Re Eldred*, 109 App. Div. 777, 96 N. Y. Supp. 435, *infra*, VIII.; *Weir v. Fitzgerald*, 2 Bradf. 42, *infra*, X.; *Gove v. Gaven*, 3 Curt. Eccl. Rep. 151, *infra*, X.; *Dack v. Dack*, 19 Hun, 630, *infra*, XII.; *Re Sanderson*, 9 Misc. 574, 30 N. Y. Supp. 848, *infra*, VIII.;

—from three to four years, *Blake v. Knight*, 3 Curt. Eccl. Rep. 547, *infra*, VIII.; *Miller v. Van Dyk*, — N. J. —, 9 Atl. 372, *infra*, VII.; *Re Bedell*, 2 Connolly, 328, 12 N. Y. Supp. 96 (apparently) *infra*, VI. a.; *Torre's Goods*, 8 Jur. N. S. 404, *infra*, VIII.;

—four and a half years, *Burgoyne v. Showler*, 1 Rob. Eccl. Rep. 5, *infra*, VII.;

—from four to seven years, *Reeve v. Crosby*, 3 Redf. 74, *infra*, VI. a.; *Lloyd v. Roberts*, 12 Moore, P. C. G. 158, *infra*, VI. a.; *O'Hagan's Will*, 73 Wis. 78, 9 Am. St. Rep. 763, 40 N. W. 649, *infra*, VI. a.; *Re Dake*, 98 App. Div. 629, 90 N. Y. Supp. 213, *infra*, VIII.; *Brinckerhoff v. Remsen*, 8 Paige, 488, *infra*, VI. b.; *Newton's Will*, *Tucker*, 349, *infra*, VII.; *Leach's Goods*, 12 Jur. 381, *infra*, VI. b.; *Vinnicombe v. Butler*, 10 Jur. N. S. 1109, 3 Swabey & T. 580, 34 L. J. Prob. N. S. 18, 13 Week. Rep. 392, *infra*, VI. b.; *Re Clafin*, 73 Vt. 129, 87 Am. St. Rep. 693, 50 Atl. 815, *infra*, VIII.; *Holyoke v. Sipp*, 77 Neb. 394, 109 N. W. 506, *infra*, VIII.; *Re Voorhis*, 125 51 L.R.A. (N.S.)

N. Y. 765, 26 N. E. 935, *infra*, X.; *Welch v. Welch*, 9 Rich. L. 133, *infra*, XIII.;

—from seven to ten years, *Nelson v. McGiffert*, 3 Barb. Ch. 158, 49 Am. Dec. 170, *infra*, VI. a.; *Butler v. Benson*, 1 Barb. 527, the same; *Deupree v. Deupree*, 45 Ga. 415, *infra*, VII.; *Elkinton v. Brick*, 44 N. J. Eq. 154, 1 L.R.A. 161, 15 Atl. 391, *supra*, IV.; *Barnes v. Barnes*, 66 Me. 286, *supra*, IV.; *Woodhouse v. Balfour*, L. R. 13 Prob. Div. 2, 57 L. J. Prob. N. S. 22, 58 L. T. N. S. 59, 36 Week. Rep. 368, 52 J. P. 7, *infra*, VIII.; *Re Wilcox*, 37 N. Y. S. R. 462, 14 N. Y. Supp. 109, *infra*, VIII.; *Re Sizer*, 129 App. Div. 7, 113 N. Y. Supp. 210, *infra*, VIII.; *Adams v. Field*, 21 Vt. 259, *infra*, VIII.; *Re Roundes*, 7 N. Y. S. R. 730, *infra*, X.; *Re Frey*, 2 Connolly, 70, 7 N. Y. Supp. 330, *infra*, X.; *Re Boardman*, 46 N. Y. S. R. 444, 20 N. Y. Supp. 60, *infra*, IX.; *Pearson v. Wightman*, 1 Mill. Const. 336, 12 Am. Dec. 636, *supra*, II. See also *Re Nelson*, *infra*, IX. *Fatherree v. Lawrence*, *infra*, XII.; *Hughes v. Hughes*, *infra*, XII.; *Howard's Will*, *infra*, XII.; *Re Grant*, *infra*, XII.; *Worden v. Van Giesen*, *infra*, XII.; *Gillis v. Gillis*, *infra*, XII. See also *RE CAREY*;

—over ten years, *Re Schweigert*, *supra*, II.; *Re Langtry*, *supra*, II.; *Wright's Estate*, *supra*, IV.; *Re Brissell*, *supra*, IV.; *Re Tyler*, *supra*, IV.; *Mock v. Garson*, *supra*, IV.; *Re Gillmor*, *supra*, IV.; *Pate v. Joe*, *supra*, IV.; *Hennes v. Huston*, *infra*, VI. a.; *Mundy v. Mundy*, *infra*, VI. a.; *Hanley v. Kraftczyk*, *infra*, VI. a.; *Eliot v. Eliot*, *infra*, VII.; *Thomas's Goods*, *infra*, VII.; *Verdier v. Verdier*, *infra*, VIII.; *Norton v. Norton*, *infra*, VIII.; *Re Sandmann*, *infra*, X.; *Re Babcock*, *infra*, X.; *Webb v. Dye*, *infra*, X.; *Lawyer v. Smith*, *infra*, XI.; *Re Kellum*, *infra*, XI.; *Re Pepoon*, *infra*, XI.

VI. Where there is an attestation clause.

a. In general.

This note does not deal with the general question of the effect of or presumption

tator's signature when they attested; for, if they did not, it is immaterial that the signature was actually there, but hidden from them." It would appear from this that in the circumstances of this case the will would be sufficiently proven under the Victorian statute, or a statute essentially like it.

The opinion in *Re Shapter*, 35 Colo. 578, 6 L.R.A.(N.S.) 575, 117 Am. St. Rep. 216, 85 Pac. 688, shows that circumstances surrounding the execution of a will may be appealed to. In the face of that decision, we do not go astray in saying that in a case like the present, where, owing to the failure of the memory of the subscribing witnesses, after the lapse of a long time, it was impossible to obtain direct testimony

from a full attestation clause, while the weight of such presumption is present in most of the cases of defective memory where there is such a clause. In this subdivision the clause is supposed to be complete, at least in so far as concerns matters in doubt or controversy, and those cases dealt with at length in this subdivision are merely selected cases. At the end of this subdivision, reference is made to other cases on the subject in other subdivisions of this note.

Effect of the clause as evidence.

In *Allaire v. Allaire*, 37 N. J. L. 312, affirmed in 39 N. J. L. 113, the court said, there being a full attestation clause, "if the attesting witnesses, when called, admit their signatures, but through defect of memory, or for any other reason, fail to testify to the due execution of the will, it may be established on the presumption arising from the form of the attesting clause, unless there be affirmative evidence given to disprove its statements." See also *Peebles v. Case*, 2 Bradf. 226, *infra*, XIII.

In *Mundy v. Mundy*, 15 N. J. Eq. 290, the court said: "Mrs. Manning has a distinct recollection of the fact of her witnessing the will, but a very imperfect and confused recollection of the particulars of the transaction. In attempting to call them to remembrance, and to give them in detail, she is led into some contradictions, which afforded counsel some room for argument that the statute had not been complied with. The will has the attesting clause, which, if true, shows that all the requirements of the law were fulfilled. Although the witnesses may have forgotten whether they were all present and saw the testator sign the will, or whether he made any publication or declaration of it, the instrument ought not to be rejected on account of such mere want of recollection. The attestation clause, with the signatures of the witnesses, is *prima facie* evidence of the facts stated in it."

It was held to be error to decline to instruct the jury that, inasmuch as the at-

testation clause to the paper propounded was in due form, a presumption that it was duly executed as a will arose, where, of the three witnesses, one testified on interrogatories to the necessary facts, one remembered nothing about the execution, and the third testified that he signed the paper at the request of the last-mentioned witness, but did not know its character and was unable to state whether or not the testator was present. *Underwood v. Thurman*, 111 Ga. 325, 36 S. E. 788.

That an attestation clause affords as much proof of execution in the presence of a living witness as in the presence of one since deceased was held in *Orser v. Orser*, 24 N. Y. 51, where the appellate court set aside the finding of a jury against the will for misdirection. The surviving witness was unable to remember any declaration or acknowledgment, but admitted that he heard some conversation between the testator and the other witness, who was an experienced scrivener, which he could not remember. The trial judge was asked to instruct the jury that they might infer from the testimony of the witness as to the conversation between the other witness and the testator, taken in connection with the certificate of attestation and the other facts found in the case, that the words of that conversation contained the necessary acknowledgment and request by the testator; but the judge, while so charging so far as related to the deceased witness, refused to do so as to the surviving witness. The appellate court held that there was no ground for distinction, and that so far as the certificate was evidence at all, it furnished as much proof that the will was executed in presence of the living witness, as in the presence of the deceased witness, as he certified that the instrument was declared to "us" by the testator.

Illustrations.

Wills with attestation clauses have been admitted to probate in cases of defective recollection of one or more of the attesting witnesses—

—where the only witness found was un-

in such cases is for the testator to sign first and then the witnesses. It is said in *Allen v. Griffin*, 69 Wis. 529, 533, 35 N. W. 21, 22: "We think, in the absence of clear proof that the witness or witnesses signed before the signing of the testator, it should be presumed that the testator signed first. This would be the usual order of signature."

While it is not necessary that the testator sign before the witnesses, yet the usual order is that he do so. So that, in the absence of anything to the contrary, it appears from the testimony that when Mr. Carey sat down at the table with a pen in his hand, he signed the will and after him the witnesses. In *Hobart v. Hobart*, 154 Ill. 610, 45 Am. St. Rep. 151, 39 N. E. 581, it appeared that the statute made the

will the subject of attestation and acknowledgment. One of the subscribing witnesses was dead. The other testified that the deceased witness was her husband; that the testator and his wife brought the will to her house. It was not stated that the testator had signed it, and she could not remember whether his signature was there or not. He declared it was his will and asked the witness to sign it. The court said: "While it is true that the witness cannot remember seeing the signature, yet she cannot say positively that she did not see it. It is clear, however, that the testator produced before the subscribing witnesses an instrument in writing which he stated to be his will, and asked them to sign it as witnesses. A will must be re-

able to state, fifteen years after execution, that he saw the testatrix sign her name, or that he even saw her signature upon the will, *Hennes v. Huston*, 81 Minn. 30, 83 N. W. 439;

—where, twenty-two or twenty-three years after execution, one witness was dead, a second had no recollection about it, and the third, while remembering some of the circumstances, was confused in her recollection and stated that the testator did not say anything when he signed, *Mundy v. Mundy*, supra;

—where one witness could not be found, the second had forgotten the circumstances of the execution, and the third testified to the due execution and stated that the testatrix's husband read aloud the attestation clause in the presence of the three witnesses before they signed as witnesses, *Re Townley*, 1 Connolly, 400, 4 N. Y. Supp. 455;

—where, seven years after the execution of the holographic will of a solicitor, one of the witnesses was dead, and, although there was no break or crowding in the attestation clause, the surviving witness testified that there was nothing on the paper that he could see when he signed except the signature of the testator and of the other witness, who signed at the same time, *Lloyd v. Roberts*, 12 Moore, P. C. C. 158;

—where the witnesses to a will six years old verified their signatures, but had no recollection of attesting the instrument, *O'Hagan's Will*, 73 Wis. 78, 9 Am. St. Rep. 763, 40 N. W. 649;

—where the recollection of some of the witnesses to a will twenty-nine years old was deficient, *Hanley v. Krafczyk*, 119 Wis. 352, 96 N. W. 820;

—where there were some absences of recollection and some discrepancies in the testimony of the attesting witnesses to instruments one and two years old, *Leech v. Bates*, 6 Notes of Cases, 699;

—where there was doubt or want of recollection of one of the witnesses to a will two or three years old, *McCurdy v. Neall*, 42 N. J. Eq. 333, 7 Atl. 566 (not necessary to decision);

—where, eight years after the date of a

will, one of the witnesses testified fully as to its due execution, and the other two witnesses did not remember whether the testator or his son-in-law asked them to sign, one of them having a vague recollection that it was the son-in-law, *Nelson v. McGiffert*, 3 Barb. Ch. 158, 49 Am. Dec. 170;

—where the witnesses, sixteen years afterward, did not remember any declaration or request, *Re Sears*, 33 Misc. 141, 68 N. Y. Supp. 363;

—where, a few months after the execution of the will of a barrister, two of the witnesses testified that the will was not signed in their presence, while a third stated that it was so signed, *Chambers v. Queen's Proctor*, 2 Curt. Eccl. Rep. 415;

—where one of the witnesses thought that the other witness did not see the testator sign the will, but the second witness positively testified to the contrary, *Farley v. Farley*, 50 N. J. Eq. 434, 26 Atl. 178;

—where, ten years after execution, one witness thought he saw the testator sign, but was not certain, and the other witness had no recollection of seeing him write, the court holding that signing or acknowledgment might be presumed, *Butler v. Benson*, 1 Barb. 526;

—where one witness testified fully as to the execution according to the statutory requirements, and the other did not recollect that the testatrix signed the will, or that he saw her signature, and denied without qualification that the signature of the testatrix was upon the paper witnessed by him, *Re Bernsee*, 141 N. Y. 389, 36 N. E. 314, cited in *Re Buel*, 44 App. Div. 4, 60 N. Y. Supp. 385;

—where one of the witnesses to a will on a blank, the written art being in the testator's handwriting, testified sufficiently, but the other witness denied the declaration and request and stated that he did not know whether the testator's signature was on the paper at the time but that he did know it was a will, *Re Bassett*, 84 Misc. 656, 146 N. Y. Supp. 842;

—where both of the witnesses to a codicil two years old testified, before seeing the paper, that they signed before the testatrix,

duced to writing, and signed by the testator, or by someone in his presence and under his direction. The words, 'said will,' in § 2, refer back to a will reduced to writing and signed. An instrument not in writing and not signed is not a will. When the testator called the paper his will, it will be presumed, in the absence of any evidence to the contrary, that he had signed it, inasmuch as a signature was necessary to justify him in calling it a will. Included in the declaration of the testator to the witnesses that the paper was his will was the further declaration that he had signed it. Where the testator declares to the witnesses that the instrument is his will, or requests them to attest his will, such declaration or request implies that the same

has been signed by him. *Nickerson v. Buck*, 12 Cush. 332. In the latter case it was said: 'The request to these witnesses to attest his will was quite enough to authorize the inference that he had executed a paper as a will, and was equivalent to his acknowledgment that he had signed some paper as a will.' The fact that a testator seeks the attestation of witnesses, and gives directions to them as to signing their names, furnishes strong presumptive proof that he had signed the will. *Dewey v. Dewey*, 1 Met. 349, 35 Am. Dec. 367. Where a testator took a paper from his desk, and asked a witness to sign it, and pointed out the place where he wished him to put his name, and the witness did so, not knowing what the paper was, and not noticing the signa-

but after seeing it one of them testified that she saw the testatrix sign before the witnesses did, and the other witness seemed to adhere to her former opinion, but in such a manner as to enable the court to think that her recollection was loose, *Brenchley v. Still*, 2 Rob. Eccl. Rep. 162;

—where, four years after execution, a witness testified that she did not see the testatrix sign the paper or declare it to be her will, although she heard the other subscribing witness ask the testatrix whether she did acknowledge it, and the other witness, who was the lawyer who drew the will, testified as to its due execution, *Re Bedell*, 2 Connolly, 328, 12 N. Y. Supp. 96, (where the attestation clause contained, besides the usual words, the statement that "she at the time of making such subscription acknowledged that she made the same");

—where the testimony taken two years after execution was not very satisfactory as to seeing the testator sign and as to the acknowledgment and declaration, and the attestation clause was complete in these respects, *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220 (where it was claimed in a dissenting opinion that the witnesses remembered what had occurred);

—where the due execution of a holographic will a few months old was proved by one of the subscribing witnesses, though the other, an heir and next of kin, testified that he did not know, when signing, what the instrument was, and the attestation clause was "signed, sealed, and published by the said testament [sic] to be his testament in the presence of," *Dogart's Estate*, 6 N. Y. Civ. Proc. Rep. 128, affirming 4 N. Y. Civ. Proc. Rep. 441;

—where the recollection of the witnesses to a holographic will a few months old was incomplete, and they testified that the will was not signed in their presence, the attestation clause being "Signed and Published by the Above Nam John Thompson Our presenc," *Gregory v. Dyke*, 4 Notes of Cases, 620;

—where the witnesses did not remember the act of publication, nor whether they knew from the act of publication the tes-

tamentary nature of an instrument executed a few days before testator's death, *Re Gahagan*, — N. J. —, 89 Atl. 771;

—where, on cross-examination, the recollection of the witnesses to a will two years old signed by mark was insufficient as to some of the requirements, but one of the witnesses stated that he read over the attestation clause aloud to the other witness in the hearing and presence of the testatrix, *Re Engler*, 56 Misc. 218, 107 N. Y. Supp. 222;

—where the witnesses were unable to say, when examined five years after execution, that they signed as witnesses at the request of the testatrix, or that she at that time declared the instrument to be her will, it being undisputed that they were requested by someone to become witnesses to a will, and that they attended on the occasion of the execution of the will in pursuance of such request, *Brown v. Clark*, 77 N. Y. 369 (where the question was probably not necessary to the decision of the case);

—where, two years after execution, one witness remembered nothing about the matter, a second witness stated that he and the first witness had signed at the request and in the presence of the testator, who told them it was his will, but that he saw no writing upon it, and the third witness, whose name was last in order, testified to all the legal requirements as to the witnessing by himself alone, except that the testator did not sign or acknowledge his signature in the presence of the witness, *Dewey v. Dewey*, 1 Met. 349, 35 Am. Dec. 367;

—where the subscribing witnesses were at first inclined to think that they signed at a certain desk where the testatrix could not have seen them, instead of at a certain table where she could have done so, but later were uncertain, and two other witnesses testified that the subscribing witnesses signed at the table, and a third that they signed at the desk, the court considering that the presumption from the attestation clause had not been overcome, *Tappen v. Davidson*, 27 N. J. Eq. 459, reversing decree refusing probate;

ture on the paper, it was held that there was a good attestation of the will. *Ela v. Edwards*, 16 Gray, 91."

In *Mead v. Presbyterian Church*, 229 Ill. 526, 14 L.R.A.(N.S.) 255, 82 N. E. 371, 11 Ann. Cas. 426, there was no attestation clause to the will, but the name of the testator and of the two witnesses appeared at the end, as is precisely the case here. Boswell, one of the subscribing witnesses, identified his signature as such witness, and said that he had no recollection of the transaction. The other witness, Paul, identified his signature and testified that he signed the instrument at the request of the testator, but had no recollection of anything that was said at the time he signed the instrument, or whether the other witness

was present or not. The court held that the evidence was sufficient to admit the will to probate. The instrument was in the handwriting of the testator. It was found among his private papers after his death, duly signed and witnessed. And the court said there was "nothing lacking in the evidence to show a legal execution of the will, save that the attesting witnesses, by lapse of time, could not recollect the facts surrounding the execution of the instrument by Mead Holmes as his last will and testament. To lay down as a rule of law that the failure of the attesting witnesses to recollect all the facts surrounding the execution of a will would defeat its probate would be, in many instances, to defeat the probate of wills where there is

—where both of the subscribing witnesses to a will which, so far as reported, was about three years old, testified that they were not present at the execution of the will, and that they did not sign the attestation clause, and their signatures were proved by experts, *Re Cottrell*, 95 N. Y. 329;

—where, three years after the execution, one of the subscribing witnesses stated that the paper offered was a forgery, and that the paper she witnessed at the time alleged was a different paper, and the other witness stated that the will offered was executed at a time different from that alleged, *Keating v. Brooks*, 4 Notes of Cases, 253.

See also as admitting a will with a full attestation clause where there was a deficiency of memory or recollection, *Hunn v. Casey*, 1 Redf. 307, where the facts are obscurely reported.

In *Theological Seminary v. Calhoun*, 25 N. Y. 422, it was held to be error to refuse to admit the will to probate, when one of the subscribing witnesses testified that it was duly executed and that the testator had told the other witness that the document was his will and explained it to her at length, and such other witness testified that the declaration and explanation were made to her by the first witness, but whether he read the attestation clause to her or not she did not remember, that the testator was quite deaf, and that she did not think he heard all that the first witness said to her, and that he did not state to her that the document was his will.

In *Wright v. Sanderson*, L. R. 9 Prob. Div. 149, 53 L. J. Prob. N. S. 49, 50 L. T. N. S. 769, 32 Week. Rep. 560, 48 J. P. 180, the court refused to reverse a decree of probate of a holographic codicil with an attestation clause, where above the clause the testator had signed and the witnesses had also signed below the word "witness," and on the next page the testator had again signed at the right of the attestation clause and the witnesses had signed at the foot of that clause, but four years afterward recollected nothing except the request for them to sign and making their signatures, and could not testify that they saw any

signature of the testator on the paper, or that they read any writing upon it at all.

In *Taylor v. Brodhead*, 5 Redf. 624, it was said that the attestation clause, together with the positive testimony of one witness, was sufficient in case of lack of recollection of the other witness, who did not remember that the attestation clause was read over.

Rejection of will with attestation clause.

A full attestation clause will be overborne by countervailing facts. *Adams v. Rodman*, 102 Wis. 456, 78 N. W. 588, 759, *infra*, X.; *Re Berdan*, 65 N. J. Eq. 681, 55 Atl. 728, *infra*, VIII.; *Lewis v. Lewis*, 11 N. Y. 220, *infra*, this subdivision. See also cases *infra*, b.

"Where the memory of witnesses is at fault in establishing a real or necessary incident attending the formal execution of a will, the attestation clause comes to the support of its validity, and the law will presume a due execution from the recitation of the requisite facts therein, or even without it, upon the hypothesis that the requirements of the law have been duly observed. . . . But it is not effective as against positive and convincing proof to the contrary." *Mendenhall's Will*, 43 Or. 542, 72 Pac. 318, 73 Pac. 1033 (will about three years old).

In *Re Solomon*, 145 N. Y. Supp. 528, the court said: "In this proceeding, unfortunately, as I believe, the testimony of the attesting witnesses of a noncompliance with the statute of wills is too positive to be overcome by a presumption from the very full certificate of attestation contradicting the attesting witnesses. Had the witnesses admitted a loss of memory, I should have presumed for the will despite their testimony; but the cross-examination only made them the more positive that they remembered all that took place. What took place, according to them, defeats probate."

In *Lewis v. Lewis*, 11 N. Y. 220, the court declined to reverse the decision of the surrogate refusing to admit to probate a will

no reasonable question but that they were executed by the testator or testatrix with all the formalities required by law, which is in conflict with the decisions of this and many other courts of last resort."

What the appellant desires this court to say is that, although the subscribing witnesses testified directly to all the requirements of the statute for the attestation and acknowledgment of the will, except as to the presence of Mr. Carey's signature thereon at the time they signed it, the will was not proven to have been duly executed. Such an announcement as that would result in the overthrow of most of the wills that are made, and would be almost a deprivation of the statutory right to make a will.

containing a full attestation clause, where one of the subscribing witnesses testified to the witnessing of the instrument by himself and the other subscribing witness, and said that the paper was so folded that it could not be seen whether there was any signature of the testator, and that the testator had said: "I declare the within to be my free will and deed," and had asked them to sign it, and the other witness remembered nothing about the execution except that he had witnessed the paper in the testator's office, and his recollection was that the testator had asked him to sign it.

In *Re De Haas*, 9 App. Div. 561, 41 N. Y. Supp. 696, the court reversed the decree of the surrogate admitting the will to probate, and ordered a new trial before a jury, where the two surviving witnesses could not remember whether the testator had signed in the presence of the witnesses, or had acknowledged his signature to them, but one of them testified that the testator read over the attestation clause to him, which stated that the will was signed in the presence of the subscribing witnesses. Probably the reason of the decision in this case is that, while the events were then ten years old, the two surviving witnesses testified with some clearness as to what had occurred.

And see as to will signed by a mark, *Worden v. Van Gieson*, 6 Dem. 237, *infra*, XII., and compare *Re Kane*, 2 Connolly, 249, 20 N. Y. Supp. 123, *infra*, XII.

An attestation clause may not always be sufficient to insure probate where there is an absence of direct proof of due execution. *Woolley v. Woolley*, 95 N. Y. 231, *infra*, X.

In *Hopper's Will*, *Tucker*, 378, a will about two years old with a full attestation clause was rejected on the ground that the testator did not declare it to be his will to the subscribing witnesses, who, while somewhat doubtful in their recollection, all had the idea that he did tell them it was his will. The surrogate apparently was governed by evidence showing that they subsequently had made statements not in accord with their testimony, and he apparently 51 L.R.A. (N.S.)

It is plain therefore that the proponents, by evidence direct and circumstantial, made prima facie proof of the due attestation and acknowledgment of the will in question, and, as there was no evidence in the case to in any manner overcome the prima facie proof, the evidence was conclusive.

This conclusion also disposes of objections made to instructions given and refused, and relating to this branch of the case, for under the evidence the jury could not have found otherwise than that the will was executed and proven as the statute requires.

In the will, the testator, Mr. Carey, gave \$500 to a friend and the remainder of his property to Richard Price, the proponent and appellee, and it was expressly stated in the will that it was made to prevent any

arrived at the conclusion that they did not recollect any declaration.

A proponent cannot expect that the attestation clause will cover lapse of memory of the witnesses or reconcile contradictions in their testimony as to the method of execution when the instrument is on its face defectively executed. *Re Kunkler*, 147 N. Y. Supp. 1094.

Other cases illustrating the value of attestation clauses.

For other cases illustrating the value of attestation clauses where there was defect of memory of witnesses, see the following cases cited under various other subdivisions of this note, *viz.*: *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831; *Re Langtry*, 1 Silv. Sup. Ct. 524, 5 N. Y. Supp. 501; *Re Johnson*, 7 Misc. 220, 27 N. Y. Supp. 649; *Bayliss v. Sayer*, 3 Notes of Cases, 22; *Miller v. Van Dyk*, — N. J. —, 9 Atl. 372, *supra*, II.; *Barnes v. Barnes*, 66 Me. 286; *Elkinton v. Brick*, 44 N. J. Eq. 154, 1 L.R.A. 161, 15 Atl. 391; *Rolla v. Wright*, 2 Dem. 482, 67 How. Pr. 117; *Re Brissell*, 16 App. Div. 137, 45 N. Y. Supp. 122; *Re Gillmor*, 117 Wis. 302, 94 N. W. 32, *supra*, IV.; *Welty v. Welty*, 8 Md. 15; *Van Hooser v. Van Hooser*, 1 Redf. 365; *Re Carey*, 24 App. Div. 531, 49 N. Y. Supp. 32; *O'Meagher v. O'Meagher*, Ir. L. R. 11 Eq. 117; see also *Re Duffy*, 127 App. Div. 174, 111 N. Y. Supp. 491, *supra*, V.; *Re Sandmann*, — N. J. —, 68 Atl. 754; *Rogers v. Diamond*, 13 Ark. 474; *Robbins v. Robbins*, 50 N. J. Eq. 742, 26 Atl. 673; *Bloom v. Terwilliger*, 78 N. J. Eq. 221, 78 Atl. 742; *Re Voorhis*, 125 N. Y. 765, 26 N. E. 935; *Humphrey's Will*, *Tucker*, 142; *Weir v. Fitzgerald*, 2 Bradf. 42; *Walsh v. Walsh*, 4 Redf. 165; *Neiheisel v. Toerge*, 4 Redf. 328; *Egan v. Pease*, 4 Dem. 301; *Re Frey*, 2 Connolly, 70, 7 N. Y. Supp. 330; *Re Brissell*, 16 App. Div. 137, 45 N. Y. Supp. 122; *Re Rounds*, 7 N. Y. S. R. 730; *Re Johnson*, 7 Misc. 220, 27 N. Y. Supp. 649; *Re Walker*, 67 Misc. 6, 124 N. Y. Supp. 615; *Re Klinzner*, 71 Misc. 620, 130 N. Y. Supp. 1059; *Re Skinner*, 40 Or. 571, 62 Pac. 523, 67 Pac. 951;

property from going to the testator's brother, the contestant and appellant.

The issue of want of mental capacity of the testator was raised. This issue was submitted to the jury and found against the contestant. The issue of undue influence was also raised, and on this issue the court instructed the jury to find for the proponent, and against the contestant. Error is assigned on this direction of the court. In a will contest, as in ordinary civil actions, the court may direct a verdict when the facts require it. *Re Shell*, 28 Colo. 167, 53 L.R.A. 387, 89 Am. St. Rep. 181, 63 Pac. 413. All that the evidence discloses as to influence exerted by Price is that Price transacted considerable business for

the testator during many years of their acquaintance, especially in selling cattle. They lived some distance apart. Price and the testator visited each other's home frequently and were warm personal friends. Aside from this, there is utter want of testimony that Price influenced the making of the will. It is claimed that this established a fiduciary relation between them. This claim cannot be sustained. The direct opposite was held in *Snodgrass v. Smith*, 42 Colo. 60, 94 Pac. 312, 15 Ann. Cas. 548, where it was said: "It is not true, as contestant says, that the fact that proponent was the cousin and friend, the nurse and business partner, of testatrix, gave rise to a fiduciary relation between them. The contrary has been expressly ruled." There

Webb v. Dye, 18 W. Va. 376; *Wright v. Rogers*, L. R. 1 Prob. & Div. 678, 38 L. J. Prob. N. S. 6; *Gove v. Gawen*, 3 Curt. Eccl. Rep. 151,—*infra*, X.; *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460; *Re Kellum*, 52 N. Y. 517; *Re Pepoon*, 91 N. Y. 255, *infra*, XI.; *Gillis v. Gillis*, 96 Ga. 1, 30 L.R.A. 143, 51 Am. St. Rep. 121, 23 S. E. 107; *Morris v. Kniffin*, 37 Barb. 337 and other cases,—*infra*, XII.; cases under subheading of *infra*, VIII.

b. Where clause is not read.

Where the proof is clear and positive that the attestation clause was not read to or by the witnesses, it carries no proof of the recitals therein.

Thus, in *Re Shaffer*, 2 How. Pr. N. S. 494, probate was refused of a will probably about three years old, where one of the subscribing witnesses testified that he did not read the attestation clause, did not know the paper was a will, and thought he must have remembered it if the testatrix had so informed him, and the other subscribing witness remembered nothing. There was also the testimony of an unattesting witness, but it was not sufficient to satisfy the court.

So, probate was revoked in *Re Simmons*, 30 N. Y. S. R. 446, 9 N. Y. Supp. 352, where the witnesses were definite in testifying about six years after execution, and their testimony showed that some of the requirements were omitted, and that the attestation clause was not read to or by them or its substance stated to them, and that they did not know its contents.

Similarly, in *Brinckerhoff v. Remsen*, 8 Paige, 488, the court reversed the decision of the surrogate admitting to probate a will five or six years old, which contained a complete attestation clause, where one of the witnesses testified that no part of the paper was read by the witnesses except the last line of the attestation clause, and that there was no statement made that the instrument was a will, although the witnesses testified that the decedent signed the paper in their presence, and that they signed at

her request, and that she acknowledged it to be her hand and seal for the purpose therein expressed, as one of the witnesses put it, or to be her signature for the uses and purposes therein mentioned, as the other seems to have put it.

In *Croft v. Croft*, 11 Jur. N. S. 183, 4 Swabey & T. 10, 34 L. J. Prob. N. S. 44, 11 L. T. N. S. 781, 13 Week. Rep. 526, it was held that a will could not be admitted to probate where the attestation clause was not read by the witnesses, and each witness denied the presence of the other; each denied that he saw the testator sign or that he saw his signature or that the testator acknowledged his signature; one testified that the paper was so folded that he could see nothing, and that he was asked to sign it; the other testified that he was asked to sign the testator's will.

In *McCord v. Lounsbury*, 5 Dem. 68, the surrogate declined to admit to probate a will on a printed blank, where the attestation clause was not read to or by the subscribing witnesses, where one of the witnesses testified positively that all that occurred was that the testator signed the paper, and that she and the other witness then signed as witnesses, and the other subscribing witness, whose memory was not very clear, testified that the scrivener asked him to sign, which he did, and the other witness signed after him. The scrivener, who was not an attesting witness, testified that the statutory requirements were carried out.

In *Wilson v. Hetterick*, 2 Bradf. 427, the surrogate rejected a will three months old, where one of the witnesses testified that he read the last two words of the attestation clause, to wit, "attesting witnesses," and both of the witnesses recollected the matter with considerable clearness, and stated that the testator asked them to witness an instrument in writing, and on being pressed they said that they did not recollect that he said it was a will, — they did not remember that he used any such expression.

A presumption as to the facts in the attestation clause having been performed is destroyed when the signature of the deceased and the clause itself are concealed from the

is no evidence whatever, circumstantial or otherwise, that Price unduly influenced the making of the will. The fact that he and the testator were friends, and that he showed some acts of neighborly kindness towards and transacted business for the testator, no doubt influenced the latter to make Price his legatee. It cannot be expected that a man will leave his property to another not related to him by ties of blood and family, unless that other has shown friendliness toward him and a disposition to help him when in need. Such kindness, friendliness, and disposition cannot be said to be undue influence.

It is said in the brief that the disposition of the testator's property was unnatural and capricious, and that this was a fact to be considered on the question of undue influence. The testator had left his home in England about forty years before his death, and during all that time had been separated from his brother and had no communication with him. During the nine or ten years that intervened between the making of the will and his death, the testator told several people that he had made a will leaving his property to Price. He told some of them that he did not want his brother to have any of his property.

knowledge and observation of the attesting witnesses. *Lewis v. Lewis*, 13 Barb. 17, affirmed in 11 N. Y. 220, where the testimony of the witnesses taken about two years after execution was reasonably clear so far as it went.

In *Connery v. Connery*, 166 Mich. 601, 132 N. W. 448, it was held that the positive statement of the witness that he never read the attestation clause or knew its contents overcame any presumption, and that it was error to instruct the jury that it was not important that the witness did not recollect that the testatrix was present when he signed, and that there was a presumption that the witness signed it in the manner in which the attestation clause stated that he had signed it; the court considered that the matter was one for the jury, and seemed to doubt whether there was any presumption except in uncontested cases.

Where there is no lack of memory, and there is no dispute that the attestation clause was not read to or by the witnesses, their clear recollection will not be overborne by that clause and by the testimony of a third person supplying almost every deficiency in the testimony of the attesting witnesses. *Re Hitchler*, 25 Misc. 365, 55 N. Y. Supp. 642.

But probate will not always be refused where there is a lack of direct evidence, although an attesting witness testifies that he did not read the attestation clause (*Re Jones*, 85 N. Y. Supp. 294), or although the evidence is that the paper was so folded that the witnesses could not see the clause (*Thomson v. Hall*, 2 Rob. Eccl. Rep. 426).

Thus, the surrogate's refusal of probate was reversed, the court deciding that enough was proved to show a legal declaration although the attestation clause was not read to two of the three witnesses and the surrogate thought that their testimony negated it as to the declaration, but that as to the third witness there had been a good execution. *Re Balmforth*, 60 Misc. 492, 113 N. Y. Supp. 934.

In *Re Jones*, supra, in admitting a recently dated will where the testimony of the subscribing witnesses was somewhat contradictory, and it was doubtful whether either of them had read the attestation clause, and one of them denied doing it, the 51 L.R.A. (N.S.)

court said: "When the statements of two subscribing witnesses are at variance in respect to some of the essential facts, admitting that each intends to be truthful, courts will not presume that the testimony which would go to avoid the instrument shall be accepted against that of the other, when it proves it, unless there is sustaining evidence showing that the instrument itself was the result of fraud or imposition upon the testator. I am convinced that Mrs. O'Neill's recollection of the facts is to be trusted on the points in which she and Carpenter disagree. With a full attestation clause, if any presumption arises, it is in favor of due execution, even though the event was of recent occurrence."

In *Thomson v. Hall*, supra, a holographic will of one educated for the law was admitted to probate where the testimony, taken two years after the execution, was to the effect that the paper was so folded that the witnesses could not see the attestation clause; that while they saw the testator write something on the instrument as they entered the room, they did not know whether it was his signature or not; and there seems to have been no evidence of any declaration on his part. The court seems to have been of the opinion that the two attesting witnesses and a third witness were suffering from imperfect recollection.

VII. Absence of attestation clause.

This note does not discuss the general question of the result and effect of, or presumption from, the absence of any attestation clause. For necessity of attestation clause to will, see note to *Mead v. Presbyterian Church*, 14 L.R.A. (N.S.) 255.

A review of the probate of wills without attestation clauses must necessarily be incomplete on account of the considerable number of cases in which the report gives no information as to whether there is or is not such clause on the will. There are comparatively few cases of lack of recollection by subscribing witnesses where the absence of an attestation clause is an important element of the case as reported. A few cases of defective attestation clauses are cited under this subdivision, and some others will be found under VI. a, supra.

because, as he said, his brother had done him a great wrong. He also stated that he knew the Prices would take care of him in his old age when he needed care.

Under such circumstances, it was certainly not capricious or unnatural for him to make the will as he did. There is in this state a statute giving the right to make wills, as well as a statute of descent and distribution. People are given their choice of these statutes. The testator, in this case, chose to avail himself of his right to make a will. Neither courts nor juries ought to deprive a man of that right simply because

he may dispose of his property in a manner not satisfactory to them.

On the whole record, it appears plainly that this will was the free and voluntary act of George Strachan Carey, and that he did precisely what he wanted to do without any undue influence whatever, and no other conclusion can be drawn from the testimony. Under such circumstances, the court was right in directing the jury as it did on the question of undue influence. Perceiving no prejudicial error in the record, the judgment is affirmed.

Gabbert and Hill, JJ., concur.

and elsewhere in this note. It does not seem of legal advantage to attempt generally to bring together the cases of defective attestation clauses.

For probate of a will signed by mark where the witnesses signed under the word "test," see *Fatherree v. Lawrence*, 33 Miss. 585, *infra*, XII.

For probate of a will signed by mark where the only attestation clause was the words "signed, sealed, and delivered in the presence of," see *Clarke v. Dunnivant*, 10 Leigh, 14, *infra*, XII.

For probate of a will without an attestation clause where the last clause of the will referred to the witnesses, see *Re Tyler*, 121 Cal. 405, 53 Pac. 928, *supra*, IV.

For probate of a will where the attestation clause omitted the request, see *Cheaney v. Arnold*, 18 Barb. 434, *supra*, V.

For probate of holographic wills with defective attestation clauses, see *Cooper v. Bockett*, 3 Curt. Eccl. Rep. 648, *infra*, VIII. and *Colyer's Goods*, L. R. 14 Prob. Div. 48, 60 L. T. N. S. 368, 37 Week. Rep. 272, 53 J. P. 134, *infra*, VIII.

As heretofore suggested, this note does not deal with the general question whether, in the absence of an attestation clause, there is or is not any presumption that *omnia rite esse acta*, and there seem to be few cases within our subject which discuss the question.

In *Deupree v. Deupree*, 45 Ga. 415, where the will was about seven years old, it was held that from the signature of the testator and the attestation of the witnesses, without reference to an attestation clause, the presumption of proper execution of the will arises where the witnesses do not distinctly remember. The failure to recollect was on the point as to whether the testator was present when the witnesses signed, and it was held that this was a question to be submitted to the jury.

See also in this connection in this subdivision *Young v. Barner*; *Vinnicombe v. Butler*; and *Leach's Goods*; and compare *Re Beggans*, *infra*, this subdivision.

Probate has been granted of wills without attestation clauses—

—where the only surviving witness testified definitely as to all the requirements except the declaration, as to the words of 51 L.R.A. (N.S.)

which she was not certain, but to her best recollection the testatrix made a statement about it, *Vernon v. Vernon*, 69 N. J. Eq. 759, 61 Atl. 409;

—where the testimony of one witness to a holographic will about two years old was sufficient, but that of the other was deficient, *Re Eldred*, 109 App. Div. 777, 96 N. Y. Supp. 435;

—where one of the witnesses to a holographic will deposed that he saw the testatrix sign the will in the presence of himself and the other witness, the other witness not recollecting whether the testatrix signed her name in his presence or not, *Hare's Goods*, 3 Curt. Eccl. Rep. 54;

—where the will was not signed in the presence of the witnesses, and none of them could recollect whether the signature of the testator was upon it when they signed, although there were only a few months between the execution and the probate, *Re Attridge*, 6 Notes of Cases, 597;

—where one of the witnesses to a will about a year old testified that she did not think she saw the signature of the testator when she signed, and the position of the two signatures on the paper was such that she must have seen it, the court holding that she was mistaken, *Re Stockwell*, 17 Misc. 108, 40 N. Y. Supp. 734.

On the other hand, probate was denied of a will about six years old without an attestation clause, where one of the witnesses testified positively that there was no declaration that the paper was a will, and that he did not know it was such when he witnessed it, and the other witness testified she was satisfied that it was a will, but could not recall whether she got this idea from anything said by the testatrix at the time, or from something that the testatrix had told her before of her intention to make a will. *Newton's Will*, Tucker, 349.

Partial or defective attestation clauses.

There is some difference of opinion in the courts as to the effect of defective attestation clauses.

In *Young v. Barner*, 27 Gratt. 96, where the only attestation clause was the words, "In presence of," and there was doubt as to whether a certain one of the attesting

witnesses had signed in the presence of the testatrix, the court, in pronouncing for the will, which was only four months old, said: "If the witnesses to the will are dead, or if there is a failure of recollection on their part, the court will often presume (the will being in other respects regular) that the requirements of the statute have been complied with in the formal execution of the instrument."

In *Vinnicombe v. Butler*, 10 Jur. N. S. 1109, probate was granted of a will seven years old which had no attestation clause, where each of the witnesses had signed at the right of a separate clause, which read in each case, "Witness this my hand." Three of the witnesses did not recollect any circumstances whatever attending the execution, and the fourth, while stating that the testatrix signed in her presence, thought that she herself had signed before the testatrix, but was not sure of it. The court said: "The principle, *Omnia rite esse acta*, as regards presence, applies with more or less force, according to the circumstances of each case. Where a regular attestation clause is found, the court may presume that all things were done in accordance with its terms, and the mere failure of memory of the witnesses will go for nothing. If there be no attestation clause, or it does not express that the will was executed in accordance with the requirements of the statute, the principle will not apply with the same force. I cannot, looking at the manner and form in which this paper was signed, presume that the testatrix was acquainted with what the law required. On the other hand, it will be the desire of the court not to allow a will to be defeated, where, from the lapse of time and failure of memory, it cannot be proved that the prescribed order of the signatures has been followed; it will be still more reluctant to pronounce against a will, if it be proved that the signature of the deceased has been really attached, and that the parties attended as witnesses at her request."

And in *Leach's Goods*, 12 Jur. 381, where the attestation clause is reported as "not being sufficiently full," and the witnesses did not remember whether they were both present when the will was executed, six years before, the court held that the presumption was in favor of due execution, and pronounced for the will.

So, wills have been admitted to probate—

—where there was no attestation clause except the word "witness," and the witnesses were unable, three years later, to recollect whether or not the signature of the testator was upon the instrument when they signed it, *Gwillim v. Gwillim*, 3 Swabey & T. 200, 29 L. J. Prob. N. S. 31; see also *Mead v. Presbyterian Church and Kaul v. Lyman*, supra, III.;

—where there was no attestation clause except the word "witness," although the surviving witness, while testifying as to the other requirements sixteen years afterward, stated that, as he remembered, the testatrix and he were the only persons present at the

time, and that the signatures of the other two witnesses were not subscribed in his presence, but that he remembered that he made a suggestion to the deceased at the time he signed the will that another witness ought to be present, *Thomas's Goods*, 1 Swabey & T. 255, 28 L. J. Prob. N. S. 33, 5 Jur. N. S. 104, 7 Week. Rep. 270;

—where the only attestation clause was "Witnesses at signing," and one of the attesting witnesses testified to the statutory requirements, while the other stated that certain of them were not observed, she being interested in a book at the time, and not paying much attention, *Swain v. Edmunds*, 53 N. J. Eq. 142, 32 Atl. 369, affirmed in 54 N. J. Eq. 438, 37 Atl. 1117.

See also *RE CAREY*, where the only attestation clause was "Witnessed by."

Similarly, in *Eliot v. Eliot*, 10 Allen, 357, the court affirmed a decree of probate of a will twelve years old, which, after the death of the testator, was found in the probate court signed by the testator, and following his signature were the words "Witness to signature," with the names of three witnesses, one of them being dead and his signature being admitted, although the other two did not recollect the testator or any of the circumstances, but each testified respectively that his own signature was genuine, and that he had no doubt that the testator signed or acknowledged the will in his presence.

In *Burgoyne v. Showler*, 1 Rob. Eccl. Rep. 5, a will four and a half years old was admitted to probate, where the attestation clause was defective as to the signature of the testator being made or acknowledged in the presence of both witnesses, present at the same time, and the witnesses did not remember the presence of each other, and one of them did not recollect seeing the testator sign.

On the other hand, it was held in *Re Beggans*, 68 N. J. Eq. 572, 59 Atl. 874, that an imperfect attestation clause raises no presumption as to the facts not stated in it; and where the attestation clause did not state that the witnesses signed in the presence of the testatrix and they both testified that they signed in an adjoining room, and, according to the testimony of one of them, they signed in such a position that the testatrix could have seen them, and, according to the testimony of the other, in such a position that the testatrix could not have seen them, it was held that the presumption which arose from their signing in the next room, that the testatrix could not have seen them sign, was not rebutted, and the will was refused probate on this ground, and on the further ground that the witnesses were diametrically opposed in their testimony as to whether they signed before or after the testatrix.

In *Ludlow v. Ludlow*, 36 N. J. Eq. 597, where the will was about three years old, it was held that a defective attestation clause, together with clear testimony of two of the attesting witnesses, as to what did occur, which was insufficient as to some of the

requirements, was not enough to prove the will, although the third attesting witness had made a formal affidavit before the surrogate of the statutory requirements. Here there seems to have been no failure of memory.

It may be noted that in *Dean v. Dean*, 27 Vt. 746, where the court declined to set aside a verdict for the will, there seems to have been evidence as to the matter omitted from the attestation clause.

VIII. Holographic wills.

Cases are excluded where the statutes do not require witnesses to holographic wills. Generally, as to necessity of witnesses to holographic wills, see note to *La Rue v. Lee*, 14 L.R.A.(N.S.) 968.

That a will is holographic makes for the validity of its execution.

Thus, that the will is holographic is a favorable element for its probate in case of the forgetfulness of the subscribing witnesses. *Barnwall v. Murrell*, 108 Ala. 366, 18 So. 831, *supra*, II.

See also in this connection, *Re Carey*, 24 App. Div. 531, 49 N. Y. Supp. 32, *supra*, V.; *Bogert's Estate*, 6 N. Y. Civ. Proc. Rep. 128, *supra*, VI. a; *Re Hunt*, 110 N. Y. 278, 18 N. E. 106, *infra*, XI.; *Lloyd v. Roberts*, 12 Moore, P. C. C. 138, the same; *Gregory v. Dyke*, 4 Notes of Cases, 620 the same; *Wright v. Sanderson*, L. R. 9 Prob. Div. 149, 53 L. J. Prob. N. S. 49, 50 L. T. N. S. 769, 32 Week. Rep. 560, 48 J. P. 180, the same; *Thomson v. Hall*, 2 Rob. Eccl. Rep. 426, *supra*, VI. b; *Hare's Goods*, 3 Curt. Eccl. Rep. 54, *supra*, VII.; *RE CAREY*.

Thus, holographic wills have been admitted in the absence of complete recollection of the witnesses—

—where the testimony of one witness was sufficient, and that of the other was deficient, and there was no attestation clause, *Re Eldred*, 109 App. Div. 777, 96 N. Y. Supp. 435, where the will was about two years old;

—where the will was written on a printed form, and one witness testified sufficiently, but was contradicted by the other witness, whose memory the surrogate considered to be at fault, *Re Stillman*, 2 Connoly, 207, 9 N. Y. Supp. 446, where nothing is reported as to any attestation clause;

—where the only surviving witness had no recollection of the execution, from twenty-seven to thirty years afterward, but was satisfied that he must have been asked to sign, as he would not otherwise have signed, *Verdier v. Verdier*, 8 Rich. L. 135, where nothing is reported as to any attestation clause.

In *Cooper v. Bockett*, 3 Curt. Eccl. Rep. 648, the court admitted to probate a recent holographic will, where the only attestation clause was the words, "Witnesses to the said will," and the testimony indicated that the testator signed after the witnesses, and one of the attesting witnesses swore that the two witnesses signed the paper by the direction of the deceased, who then took the

pen and wrote, and, when he had done so, said: "This is my name in your presence;" that he did not see all that the testator wrote, but he saw him make the large "R" of his name. The second witness deposed in effect that she and the other witness signed the will by the desire of the deceased, who then wrote something, but what she could not say, and said: "This is my will and my name in your presence." It would appear from the appearance of the instrument, the latter part of which was given in the report, that the testimony of the first witness was correct, but the court considered that it was a case of defective recollection, though only a short time had passed between execution and probate.

It may be noted that in *Re Akers*, 74 App. Div. 461, 77 N. Y. Supp. 643, affirmed in 173 N. Y. 620, 66 N. E. 1103, the question seems to have been one not of want of recollection, but of the sufficiency of the facts recollected.

Holographic wills with attestation clauses.

Holographic wills with full attestation clauses have been admitted to probate—

—where the testimony of the witnesses about two years after execution was quite insufficient as to the statutory requirements, *Re Sanderson*, 9 Misc. 574, 30 N. Y. Supp. 848;

—where the only surviving witness testified as follows, referring to his signature: "I should think I should call it mine; it is my handwriting; I have no recollection whatever of signing this will, or having it brought there, or of anything in relation to it," the court considering that, from the wording of the instrument and the mode of its execution, it was evident that the testator was familiar with the execution of wills, *Lawrence v. Norton*, 30 How. Pr. 232, 45 Barb. 448, reversing *Tucker*, 243;

—where the only surviving attesting witness of a will remembered eleven years afterward that the testator had sent for him, and when he arrived informed him that he wished him to witness his will, and leaving the room came back later with a document which the witness signed, and which was the will, and he did not recollect anything further, except that the other witness was present at the time, but it was his opinion that the testator did not sign the instrument while he was there, *Norton v. Norton*, 2 Redf. 6;

—where a codicil eight years old, with an attestation clause, took all the space to the bottom of the page, and the witnesses had signed on the opposite page under the word "witness," and they recollected absolutely nothing whatever about the transaction, but identified their signatures, *Woodhouse v. Balfour*, L. R. 13 Prob. Div. 2, 57 L. J. Prob. N. S. 22, 58 L. T. N. S. 59, 36 Week. Rep. 368, 52 J. P. 7;

—where the witnesses to a will seven years old, on a printed blank, testified that the attestation clause was read over before they signed, and one of them had no recol-

lection about having seen the testator sign, or whether his signature was upon the paper when the witnesses signed, and the other witness thought that he saw the signature of the testator, and stated that he would not have signed if he had not seen the testator sign, but he did not recollect that he saw him sign, *Re Wilcox*, 37 N. Y. S. R. 462, 14 N. Y. Supp. 109, directing probate to issue and reversing a decree refusing probate;

—where the only signature of the testatrix was in the attestation clause, and the surviving subscribing witness, four years afterward, recollected only signing her name just after the deceased witness had written his, and at his request, he stating it was the testatrix's will, and she "thought" the testatrix was in the room, *Torre's Goods*, 8 Jur. N. S. 494;

—where one of the subscribing witnesses to the will of an experienced testator had but a faint recollection of the matter, and the other denied the presence of his co-witness, but his memory was shown to be unreliable in that he stated that he had witnessed no other will, although it appeared that he had witnessed an earlier will of the same testator, witnessed also by the same co-witness and another person, *Reeves v. Lindsay*, Ir. Rep. 3 Eq. 309;

—where, upon probate of a lawyer's (holographic) will, twenty months old, having a full attestation clause, two of the three witnesses deposed to its due execution, and a year or more thereafter they testified, denying most of the statutory requirements (nothing being reported as to the third witness), *Wyman v. Wyman*, 118 App. Div. 109, 103 N. Y. Supp. 64, affirmed in 197 N. Y. 524, 90 N. E. 1167; see also 118 App. Div. 116, 103 N. Y. Supp. 69.

The court considered it of particular value that the attestation clause was in the handwriting of the testator, as showing that he knew the statutory requirements, in *Re Alpaugh*, 23 N. J. Eq. 507, where the decree of probate of a holographic will with a full attestation clause was affirmed. The witnesses testified that the testator, after his name was signed to the will, took it in his hands and declared it to be his last will, and asked them to sign as witnesses, but none of them testified that he saw the testator sign it, or that he acknowledged the signature. The court stated that if the attesting witnesses had testified that they did not recollect whether the will was signed in their presence, the effect would be the same.

In *Re Clafin*, 73 Vt. 129, 87 Am. St. Rep. 693, 50 Atl. 815, it was held to be error to direct a verdict against the holographic will of an experienced testator with a full attestation clause, where six years had elapsed between the execution and the trial, although one of the subscribing witnesses could recollect nothing about the matter, and the testimony of the other subscribing witnesses fell short of showing due execution. This case again came before the court after another trial resulting in a

decision against the will in 75 Vt. 19, 55 L.R.A. 261, 52 Atl. 1053, which decision was again reversed, but on other grounds, the court pointing out that it was important and proper to show that the testator knew how wills ought to be executed.

In *Re Sizer*, 129 App. Div. 7, 113 N. Y. Supp. 210, affirmed in 195 N. Y. 523, 88 N. E. 772, it was held that a holographic will on a printed blank, with an attestation clause, was sufficiently proved although two of the subscribing witnesses testified about eight and one-half years after execution that they had no recollection of anything about it, and the third witness testified that, at the request of the testator, he went to his store to witness his signature, and there signed a paper under the names of the two preceding witnesses; that he did not know what the paper was, and that the testator did not say; that he saw one of the witnesses in the back part of the store, but not the other. The court seemed to consider that, as two witnesses were all that were required, practically the only question in the case was whether the testimony of the last witness was sufficient to offset the presumption of the attestation clause as to the two who had forgotten.

In *Colyer's Goods*, L. R. 14 Prob. Div. 48, 60 L. T. N. S. 368, 37 Week. Rep. 272, 53 J. P. 134, the court admitted to probate a holographic will ending (apparently) as follows: "Signed, sealed and delivered by the aforesaid John Colyer, in the presence of," and signed to the right of a line by the testator, and to the left of the line by the two witnesses, although neither of them could give any positive testimony as to the circumstances of execution. One of them had a slight recollection of the testator's asking him to sign his name to the document, and the other said that the deceased was frequently in the habit of asking him to attest his signature to documents, but that he had no special recollection of this document, nor did he remember ever being told that he was witnessing a will.

In *Blake v. Knight*, 3 Curt. Eccl. Rep. 547, the court admitted to probate the holographic will of an experienced testator, with a particularly full attestation clause, although the witnesses, three and one-half years after execution, would not swear positively that the deceased's name was or was not at the bottom of the will when they signed it as witnesses. The court stated that it could not safely trust to the memory of witnesses under such circumstances. It must attend to the facts of the case, and say whether it was satisfied that the name of the deceased was written to the will when the witnesses signed it, and whether it was signed in their presence or signed beforehand and acknowledged in their presence. It may be stated that the court's summary of the evidence of the witnesses would seem to make their evidence less positive as to the omission of the requirements than is suggested by the report of their evidence.

In *Holyoke v. Sipp*, 77 Neb. 394, 109 N.

W. 506, the decision rejecting a holographic will was reversed, although the attesting witnesses, five years after execution, were not certain as to the declaration or whether the will was signed by the testator when they signed, and the attestation clause, though imperfect, included the statement "signed and acknowledged by the above testator in the presence of us." The court considered that from previous conversations with the testator the witnesses understood that the paper was his will, and that they were requested to attest it as such.

In *Adams v. Fields*, 21 Vt. 256, where the will was held sufficiently proved, the point of the case was that the testator, having written out a will entirely in his own handwriting, with a full attestation clause, had not signed it, and the court held that this was sufficient, he having begun the will with his name. At the hearing nine years after execution, one of the witnesses testified as to the declaration by the testator and as to the execution by the witnesses, but the testimony of the other two witnesses tended to prove that they never signed the instrument and were never requested to sign it; proof was given of their signatures, but the court does not refer to the discrepancy in the testimony of the witnesses.

But a holographic will will be rejected if the court is not satisfied as to the completeness of its execution.

Thus, probate was denied of a holographic will eleven years old, with a full attestation clause, although there were various mistakes in the testimony of one of the subscribing witnesses, indicating lapses of memory in some matters not here referred to, where each of the witnesses, while stating that he signed at the testator's request to witness his will, said that he did not see anything on the paper, that the testator did not sign in his presence nor acknowledge any signature, and that there was not anyone present besides himself and the testator. *Re Berdan*, 65 N. J. Eq. 681, 55 Atl. 728, where one of the witnesses stated that the paper was folded.

In *Pennant v. Kingscote*, 3 Curt. Eccl. Rep. 642, the court declined to admit to probate a holographic will, where one attesting witness testified that he wrote the words, "signed, sealed, and delivered in the presence of us," that he then signed it, and that his co-witness signed next, and the testatrix after them; the other witness was quite certain that the testatrix did not sign at all in his presence. The court said: "There are no circumstances of which I can give the party propounding the will the benefit, so as to pronounce for a due execution."

IX. Experience of testator.

An important element in enabling the court to find the requisite facts of execution of a will in spite of the fault of memory of the subscribing witnesses is the experience of the testator. Thus, it makes for the sufficiency of the execution of his will

that the testator knew the legal requirements. *Re Alpaugh*, 23 N. J. Eq. 507; *Re Claflin*, 73 Vt. 129, 87 Am. St. Rep. 693, 50 Atl. 815; *Chambers v. Queen's Proctor*, 2 Curt. Eccl. Rep. 415; *Blake v. Knight*, 3 Curt. Eccl. Rep. 547; *Thomson v. Hall*, 2 Rob. Eccl. Rep. 426; *O'Meagher v. O'Meagher*, Ir. L. R. 11 Eq. 117; *Reeves v. Lindsay*, Ir. Rep. 3 Eq. 309; *Re Carey*, 24 App. Div. 531, 49 N. Y. Supp. 32, affirming 14 Misc. 486, 36 N. Y. Supp. 817; *Mock v. Garson*, 84 App. Div. 65, 82 N. Y. Supp. 310; *Wyman v. Wyman*, 118 App. Div. 109, 103 N. Y. Supp. 64, affirmed in 197 N. Y. 524, 90 N. E. 1167, see also 118 App. Div. 116, 103 N. Y. Supp. 69; *Re Nelson*, 43 N. Y. S. R. 30, 16 N. Y. Supp. 690; *Re Boardman*, 46 N. Y. S. R. 444, 20 N. Y. Supp. 60.

See also cases cited supra, VIII.

In *Mock v. Garson*, supra, the court said in sustaining a will where the testator knew the legal requirements: "Where there is no question of mental incapacity or of undue influence, and the person supervising the execution of the will is familiar with the requirements of the statute pertaining to such execution, and a long time has gone by since the transaction, and the witnesses do not appreciate just what each step in these requirements signifies, and their testimony at most is an absence of recollection as to some of the features, rigid, explicit proof may not be required. A substantial compliance with the requisites attending execution must be adhered to, but the desire to carry out the wishes of a competent testator often induces the courts to abate somewhat from positive proof in such a case, where the inference is fairly deducible that the will was duly executed, but the subscribing witnesses, by reason of a failure of recollection, do not explicitly testify in full measure to every detail." We are not informed as to whether there was any attestation clause.

In *Re Nelson*, 43 N. Y. S. R. 30, 16 N. Y. Supp. 690, a will thirteen years old was admitted to probate, where the testator and a deceased subscribing witness were both lawyers of experience, although the attestation clause omitted the request of the testator and the only surviving witness testified that the testator did not ask him to sign the will, but that the other subscribing witness read over the attestation clause to him in the testator's presence and asked him to sign. The court considered that the defect in the attestation clause was fully supplied by sufficient proof.

In *Re Boardman*, 46 N. Y. S. R. 444, 20 N. Y. Supp. 60, where there seems to have been no evidence that the testator had signed a codicil in the presence of the witnesses, or had acknowledged his signature, the court considered that, inasmuch as it appeared from the ink that all signatures to it were made at the same time, the codicil should be admitted to probate, the testator being a man who knew how to execute a will, as appeared, said the court, from the care in which the will itself was exe-

cuted. The report is silent as to any attestation clause.

Conversely, the inexperience of the testator may be an obstacle to the granting of probate. *Re Shaffer*, 2 How. Pr. N. S. 494, where there was lack of evidence of any declaration.

X. Presence of attorney or experienced scrivener as a subscribing witness or otherwise.

The presence of an attorney or other experienced scrivener at the execution of a will, whether as a witness or not, is a cogent fact in favor of probate, where there is a failure of proof by the subscribing witnesses.

Presence of experienced person.

The presence of an experienced person makes for the probate of a will with a full attestation clause, although he is not a subscribing witness, and does not testify. *Walsh v. Walsh*, 4 Redf. 165; *Re Rounds*, 7 N. Y. S. R. 730; *Re Klinzner*, 71 Misc. 620, 130 N. Y. Supp. 1059; *Re Walker*, 67 Misc. 6, 124 N. Y. Supp. 615; *Re Sears*, 33 Misc. 141, 68 N. Y. Supp. 363.

Thus, a will about a year old, with a full attestation clause, was admitted, it being shown that a lawyer superintended the execution, although the testimony of one of the witnesses showed a lack of recollection as to some of the formalities, and the testimony of the other witness did not show that the testator requested the witnesses to sign, where both of the witnesses, however, testified that the lawyer asked the testator some questions about the will. *Walsh v. Walsh*, 4 Redf. 165.

Similarly, the court admitted to probate a will nine years old, with a full attestation clause, which was executed in the presence of a scrivener who was familiar with the execution of wills. *Re Rounds*, 7 N. Y. S. R. 730, where one of the subscribing witnesses testified that from his recollection the testator or the draughtsman declared the instrument to be the testator's last will and testament, although the other witness was quite positively of the impression that no declaration was made.

In *Re Klinzner*, 71 Misc. 620, 130 N. Y. Supp. 1059, a case hardly within the scope of the note, as the question was particularly whether the testator, who signed by mark, understood the instrument, which had a full attestation clause, the court, in granting probate about a year after execution, considered that the presence of the lawyer who drew the will, upon its execution, afforded some presumption of regularity although the lawyer could not testify, not being a subscribing witness and being also a beneficiary.

The presence at the execution of a will of an experienced lawyer, who was the person who drew it, and who is the sole beneficiary thereunder, makes for the due execution of the will. *Re Walker*, 67 Misc. 6, 124 N. Y. Supp. 615, where a will nineteen years 51 L.R.A. (N.S.)

old, with a full attestation clause, was admitted to probate, although the surviving subscribing witness could not testify as to the declaration or request of the testatrix, his testimony being to the effect that she said nothing at all to him or in his presence, and that her husband, who drew the will, had requested him to witness the testatrix's signature. The court considered that the witness was unreliable in memory, as some of his testimony showed.

Experienced nonsubscribing witness.

A fortiori it makes for the probate of a will when an experienced person testifies for the due execution of a will with an attestation clause, although he is not a subscribing witness. See the following cases *supra*, II.: *Rugg v. Rugg*, 83 N. Y. 592; *Re Johnson*, 7 Misc. 220, 27 N. Y. Supp. 649.

Thus, a will six years old with the usual attestation clause was admitted where the counsel testified to the publication, which was the only point in question, and one of the subscribing witnesses testified that when he signed, either the testatrix or her counsel stated it was her last will, and the other that before he signed the counsel asked the testatrix if she wished these gentlemen to witness her will, and she said "Yes." *Re Voorhis*, 125 N. Y. 765, 26 N. E. 935.

For a case admitting a will with a defective attestation clause, where the scrivener had forgotten the circumstances, see *Re Schweigert*, *supra*, II.

Experienced subscribing witness.

Where the lawyer who draws a will with a full attestation clause is a subscribing witness thereto, his testimony showing the performance of the requisite formalities of execution will in general prevail, notwithstanding the forgetfulness or even unfavorable testimony of a lay witness.

Thus, wills have been admitted in these circumstances where the other attesting witness—

—did not recollect whether the testator or some other person asked him to sign, *Rogers v. Diamond*, 13 Ark. 474;

—was somewhat hazy and doubtful about some of the requirements three years after execution, *Weir v. Fitzgerald*, 2 Bradf. 42;

—who was the testator's physician, did not recollect anything about the declaration, although it was but a few months since the execution of the instrument, *Robbins v. Robbins*, 50 N. J. Eq. 742, 26 Atl. 673;

—did not remember seeing the testator sign, although she testified that the attestation clause was read in her presence, and when the will was first offered she had made the usual affidavit stating the performance of the requisite formalities of execution, including that she saw the testator sign, *Re Skinner*, 40 Or. 571, 62 Pac. 523, 67 Pac. 951;

—testified so doubtfully eleven years after execution, as to throw doubt on the entire

matter, *Re Sandmann*, — N. J. —, 68 Atl. 754;

—was generally forgetful or preverse, seven years after execution, and stated that no one asked her to witness the will, *Re Frey*, 2 Connolly, 70, 7 N. Y. Supp. 330;

—stated, about two years after execution, that the will was not signed by the testator in his presence, *Gove v. Gawen*, 3 Curt. Eccl. Rep. 151 (where this fact in the case appears only in the headnote);

—testified, apparently about four years after execution, that she did not see the testatrix sign or hear her declare the instrument to be her will, although she heard the lawyer ask the question whether she acknowledged the instrument to be her will, *Re Bedell*, 2 Connolly, 328, 12 N. Y. Supp. 96 (where the attestation clause contained, in addition to the usual words, the statement, "she at the time of making such subscription acknowledged that she made the same");

—differed somewhat from the lawyer as to details, and also testified positively that the will was signed before the witness came into the room, in contradiction to the testimony of the lawyer and to the statement of the attestation clause, *Neiheisel v. Toerge*, 4 Redf. 328 (where the will was about a year old).

In *Egan v. Pease*, 4 Dem. 301, the will was admitted to probate where the lawyer who drew the will was one of the witnesses and testified fully as to its due execution, and stated that the attestation clause, which was full, was read over in the presence of the testatrix and of all the subscribing witnesses, although the other witnesses testified that the decedent made no declaration in their presence that the instrument was a will, and that they did not know it was a will.

It is error to disregard the testimony for the will of the attesting witnesses, one of whom was the lawyer who drew it, because the execution was thirty years past. *Re Duffy*, 127 App. Div. 174, 111 N. Y. Supp. 491, *supra*, V.

We are not informed as to whether there was an attestation clause in *Re Babcock*, 42 Misc. 235, 86 N. Y. Supp. 670, where a will sixteen years old was admitted where the lawyer who drew it, and who was one of the attesting witnesses, testified as to its due execution, and the other attesting witness failed to recollect the legal formalities, and apparently denied the observance of at least some of them.

So, we are not informed whether there was an attestation clause in *Bennett v. Sharp*, 1 Jur. N. S. 456, where the will was admitted to probate although both the attesting witnesses testified that the testator did not acknowledge the instrument in their presence, and they did not remember that she signed in their presence, but the scrivener, a solicitor, testified to all the facts of execution required by the statute, and to the signing by the testatrix in the presence of the attesting witnesses.

It does not appear whether the lawyer 51 L.R.A. (N.S.)

witness was the scrivener of the will which was admitted in *Humphrey's Will*, Tucker, 142, where of the three witnesses one was a lawyer and testified fully as to the circumstances, and the other two witnesses were ladies, who stated that the testatrix requested them to witness the execution of an instrument to be by her executed, and that they did sign their names to it, but they did not remember that anything else took place. The attestation clause certified that the will was signed and declared by the testatrix as for a last will and testament in the witnesses' presence. The court said: "As I have before had occasion to remark, the presence and agency of a respectable member of the legal profession, at the time of the execution of a will, adds greatly to the presumption of due execution."

In *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21, the court said in holding that, in the absence of clear proof that the witness or witnesses signed before the signing of the testator, it should be presumed that the testator signed first: "There is no question in this case, upon the testimony, but that the writing to which the witnesses affixed their signatures was intended by the deceased to be her will. This is fully established by the evidence of Hall, who drew the instrument and witnessed the same; and this fact would not be more clearly established had the other witness, Hattie Wyman, been able to testify that the deceased asked her to sign as a witness to her will. Her memory of that fact would not be as satisfactory as the evidence of the man who was called upon to draw the instrument, and had full knowledge of its contents, and of the purposes for which it was made." Few of the facts are here reported; it is not stated whether the scrivener was a lawyer, and it seems to be suggested that if there was any attestation clause it was not a complete one.

The forgetfulness, however, may be that of the scrivener, and the will may be admitted over his negative testimony.

Thus, in *Bloom v. Terwilliger*, 78 N. J. Eq. 221, 78 Atl. 742, a will with a perfect attestation clause was admitted, although the scrivener, who was one of the attesting witnesses and had had some experience in drawing wills, testified that no declaration was made by the testator. The other attesting witness testified that the attestation clause was either read or its purport stated at the time, and the chief beneficiary under the will, while testifying at first that she could not remember whether any declaration was made, later, after an appeal had been taken and the case was reopened, testified that a declaration was made. The court was satisfied that the beneficiary was a truthful person, and that the scrivener had forgotten the circumstances.

That an inexperienced lawyer may not be a useful witness to a will is shown in *Woolley v. Woolley*, 95 N. Y. 231, where the probate was reversed of a codicil containing a full attestation clause, which was executed less than a year before it was of-

ferred for probate. The witnesses both testified that they signed at the request of the testatrix, and one of them stated that the testatrix did not acknowledge the paper to be a codicil, and that the witness did not remember seeing her sign the paper or saying anything about it, and the other witness, a lawyer of two or three years' standing, said that he did not see the testatrix sign the paper, and did not think that she acknowledged it to him; that he presumed that the attestation clause was there when he signed it, and that he knew that it was not customary for the witness to state his residence except in the case of a will. The court said: "Here there was not even the presumption that is sometimes indulged in from the fact that the will was drawn by a lawyer, and executed under his supervision, for this codicil bears internal evidence that it was not drawn by a lawyer; and while Van De Water was a lawyer, he was simply called upon to witness the instrument; and it can be inferred that he knew that it was of testamentary character only from the simple fact that he wrote his place of residence after his signature."

Where experienced subscribing witness has died.

Where a deceased witness was a person of experience this, with a full attestation clause, may overcome the forgetfulness of the surviving witness as to the requirements. *Orser v. Orser*, 24 N. Y. 51, supra, VI. a; *Re Brissell*, 16 App. Div. 137, 45 N. Y. Supp. 122; *Webb v. Dye*, 18 W. Va. 376. See also *Re Nelson*, 43 N. Y. S. R. 30, 16 N. Y. Supp. 690, supra, IX. See also, where testator signed by mark. *Re Kane*, 2 Connoly, 249, 20 N. Y. Supp. 123, infra, XII.; and compare with it *Worden v. Van Gieson*, 6 Dem. 237, infra, XII.

Thus, probate was sustained of a will and codicil sixteen and eighteen years old, both having full attestation clauses and the same witnesses, where the surviving witness identified his signature and remembered only that the testatrix asked him to witness her will, and the deceased witness was a lawyer, the court assuming that he superintended the execution of the two instruments. *Re Brissell*, 16 App. Div. 137, 45 N. Y. Supp. 122.

So, in *Webb v. Dye*, 18 W. Va. 376, supra, the court declined to disturb a verdict for a will dated eighteen years before, containing a full attestation clause, where one of the subscribing witnesses, who was an experienced scrivener, was deceased, although the surviving witness testified that he did not know what the paper was, that he did not read the attestation clause, that he signed at the request of the testator, and thought the signature of the other attesting witness was upon it, that he looked to see what names were on it and saw the scroll, but not the name of the testator, and, on being recalled, he said he did not recollect 51 L.R.A. (N.S.)

that he saw the name of the testator on the paper.

In *Wright v. Rogers*, L. R. 1 Prob. & Div. 678, 38 L. J. Prob. N. S. 67, 21 L. T. N. S. 156, 17 Week. Rep. 833, the court declined to revoke the probate of a will with a full attestation clause, witnessed by an attorney and his clerk, where probate had been granted it seems upon an affidavit signed by the attorney, which had been filed out on a printed form by the clerk, and showed the due execution of the will. At the time of the proceeding for revocation, the attorney was dead, and the clerk testified, about a year after execution, that the attestation by the attorney and himself was not made until after they had left the testator's house and returned to the attorney's office, but the court declined to give credence to the testimony of the clerk, who, however, seems to have been clear enough in recollection.

In the insufficiently reported case of *Adams v. Rodman*, 102 Wis. 456, 78 N. W. 588, 759, the court, while refusing to set aside the finding of a jury against a will fifteen years old, where a deceased witness had been a lawyer of large experience, said: "The fact that the attesting clause states that the witnesses signed the instrument in the presence of the testator raises a strong presumption that they did so sign, and such presumption should prevail unless overcome by clear and satisfactory evidence. True, also, the fact that R. R. Menzie was a lawyer of large experience in his profession is a strong circumstance in support of the truth of the attesting clause signed by him. One of the surviving witnesses was also a lawyer, possibly a clerk of the deceased witness, and it seems that there may have been some question as to the memory of the surviving witnesses, both of whom testified in contradiction to part of the attestation clause."

XI. Habit of witness.

It is, of course, familiar practice for lawyers, as witnesses to wills, who have forgotten the circumstances or some of them, generally to state their belief and conviction that they would not have signed had not all the legal requirements been observed. And witnesses to wills generally, who do not remember all the circumstances, often state their habit not to sign instruments unless the maker has signed or acknowledged in their presence, etc. See, in general, *Hughes v. Hughes*, 31 Ala. 519, infra, XII.; *Pate v. Joe*, 3 J. J. Marsh. 113, supra, IV.; *Barnes v. Barnes*, 66 Me. 286; *Rolla v. Wright*, 2 Dem. 482, 67 How. Pr. 117, supra, IV.; *Butler v. Benson*, 1 Barb. 526, supra, VI. a. See also for a case of an experienced scrivener, *Re Schweigert*, 17 Misc. 186, 40 N. Y. Supp. 979, supra, II.

In *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460, it was held that it was proper evidence for the jury as to the execution of a will thirty-two years old, with a full attestation clause, that a witness thereto

who did not recollect having seen the testatrix sign, said that he had no doubt that she signed it, that he had never witnessed an instrument in that form without knowing what it was, and that he had no doubt that the persons whose names appeared on the will were present at the time it was executed.

In *Re Kellum*, 52 N. Y. 517, the court sustained the probate of a will eleven years old, although there was no recollection as to its execution on the part of either of the witnesses, one of whom was an experienced lawyer, who had drawn the will, and who stated that he was careful always to have wills executed according to the statute, and testified positively to all of the required facts, basing his statement upon the attestation clause and circumstances which he did recollect, and his uniform custom in transacting such business; the other witness was a clerk of the draftsman.

In *Craig v. Craig*, 156 Mo. 358, 56 S. W. 1097, it was held that the will was sufficiently proved where one of the witnesses testified fully as to the statutory execution including the signing by both the witnesses, and the other witness, while not remembering the testator, said he had witnessed a number of wills and in case of any will that he had signed the question had been asked of the testator whether the witnesses should sign in his presence. It does not appear whether there was an attestation clause or not.

Similarly, the will was held sufficiently proved in *Gwinn v. Radford*, 2 Litt. (Ky.) 137, where one of the witnesses testified as to its due execution, and the other witness did not recollect having witnessed the paper, but identified his signature and testified that he had a distinct recollection of having witnessed one paper for the testator, and a faint recollection of having witnessed another, and that it was his invariable habit not to attest an instrument as a witness unless it was acknowledged by the person executing it. Nothing appears as to any attestation clause.

Similarly, in *Re Pepoon*, 91 N. Y. 255, the court sustained the probate of a will about fourteen years old, with a full attestation clause, where one of the witnesses testified, after reading the attestation clause, that the testatrix must have declared the instrument to be her will and signature, but he had no recollection of being requested to sign as a witness, but later he said that he must have read the clause, and that he must have been asked to sign, stating that he never signed anything without reading it and would not have signed unless the things stated had been done. The other witness had only a vague impression of the testatrix being one day at the office where he was employed and of her signing and his witnessing the will, but stated that he had the habit of not signing any document without reading it, and thought he must have read the attestation clause, and he had no doubt that what was stated therein had occurred.

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In *Re Hunt*, 110 N. Y. 278, 18 N. E. 106, affirming 42 Hun, 434, a holographic will was ordered to be admitted to probate, and the decision of the surrogate reversed, where it is stated that the recollection of the two witnesses was imperfect, but each testified that the circumstances must have been as stated in the attestation clause or he would not have signed it. This case is unsatisfactory on account of the insufficient reporting of the facts, particularly as the attestation clause omitted the statement that the witnesses signed at the request of the testator, and this omission is not discussed in the opinion of the court of appeals or in that of the general term.

XII. Signature by mark.

For the general subject of proof of signatures to will by mark, when attesting witnesses are dead or cannot remember the transaction, see note to *Wienecke v. Arbin*, 44 L.R.A. 142. It is not intended to include here other cases than those in which the defective memory of witnesses is concerned.

Generally speaking, there does not seem to be any difference in legal principle, in cases of defective memory of subscribing witnesses, between wills signed by mark and those signed by name.

In *Fatherce v. Lawrence*, 33 Miss. 585, it was held that probate was properly granted to a will signed by a mark and attested by two witnesses (father and son) under the word "test," where the survivor of the witnesses twenty-two years after the date of the will did not recollect any of the circumstances except that he had written the will, that the testatrix had been ill at his father's house, and he thought the will had been then prepared. He further proved the signatures of his father and himself as witnesses, and stated that the signature of the testatrix was in his handwriting, that he did not think he would have signed as a witness if the paper had not been legally executed, but was not certain he knew what was necessary to a legal execution. The same witness had made an affidavit twenty-two years before, when the will was first offered for probate (the other subscribing witness being dead at that time), as to its execution, which omitted to state that the witnesses signed in the presence of the testatrix, but the court considered that this omission did not prove that the affidavit stated all the facts of the execution.

In *Clarke v. Dunnivant*, 10 Leigh, 14, the court approved the probate of a will signed by the testator's mark, where one of the witnesses testified to most, if not all, of the requirements, and thought that he signed the testator's name, although the other witnesses, while testifying that they were at the house of the testator upon the occasion, did not remember anything about the making of the will, which was done eight years before their testimony was taken. The only attestation clause was the words "signed, sealed, and delivered in the presence of."

It may be noted that in *Hughes v. Hughes*, 31 Ala. 519, upon a contest as to probate of a will on account of undue influence, fraud, etc., it was held to be error to exclude from the jury evidence of a former will twelve years old, having three witnesses, and of its execution, when the evidence of its execution consisted of the testimony by one of such witnesses that this former will was in the witness's handwriting, that he did not remember anything about it except that he supposed that the testator did sign with a mark, as he had been a paralytic, and that he himself would not have signed the will as a witness unless the testator had declared it to be his will. Nothing appears about the other witnesses nor as to any attestation clause.

In *Howard's Will*, 5 T. B. Mon. 199, 17 Am. Dec. 60, a will nineteen years old, signed by a mark, was admitted to probate where the statute required two witnesses, and two of the witnesses testified that it was signed by all of the witnesses in the same room with the testator, but after the third witness had testified that he signed it in an adjoining room, one of the first witnesses was re-examined and expressed doubt as to which of the rooms was the one in which he had signed. The report of the case is silent as to any attestation clause.

It may be noted that in *Re McCabe*, 75 Misc. 35, 134 N. Y. Supp. 682, where the statute required two witnesses, a will signed by mark was admitted to probate where two of the three witnesses satisfactorily showed the statutory requirements, and the third had forgotten almost every essential about the execution. Nothing is reported as to an attestation clause.

Where there is a full attestation clause.

In *Newhouse v. Godwin*, 17 Barb. 236, where a decree rejecting a recent will signed by mark and having a full attestation clause was affirmed on another ground, the court, after referring to the sufficient testimony of one witness, a lawyer's clerk, said *obiter*: "The other subscribing witness does not recollect hearing the testator declare that the paper to which he had made his mark was his last will and testament, or request anyone to sign his name as a witness. But the nonrecollection of this witness cannot overthrow, or balance, the affirmative and positive evidence of one who seems to have been more attentive, and to have a better memory."

Wills signed by mark and having a full attestation clause have been admitted to probate—

—where the witnesses testified sufficiently on direct examination, but on cross-examination their recollection, two years after execution, proved to be insufficient as to some of the statutory requirements, *Re Engler*, 56 Misc. 218, 107 N. Y. Supp. 222, where one of the witnesses testified that he read the attestation clause aloud to the other witness in the hearing of the testatrix;

—where the will was drawn by a deceased

witness, who was an experienced scrivener, and the surviving witness testified that he signed before the testatrix signed, his want of recollection being suggested by his further statement that he signed after the other witness, whereas the ocular evidence upon the face of the will indicated the contrary. *Re Kane*, 2 Connolly, 249, 20 N. Y. Supp. 123.

See also as to presumption from presence upon the execution of the will, of the lawyer who drew it, where the will was signed by mark, *Re Klinzner*, 71 Misc. 620, 130 N. Y. Supp. 1059, *supra*, X.

In *Dack v. Dack*, 19 Hun, 630, the court reversed the decision of the surrogate refusing probate of a codicil three years old, signed with a mark and having a full attestation clause, where one of the subscribing witnesses testified to the declaration, although the other two, one of which was the scrivener, could not testify to any declaration. This case was reversed in 84 N. Y. 663, upon a question of undue influence, the court approving the decision as far as the execution of the codicil was concerned.

In *Grant's Will*, 149 Wis. 330, 135 N. W. 833, it was held that a will signed by testatrix's mark, and having a full attestation clause, was sufficiently proved, where it was a joint will of testatrix and her husband, of which, as the will of her husband, she had acted as executrix for twenty years. One of the witnesses, an experienced scrivener who drew the will, was dead; another witness, eighty years old, had no recollection of the transaction and was not even sure of his signature, which was proved to be genuine; he was positive that he had never been in the house of testatrix's husband, where if ever, the will was executed: the third witness testified that he was called to that house to witness the will, and did so, but that neither the testator nor the testatrix signed the will in his presence, and that the scrivener did not sign as a witness while he was there, and that the other witness was not in the house while he remained there. There was other evidence that the testator and testatrix and the three witnesses were all together in the house shortly after the will was executed.

But in *Worden v. Van Gieson*, 6 Dem. 237, the surrogate declined to admit to probate a will which was signed by a mark and had a full attestation clause, where one of the subscribing witnesses, the lawyer who drew it and superintended its execution, was dead, and the other subscribing witness, twelve years after the execution of the will, was either afflicted with a defective memory or had an inclination to appear in that condition. The surrogate considered that, under § 2620 of the Code of Civil Procedure, there being no third persons present to identify the mark of the testatrix, and no way of proving handwriting, as provided by the statute, he was constrained to refuse probate. This decision was affirmed in 47 Hun, 5, on the ground that the witness, while stating that the testatrix had declared the instrument to be her will, said

further that he did not see her sign it, and she never told him she had signed it. (For a discussion indicating that the surrogate's decision in this case, so far as it turned on the necessity of proof of mark by two witnesses, is no longer authority, see the *fore-said* note in 44 L.R.A. 144.)

In *Jenkins's Will*, 43 Wis. 610, where a decree denying probate was reversed, we are not informed whether or not the conflict in testimony three years after execution indicated any want of recollection.

Witnesses signing by mark.

For the general subject of attesting will by mark, see note to *Re Guilfoyle*, 22 L.R.A. 372.

In *Morris v. Kniffin*, 37 Barb. 336, it was held in an ejectment case that there should have been submitted to the jury the question of the validity of the execution of a will with a full attestation clause, where the only surviving witness had made his mark as a witness and recollected practically nothing about the execution except that he was present at the testator's house on a visit at the time the will was drawn, and that he and the other subscribing witness went into the room where the testator lay in bed, it seems, after the will was drawn. There was some other evidence in the case, but not of the execution. The trial was from one to three years after the date of the will.

A will twenty-three years old, having a full attestation clause, was held sufficiently proved where, of the three witnesses, one was dead, one proved the due execution of the will, and the third, who attested by his mark, did not remember having attested to the will and had no recollection of the transaction. *Gillis v. Gillis*, 96 Ga. 1, 30 L.R.A. 143, 51 Am. St. Rep. 121, 23 S. E. 107, where it was held that this decision was not against the Georgia statute providing that "a witness may attest by his mark, provided he can swear to the same," as this statute strictly relates to the competency of a witness attesting by his mark at the time that he did attest, and does not relate to the time of proving the will, under the general rule that the competency of witnesses is to be determined at the time of attestation, and not at the time of probate, as in this case the witness might have died or become blind or insane. There was also evidence of a nonsubscribing witness who was present, the report not stating her testimony.

Reference may be made in this connection to *Montgomery v. Perkins*, 2 Met. (Ky.) 448, 74 Am. Dec. 419, where it was held that a will was sufficiently proved where the two subscribing witnesses testified that the scrivener signed their names as witnesses, they holding the pen, as neither of them could write, but they could not identify the paper propounded, and on hearing it read over thought that one of its provisions was different from that of the paper which they had witnessed, and the scrivener

testified that he wrote the paper, and identified it as the paper which was witnessed in the manner already stated. Nothing is reported as to an attestation clause.

XIII. Miscellaneous.

Where the requirements of the statute have been substantially met, discrepancies in the testimony of the attesting witnesses as to the time and place of execution will be disregarded. *Re Dake*, 98 App. Div. 629, 90 N. Y. Supp. 213, where the probate of two codicils more than five years old, with attestation clauses, was sustained.

In *Lambert v. Cooper*, 29 Gratt. 61, the court approved the verdict of the jury for the will where the scrivener, who was the executor and one of the attesting witnesses, proved the due execution of it, and two other attesting witnesses testified that the will was not duly executed. The report is silent as to any attestation clause.

A will about eighteen months old was held sufficiently proved where it concluded, "In witness thereof, I place my signature in the presence of two witnesses," and one of the witnesses testified that the testator signed in the presence of both the witnesses, although the other witness could not say whether the testator signed it before the witness entered the room, but stated that the testator did not call attention to his signature. *Cregreen v. Willoughby*, 6 Jur. N. S. 590.

In *Nicholson v. Myers*, 3 Dem. 193, the surrogate considered that the circumstances involved a request on the part of the testatrix, although the attestation clause omitted this requirement, where the testimony of the only surviving witness, taken thirty years after the execution of the will, was that he signed the instrument, that he saw the testatrix sign it, and saw it signed by the other subscribing witness; that he had an indistinct recollection that the testatrix signed at a stand in a room, and that when she had signed she yielded her seat to one of the witnesses, who signed and then surrendered his place to the other witness.

In *Re Nussbaum*, 144 N. Y. Supp. 443, the will was admitted to probate where the witnessing by the two witnesses was at different times, and the testimony of the witness who signed first was satisfactory, and the other stated that the testator presented the paper writing proceeded on, and said to him, "Sign it; one name is on it, and that is my testament;" that he could not remember exactly whether he saw testator's name on the paper when he signed it, but he believed there were then two names there. Nothing is reported as to any attestation clause.

In *Ex parte Brock*, 37 S. C. 348, 16 S. E. 38, the probate was affirmed of a will executed fifteen years before, where the attesting witnesses did not seem to have been clear as to their having signed in the presence of the testator or of each other. The appellate court, in approving the instructions to the jury, said: "These instructions

practically amounted to this, that where a paper propounded as a will is shown to have been signed by the alleged testator, and by the requisite number of subscribing witnesses, in the absence of any satisfactory evidence to the contrary, the presumption is that all the other formalities have been complied with. This, we think, is good law, and any other rule would render it impossible to prove a will where the subscribing witnesses were dead or their testimony was not attainable." We are not informed whether there was an attestation clause.

In *Peebles v. Case*, 2 Bradf. 226, two wills were offered, both bearing the same date, two or three years before, both signed by the same witnesses. Both witnesses positively identified and remembered the execution of will No. 2, one of them positively denied his signature to will No. 1, and the other said he had no recollection of anything about it, and if he ever signed it, it was not as witnessing a will. The surrogate took evidence of some collateral facts, seems to have considered that both wills were genuine, and said in admitting will No. 1 to probate: "When the witnesses to a will are dead, or have forgotten the circumstances of the execution, the performance of the formalities required by statute may, after proof of their signatures and that of the testator, be inferred or presumed from the recitals of the testatum clause. . . . On the supposition that Parsons and Smith have lost all recollection of the transaction, the court, if satisfied from other evidence that they did in fact witness the will, may admit it to probate."

In *Reeve v. Crosby*, 3 Redf. 74, where it seems that three instruments were admitted to probate, and that at least one of them had an attestation clause, some of the subscribing witnesses did not clearly recollect, four years after the execution, that all the formalities had been performed, while others did so, and the court considered that the proof was sufficient without the evidence of the testator's counsel, who, however, testified. B. B. B.

COLORADO SUPREME COURT. (In banc.)

M. S. CHENOWETH, Plff. in Err.,
v.

STATE BOARD OF MEDICAL EX-
AMINERS et al.

(— Colo. —, 141 Pac. 132.)

Certiorari — to review action of medical examiners — question open.

1. The questions open upon certiorari to review the action of the board of medical examiners in revoking a physician's license are whether the board had jurisdiction, exceeded its jurisdiction, or greatly abused 51 L.R.A.(N.S.)

its discretion, or whether the statute under which it acted is constitutional.

Physicians and surgeons — revocation of license — advertising to treat disease of the sex organs.

2. The legislature cannot, under a Constitution protecting the rights of liberty and property, provide for the revocation of the license of a physician for advertising to treat diseases of the sexual organs, if the advertisements are not couched in terms which injuriously affect the public morals.

Statutes — indefiniteness — validity.

3. A statute providing for the revocation of a physician's license for publishing an advertisement "relating to a disease of the sexual organs" is void for indefiniteness.

Constitutional law — class legislation — limitation of advertisements.

4. A statute providing for the revocation of the license of a physician who publishes an advertisement relating to disease of the sexual organs, while permitting such advertisement by other persons, is invalid as class legislation.

(Gabbert, Bailey, and Hill, JJ. dissent.)

(October 6, 1913.)

ERROR to the District Court for Denver County to review a judgment dismissing a writ of certiorari to review the action of the State Board of Medical Examiners in revoking the license of defendant to practise medicine. Reversed.

The facts are stated in the opinion.

Mr. Roy E. Dickerson, for plaintiff in error:

The right to labor and its fruit is a natural right which may not unreasonably be interfered with.

State v. Gardner, 58 Ohio St. 599, 41 L.R.A. 689, 65 Am. St. Rep. 786, 51 N. E. 136; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *State v. Bair*, 112 Iowa, 466, 51 L.R.A. 776, 84 N. W. 532; *Ruhstrat v. People*, 185 Ill. 133, 49 L.R.A.

Note. — Grounds for revoking physician's license.

The purpose of this note is to review the recent cases passing on the above question. For a discussion of the earlier cases involving this subject, see the notes to *Macomber v. State Bd. of Health*, 8 L.R.A.(N.S.) 585; *Munk v. Frink*, 17 L.R.A.(N.S.) 439; *State Medical Board v. McCray*, 30 L.R.A.(N.S.) 783; and *Richardson v. Simpson*, 43 L.R.A.(N.S.) 911.

The license of a physician is a valuable privilege, and perhaps a property right which is protected at least by such safeguards as the legislature has thrown around it. *State ex rel. Spriggs v. Robinson*, 253 Mo. 271, 161 S. W. 1169.

181, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453; *Gothard v. People*, 32 Colo. 13, 74 Pac. 890.

The right to regulate the practice of medicine, being the regulation of the natural right to labor, must find authority, if any, within that power of the state which protects the public health, welfare, and safety.

Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *State v. Gardner*, 58 Ohio St. 599, 41 L.R.A. 689, 65 Am. St. Rep. 785, 51 N. E. 136; *State v. Gravett*, 65 Ohio St. 289, 55 L.R.A. 791, 87 Am. St. Rep. 605, 62 N. E. 325.

The legislature may control the practice of medicine. Such enactments emanate from that branch of the police power having to do with the protection of public health.

Smith v. People, 51 Colo. 270, 36 L.R.A. (N.S.) 158, 117 Pac. 612; *Harding v. People*, 10 Colo. 387, 15 Pac. 727.

If the power is exercised for the purpose of protecting the public health it must be exercised so as to prevent injury to the public through the ignorance, incapacity, incompetency or unfitness of those holding

themselves out to the public as qualified to minister to the ailments to which mankind is heir.

O'Neil v. State, 115 Tenn. 427, 3 L.R.A. (N.S.) 762, 90 S. W. 627; *Hewitt v. Charier*, 16 Pick. 353; *Sate ex rel. Powell v. State Medical Examining Board*, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238; *Ex parte Whitley*, 144 Cal. 167, 77 Pac. 879, 1 Ann. Cas. 13; *State v. Heath*, 125 Iowa, 585, 101 N. W. 429; *Parks v. State*, 159 Ind. 211, 59 L.R.A. 190, 64 N. E. 862; *People v. Gordon*, 194 Ill. 560, 88 Am. St. Rep. 165, 62 N. E. 858, 15 Am. Crim. Rep. 540; *Meffert v. State Bd. of Medical Registration (Meffert v. Packer)* 66 Kan. 710, 1 L.R.A.(N.S.) 811, 72 Pac. 247, affirmed without discussion in 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790; *State v. Bair*, 112 Iowa, 466, 51 L.R.A. 776, 84 N. W. 532; *State v. Davis*, 194 Mo. 485, 4 L.R.A.(N.S.) 1023, 92 S. W. 484, 5 Ann. Cas. 1,000; *Tiedeman, Pol. Power*, § 85, p. 198.

The rights of a physician who has been admitted to practise are recognized as val-

In construing Kentucky Statutes, § 2615, providing that the board of health may suspend or revoke a physician's license, (1) for the presentation to the board of any license which was illegally or fraudulently obtained, or the practice of fraud in passing an examination; (2) for the commission of a criminal abortion, or conviction of a felony involving moral turpitude; (3) for chronic or persistent inebriety, or addiction to a drug habit to an extent which disqualifies him to practise with safety to the people; (4) or for other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public,—the last clause is to be read in connection with those preceding, and means that the unprofessional, dishonorable conduct intended is other than that specified in the preceding clauses, and when so construed it erects a definite standard by which professional conduct may be measured, and is a valid exercise of the police power. *Forman v. State Bd. of Health*, 157 Ky. App. 123, 162 S. W. 796.

It is not an offense involving moral turpitude for a physician to aid another in conducting a medical institute under a corporate name, and to practise medicine for the corporation in its name for hire, and such acts constitute no ground for revoking a license under Kentucky Statutes, § 2615. *Ibid.*

And although a physician may violate the professional code by advertising, his act will not constitute a ground for revoking his license, unless his conduct is dishonorable, fraudulent, and involves moral turpitude within the contemplation of the above statute. *Ibid.*

And the fact that a physician advertises that he can cure a certain disease does not 51 L.R.A.(N.S.)

constitute a ground for suspension if he is sincere in his belief that he can do so, but if he knows the advertisement to be false, and thus deceives the public, he is guilty of fraudulent, dishonorable, and unprofessional conduct involving moral turpitude. *Ibid.*

Whether his acts are sincere or fraudulent and done for the purpose of defrauding the public is a question to be decided by the state board of health. *Ibid.*

The proceedings of such board are not judicial, but are purely administrative; and it cannot act arbitrarily, but must act upon reasonable grounds and in compliance with the statute, and if it acts arbitrarily the courts will intervene to protect private rights. *Ibid.*

Conduct that is dishonorable, unprofessional, fraudulent, and involving moral turpitude, within the meaning of Kentucky Statutes, § 2615, is stated by a charge that the physician aided a corporation by which he was employed, to obtain money from persons by fraudulent pretenses, in pretending that he could cure diseases that were incurable, and guarantying to cure all diseases, and aided in publishing to the world an untrue statement that the corporation possessed an electrical apparatus which was the only one in the country, by which various diseases could be cured. *Ibid.*

A statute authorizing the board of health to revoke licenses of physicians who are guilty of unprofessional or dishonorable conduct, and providing that habitual drunkenness, drug habit, or excessive use of narcotics, producing criminal abortion, or soliciting patronage by agents, shall be deemed unprofessional and dishonorable conduct within the meaning of the statute, but providing that these specifications are

uable rights not to be disturbed or forfeited without due process of law.

Matthews v. Murphy, 23 Ky. L. Rep. 750, 54 L.R.A. 415, 63 S. W. 785; *Smith v. State Medical Examiners*, 140 Iowa, 66, 117 N. W. 1116; *People use of State Bd. of Health v. McCoy*, 125 Ill. 289, 17 N. E. 786; *Mathews v. Hedlund*, 82 Neb. 825, 119 N. W. 17.

If it is the advertisement itself which is objectionable it is equally so whether inspired by physician or layman, and the physician alone must not be penalized for the act. This is class legislation of the plainest kind.

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Wagner v. Milwaukee County*, 112 Wis. 601, 88 N. W. 577; *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3; *Otis v. Parker*, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; *Smith v. Farr*, 46 Colo. 365, 104 Pac. 401; *Missouri, K. & T. R. Co. v. May*, 194 U. S. 287, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; *Cooley, Const. Lim.* 7th ed. p. 561; *Ruhrstrat v. People*, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453; *Eden v. People*, 161 Ill. 296, 32 L.R.A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611.

The act is unconstitutional because it

not intended to exclude all other acts for which licenses may be revoked, is highly penal, and must be treated as a penal law. *State ex rel. Spriggs v. Robinson*, 253 Mo. 271, 161 S. W. 1169.

And under such statute no one can be held to have violated its provisions unless his act comes within both the letter and the spirit of the law. *Ibid.*

And a mere willingness to commit the crime of abortion does not constitute a ground for revoking a license under such statute, since the indicated specification of matters constituting grounds for revocation grow out of intentional affirmative acts, and the general specification following is directed solely against certain undesignated acts, not against evil thoughts and a willingness to perform wrongful acts. *Ibid.*

And under such statute the conviction and suspension of a physician cannot be sustained upon evidence that he inserted an advertisement in a newspaper, giving his name, and stating that his practice was limited to diseases of women and surgery, or upon the evidence of another physician to the effect that several physicians had told him that the licentiate bore the reputation of being a criminal abortionist. *Ibid.*

The statute involved in this case was held not to be invalid on the ground that the general specification therein authorized the board of health to determine what should

discriminates between resident and nonresident physicians.

State v. Pennoyer, 65 N. H. 113, 5 L.R.A. 709, 18 Atl. 878; *State v. United States & C. Exp. Co.* 60 N. H. 219; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579.

Mr. Charles L. Dickerson also for plaintiff in error.

Messrs. Harry E. Kelly and Charles H. Haines, for defendants in error:

A statute which authorizes the revocation of a license to practise medicine, on the ground that the licentiate has caused the publication and circulation of an advertisement relative to diseases of the sexual organs, is not unconstitutional.

State ex rel. Powell v. State Medical Examining Board, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238; *State ex rel. Feller v. State Medical Examiners* 34 Minn. 391, 26 N. W. 125; *Meffert v. State, Bd. of Medical Registration (Meffert v. Packer)* 66 Kan. 710, 1 L.R.A.(N.S.) 811, 72 Pac. 249, affirmed in 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790; *Aiton v. Medical Examiners*, 13 Ariz. 354, — L.R.A.(N.S.) —, 114 Pac. 962; *State ex rel. Hathaway v. State Bd. of Health*, 103 Mo. 22, 15 S. W. 322; *State Medical Board v. McCrary*, 95 Ark. 511, 30 L.R.A.(N.S.) 783, 130 S. W. 544, Ann. Cas. 1912A, 631; *Kennedy v. State Bd. of Registration*, 145 Mich. 241, 108 N. W. 730, 9 Ann. Cas. 125.

A license to practise medicine is not a

constitute dishonorable and unprofessional conduct, and thereby vested it with legislative functions in violation of § 1, arts. 3 and 4 of the Constitution. *Ibid.*

And it was held that if these constitutional provisions were suspended, and the board of health given power to legislate, where it did not appear, in a case in which the revocation of a physician's license was sought on the ground that he offered to commit an abortion, that the board, prior to the institution of the proceeding, even enacted a law making this a ground for revoking licenses, a revocation could not be had on this ground, since the board would be subject to the constitutional provision forbidding the enactment of retrospective laws. *Ibid.*

In *Graeb v. State Medical Examiners*, — Colo. —, 47 L.R.A.(N.S.) 1063, — Pac. —, where the State Board of Medical Examiners, which was the only authority presented upon the question, admitted that consumption, the disease there relied upon, or any other disease, was not manifestly incurable, it was held that a statute authorizing the revocation of a physician's license for obtaining a fee "on the representation that a manifestly incurable disease can be cured," was void because of insufficiency and uncertainty, since there is no such thing as a manifestly incurable disease.

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property right, but is a special privilege conferred upon the licentiate.

State v. Edmunds, 127 Iowa, 333, 101 N. W. 431.

Scott, J., delivered the opinion of the court:

On the 15th day of March, 1906, a complaint was filed with the State Board of Medical Examiners, charging M. S. Chenoweth, duly licensed to practise medicine under the laws of the state, with publishing in the Rocky Mountain News, a newspaper published in the city of Denver, an advertisement relative to a disease and diseases of the sexual organs. This was under § 6068, Revised Stat. 1908, authorizing the State Board of Medical Examiners to refuse to grant, or to revoke, a license to practise medicine in this state upon the ground, among others given in the statute, of "causing the publication and circulation of an advertisement relative to any disease of the sexual organs."

The advertisements complained of are not set out in the complaint nor in the abstract of record, but there are newspaper clippings attached to the transcript of record which we assume to be the advertisements offered in evidence. A hearing was had on this complaint by the State Board of Medical Examiners, and the license of Dr. Chenoweth revoked. A writ of certiorari was issued out of the district court, and upon a hearing before that court this writ was dismissed, from which ruling of the court the plaintiff in error brings the case here for review. The question as to whether certiorari is the proper remedy in this case is not raised or presented, and we are not to be understood as passing upon that question.

The record discloses that the medical board preserved no testimony, and we are left to the minutes of that body alone for information as to what occurred at the hearing upon the complaint filed. There were others tried at the same hearing, but other final disposition was made as to these cases, and the plaintiff in error alone is now complaining.

The minutes of the board disclose the presence of Dr. Chenoweth at the hearing and his admission of responsibility for the publication by the Scott Medical Company and the Dr. Myers Medical Company, both of which companies he apparently controls. Also a resolution by the board revoking his license to practise medicine because of the fact of such publications alone.

It has been held by this court that the inquiry upon certiorari is limited to whether the court below exceeded its jurisdiction or greatly abused its discretion. *People ex rel. Burchinell v. District Ct.* 22 Colo. 422, 51 L.R.A. (N.S.)

45 Pac. 402. Also that the object of the proceeding is to correct errors of law apparent from admitted or established facts, and not to settle those which are disputed. *People ex rel. Hallett v. Arapahoe County*, 27 Colo. 86, 59 Pac. 733. Further, that in Colorado there are two different proceedings by certiorari: One to review the action of an inferior tribunal or board of officers; the other to secure the trial *de novo* of causes previously heard by justices of the peace. *Small v. Bischelberger*, 7 Colo. 563, 4 Pac. 1195.

The question, then, to be determined in this case is whether the Board of Medical Examiners was without jurisdiction, exceeded its jurisdiction, or greatly abused its discretion, and, in this instance, is the statute, in so far as it relates to the particular ground for revocation, in violation of the constitutional rights of the plaintiff in error? There is no question but that the defendant caused the publication of the advertisements. There can be no reasonable question under the decisions of the courts of this state and the law generally but that, under the police power inherent in the state, the legislature may enact reasonable regulations for the examination and registration of physicians, in the practice of medicine and surgery, and that such statutes violate neither the Federal nor the state Constitutions.

Neither does the authority of the legislature end with declaring what qualifications he who enters upon the practice of that profession shall possess. "As it has plenary power over the whole subject, it alone must be the judge of what is expedient, both as to the qualifications required and as to the method of ascertaining those qualifications. The only limit to the legislative power in prescribing conditions to the right to practise is that they shall be reasonable, and whether they are reasonable the courts must judge." 30 Cyc. 1548.

That the state may create a board of experts authorized to examine and grant such licenses and to hear and determine any complaint made against any person holding a physicians' license, and in a proper case to revoke the same, is equally well settled. It is also true that, while the power of a board so created is in the nature of a quasi judicial power, yet it is not such a power as cannot be granted by the legislature. Therefore the only limit of the legislature in this respect is that it shall provide reasonable regulation. But the right is one of regulation only, and must be found in the power of the state to provide for the general welfare of its people. The power of the legislature, however, is not such as may unreasonably interfere with the undoubted

right of every citizen to follow any lawful calling, business, or profession he may choose, subject only to reasonable regulation; for the right to labor and to receive the fruits of such labor is a natural and inherent right always protected by the Constitution.

The statutory ground in this case is "causing the publication and circulation of an advertisement relative to any disease of the sexual organs." The only statute of similar import brought to our attention is that of Nebraska (§ 4327, Neb. Comp. Stat.). In that statute, however, is found the qualifying words, "tending to injure the morals of the public." In the statute under consideration, the mere publication of the advertisement, regardless of its tendency, is sufficient to authorize the revocation of the license, and it must be presumed that the action of the board was based solely upon the fact of the publication, as it was authorized to do by the language of the statute. Under this statute, then, no matter how harmless or innocent may be the publication, nor what may be the chasteness of its language, nor the utter absence of any tendency to injure the morals of the public, yet the very fact of the publication of the advertisement is sufficient to take from a physician his license and the right to practise his profession. If this is to be justified under the statute, then the very basis upon which rest such statutes of regulation must be ignored. For such legislation is justified only upon the ground of police power and as tending to promote the public health, morals, safety, or general welfare.

"The police power is limited to enactments which have reference to the public health or comfort, the safety, or welfare, of society. Laws which impose penalties on persons and interfere with the personal liberty of the citizen cannot be constitutionally enacted, unless the public health, comfort, safety, or welfare demands their enactment. It is for the legislature to determine when an exigency exists for the exercise of this power, but what are the subjects of its exercise is clearly a judicial question. The exercise of legislative discretion is not subject to review by the courts when measures adopted by the legislature are calculated to protect the public health and secure the public comfort, safety, or welfare; but the measure so adopted must have some relation to the ends thus specified. *Ritchie v. People*, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454. The legislature has no power, under the guise of police regulations, to arbitrarily invade the personal rights and personal liberty of the individual citizen. Its determination upon this question is not final or conclusive. If 51 L.R.A.(N.S.)

it pass an act ostensibly in the exercise of the police power, but which in fact interferes unnecessarily with the personal liberty of the citizen, the courts have a right to examine the act and see whether it relates to the objects which the exercise of the police power is designed to secure, and whether it is appropriate for the promotion of such objects. When the police power is exerted for the purpose of regulating a useful business or occupation and the mode in which that business may be carried on or advertised, the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling and to exercise his own judgment as to the manner of conducting it. The general right of every person to pursue any calling, and to do so in his own way, provided that he does not encroach upon the rights of others, cannot be taken away from him by legislative enactment. *Tiedeman*, Pol. Power, § 3; *Re Jacobs*, 98 N. Y. 108, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Cook*, Const. Lim. 6th ed. pp. 606, 607, 744; *Ex parte Whitwell*, 98 Cal. 73, 19 L.R.A. 727, 35 Am. St. Rep. 152, 32 Pac. 872; *Fraser v. People*, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Ritchie v. People*, supra." *Ruhrstrat v. People*, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453.

It is not material for the purpose of this case to determine whether the right to practise medicine be classed as a property right, as contended by the plaintiff in error, or as a mere privilege, as insisted by the board, for it must be conceded that it is a valuable right. The right to practise medicine in respect to its value is no different from the right to practise law, and of this Mr. Justice Field said in *Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569: "To disbar an attorney is to inflict upon him a punishment of the severest character. He is admitted to the bar only after years of study. The profession may be to him the source of great emolument. If possessed of fair learning and ability, he may reasonably expect to receive from his practice an income of several thousand dollars a year,—equal to that derived from a capital of one or more hundred thousand dollars. To disbar him having such a practice is equivalent to depriving him of this capital. It would often entail poverty upon himself and destitution upon his family. Surely the tremendous power of inflicting such a punishment should never be permitted to be exercised unless absolutely necessary to protect the court and the public from one

shown by the clearest legal proof to be unfit to be a member of an honorable profession."

Advertisements by physicians may be regarded by certain members of the profession, as contrary to professional ethics, but with that legislatures and courts may not be concerned. The legislature has no power to confer the authority upon a Board of Medical Examiners to deny to a physician the right to advertise his business.

Many statutes relating to the powers and duties of boards of medical examiners fix as cause for the revocation of a physician's certificate to practise medicine such as "unprofessional and dishonorable conduct," "grossly immoral and unprofessional conduct," etc. These statutes have been generally sustained by the courts. *State ex rel. Powell v. State Medical Examining Board*, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238, id. 34 Minn. 391, 26 N. W. 125; *Meffert v. State Bd. of Medical Registration* (*Meffert v. Packer*) 66 Kan. 710, 1 L.R.A.(N.S.) 811, 72 Pac. 247; *Meffert v. Packer*, 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790; *Aiton v. Medical Examiners*, 13 Ariz. 354, — L.R.A.(N.S.) —, 114 Pac. 962; *State ex rel. Hathaway v. State Bd. of Health*, 103 Mo. 22, 15 S. W. 322; *Kennedy v. State Bd. of Registration*, 145 Mich. 241, 108 N. W. 730, 9 Ann. Cas. 125. But these cases sustain such statutes upon the ground of public welfare and public morals. For it is as essential that a licensed physician shall be possessed of professional honor as that the applicant for such license shall possess such qualifications. In the first one of these cases cited by counsel for the board in this case, it was said: "We will add, as our construction of the words 'unprofessional or dishonorable conduct,' as used in § 9, that we do not think that the legislature contemplated matters of merely professional ethics, but that the term 'unprofessional' was used convertibly with 'dishonorable.' The meaning may be expressed by using the conjunctive *and* in place of the disjunctive *or*. *Wert v. Clutter*, 37 Ohio St. 347, 350; *Weston v. Loyhed*, 30 Minn. 221, 14 N. W. 892." And in *Meffert v. State Bd. of Medical Registration*, *supra*, the court said: "It is subversive of the morals of the people and degrading to the medical profession for the state to clothe a grossly immoral man with authority to enter the homes of her citizens in the capacity of a physician."

Doubtless a physician might publish an advertisement which would in itself be so grossly immoral as to constitute dishonorable conduct. But our statute contains no such ground as a cause for revocation; neither is it contended or charged that either of the publications complained of

were of any such character or had such tendency. The character of the advertisement is simply charged in the language of the statute as "relative to a disease of the sexual organs."

While we may not in this case enter into a consideration of the evidence, yet as illustrating the soundness of our conclusions, we note that the "Myers Medical Company" advertisement, and one for publication of which the license of Chenoweth was revoked upon the hearing, does not include the word "sexual," and contains no fairly inferred reference to a disease of the sexual organs. The only language in such advertisement that can be said to state or refer to any disease whatsoever is as follows: "We treat and cure catarrh and stomach troubles, nervous diseases, kidney, bladder troubles, heart diseases, diseases of the stomach and bowels, piles, fistula and rectal diseases, female complaints, diseases of women and children, rickets, spinal troubles, skin diseases, deafness, asthma, bronchial and lung troubles, consumption in the first stages, rheumatism, hay fever, neuralgia, hysteria, eye and ear diseases, goitre or big neck, la grippe, blood diseases, scrofula, and all forms of nervous and chronic diseases (that are curable)." Certainly there can be found nothing in this to justify the charge of an offense against the public morals. This but illustrates the settled principle of the law that such regulation statutes, to be justified, must be based upon the theory of protection of the public interest, the public morals, or the public welfare.

The "Scott Medical Company" advertisement does not use the term "sexual organs," but, in addition to the naming of diseases in no sense sexual, recites: "We successfully treat weakness, partial or complete loss, lack of power and strength, complicated and special disorders of men only." These terms do not refer specifically to diseases of the sexual organs. They may possibly refer to resultant effects of diseases of the sexual organs but just as possible to be produced from other causes. Hence to sustain the statute we must construe a publication relating to a condition which may or may not have been the resultant effect of a disease of the sexual organs, as being within its purview.

Then, how can such an advertisement be reasonably said to injuriously affect the public morals? Such a contention is both prudish and absurd. We can but take notice of the trend of the times and of the fact that societies and large numbers of respectable and moral people, including physicians, are urging that sex hygiene be taught in our public schools, in the interest of the public good and public morality. The statute does

not provide that a tendency to injuriously affect the public morals or welfare shall appear as an essential fact to be considered in connection with such an advertisement. Neither does the complaint so charge. All of this tends to convey the impression that the purpose of the provision under consideration was to enforce the ethical notions of some members of a profession, rather than for the protection of the public at large.

We must not be understood as in any sense declaring for the restriction of the exercise of the police power as heretofore announced by this court, in cases where the purposes are plainly for the public good, for it is the tendency of courts to make such new and other application of this doctrine as the ever-changing conditions and protection of society may seem to require. But there is a necessary limit to the invasion of the inherent and constitutional rights of the citizen beyond which legislative restriction may not go, if stable government is to remain.

"In *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257, the general proposition that the enjoyment by the citizen, upon terms of equality with all others in similar circumstances, of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is a general part of his rights of liberty, and property as guaranteed by the 14th Amendment, was assented to by the Supreme Court of the United States as embodying a sound principle of constitutional law. In the latter case it was also held that, although the power and discretion which a state legislature has in the matter of promoting the general welfare and of employing means to that end are very large, yet such power must be so exercised as not to impair the fundamental rights of life, liberty, and property." *Ruhrstrat v. People*, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453.

The expression in the Constitution, "life, liberty, and the pursuit of happiness," is general in character, and includes many rights which are inherent and inalienable. Many of the rights referred to in this expression are included in the general guaranty of "liberty." The happiness here referred to may consist in many things or depend on many circumstances, but unquestionably includes the right of the citizen to follow his individual preference in the choice of occupation. *Black, Const. Law*, 404. For these reasons we must conclude that the provisions of the statute that a physician's license may be revoked for "causing the publication and circulation of an advertisement relative to any disease of

the sexual organs" is in violation of the 14th Amendment to the Constitution and § 3, art. 2, of our own Bill of Rights: "That all persons have certain natural, essential, and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; and of seeking and obtaining their safety and happiness." The State Medical Board may act only within its statutory authority; and, such provision of the statute being invalid, the acts of the board in this case were void.

The plaintiff in error contends also that the term, "relating to a disease of the sexual organs," as used in the statute, is so indefinite and uncertain as to make the statute inoperative and invalid for that reason. The question naturally arises as to what we are to understand by the term, "diseases of the sexual organs." To what authority are we to turn for a definition? Does this term have a common or well-understood meaning, and, if not, what authority are we to seek for a definition? Suppose that by such a statute the publication of an advertisement relating to a disease of the sexual organs was declared to be a public offense, and that thereby others than physicians might be amenable to such a penal law, which by the way is not the case, and for that reason it is likewise contended that the provision in the statute is class legislation and for such reason void, and suppose that it became necessary for the court in a given case to charge the jury as to what constitutes a "disease of the sexual organs." If the court turned to the statute, he would find no definition as in case of murder, arson, larceny, etc. If he were to search law dictionaries and law text-books, he would be equally in the dark as to a definition of the term. If he were to examine Webster, he would find no such expression; yet he must define this alleged wrongful thing to which the offensive publication relates, in order that the jury may have some notion as to whether or not the accused is guilty of committing the offense. Having exhausted lexicographers, law-writers, and court decisions without avail, he can have recourse only to his common knowledge and the definition of the words considered separately. He may have a very clear notion as to what the word "disease" means, but he cannot conceive that the use of this word, or of the specific names by which the multitude of diseases are known, the use of which names are so necessary to science and to the use of physicians and laymen alike, can be under any circumstances inherently harmful or by law made so. If he considers the word "sexual," he finds

that this is defined "as relating to sex," and that it includes both sexes. If he proceeds so far as to assume that such diseases arise solely from immoral acts, he must make additional unreasonable assumption. He must assume that the advertisement relates to a disease which is the result of immoral acts, else a mere publication relating to it may not, within the range of reason, be designated an offense.

Will it be said that more than a comparatively fair proportion of the diseases of sexual organs are the result of immorality? What will be said of tuberculosis, tumors, cancerous, and other growths, constituting diseases which affect every part of the human system? It is perhaps true that venereal diseases may be definitely said to be those arising from immorality, but who will have the hardihood to say that all sexual diseases are necessarily venereal diseases? Will a court of justice sustain a conviction for an offense so abstractly named, so wholly undefined, and so uncertain of definition? Yet we are asked to sustain such a statute to the extent that a physician, who may be charged with its violation, is to be denied the right to practise his profession. Clearly the statute is so indefinite as to render it invalid for that reason alone.

Besides, the penalty provided is so grossly excessive and unconscionable as to make the statute repugnant to every sense of justice if not to render it void for such reason. Under its provision a physician who has spent many years and vast sums of money to qualify himself to practise medicine, who has spent many more years in the practice, and thereby established a reputation and a practice worth thousands of dollars to him annually, and yet if he shall publish an advertisement relating to a disease of the sexual organs, however humane may be the purpose and however innocent of wrong may be the intent, he must have all this taken from him and have the consequent ignominy and contempt heaped upon him in addition. And in his trial for the alleged offense he is to be denied the privilege of a hearing before a court of justice and the right of trial by jury. He may not have the same right that is accorded to ordinary offenders. The statute provides that "causing the publication of an advertisement relating to the sexual organs" shall be an offense only if by physicians. Any person other than a physician may publish such advertisements at will. If such publication tends to injuriously affect the public morals, it is not by reason of the fact that the publication is caused by a physician. The effect is precisely the same whoever may be the publisher. The offense, if it be one, is a public one, equally applicable to all persons. 51 L.R.A.(N.S.)

The statute that makes the act an offense only when committed by a physician, and provides an excessive penalty in such case, is clearly discriminatory in that it applies to a class of citizens only, and for that reason alone is void.

The writer of this opinion, speaking for himself, is of the opinion that, in the interest of justice and fairness, the legislature might well provide for the right of appeal in such case to the courts where such a matter may be finally determined on its merits, as are other rights of citizens. Arbitrary and star-chamber proceedings are abhorrent to the American mind. There is no sane reason why a physician once found to be qualified in all respects to practise his profession should not be permitted to have his rights ultimately and finally determined by a court of justice.

The judgment of the trial court is reversed, and the case remanded, with instructions to enter judgment directing the State Board of Medical Examiners to cancel its order revoking the license of the plaintiff in error to practise medicine in the state of Colorado and to restore to him such rights and privileges in the premises as he may have been entitled to prior to such act of revocation.

Musser, Ch. J., and Garrigues and White, JJ., concur. Bailey, Gabbert, and Hill, JJ., dissent.

Gabbert, J., dissenting:

The police power of the state may always be exercised to protect the public morals, and its exercise of this power is valid when regulations of this character tend to accomplish the purposes for which they were enacted. The statute under consideration provides that the State Board of Medical Examiners may refuse to grant or may revoke a license to practise medicine in this state for several causes, among which is "causing the publication and circulation of an advertisement relative to any disease of the sexual organs." One purpose of these regulations, and the only one necessary to consider, is to protect the public morals by prohibiting alleged physicians, who have obtained a license to practise, from publishing and circulating advertisements of a nature that would tend to injuriously affect the morals of the community where the inhibited advertisements might be circulated and read. It needs no argument to demonstrate that advertisements of the kind prohibited are unfit to find their way into homes through the medium of the press, and that to the youth of either sex, at least, they are demoralizing. It is therefore apparent that the clause of the act in question which

is under consideration is a valid exercise of the police power of the state. It is also clear, if that question is before us, that the advertisements which the doctor caused to be published fall within its inhibition, for the reason that they unquestionably relate to diseases of the sexual organs and refer to that class of diseases in as unmistakable terms as though the words "sexual organs" appeared in the advertisements.

The judgment of the district court should be affirmed.

The writer is authorized to state that Mr. Justice Hill and Mr. Justice Bailey concur in this opinion.

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**UNITED STATES CIRCUIT COURT OF
APPEALS, SIXTH CIRCUIT,**

**CAMBRIA STEAMSHIP COMPANY, Appt.,
v.
PITTSBURG STEAMSHIP COMPANY et
al.**

(— C. C. A. —, 212 Fed. 674.)

Interest — rate in admiralty tort within state.

The interest to be allowed by the admiralty court for a tort arising within the

border of a state is to be computed for the entire time allowed, whether before or after the final decision, at the rate fixed by the state statute for allowance on judgments.

(January 6, 1914.)

A PPEAL by libelee from a decree of the District Court of the United States for the Eastern District of Michigan in favor of libellants in a suit to recover damages for a collision alleged to have been caused by the negligence of libelee. Modified and affirmed.

The facts are stated in the opinion.

Argued before Warrington and Knappen, Circuit Judges, and Hollister, District Judge.

Messrs. Brown, Ely, & Richards for Cambria Steamship Company.

Messrs. Harvey D. Gould and Frank S. Masten, for The John W. Moore:

Loss of use never has been regarded as an unliquidated damage in any case in which the matter has been considered.

The J. C. Gilchrist, 173 Fed. 666, affirmed in 105 C. C. A. 397, 183 Fed. 105; Roscoe, Damages in Maritime Collisions, 84.

The rate should be uniform, whatever it is, and it is in no wise determinable by the state rate.

Note. — Rate of interest allowed by admiralty court in case of marine tort as affected by place of occurrence or suit.

Cases wherein the action is brought on contracts entered into and to be performed in a given state or territory, such as *The Mary N. Bourke*, 76 C. C. A. 441, 145 Fed. 909, and *Northern Commercial Co. v. Lindblom*, 89 C. C. A. 230, 162 Fed. 250, are not included in this note. It may be added, however, that there seems to be no question but that the state or territorial rate of interest would govern in such a case. And of course the question as to whether or not interest will be allowed at all is not treated as the present note assumes that interest will be allowed, and is concerned merely as to the rate.

The early rule was that the rate of interest to be allowed in admiralty in case of a marine tort was not governed by the rate of the state where the tort was committed, or where the action is tried, except possibly as to money paid out in such a jurisdiction for repairs, but that there ought to be a uniform rate; and 6 per cent was usually awarded. The later cases, however, indicate a growing tendency to award interest according to the varying laws of the states.

But it seems safe to assume that the question is an open one until expressly passed upon by the Federal Supreme Court. To date that court has affirmed a lower 51 L.R.A.(N.S.)

court decision which expressly adhered to the rule that a uniform rate should be and has been established (see *Dyer v. National Steam Nav. Co. infra*), and has stated that rule by way of argument (see *Hemmenway v. Fisher, infra*), and, on the other hand, has modified, but without discussion, an allowance of interest so as to make the rate thereof conform to the state rate (see *The New York, infra*).

In fact one of the earliest expressions of opinion upon this interesting question was by the Supreme Court of the United States in the case of *Hemmenway v. Fisher*, 20 How. 255, 15 L. ed. 799. In that case Mr. Chief Justice Taney, in expressing his opinion that the rate of interest to be allowed by an admiralty court in case of a marine tort ought not to vary according to the state laws and rules, said: "There could be no reason for giving one rate of interest where a case of collision or salvage was, in the first instance, tried and decided in Louisiana, and another rate of interest where it was tried and decided in New York, or in any other state where the interest allowed by the state laws was different."

And it is upon this case that the rule of uniform rate of interest seems to be based. Thus, following the statement of Mr. Justice Taney set out supra, *Blatchford, J.*, in *The Aleppo*, 7 Ben. 120, Fed. Cas. No. 168, expressly held that "in admiralty in cases of collision where interest is allowed it ought to be a uniform rate, and not one varying

Steamship Wellesley Co. v. C. A. Hooper & Co. 108 C. C. A. 71, 185 Fed. 733.

The allowance or disallowance of interest in any admiralty case is a matter of discretion.

The *Scotland*, 118 U. S. 519, 30 L. ed. 155, 6 Sup. Ct. Rep. 1174; The *Albert Dumois*, 177 U. S. 255, 44 L. ed. 760, 20 Sup. Ct. Rep. 595; The *Maggie J. Smith*, 123 U. S. 356, 31 L. ed. 178, 8 Sup. Ct. Rep. 159; The *North Star*, 10 C. C. A. 262, 22 U. S. App. 242, 62 Fed. 87.

The accepted rate of interest in admiralty where there are no special circumstances has been for many years 6 per cent. It is not as a matter of interest so much as it is a part of the damages.

The *Mary Eveline*, 14 Blatchf. 497, Fed. Cas. No. 9,212; The *Mary J. Vaughan*, 2 Ben. 47, Fed. Cas. No. 9,217; The *Aleppo*, 7 Ben. 120, Fed. Cas. No. 158; *Allen v. Mackay*, 1 Sprague, 219, Fed. Cas. No. 228; The *Oregon*, 89 Fed. 520; *Great Lakes Towing Co. v. Kelley Island Line & Transport Co.* 100 C. C. A. 108, 176 Fed. 498.

Messrs. F. H. Canfield and G. L. Canfield for cargo of The *John W. Moore*.

Messrs. Hoyt, Dustin, Kelley, McKeehan, & Andrews, with Mr. H. A. Kelley, for *Pittsburg Steamship Company*.

Messrs. Frederick L. Leckie and Roscoe B. Huston for *Jerrainy McIntyre*.

Warrington, Circuit Judge, delivered the opinion of the court:

The suit upon which this appeal is based grew out of a collision between the steamer *Queen City* and the steamer *John W. Moore* in the Detroit river on October 19, 1907. The final decree was entered July 25, 1912. An interlocutory decree had previously been entered, finding that the damages sustained through such collision, by the colliding steamers, by *Jerrainy McIntyre*, administratrix of the estate of *Duncan McIntyre*, deceased, and by the *St. Paul Fire & Marine Insurance Company*, were occasioned through the sole fault of the steamer *Edward Y. Townsend*, and making the usual reference to a commissioner to take proofs and ascertain and report the damages. The reasons for the finding and order of reference are stated in the opinion of Judge Denison, who presided at the trial (189 Fed. 653); and his opinion is approved and adopted.

May 17, 1912, upon exceptions to the partial report of the commissioner, the damages awarded to *Jerrainy McIntyre*, administratrix, were reduced by Judge Angell from \$6,000 to \$4,000, with interest from

with the laws of the states." He also said that "such rate of interest, in collision cases tried in this court, has been and is 6 per cent, except that, on money paid out here for repairs made here, interest according to the law of this state has, in some cases, been allowed. This rate of 6 per cent was fixed at an early day, in analogy, perhaps, to the rate fixed by act of Congress as the rate on bonds for duties to the United States." And in connection with this case, see *Vanderbilt v. Reynolds*, 16 Blatchf. 80, Fed. Cas. No. 16,839, wherein it was stated that the rule as to interest on damages for loss caused by a collision was 7 per cent per annum on the money paid for repairs, and 6 per cent on the other damages.

And following the rule laid down in the *Aleppo* Case it was held in The *Oregon*, 89 Fed. 520, that 6 per cent was the proper rate of interest for damages arising from a marine collision.

And the *Aleppo* Case was again followed in *Dyer v. National Steam Nav. Co.* 14 Blatchf. 483, Fed. Cas. No. 4,225, affirmed on this point in 105 U. S. 24, 26 L. ed. 1001 (entitled in the official reporter, "The *Scotland*"), it being expressly held in the lower court that the proper rate of interest on the amount of damages for loss of a ship was 6, and not 7, per cent, and Mr. Justice Bradley, as is noted in *CAMBRIA S. S. Co. v. PITTSBURG S. S. Co.*, saying, in writing the opinion for the United States Supreme Court, that "the rate of interest allowed, 61 L.R.A. (N.S.)

6 per cent per annum, was the proper one in such a case."

So, in The *Mary Eveline*, 14 Blatchf. 497, Fed. Cas. No. 9,212, it was held that the court erred in allowing interest at the rate of 7 per cent on the amount of damages sustained in a marine collision, the court saying that "the rate in such cases is established in admiralty at 6 per cent" and that the point was decided "after a conference with Judge Blatchford and with his concurrence and approval."

And see the following cases wherein it was decreed without discussion that interest should or would be allowed at the rate of 6 per cent per annum: The *Ocean Queen*, 5 Blatchf. 493, Fed. Cas. No. 10,410, affirming Fed. Cas. No. 10,409; The *Baltic*, 3 Ben. 195, Fed. Cas. No. 824, wherein the court merely followed the next preceding case, saying that the proper rate of interest was 6, and not 7, per cent; The *Mary J. Vaughan*, 2 Ben. 47, Fed. Cas. No. 9,217, affirmed without reference to the question of interest in 14 Wall. 258, 20 L. ed. 807.

And that the rule is that the rate of interest allowed by courts of admiralty is not affected by state laws, and is usually 6 per cent, see 4 *Sutherland, Damages*, § 1294, p. 3795, and 25 *Am. & Eng. Enc. Law*, 1032.

On the other hand, the court in *CAMBRIA S. S. Co. v. PITTSBURG S. S. Co.*, after reviewing many of the foregoing authorities, refused to adopt the rule that admiralty courts should allow interest at a uniform rate, and seemingly for the first time in

that date "if such course shall be deemed not inconsistent with law when the decree is entered," but without fixing the rate of interest. The remaining damages, as ultimately allowed, were fixed by stipulations, with interest from specified dates though no rate was named. In the final decree Judge Sessions fixed the rate at 6 per cent per annum from such dates "until paid." And Judge Tuttle, sitting in the same court, has since then in another case reached the conclusion that the rate allowable upon the items entering into such a decree should be

5 per cent. *The Newaygo* (D. C.) 205 Fed. 178. It is contended for appellant that the entire interest allowed should have been at the rate prescribed by statute of Michigan, to wit, 5 per cent per annum; while it is insisted for appellees that the usual rate allowed in cases arising in admiralty is 6 per cent per annum. Hence no question is made touching the right of the trial court either to have allowed or denied interest; and it must be conceded that it possessed a reasonable discretion in this behalf. See decisions cited in *Thompson*

any court expressly held that in admiralty interest should be allowed in case of a marine tort arising within the border of a state at the rate established by that state. This conclusion was based in the main upon a decision of the United States Supreme Court which inferentially only supports it. The case referred to is variously reported as "*The New York*," "*The Conemaugh*," and "*Union Steamboat Co. v. Erie & Western Transportation Co.*" It arose in the United States district court for the eastern district of Michigan (reported *sub nom.* *The New York*, 53 Fed. 553), and the record, as is stated in the *CAMBRIA* CASE, shows that interest was allowed on the damages as ascertained at the rate of 6 per cent. The case was then appealed to the circuit court of appeals (reported *sub nom.* *The New York*, 27 C. C. A. 154, 54 U. S. App. 248, 82 Fed. 819, rehearing denied in 30 C. C. A. 628, 56 U. S. App. 146, 86 Fed. 814), wherein the judgment of the district court was reversed for error in the determination of primary liability. The case then went to the United States Supreme Court (reported *sub nom.* *The New York*, 175 U. S. 187, 44 L. ed. 126, 20 Sup. Ct. Rep. 67) upon writ of certiorari and was again reversed, the mandate directing that a decree be entered with interest "at the same rate per annum that decrees bear in the courts of the state of Michigan. Pursuant to this mandate the district court entered judgment (March 4, 1899) as directed, and an appeal was again taken to the circuit court of appeals (reported *sub nom.* *The New York*, 47 C. C. A. 232, 108 Fed. 102) upon the ground, among others, that the district court had erred in its decision as to which of two statutory rates of interest was applicable, but the judgment was affirmed. The case then again went to the United States Supreme Court on writ of certiorari (reported *sub nom.* *The Conemaugh*, 189 U. S. 363, under the title *Union S. B. Co. v. Erie & W. Transp. Co.* in 47 L. ed. 854, 23 Sup. Ct. Rep. 504), and the court, quoting its mandate as issued when the case was before it on the former writ of certiorari, affirmed the judgment of the lower courts. However, these decisions do not expressly discuss the question whether or not the rate of interest fixed by the Michigan statute rather than a uniform rate is the proper one in admiralty in case of marine torts, and the only force attachable thereto is 51 L.R.A. (N.S.)

derived from the fact that the lower court allowed interest at 6 per cent, and the supreme court, in reversing the case, directed that the interest be computed at the Michigan statutory rate, which, as ultimately determined in the second appeal to that court, was 7 per cent.

And it is inferable from the argument and decision in *Steamship Wellesley Co. v. C. A. Hooper & Co.* 108 C. C. A. 71, 185 Fed. 733, where the court allowed interest at the rate (7 per cent) fixed by the law of California, that the rates of interest allowed in admiralty in case of marine tort should be determined by the rate set by the respective states, rather than by the establishment of a uniform rate.

So, in *The Newaygo*, 205 Fed. 178, the court, although having a contract case under consideration, questioned the authority of *The Aleppo*, *The Oregon*, and kindred cases set out supra.

The question of interest as damages was raised in *Munch v. The Sucker State*, Fed. Cas. No. 9,921, wherein the court allowed the cost of repairs necessitated by a collision, and, as damages for loss of service of the vessel during the time the repairs were being made, the highest rate of interest upon her value permitted in the state (Minnesota) where the cause of action arose and was tried.

But see *The Rhode Island*, Abb. Adm. 100, Fed. Cas. No. 11,743, affirmed in 2 Blatchf. 113, Fed. Cas. No. 11,744, wherein, as damages for loss of time consumed in making repairs, 6 per cent interest upon the value of the vessel was allowed, the court saying that such rate was "the usual rate of interest awarded by this court and the legal rate in Connecticut, where the vessel is owned."

In *Thompson Towing & Wrecking Assn. v. McGregor*, 124 C. C. A. 479, 207 Fed. 209, which was said in the *CAMBRIA* S. S. CO. CASE to rule the rate of interest that should be allowed in the latter case, the action was in admiralty to recover under the Michigan death act for wrongful death, and the question was as to whether interest should be allowed at all, and not as to what rate of interest should be allowed; and the court merely held that, since a Michigan statute was being construed, the Michigan rules should be followed, and an award of interest at 5 per cent was affirmed.

G. J. C.

Towing & Wrecking Asso. v. McGregor, 124 C. C. A. 479, 207 Fed. 209, at page 221, note, (C. C. A. 6th Cir.). Since it was determined actually to allow interest as part of the ascertained damages "until paid," it should be borne in mind that the question concerns the rate that should have been applied both before and upon the decree.

It is apparent that the question did not arise in Judge Denison's consideration of the case. And Judge Sessions appears to have fixed the rate at 6 per cent, because Judge Angell had previously allowed that rate in an unreported case; but Judge Angell seems to have entertained doubt in that case, as also in the present case, touching the allowance of a rate in excess of 5 per cent. Concededly there are admiralty decisions in which the rate of 6 per cent has been distinctly allowed from the date of loss at least until the date of decree. For example: The Aleppo, 7 Ben. 120, Fed. Cas. No. 158, decided in 1874 by Judge Blatchford, then district judge; Dyer v. National Steam Nav. Co. 14 Blatchf. 483, Fed. Cas. No. 4,225, decided in 1878 by Judge Blatchford when circuit judge; The Mary Eveline, 14 Blatchf. 497, Fed. Cas. No. 9,212, by Mr. Justice Hunt, sitting as circuit justice, decided after conference with Judge Blatchford and with his concurrence on the day following the decision in the Dyer Case; The Oregon (D. C.) 89 Fed. 520, 526. The Dyer Case, *supra*, with others, was appealed to the Supreme Court, and is reported in the name of The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 24, 36, 26 L. ed. 1001, 1005, in which Mr. Justice Bradley said: "The rate of interest allowed, 6 per cent per annum, was the proper rate in such a case." Moreover, in The New York, 175 U. S. 187, 44 L. ed. 126, 20 Sup. Ct. Rep. 67, a district court decree was involved, which had been reversed in this court (27 C. C. A. 154, 54 U. S. App. 248, 82 Fed. 819), and in which, as appears in the record of the case, Judge Swan had allowed interest on an ascertained amount of damages at the rate of 6 per cent per annum for a definite period prior to his decree. Upon reversal of the decision of this court, the district court was directed to enter a decree "in conformity with the opinion of this (the Supreme) court, with interest from July 3, 1896 (the date of the decree allowing 6 per cent interest as stated), until paid, at the same rate per annum that decrees bear in the courts of the state of Michigan." 175 U. S. at 210, 44 L. ed. 136, 20 Sup. Ct. Rep. 76. In the decree entered pursuant to this mandate, it appears that interest was allowed for a time anterior to the decree; but the rate was not 51 L.R.A.(N.S.)

stated, and we are unable to discover it in the record. That decree, however, was affirmed by this court (47 C. C. A. 232, 108 Fed. 102) and by the Supreme Court (*sub nom.* The Conemaugh [Union S. B. Co. v. Erie & W. Transp. Co.] 189 U. S. 363, 47 L. ed. 854, 23 Sup. Ct. Rep. 504); and the only question of rate of interest expressly passed upon in these latter decisions was, Which of two different statutory rates then existing in Michigan should be allowed on the decree? and the rate of 7 per cent prescribed as to state judgments and decrees was adjudged to be applicable. It is further to be observed that no interest at all would have been recoverable upon that decree if the court had not expressly allowed it. The Scotland, 118 U. S. 507, 519, 30 L. ed. 153, 155, 6 Sup. Ct. Rep. 1174; Hemmenway v. Fisher, 20 How. 255, 260, 15 L. ed. 799, 800; Supreme Court Rule 23, subdiv. 4, appendix p. 28, 222 U. S., 56 L. ed. 1301, 32 Sup. Ct. Rep. xi.; Dewhurst's Supreme Court Rules, p. 122, Rule 23 as it now stands.

Now, in view of the two rates of interest thus approved in the one instance and adopted in the other by the Supreme Court, what is the duty of this court in the instant case? It may be conceded that the exercise of discretionary power was involved in both instances, that is, through the Supreme Court's approval of the discretion exercised by the court below in the first, and through the specific exercise by the Supreme Court of its own discretion in adopting the state rate in the second, instance. We are disposed to follow the course adopted in the last instance. The first instance amounts to an approval of the usual 6 per cent rate where there is no statutory rate that can reasonably be applied; while the second in effect adopts the principle of applying prescribed state rates where the conditions will admit of it. The former illustrates the ordinary conditions attending suits respecting collisions or salvage upon the high seas, and the latter the conditions usually growing out of and involved in suits with respect to similar disasters upon the internal navigable waters. It may be, as respects the latter, a rate lower than that fixed, for the decree itself was in practical effect approved with reference to the time for which interest was allowed prior to the decree; but that was due to anomalous statutory conditions then prevailing in Michigan, which (in the absence of stipulation) fixed the rate of interest at 5 per cent on all obligations other than judgments and decrees, and on the latter the rate of 7 per cent. The New York, *supra*, 47 C. C. A. 232, 108 Fed. 107, 110 (C. C. A. 6th C.), affirmed *sub nom.* The Conemaugh (Union S. B. Co. v. Erie & W.

Transp. Co.) 189 U. S. at 368, 370, 47 L. ed. 857, 23 Sup. Ct. Rep. 504). This anomaly has since been removed by imposing a uniform rate of 5 per cent on judgments and decrees and (where not otherwise stipulated) on all other obligations. 2 How. Anno. Stat. (Mich.) 2d ed. §§ 2869, 2873. It could rarely occur normally that a rule would be suffered to prevail which would, prior to the entering of the decree, allow one rate of interest upon its component parts, such as liquidated damages and the like, and another rate upon the decree. For that would be to affirm that the same thing should bear one rate before and another after the entry of the decree; and we do not see how anything more than the deprivation of the use of money could be involved, no matter whether it be before or after the date of the decree. It follows that there is now more reason for applying the state rate to the present decree, than there was for adopting it with respect to the decree in the case of *The New York*; and certainly no decision has come to our notice that would justify both ignoring the present state rate (5 per cent) as regards the decree, and sanctioning the higher rate (6 per cent) allowed below as to the time previous to the decree. *Steamship Wellesley Co. v. C. A. Hooper & Co.* 108 C. C. A. 71, 185 Fed. 733, 740 (C. C. A. 9th C.); *The Newwaygo* (D. C.) 205 Fed. 178.

What we have said respecting a uniform rate of interest, both before and upon any given decree, is not affected by counsel's suggestion that it is contrary to the view expressed in *Hemmenway v. Fisher*, 20 How. at page 259, 15 L. ed. 799, to the effect that there is no reason for giving different rates of interest according to those fixed in the states where the cases of collision or salvage might in the first instance be tried. The view so expressed had reference to interest upon a decree, and is opposed to the principle adopted in the case of *The New York*, 175 U. S. at page 210, 44 L. ed. 136, 20 Sup. Ct. Rep. 67. Further, that view is not in accord with the spirit and apparent purpose of Rule 23 of the Supreme Court, which in substance provides that, unless otherwise ordered, a decree for the payment of money in a case in chancery (a kindred although not identical subject) shall bear interest at the same rate that similar decrees bear in the courts of the state where such decree is rendered. We may observe, too, that our own Rule 26 (118 C. C. A. xix., 202 Fed. xvii.) is like this except that our rule expressly includes decrees in admiralty.

We have thus far considered only the rates of interest that have been and should be applied to ascertained damages result-

ing from torts which are sought to be redressed in suits in admiralty, and to decrees entered upon the amounts so found; but in principle our conclusion finds still further support, we think, in the rule that claims upon contracts entered into and to be performed in a given state with respect to a vessel or anything connected with it shall bear interest at the rate prescribed by statute in such state. *The Mary N. Bourke*, 76 C. C. A. 441, 145 Fed. 909, 911 (C. C. A. 2d C.). We may add that the rate of interest that should be allowed on the damages as ultimately fixed in favor of *Jerrainy McIntyre*, administratrix, is ruled by the decision of this court in *Thompson Towing & Wrecking Assn. v. McGregor*, 124 C. C. A. 479, 207 Fed. at pages 219, 220, and so must, for this additional reason, be limited to 5 per cent per annum.

It results that the rate of interest allowed by the final decree must be so modified as not in respect of any time prior to the date of the decree, or upon the decree itself, exceed the rate of 5 per cent per annum. Subject to this modification, the decree is affirmed. In view of the large amount of interest involved, the costs of this court will be divided; and the cause is remanded with direction to enter a decree accordingly.

MINNESOTA SUPREME COURT.

EMANUEL KAYSER et al., Appts.,
v.

JOHN H. VAN NEST, Resp't.

(125 Minn. 277, 146 N. W. 1091.)

Master and servant — injury by automobile.

1. Whether the owner of an automobile is liable for damages caused by negligence in driving it depends upon whether the driver was or was not the servant of the owner and engaged upon the business of the owner when the negligence occurred.

Same — liability of parent.

2. Where a parent keeps an automobile, which he authorizes a child to use for pleasure at any time, and the child operates it so negligently as to cause injury to others, it is error to rule that, as a matter of law, the parent is not responsible for such negligence.

Headnotes by TAYLOR, C.

Note. — The question of liability where automobile is being used by a member of owner's family is considered in the notes to *McNeal v. McKain*, 41 L.R.A.(N.S.) 775, and *Birch v. Abercrombie*, 50 L.R.A.(N.S.) 59.

Same — permitting passenger to drive.

3. The fact that a servant, driving his master's car upon the master's business, permits a stranger riding with him to drive it temporarily, while upon such business, does not absolve the master from responsibility.

(April 24, 1914.)

A PPEAL by plaintiffs from a judgment of the District Court for Hennepin County denying their motion for new trial in an action brought to recover damages for injuries caused by the alleged negligent driving of defendant's automobile. Reversed.

The facts are stated in the opinion.

Mr. John M. Rees for appellants.

Messrs. George B. Leonard and M. Rose, for respondent:

The mere fact that respondent owned the car is not sufficient to charge him with liability.

Freibaum v. Brady, 143 App. Div. 220, 128 N. Y. Supp. 121; Lotz v. Hanlon, 217 Pa. 339, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 Ann. Cas. 731; Lewis v. Amorous, 3 Ga. App. 50, 59 S. E. 338; Cunningham v. Castle, 127 App. Div. 580, 111 N. Y. Supp. 1057.

The mere fact that the respondent permitted another to use his car is not sufficient to charge him with liability for the negligence of the bailee.

Doran v. Thomsen, 76 N. J. L. 754, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296.

Taylor, C., filed the following opinion:

A collision occurred between two automobiles, and this action was brought by the owners of one to recover damages from the owner of the other. A verdict for the defendant was directed by the court, and, after a motion for a new trial had been made and denied, plaintiffs appealed.

Defendant kept his car for the use, convenience, and pleasure of himself and the members of his family. It was usually driven by his daughter, nineteen years of age, and she was authorized to use it whenever she desired to do so. On the day of the accident, she took it, and, accompanied by a younger sister, drove to the home of a relative, where they were joined by other young people. From this point the daughter permitted a cousin, then riding with them, to drive the car, and the accident is alleged to have occurred by reason of his negligence. The evidence as to such negligence was sufficient to require the submission of the case to the jury if defendant is liable therefor. The court held as a matter 51 L.R.A.(N.S.)

of law that defendant was not responsible for the acts of either his daughter or her cousin at the time of the accident, and directed a verdict in his favor upon that ground.

Whether the owner of an automobile is liable for the damages caused by it which result from the negligence of the person operating it depends upon whether the person operating it was the servant of the owner and engaged upon the business of the owner at the time the negligence occurred. If he was such servant and engaged upon such business, the owner is responsible for injuries to persons or property caused by his negligence in operating it. If he was not such servant, or was not engaged upon such business, the owner is not responsible for such negligence. *Sina v. Carlson*, 120 Minn. 283, 139 N. W. 601; *Geiss v. Twin City Taxicab Co.* 120 Minn. 368, 45 L.R.A.(N.S.) 382, 139 N. W. 611; *Meyers v. Tri-State Automobile Co.* 121 Minn. 68, 44 L.R.A.(N.S.) 113, 140 N. W. 184; *Ploetz v. Holt*, 124 Minn. 169, 144 N. W. 745; *McNeal v. McKain*, 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742.

Defendant's daughter, while operating the car by his authority and upon his business, was defendant's servant within the meaning of the rule, and he was responsible for her acts to the same extent that he would have been responsible for the acts of any other servant. Defendant might properly make it an element of his business to provide pleasures for his family; and, as the car was intended for the use of the members of the family for purposes of pleasure as well as for other purposes, and the daughter had authority to take it and operate it for such purposes, it was at least a question for the jury whether, at the time of the accident, she was not the servant of defendant and engaged upon the business of defendant. See the cases above cited.

Defendant contends that, even if he is responsible for the acts of his daughter, he is not responsible for the acts of the third party who was operating the car at the time of the accident. The daughter remained in the car, and, although not personally operating it, had not relinquished control over it, nor turned it over to another to use for his own purposes. It was still being used in furtherance of the purpose for which she had taken it out. That the mere fact that the person authorized to operate the car permits another to operate it temporarily does not absolve the owner from responsibility, under such circumstances, has already been determined in *Geiss v. Twin City Taxicab Co.* 120 Minn.

368, 45 L.R.A.(N.S.) 382, 139 N. W. 611, and the cases there cited.

The issues should have been submitted to the jury, and the order appealed from is reversed.

NEW MEXICO SUPREME COURT.

STEPHEN CANAVAN et al., Appts.,
v.
KATE CANAVAN.

(— N. M. —, 139 Pac. 154.)

Contempt — civil.

1. The proceedings examined and held to be proceedings as for civil contempt.

Injunction — dissolution — prior violation — effect.

2. A final decree dissolves a preliminary injunction which is ancillary to the main

Headnotes by PARKER, J.

Note. — Dissolution of preliminary injunction as affecting right to punish for contempt for its violation.

In general.

The general rule is, as laid down in CANAVAN v. CANAVAN, that a litigant cannot be punished as for contempt after the dissolution of a preliminary injunction, on the ground of an infringement of it while it was in force. The following additional cases announce this rule: Peck v. Yorks, 32 How. Pr. 408, quoted in CANAVAN v. CANAVAN; Taber v. Manhattan R. Co. 14 Misc. 189, 35 N. Y. Supp. 465 (affirmed in 148 N. Y. 743, 42 N. E. 1093); Moat v. Holbein, 2 Edw. Ch. 188; Jones v. Jones, 75 Wash. 50, 134 Pac. 528. And in Murad v. Thomas, 6 N. Y. S. R. 662, it was held that the discontinuance of an action wherein a temporary injunction had been granted, even if the discontinuance was after an alleged violation of the injunction, was fatal to the subsequent maintenance of contempt proceedings on account of such violation.

But there are authorities to the effect that one who violates an injunction before its dissolution may be punished as for contempt after its dissolution. Thus, in Smith v. Reno, 6 How. Pr. 124, 1 Code Rep. N. S. 405, in so holding, the court said: "It was not for him [the one enjoined] to determine whether the injunction was properly granted or not. So long as it remained an order of the court, so long he was bound to regard it. The fact that it has now been dissolved will furnish no protection to him for its violation, while it remained in force." (This case, however, although in direct conflict with, is not cited in the New York cases of Peck v. Yorks, Taber v. Manhattan R. Co. and Moat v. Holbein, all of which are set out supra.) And in Weidner v. Friedman, 126 Tenn. 677, 42 L.R.A. 51 L.R.A.(N.S.)

case, unless the same is specially continued by the decree, and thereafter a litigant cannot be punished as for a civil contempt for violation of the preliminary injunction prior to its dissolution.

(February 25, 1914.)

APPEAL by defendants from a judgment of the District Court for McKinley County adjudging defendant Canavan guilty of contempt for violation of a preliminary injunction in a divorce suit against him. Reversed.

The facts sufficiently appear in the former opinions.

Messrs. C. A. Spiess, E. A. Mann, and Burkhart & Coors for appellants.

Messrs. Vigil & Jamison, for appellee.

The preliminary injunction was not dissolved by the final decree.

Neisler v. Smith, 2 Ga. 265; Winship v. Clendenning, 24 Ind. 439; Shipman v. Superior Ct. — Cal. —, 12 Pac. 787; Ful-

(N.S.) 1041, 151 S. W. 56, it was held that violation of a temporary injunction should be punished as for contempt, although the bill for an injunction had been dismissed, the court saying that the dismissal of the bill would have no effect upon the contempt proceedings, as it was the duty of the defendant to obey the injunction, and the failure to do so a contempt of court; but that under the circumstances the imprisonment should be remitted.

And it has been held that a contempt proceeding for violating an injunction, if commenced before, may be continued after the injunction is dissolved. This was the rule laid down in Crook v. People, 16 Ill. 534, it being said that when the charge is made it becomes a distinct proceeding, which does not depend upon the continuance of the injunction. The court also said that an application to punish for contempt "might" be refused if made after dissolution of the injunction.

But no act of contempt occurs by doing acts prohibited by an injunction which has been dissolved previous to the doing of such acts. United States ex rel. McIntosh v. Price, 1 Alaska, 204; Ex parte Simmons, 105 Ark. 19, 150 S. W. 141; Caldwell v. Nashville Interurban R. Co. — Tenn. —, 164 S. W. 773.

And it has been held that a violation of a temporary injunction will not be punished as for contempt, where the injunction, subsequent to its violation, is dissolved because issued without jurisdiction. Old Dominion Teleg. Co. v. Powers, 140 Ala. 220, 37 So. 195, 1 Ann. Cas. 119; Gulf, C. & S. F. R. Co. v. Cleburne Ice & Cold Storage Co. 37 Tex. Civ. App. 334, 83 S. W. 1100.

It seems that the dissolution necessary to release from punishment for contempt for violation of an injunction must have actually taken place. Thus, it has been held that reliance on a common rumor that

ton v. Greacen, 44 N. J. Eq. 443, 15 Atl. 825; Worden v. Searls, 121 U. S. 14, 27, 30 L. ed. 853, 858, 7 Sup. Ct. Rep. 814.

If this is imprisonment for contempt in failure to comply with the final decree, it is not imprisonment for debt, and such failure is properly punishable by an attachment for contempt.

Curtis v. Gordon, 62 Vt. 340, 20 Atl. 820; Van Dyke v. Van Dyke, 125 Ga. 491, 54 S. E. 537; Gray v. Gray, 127 Ga. 345, 56 S. E. 438; Atkinson v. Southern R. Co. 114 Ga. 146, 55 L.R.A. 225, 39 S. E. 888, 11 Am. Neg. Rep. 32; Andrew v. Andrew, 62 Vt. 495, 20 Atl. 817; Scott v. Scott, 80 Kan. 489, 25 L.R.A.(N.S.) 132, 133 Am. St. Rep. 217, 103 Pac. 1005, 18 Ann. Cas. 564; Cavanaugh v. Cavanaugh, 106 Ill. App. 209; Shaffner v. Shaffner, 212 Ill. 492, 72 N. E. 447; Re Cave, 26 Wash. 213, 90 Am. St. Rep. 736, 66 Pac. 425; Davis v. Davis, 29 App. D. C. 258, 9 L.R.A.(N.S.) 1071.

Mr. A. T. Hannett also for appellee.

Parker, J., delivered the opinion of the court:

This is an appeal from a judgment in a contempt proceeding. The appellant has been before the court on two former occasions. See *Re Canavan*, 17 N. M. 100, 130 Pac. 248, and *Canavan v. Canavan*, 17 N. M. 503, 131 Pac. 493. The facts sufficiently appear in those cases, and will not be here repeated. The first case was a habeas corpus proceeding upon a partial and imperfect record. It did not appear from the record in that case that the court was without jurisdiction, and we held that habeas corpus was not a proper remedy. In the second case we refused to review the judgment in the contempt proceeding, because it was rendered after the final decree in the divorce case, and was consequently not reviewable on appeal from the final decree. In this case, however, the appeal is brought directly from the judgment in the contempt proceeding. The

an injunction had been dissolved will not excuse its breach so as to avoid punishment for contempt. *Morris v. Hill*, 28 N. J. Eq. 33. And see *Murad v. Thomas*, 6 N. Y. S. R. 662.

And it has been held that it is not a defense to a contempt proceeding for violation of an injunction that the injunction has been vacated by a judge who had no jurisdiction to do so. *Koehler v. Farmers' & D. Nat. Bank*, 25 N. Y. S. R. 222, 17 N. Y. Civ. Proc. Rep. 307, 3 Silv. Sup. Ct. 141, 6 N. Y. Supp. 470; *People ex rel. Cauffman v. Van Buren*, 63 Hun. 635, 44 N. Y. S. R. 820, 18 N. Y. Supp. 734.

In appeal cases.

As to effect in general of appeal from injunction upon jurisdiction of trial court to punish for contempt for its violation, see note to *Barnes v. Chicago Typographical Union*, 14 L.R.A.(N.S.) 1150.

It has been held that the doing, in good faith, of an act in violation of the terms of a temporary injunction, intervening the dissolution of the injunction and the entry of an appeal with supersedeas, does not constitute contempt. *Smith v. Whitfield*, 8 Fla. 211, 20 So. 1012.

But a different rule seems to apply after an appeal has been perfected.

Thus, in *Merrimack River Sav. Bank v. May Center*, 219 U. S. 527, 55 L. ed. 320, 1 Sup. Ct. Rep. 295, Ann. Cas. 1912A, 513, wilful violation of a preliminary injunction pending an appeal to the United States Supreme Court from a decree dismissing the bill and discharging such injunction was held in and of itself to be a contempt of the jurisdiction of the Supreme Court.

And it has been held that one who has been temporarily enjoined is not released from punishment for contempt of a violation of the injunction, by affirmance of a

decree dismissing the bill and discharging the injunction, where the violation takes place after the affirmance, but before the issuance of the mandate, as in such case the appeal must be regarded as pending until a mandate issues, but an honest belief that there was no reason for obeying the injunction after such affirmance may reduce the punishment. *Ibid*.

Of course, where an injunction which has been dissolved is restored or continued during appeal from the decree, violation of the injunction pending the appeal is punishable as for a contempt. *Balkum v. Harper*, 60 Ala. 372; *Gulf, C. & S. F. R. Co. v. Cleburne Ice & Cold Storage Co.* supra, provided the injunction was dissolved for an irregularity or for want of equity; *Merrimack River Sav. Bank v. Clay Center*, supra. And one who violates an injunction which has been dissolved, after appeal and the execution of a supersedeas bond and service thereof, is guilty of contempt where the service of the order of supersedeas leaves the injunction in full force. *Smith v. Western U. Teleg. Co.* 83 Ky. 269; *Elizabethtown, L. & B. S. R. Co. v. Ashland & C. R. Co.* 94 Ky. 478, 22 S. W. 855. And the same is true where the appeal from the dissolution of the injunction is with supersedeas bond (*State ex rel. Carroll v. Campbell*, 25 Mo. App. 635), or a "supersedeas appeal" is taken from the order dissolving an injunction (*State ex rel. Barthet v. Houston*, 37 La. Ann. 852).

But it has been held that an order staying the proceedings under an order dissolving the injunction restraining the taking of certain property under a certain judgment until a decision be had on an appeal from the order of dissolution did not revive the injunction so as to make a taking of the property punishable as a contempt. *Weeks v. Smith*, 3 Abb. Pr. 211.

G. J. C.

question now is as to whether the judgment in the contempt proceeding was erroneous.

Counsel for appellant relied upon several propositions, two of which only will be considered.

1. It is first asserted that the alleged contempt is a civil contempt. This was practically assumed in *Canavan v. Canavan*, supra, and is now so decided. Counsel have alleged, in support of this conclusion: First. That all of the affidavits, motions, and orders of the court in the contempt proceeding are entitled and filed in the original divorce proceeding. While this fact may not always be controlling, it is always a strong circumstance tending to show that the proceeding is civil, and not criminal. Second. Counsel urge that the form of the prayer of the plaintiff, to the effect that the court commit appellant to jail until he turns over the \$19,000 decreed to the plaintiff, is controlling. This fact we deem of the highest importance and determinative of the character of the proceeding. Third. Counsel suggests that the judgment in contempt itself, in adjudging costs to the plaintiff, characterizes the proceeding as civil. It must be apparent that, if the proceeding were criminal, no costs could be awarded the plaintiff. Costs in such a case would go into the public treasury. Fourth. Counsel urges that the coercive nature of the judgment itself fixes the character of the proceeding. It clearly appears from the judgment that the object sought to be attained thereby was to secure the payment of the decree to the plaintiff. With all of these suggestions we agree, and they are undoubtedly the law on the subject. *Gompers v. Buck's Stove & Range Co.* 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492.

Our own territorial court has pointed out the true rule on this subject in *Costilla Land & Invest. Co. v. Allen*, 15 N. M. 528, 110 Pac. 847, where it is said: "The border line between what may be termed civil and what criminal contempt is, as has been pointed out by many authorities, exceedingly indistinct and narrow, leaving it often a question of extreme refinement as to whether the act was one or the other. Of course all judgments for contempt are in a sense punitive, since the sentence imposed, even if simply to preserve private rights, and even if the so-called fine go to the litigant purely by way of reimbursement, has the effect to punish the recalcitrant, and to declare the purpose of the court that its orders shall not be trifled with. The authorities, however, draw a distinction between those contempts where the protection of the court and a vindication of its dignity

are the main objects of the proceeding and those where a more effective remedy to private litigants is, after all, the purpose of what is done."

2. Counsel for appellant take the second position as follows: The injunction, for the alleged violation of which appellant was committed, was a preliminary injunction and was merged into or dissolved by the final decree of divorce which made no reference to the same; this being true, it is asserted there remains no power in the court to punish for civil contempt after merger or dissolution of the injunction, even if the same was in fact violated while it was in force.

The first half of the proposition seems to be well established, and to be uniformly recognized. Thus Mr. High states the rule as follows: "But, when the injunction is merely ancillary to the principal relief sought and is in terms granted until further order of the court, it is regarded as abrogated by the final judgment of the court granting the principal relief sought by the action and making no provision for continuing the injunction." High, Inj. 4th ed. § 1503. See also 22 Cyc. 981, where it is said: "The entry of a final decree in the injunction suit renders a temporary injunction ineffective." See also *Sweeney v. Hanley*, 61 C. C. A. 155, 126 Fed. 99, where in it is said: "It will be noticed that by this final decree the injunction theretofore granted was not continued in force. Upon the entry of the final decree the temporary injunction came to an end. *Gardner v. Gardner*, 87 N. Y. 14; *Eureka Consol. Min. Co. v. Richmond Min. Co.* 5 Sawy. 121, Fed. Cas. No. 4,549; 10 Enc. Pl. & Pr. 1029; *Buffington v. Harvey*, 95 U. S. 99, 24 L. ed. 381. A motion was subsequently made on behalf of the defendants to the suit for an order dissolving the preliminary injunction, which motion the court below denied. Whether or not it was the real reason for that action of the court, it is a sufficient reason therefore that no such injunction was then in force; it having come to an end by the entry of the final decree in the cause, making no provision for any injunction."

This must be so. The final decree always represents the determination of the court upon all the issues between parties, unless some of them are expressly reserved or excepted therefrom. It must of necessity require some special reservation, exception, or continuance of the court to preserve an anterior ancillary order in the form of an injunction issued for the purpose of preserving the status of property *pendente lite*.

The second half of the proposition is of more difficulty. On principle it would seem

that a party to an equity proceeding, who has been enjoined from removing the estate which is the subject of litigation, from the jurisdiction, and who has violated the injunction, and who has thereby defeated his antagonist from collecting the amount of the decree which has been awarded against him, certainly should be punishable by the coercive remedy of a proceeding as for a civil contempt, until he shall pay the judgment. One's sense of right and wrong would seem to sanction the proposition. But, when examined more carefully, it would seem not to be sound. It is to be remembered that an injunction is a rule of conduct merely imposed, for the time being, upon a litigant by the properly constituted authority. But for the injunction the acts against which it is directed may be lawfully performed. If the litigant violates the injunction during its existence, he may be punished as for civil or criminal contempt, or both. But, if the injunction be dissolved, what was unlawful when it was in force, because prohibited by it, becomes lawful, and no basis remains upon which to predicate a proceeding in contempt. The principle runs through other branches of the law. For instance, if a statute prohibits the doing of any given act, the citizen may be punished for doing it so long as the statute remains in force. But if the statute be repealed, and the legislature fails to provide that the statute shall remain in force as to all prior violations of the act, that which was unlawful has become lawful, and no prosecutions can be had. While the criminal in morals is still a criminal, in legal contemplation the law has released him from his criminality. Just so with injunctions. A person violating an injunction and thereby defrauding his adversary of the fruits of his cause of action is still guilty in morals, but in legal contemplation the law has discharged him of his offense.

A different principle would seem to govern in case of criminal contempt, but we will not discuss the same; it not being involved. In actions for civil contempt the duty commanded by the injunction no longer exists after the dissolution. In order to punish for a civil contempt, it would seem that there must be a present rule of conduct subsisting and in force, together with the acts violating the same.

Comparatively little satisfactory authority is to be found on the subject. It is said in *Spelling on Injunctions & Extraordinary Legal Remedies*, § 1129, that this is the correct rule, and he cites one case, that of *Moat v. Holbein*, 2 Edw. Ch. 188. The opinion is by the vice chancellor, and is not at all satisfactory in its discussion of the 51 L.R.A.(N.S.)

proposition, but it seems to be the earliest case to be found.

In *Peck v. Yorks*, 32 How. Pr. 408, the same doctrine is announced, and a very well-considered opinion is rendered by the court, in which it is said: "An injunction, which is but an order of the court, can have no more force or extended operation after it is set aside or modified than a statute repealed or modified, in regard to acts previously done. In either case, the rule being abolished, the infraction of it is abolished also, and nothing remains on which a conviction can be based." See also *Taber v. Manhattan R. Co.* 14 Misc. 189, 35 N. Y. Supp. 465, to the same effect.

In *Gompers v. Buck's Stove & Range Co.* supra, while the exact point was not involved which is involved here, a similar proposition was involved, and the court held that, by reason of the settlement of the main case, the ancillary proceedings by way of injunction had come to an end, and that therefore no proceedings for civil contempt could be maintained.

We therefore hold that the proceeding in this case, being a proceeding as for civil contempt, and being a proceeding for a violation of a preliminary injunction after the same had been merged and dissolved, and for acts alleged to have been committed prior to its dissolution, is not maintainable.

It follows, from what has been said, that the judgment of the court below is erroneous, and the same will be reversed, and the cause remanded to the district court, with directions to proceed in accordance with this opinion.

Roberts, Ch. J., and Hanna, J., concur.

NORTH CAROLINA SUPREME COURT.

M. F. TEETER, Appt.,

v.

HORNER MILITARY SCHOOL.

(165 N. C. 564, 81 S. E. 767.)

School — expulsion of pupil — retention of tuition.

A private school the catalogue of which makes the tuition payable in advance, and provides that pupils may be expelled for breach of discipline, may, upon expelling a pupil for breach of reasonable regulations,

Note. — Expulsion or withdrawal from school as affecting tuition fee.

As to the right to exclude, suspend, or expel pupils from school for misconduct of pupil or parent, see note to *Board of Education v. Purse*, 41 L.R.A. 593.

not only retain the tuition actually paid, but compel payment of the portion due and not paid when the expulsion occurred.

(May 13, 1914.)

APPEAL by plaintiff from an order of the Superior Court for Cabarrus County setting aside a verdict in his favor and granting a new trial in an action brought to recover money paid by him for the tuition and expenses of his son at defendant's school. Affirmed.

Statement by Walker, J.:

This action was brought to recover \$70, money paid by the plaintiff to the defendant for the tuition and expenses of his

son at the latter's school. The boy was entered January 1, 1913, for the remainder of that scholastic year, and returned for the fall term, 1913, the 1st of September. Defendant, early in September, sent a bill for the whole amount of tuition and expenses for the term, to wit, \$185. Plaintiff paid \$90, and failed to pay the balance due. The boy was expelled for repeated misconduct and violation of the rules and regulations of the school, about October 1, 1913. This suit was brought to recover the amount thus paid. Defendant denied liability, and set up a counterclaim for balance of the bill, less some deductions, which was \$80.56, alleging, and Mr. J. C. Horner, principal of the school, testifying, that it was all payable in advance. Plaintiff tes-

General rules.

A contract for schooling for any specified period of time being entire (see 35 Cyc. 816), it seems to be well settled that, if, during the term of the contract, a pupil is properly expelled for misconduct, or unnecessarily withdraws from the school, without any fault on the part of the proprietor or master, or anyone connected with the school, the school is entitled to the whole consideration for the entire period, and may recover any portion thereof remaining unpaid; and the other party to the contract may not recover back any part of the consideration paid in advance for such period.

Thus, a parent whose son was properly expelled from a military school for hazing, about thirty days after the beginning of a term, cannot recover any portion of a sum which he paid in advance, at the beginning of the term, upon the tuition fee. *Kentucky Military Institute v. Bramblet*, 158 Ky. 205, 164 S. W. 808.

And a father who entered his son as a cadet in a military academy, under a contract providing that no money would be refunded in case the cadet was dismissed, cannot, upon the dismissal of his son from the academy, two months after entrance, recover any portion of the sum paid by him in advance for board, room, tuition, etc.,—being the portion of the annual charge payable on entrance,—unless the action of the superintendent of the academy in dismissing the cadet was so unreasonable or oppressive as to warrant the conclusion that he acted maliciously, unfairly, or from some improper motive. *Manson v. Culver Military Academy*, 141 Ill. App. 250.

So, a father who contracted with the teacher of a private school for the board and tuition of his son, and paid in advance one half of the yearly charges at the beginning of each half year,—the rules and catalogue of the school, furnished to the father, providing, to his knowledge, that no engagements were made for less than the school year, and that all payments were forfeited in case of expulsion,—cannot re-

cover, upon the expulsion of his son for good cause, soon after the beginning of the second half year, any part of the payment made in advance for that half year. *Fessman v. Seeley*, — Tex. Civ. App. —, 30 S. W. 268.

And one who entered a school and paid in advance a tuition fee, in consideration of which the proprietor of the school agreed to give him instruction until he should be qualified to pass certain examinations, cannot, upon being suspended from the school for improper and insubordinate conduct, recover any portion of the fee paid. *Kabus v. Seftner*, 34 Misc. 538, 69 N. Y. Supp. 983.

Where a mother placed her daughter as a pupil in a boarding school for the school year, under a contract which, as contended by the school and as correctly construed, gave the officers of the school absolute discretion to determine when a pupil should be permitted to be absent; and the mother, at the end of six weeks, and after her daughter had already been allowed to spend three Sundays with her since entering the school, took her daughter away for two days without the permission of the school officers, whereupon they refused to allow the daughter to remain longer in the school unless the mother would accept their construction of the contract, above stated, with reference to absences; and the mother refused to accept this construction and took her daughter away,—she cannot recover any of the money which she advanced, under the contract, for a half-year's board and tuition for her daughter, with the provision that no deduction should be made for absence, except in case of protracted illness. *Curry v. Lasell Seminary Co.* 168 Mass. 7, 46 N. E. 110.

And a schoolmaster is entitled to recover from the father of a pupil the entire amount of a quarter's school fees in respect of the son, which amount was payable in advance at the beginning of the quarter, where, about three weeks after the beginning of the quarter, the father insisted on keeping his son home over night, in known violation of one of the rules of the school and in

tified: "When I received the bill for a half year's payment, I knew the money would be forfeited on expulsion." Mr. Horner testified: "On page 11 of the catalogue, on Character, I find: 'We do not want vicious or habitually insubordinate boys, and if such succeed in entering they will be dismissed. Applicants are accepted with the express understanding that they will submit to our authority in every respect. A boy whose conduct is hurtful to the scholarship and morals of his associates will be expelled. The discipline is not severe, but firm and decided, and no boy will be retained who does not cheerfully comply with the rules and regulations, or whose influence is known to be injurious to the morals and scholarship of his fellows. The free-

dom of college life is not given, but the aim of our discipline is to teach a boy to be self-governed. The discipline at Horner's appeals to a boy's sense of manliness, and teaches him, first, self-control and obedience to order, and in turn to control and command others. Any cadet who shall disobey a command of the principal, or of any professor, instructor, or other superior officer, or behave himself in a refractory or disrespectful manner, shall be expelled, or otherwise punished.' In general, these rules have been required to be kept hanging in the rooms. In the conduct of our school we enforce our rules in the catalogue as to payments to be made in advance. I suppose for fifteen or twenty years I have been collecting a half year in advance. That was

spite of the master's objection, whereupon the master properly refused to receive the pupil back into the school. *Price v. Wilkins*, 58 L. T. N. S. 680.

So, where a child had been placed in a day school as a boarder, and the master's charges for him had always been paid quarterly, and the child was taken ill four days after the beginning of a quarter and properly sent home by the master for his recovery, and was never sent back, or any intention manifested to put an end to the contract,—although the child was the only boarder the master had, and there was no express contract by the quarter,—the master is entitled to recover his charges for the whole quarter. *Collins v. Price*, 5 Bing. 132, 6 L. J. C. P. 244, 2 Moore & P. 233, 30 Revised Rep. 542.

And where the terms of a school stipulate that "a quarter's notice is required to be given before the removal of any young gentlemen from school, or to pay for a quarter," and a scholar is removed without notice, the master is entitled to recover pay for an additional quarter after his leaving, as for the things already actually furnished. *Eardley v. Price*, 2 Bos. & P. N. R. 333, 9 Revised Rep. 654.

Likewise, where a father, having applied for the admission of his sons into a select school, received from the proprietors and managers thereof a favorable answer and a copy of the regulations of the school, which provided for a certain charge per session in advance, and that "when the place is engaged, the session's charge is considered due, unless the boy be prevented from coming by the act of God;" and the father thereafter wrote that he gladly availed himself of the opportunity of handing over his boys to the principal of the school,—the proprietors or managers of the school are entitled to recover from the father the session's charge for the boys, although the father did not send them to this school, at all, but to another one, without notice to the proprietors of the first. *Bingham v. Richardson*, 30 N. C. (1 Winst. L.) 215.

And where a student entered into a contract with a corporation conducting a cor-

respondence school, to take one of its courses of instruction, for which he was to pay a certain sum in monthly payments, but he never entered upon the studies, although the books and papers necessary for that purpose were sent to him by the company, and, after continuing the monthly payments for some time, he ceased to make them, and subsequently notified the agent of the company that he did not intend to carry out the contract,—the company is entitled to recover from him the unpaid balance of the contract price for the course. *International Text-Book Co. v. Martin*, 92 Neb. 430, 138 N. W. 582, on earlier appeal, 82 Neb. 403, 117 N. W. 994.

Where a father and guardian entered his son and his ward in a school, the rules of which provided that payment for board and tuition must be made quarterly in advance and that no money would be returned in case of dismissal for bad conduct, but there was no stipulation in the contract that the father and guardian should be liable, in case of such dismissal, for the whole session, or for the scholastic year, and the boys were expelled for good cause, during the first quarter,—the school is entitled to recover the amount payable in advance for the first quarter, the nonpayment of which, when the boys entered the school, was owing to the indulgence, and not the fault, of the school officers; but it cannot recover its charges for the whole session or the whole scholastic year. *Horner School v. Wescott*, 124 N. C. 518, 32 S. E. 885.

So, where a father entered his daughter as a resident pupil in a school at which one half of the yearly tuition fee was payable in advance, but did not, either expressly or impliedly, contract for the entire year at a certain charge, without deduction for absence or withdrawal, and the daughter, after remaining a short time in the school, was withdrawn on account of sickness, the school cannot recover from the father the whole of the yearly tuition fee, but only the amount which was payable in advance. *Hartridge School v. Riordan*, 112 N. Y. Supp. 1089. In this case, a judgment in favor of the school for the half

stated in the catalogue. About ten years ago we changed the catalogue, and since that time we enforce the rule. I consider that the strongest discipline in the school is for a boy to have his money forfeited. It is a strong discipline over him. I have enforced the rule rigidly when a boy is expelled, that there is no deduction. We have always done that." He further testified that the boy had often committed serious offenses, when he notified him if they continued he would be expelled. "This was done at regular roll call in the presence of the students or cadets, but I made no good impression upon him, as he repeated them afterwards and ran his demerits up from 100 to 150. When demerits ran to 100, we could either whip or expel. The boy had been whipped once." He was expelled for excessive demerits,—violation of the rules. He smoked, he visited, left his room when he was required to be in it; when required in there to prepare his

lessons, he would slip out; also for throwing in the assembly hall, which is a serious offense. These acts were against our rules. In ordinary practice there is no fixed amount of demerits until a student is notified. I spoke to the boy about this matter before his demerits were going up so rapidly, but he disregarded all of it. I thought his conduct was demoralizing. He wasn't preparing his lessons. I expelled him in the regular course of my school the same as I have done many times before. The bill as sent Mr. Terter in September, 1913, was for a half year payment for the fall term. When January came around the bill was for the spring term." The witness also stated why the school was compelled to charge for the full term in advance, which was that "they had to make a very large outlay in the beginning for supplies and pay cash for them the amount being about \$10,000. There was much testimony to corroborate the

yearly fee, payable in advance, was affirmed,—the only contention, however, being on the part of the school, that it was entitled to the fee for the whole year, which was denied by the court.

And where a parent, upon his son's entering a military school at the beginning of a term, paid in advance about one half of the tuition for the term, and, about thirty days after the term began, the boy was expelled for hazing, the master cannot, in the absence of proof of the terms of the contract as to the time of payment of the tuition for the term, recover the balance of such tuition, on a counterclaim in an action by the parent to recover the amount which he paid in advance. *Kentucky Military Institute v. Bramblet*, 158 Ky. 205, 164 S. W. 808.

Special contracts.

Where, although a school catalogue states that "pupils by their presence in the school are registered for the full school year," and that "no abatement is made from these terms for any reason other than that of illness," etc., a pupil was expressly received on trial for the purpose of testing his capacity to meet the requirements of the school, and his parent's attention was not called to the catalogue regulations, and he never agreed to be bound thereby, but did pay in advance the required tuition fee and expenses for one half of the year; and, about five weeks after the beginning of the year, the oral contract actually made between the parties was terminated by the serious illness of the boy, manifested by epileptic convulsions, which disqualified him from remaining in the school, and on account of which his removal was requested by the manager,—the school is entitled only to a proportional part of the sum charged for a full year, as compensation for the time during which the boy was a pupil of 51 L.R.A. (N.S.)

the school, and the parent is entitled to recover the balance of the amount paid in advance. *Chapin v. Little Blue School*, 110 Me. 415, 86 Atl. 838.

And the principal of a school who contracted with a father to receive the latter's son into his family and as a pupil in his school, during a certain term; to instruct the boy in the learning and knowledge taught at the school; protect him and provide for his physical wants; and at the same time be the constant companion of his studies and recreations, in the home circle,—cannot, after he has refused to receive the boy back at his father's request, after the boy had left the home and school without the knowledge and against the will of his father, recover on a note which the father gave for the amount of the consideration for the contract, which amount was payable in advance, but for which the principal accepted the note for the convenience of the father. *Starr v. Litch*, 114 40 Barb. 541. The court said: "To entitle him to that remuneration he must fulfil the contract on his part. He cannot, for some actual or supposed transgression of the boy, withdraw his care and protection, deny him the shelter and comfort of his house, and under the name or form of punishment leave him a wanderer in the public streets, without the means of subsistence. Such a mode of punishment is neither reasonable nor usual; for in many cases it would expose the health as well as the morals of the pupil to certain destruction. It is subversive of the ends and purposes of the contract; because under pretense of inflicting a salutary punishment for the reformation of the offender, it releases and relieves the person prescribing it for the time being, from his duties and obligations under the contract. In the absence of express stipulations to that effect in the contract, we think the plaintiff could not as a punishment for a transgression of the rules

witness. Plaintiff testified that he did not see the catalogue. He did not say that it was not mailed to him and received at his home, but denied merely that he had seen it, although there was circumstantial evidence that it had reached him, and he had the opportunity to read it. "I never laid my eyes on this catalogue to my knowledge. It might have come in the mail to my home. The family might have brought it down, and I might have looked at it and thought it was some old circular and destroyed it. I usually do so. I never did read it. When I received the bill for a half year's payment, I knew money would be forfeited on expulsion." He also stated that he was not notified by Mr. Horner that the money would be forfeited if his son misbehaved, nor did he agree that the money should be retained if the boy was expelled. Under the charge of the court, there was a verdict for the plaintiff, which the judge set aside upon the following

grounds: (1) That he had refused the defendant's sixth prayer for instructions as follows: "If the jury believe the evidence, they should answer the first issue, 'Nothing,' and the second issue for the half annual charges for board, tuition, etc., less the \$90 paid by the plaintiff, to wit, '\$80.56.'" (2) That he erred in leaving it to the jury to determine "whether or not there was malice or viciousness on the part of defendant, and whether it was prompted by some other purpose than the enforcement of the regulations and good government of the school in expelling the boy of the plaintiff. There being no evidence as to what were the rules and regulations of the defendant and its motives for expelling the boy of the plaintiff for violation of the same, other than testified to by defendant's witnesses and the catalogue and cadet regulations of the defendant's school introduced by defendant, the court is of the opinion, upon the undisputed facts, that said rules and

of his school or the order of his family, actually ascertained, expel the pupil from the shelter and protection of his house, or refuse to receive him back at his father's request, after he had voluntarily left, and still claim the compensation stipulated in the contract. . . . It is no answer to the evil and inevitable consequences to result from the right which the plaintiff claims to exercise, to say that the boy thus abandoned could resort, and did resort, to the shelter and protection of his father's house, only 15 miles distant. . . . The contract is entire; it cannot be separated and apportioned. . . . He was to receive the entire sum of \$150 for the twenty-two weeks' board and tuition. Having refused to furnish it, he is not entitled to recover anything."

Effect of physical inability of pupil.

In *Stewart v. Loring*, 5 Allen, 306, 81 Am. Dec. 747, it was held that the proprietor of a gymnasium cannot recover on a written contract to pay him a certain amount for tuition in the gymnasium for a specified period in the future, where the promisor, without any fault of his own, and solely by reason of ill health, was rendered physically incapable of attending the gymnasium as a pupil, and did not attend or receive any instruction during the period specified.

But where a father entered his son in a military school for a year, paying one half the yearly charges in cash in advance, and executing two notes for the other half, and the terms of the school catalogue, of which the father knew, provided that money advanced on account was never refunded, except in cases of severe illness, whereby a pupil withdrew from the school by the vice of a doctor of the city where the school was located,—the father cannot demand an action on the notes, nor can he

recover on a counterclaim in such action any part of the cash paid, on the ground that his son withdrew from the school by reason of severe illness, where, although the son did develop a case of trachoma, which unfitted him for further attendance at school, this developed while he was at home in another city, on a temporary withdrawal for a cause which did not incapacitate him for attending school, and no doctor of the city where the school was located advised the permanent withdrawal, nor was any such doctor consulted as to such withdrawal or the necessity thereof, as required by the provisions of the catalogue. *Vidor v. Peacock*, — Tex. Civ. App., 145 S. W. 672.

Where a father placed his son in a school, with the agreement that, if and when he removed his son from the school, he would either give a term's notice, or, in default, pay to the schoolmaster an equivalent in money, and the boy was sent home by the master in consequence of a severe illness breaking out in the school, which continued during the whole of the residue of that term; and the boy was himself in poor health at the time he was sent home, and suffered a severe illness during the ensuing term, whereby he was unable to return to the school then,—the school master cannot recover against the parent as for removing the pupil without giving a term's notice, as the father did not remove his son at all from the school, or, if he did, only temporarily and during a time when he was not bound to send him back. *Simeon v. Watson*, 46 L. J. C. P. N. S. 679. The court, however, would not say (the question not arising here) that the father had a right, at the end of the term during the whole of which the son was away from the school on account of illness, to remove or keep him longer away from the school without giving or paying for an additional term's notice.

A. C. W.

regulations were reasonable, and that the defendant was actuated by no other motive, in expelling the boy of the plaintiff, than the enforcement of the regulations and good government of the school." The verdict was set aside for error in law, as above set forth, and plaintiff appealed.

Messrs. M. H. Caldwell and L. T. Hartsell, for appellant:

There was no special or express contract in this case, and it was a question to be left to the jury.

Horner v. Baker, 74 N. C. 65; Horner School v. Wescott, 124 N. C. 518, 32 S. E. 885.

Messrs. Maxwell & Keerans and John W. Hutchinson, for appellee:

Plaintiff was liable for the tuition.

Horner School v. Wescott, 124 N. C. 518, 32 S. E. 885; Horner v. Baker, 74 N. C. 65; Bingham v. Richardson, 60 N. C. (1 Winst. L.) 217; Manson v. Culver Military Academy, 141 Ill. App. 250; Kabus v. Seftner, 34 Misc. 538, 69 N. Y. Supp. 983; Vidor v. Peacock, — Tex. Civ. App. —, 145 S. W. 673; Fessman v. Seeley, — Tex. Civ. App. —, 30 S. W. 268; Curry v. Lassel Seminary Co. 168 Mass. 7, 46 N. E. 110.

The conduct of the plaintiff shows that he intended to be bound thereby, and actually had notice of the rules and regulations.

1 Page, Contr. § 50.

Defendant had undoubted power to adopt and enforce suitable rules and regulations for the government and management of the school.

25 Am. & Eng. Enc. Law, 2d ed. 27, 28.

There can be no question as to the right to expel a pupil when his conduct is such as to interfere with the discipline and proper government of the school.

35 Cyc. 1140, 1141; State ex rel. Burpee v. Burton, 45 Wis. 156, 30 Am. Rep. 706; Hodgkins v. Rockport, 105 Mass. 475; Samuel Benedict Memorial School v. Bradford, 111 Ga. 801, 36 S. E. 920; Murphy v. Independent Dist. 30 Iowa, 429; Donahoe v. Richards, 38 Me. 379, 61 Am. Dec. 256; Guernsey v. Pitkin, 32 Vt. 224, 76 Am. Dec. 171; Vermillion v. State, 78 Neb. 107, 110 N. W. 736, 15 Ann. Cas. 401; State ex rel. Crain v. Hamilton, 42 Mo. App. 24.

Walker, J., delivered the opinion of the court:

This was a military school, and in the Horner Cadet Regulations it is provided that "any cadet who shall disobey the command of the principal or of any professor, instructor, or other superior officer, or behave himself in a refractory or disrespectful manner, shall be expelled, or otherwise punished," and in the Horner School Catalogue (N.S.)

logue is the following provision: "The discipline is not severe, but firm and decided, and no boy will be retained who does not cheerfully comply with the rules and regulations, or whose influence is known to be injurious to the morals and scholarship of his fellows." There was also a rule that if a pupil received more than 100 demerits for misconduct, he would be expelled or thrashed, at the discretion of the principal. There is ample evidence in the case to show that this boy misbehaved himself frequently, ran his demerits up rapidly to 150 after he had been duly warned that if they reached 100 he would be expelled, and that he was generally unruly and refractory. The principal seems to have exercised forbearance until it ceased to be a virtue, and the boy's conduct had become so bad that it was demoralizing in its effect upon the school. Besides his personal misbehaviors he was backward in his lessons, and receiving no benefit himself, but doing much injury to others by his example. If the principal had longer submitted to this gross breach of school discipline, amounting almost to defiant insubordination, it may have done incalculable harm to the school. The defendant had the undoubted power to adopt and enforce suitable rules and regulations for the government and management of the school. 25 Am. & Eng. Enc. Law, 2d ed. 27, 28. They should be reasonable, and enforced for the purpose contemplated, and not maliciously or arbitrarily.

If need be, punishment for the infraction of the rules may extend to the dismissal of the pupil who violates them. 35 Cyc. 1140, 1141. The conduct of the recreant pupil may be such that his continued presence in the school for a day or an hour may be disastrous to its proper discipline, and even to the morals of his fellows, and to permit him to "run the school," instead of obeying its rules and submitting himself to the authority of his superiors, would produce insubordination, which in its turn would soon disorganize it. In such a case it seems imperative and essential to the welfare of the school that the power should reside in the teacher to suspend the offender at once from its privileges, and he must necessarily decide for himself whether the case requires that remedy, unless some other method is provided for that purpose.

This doctrine was clearly treated and formulated by the court in State ex rel. Burpee v. Burton, 45 Wis. 156, 30 Am. Rep. 706, where Judge Lyon said: "In the school, as in the family, there exist on the part of the pupils the obligations of obedience to lawful commands, subordination, civil deportment, respect for the rights of other

pupils, and fidelity to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school. Every pupil is presumed to know this law, and is subject to it, whether it has or has not been reenacted by the district board in the form of written rules and regulations. Indeed it would seem impossible to frame rules which would cover all cases of insubordination and all acts of vicious tendency which the teacher is liable to encounter daily and hourly. The teacher is responsible for the discipline of his school, and for the progress, conduct, and deportment of his pupils. It is his imperative duty to maintain good order, and to require of his pupils a faithful performance of their duties. If he fails to do so, he is unfit for his position. To enable him to discharge these duties effectually, he must necessarily have the power to enforce prompt obedience to his lawful commands. For this reason the law gives him the power, in proper cases, to inflict corporal punishment upon refractory pupils. But there are cases of misconduct for which such punishment is an inadequate remedy. If the offender is incorrigible, suspension or expulsion is the only adequate remedy." The court, after an able and learned discussion of the question, concluded that the teacher has, in a proper case, the inherent power to dismiss a pupil for misconduct and infractions of the rules and regulations of the school, especially when they are repeated and persistent, so that the pupil must finally yield or the teacher's authority over him be destroyed.

"The plaintiff, by entering the defendant's school, subjected himself to their reasonable rules of discipline. The power is vested in the faculties of all schools and colleges to suppress and punish unbecoming conduct." *Kabus v. Seftner*, 34 Misc. 538, 69 N. Y. Supp. 983.

It appeared in *Curry v. Lasell Seminary Co.* 168 Mass. 7, 46 N. E. 110, that plaintiff had entered her daughter, as a pupil, at the defendant company's school, to be boarded, instructed, and cared for through the school year. The court held that if there had been no express contract, the plaintiff, by placing her daughter as a pupil in the school, would have impliedly agreed that she should obey all reasonable rules and regulations of the school. This is the duty of every pupil who attends a public school, and a parent has no right to have his child remain in the school if he persists in wilfully disregarding such reasonable rules. These important principles, so necessary to the proper regulation and to the welfare of our educational institutions, have been quite uniformly adopted by the courts. *Manson v. Culver Mili-* 51 L.R.A. (N.S.)

tary Academy, 141 Ill. App. 250; *Fessman v. Seeley*, — Tex. Civ. App. —, 30 S. W. 268; *Samuel Benedict Memorial School v. Bradford*, 111 Ga. 801, 36 S. E. 920; *Hodgkins v. Rockport*, 105 Mass. 475; *Vermillion v. State*, 78 Neb. 107, 110 N. W. 736, 15 Ann. Cas. 401.

In the *Vermillion Case*, the court said that the authorities are generally to the effect that, where a pupil is guilty of such misconduct as to interfere with the discipline and government of the school, he may be suspended or expelled, citing many cases.

In the *Manson Case*, *supra*, the court held that the only requirement necessary, so far as concerns a review by a court of justice of the manager's action in dismissing a pupil,—in that case, as here, a cadet,—is that it shall be so unreasonable and oppressive as to warrant a conclusion that it was done maliciously, unfairly, or from some improper motive, and not for the enforcement of the school's rules and regulations, and the maintenance of proper discipline.

An examination of our own cases, while they do not deal with the subject in every phase presented in this record, will show that we have substantially approved the doctrine as already stated. It is founded upon justice and common sense, and should prevail, as in no other way could our schools be successfully conducted. *Horner v. Baker*, 74 N. C. 65; *Horner School v. Wescott*, 124 N. C. 518, 32 S. E. 885. These decisions clearly recognize the principle that there is an implied promise, if it is not expressed, that the pupil who has entered the school will comply with its reasonable rules and regulations, and may be dismissed, in a proper case, for failing to do so. The school authorities, it is true, may excuse or condone the offense of the pupil, but of course are not compelled to do so, and it would often be subversive of good discipline to do so, especially in the case of an incorrigible offender. The interest of every pupil is involved in the welfare of the school, and there is no reason why its success should be imperiled by the misconduct of one of them.

Our opinion is, upon the evidence we find in the record, if believed, that plaintiff is not entitled to recover any part of the money he has paid, and that defendant is entitled to recover the balance of what would have been paid by the plaintiff but for the former's indulgence. This, we think, is settled by *Horner School v. Wescott*, *supra*; *Bingham v. Richardson*, 60 N. C. (1 Winst. L.) 217; and by clear implication in *Horner v. Baker*, *supra*, for we have the evidence in this case, which the court, by Chief Justice Pearson, held was

lacking in that one. The court said, in *Horner School v. Wescott*, supra: "As it was the defendant's duty to have paid this instalment when it was due, and not the plaintiff's fault that it was not paid, it seems that defendant should not complain if he has to pay now." It is apparent, upon the evidence, that plaintiff was to pay the full amount in advance, and if he had paid it, as his contract required him to do, the defendant could have retained it. This being so, and, as said in *Horner School v. Wescott*, supra, he is entitled to the balance of the amount due at the beginning of the session. *Fessman v. Seeley*, — Tex. Civ. App. —, 30 S. W. 268.

We have discussed the case in the light of the evidence now before us. The boy was not called and examined, and, in the absence of his evidence, there is nothing to contradict the defendant's testimony as to the rules and regulations. There is strong additional evidence that plaintiff received the catalogue containing the rules. There is no evidence that defendant acted maliciously, oppressively, or unreasonably in expelling the plaintiff's son, but, on the contrary, as it now appears to us, the act was fully justified. The court was therefore right in setting aside the verdict and granting a new trial, and for the reasons given by the learned judge, which are set out in the record.

No error.

OREGON SUPREME COURT. (Department No. 2.)

MINNIE HOUGH, By Guardian *ad Litem*,
Appt.,
v.

HERMAN IDERHOFF, Resp't.

(— Or. —, 139 Pac. 931.)

Rape — civil liability — effect of consent.

1. Consent by a child under the age of con-

Note. — Civil liability for intercourse with child under age of consent.

Does the maxim, *Volenti non fit injuria*, apply where the female gave actual consent, but was under the age of legal consent at common law or as fixed by statute embodied in the Criminal Code? This is the only question raised by the present note. The courts in every case in which they have been obliged to pass upon the question have held that it does not apply, and that one committing the crime known as statutory rape is liable in a civil action. The reasons assigned for the decisions are not entirely clear. If the general policy of the state is to maintain that all females under a 51 L.R.A.(N.S.)

sent is no bar to civil liability for rape where the statute defines criminal knowledge of a child under such age as rape the same as forcible knowledge of one over such age.

Pleading — rape — charging force — reliance on statute.

2. The allegation of force and violence is a complaint seeking damages for rape on a child under the age of consent does not prevent reliance on the statute as barring the defense of consent.

(March 24, 1914.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County in defendant's favor in an action brought to recover damages for a criminal assault. Reversed.

Statement by Eakin, J.:

The plaintiff is the foster child of Emilie Toedtemeir, who is the guardian *ad litem* herein. She was born March, 1897, and at the time of the assault complained of she was thirteen years and seven months old. She by her guardian sues to recover damages for a criminal assault upon her by the defendant. The allegation, after giving the time of her birth, being "that some time during the month of October, 1910, the exact date being unknown to this plaintiff, the defendant wilfully, violently, and forcibly made an indecent assault upon plaintiff, and did then and there debauch, ravish, rape, and carnally know her at the home of the defendant in Clackamas county, Or.: that plaintiff became pregnant with child, and did on or about the 14th day of July, 1911, give birth to a living male child." The defendant denied the allegations of the complaint, and a trial was had before a jury, which resulted in a verdict for the defendant, from which plaintiff appeals.

Messrs. Ditchburn & Downes for appellant.

Mr. Gilbert L. Hedges, for respondent:
Consent of the female is a bar to a civil

certain age shall be considered incapable of giving a legal consent to the act of sexual intercourse, even though that policy is expressed only in the Criminal Code, then it would seem quite clear that actual consent by one incapable of giving legal consent would not defeat a civil action. There would seem to be no doubt that where the female is under the common-law age of consent (that age seems to be fixed at ten years at least in the states. See 33 Cyc. 1416, reference note, 3), courts are justified in holding that her incapacity should be recognized in civil as well as criminal actions. Statutes declaring that sexual intercourse with a female under a certain age, with or without her consent, shall be rape,

action for damages for rape; the maxim, *Volenti non fit injuria*, applies.

33 Cyc. 1521; Koenig v. Nott, 2 Hilt. 323, 8 Abb. Pr. 384; Robinson v. Musser, 78 Mo. 153; Bessler v. Stephani, 71 Ill. 400; Dickey v. McDonnell, 41 Ill. 62; Champagne v. Hamey, 189 Mo. 709, 88 S. W. 92.

Force is the gist of a civil action for damages for rape.

Koenig v. Nott, 8 Abb. Pr. 384.

The civil action for damages should not be confused with the criminal prosecution.

Goldnamer v. O'Brien, 98 Ky. 589, 36 L.R.A. 715, 56 Am. St. Rep. 379, 33 S. W. 831.

Eakin, J., delivered the opinion of the court:

There is but one assignment of error, *viz.*, the refusal of the court to instruct the

have been generally construed as simply raising the age limit. See 33 Cyc. 1424. The courts in cases coming within the scope of the present note, have, without much discussion, apparently assumed that the age limit for consent even though fixed by the Criminal Code is to be regarded in civil actions, and that such statutes are to be regarded as declaratory of the public policy of the state for all purposes. There are, however, but few reported cases where the courts have dealt with the question. And Chand, in his Law of Consent, p. 318, § 154, points out that "the age of consent for the purpose of criminal law" need not be the same as for "civil transactions."

Also see note to Ex parte Holloper, 21 L.R.A.(N.S.) 847, as to the effect of statute fixing age of consent in defining statutory rape as determining age of consent for marriage.

The holding in HOUGH v. IDERHOFF, that the maxim is not applicable where the female is under the age of consent as fixed by the criminal statute, and that defendant is liable in a civil suit for sexual intercourse with such female even with her consent, where such act constitutes rape under the statute, is supported by Priboth v. Haveron, — Okla. —, 139 Pac. 973; and Altman v. Eckermann, — Tex. Civ. App. —, 132 S. W. 523.

In Dean v. Raplee, 145 N. Y. 319, 39 N. E. 952, where there was considerable doubt as to the fact of consent on the part of a fifteen-year-old child under the circumstances, and the defendant was held liable, the court said: "Since the amendment of the Penal Code (§ 278) by chap. 693 of the Laws of 1887, the acts charged against the defendant, when committed upon a female under sixteen years of age, would amount to rape; and while the present case must stand upon the law as it existed when the alleged assaults were made, yet the reasons which induced the legislature to change the law cannot be ignored in our review of the case. That act eliminated the question of consent or resistance from 51 L.R.A.(N.S.)

jury "that if the jury should find that the plaintiff, Minnie Hough, was at the time of the alleged assault under the age of sixteen years, she was incapable of consenting,"—the court having instructed the jury directly contrary to the request, and which was duly excepted to, *viz.*, "that if she did not resist with all the force in her command then the defendant cannot be held in damages." So that the only question is: Can a defendant be held liable in a civil action to the injured female for damages where he violated her person in case she is under the age of sixteen years and made no resistance to the assault? The trial court held that he cannot, following the maxim, *Volenti non fit injuria*, that an action will not lie if plaintiff consented, and nearly all the cases and text-books seem to uphold

the case of an assault upon a female under that age on the trial of a criminal charge. The amendment was evidently based upon the principle that consent or nonresistance on the part of a girl of that age was not to be understood in the same way as in the case of like acts committed upon a woman of more mature years."

In Watson v. Taylor, 35 Okla. 768, 131 Pac. 922, where the case was tried upon the theory that the plaintiff, a seventeen-year-old girl, did not consent, and a verdict had been rendered in her favor, although the circumstances were such as to create doubt upon that point, the court said: "Moreover, our statute provides (§ 2353, Comp. Laws, 1909) that all that is required to constitute the crime of rape is an 'act of sexual intercourse accomplished with a female not the wife of the perpetrator.'

Where the female is over the age of sixteen years and under the age of eighteen, and of previous chaste and virtuous character.' The language of the statute is clear and unambiguous. It clearly eliminates the elements of consent and resistance from the case of an assault upon the class of females therein described. Its manifest purpose is to throw a protecting mantle about the female children of this state within certain ages, which the hand of the libertine may not withdraw except at his peril. The statute in effect says that chastity is such a precious gem in the crown of maidenly graces that it cannot be stolen or removed therefrom even with the consent of the wearer, without offending the majesty of the law. To prove that the female consented will not mollify the statute, neither should it avail as a defense to a civil action for damages for an assault upon her committed in such manner and under such circumstances as to constitute rape as defined by the statute."

On the question as to effect of fact that intercourse was accomplished by force to defeat action for seduction, see note to Velthouse v. Alderink, 18 L.R.A.(N.S.) 587. J. W. M.

the rule; however, the most of the reported cases were for assaults upon adults.

Our statute defines "rape:" "If any person over the age of sixteen years shall carnally know any female child under the age of sixteen years, or any person shall forcibly ravish any female, such person shall be deemed guilty of rape, and upon conviction thereof shall be punished by imprisonment in the penitentiary for not less than three nor more than twenty years." L. O. L. § 1912. So that the measure of damages is the same for the offense against a child as against an adult. It will thus be seen that the legislature has defined carnal knowledge of a female under the age of sixteen years as rape whether the action be civil or criminal. The civil liability has not been defined or its elements determined in this court; but the rule was early established by the courts that the seeming acquiescence of a female of feeble mind or of tender years to an act of sexual intercourse offered no defense to an action of rape, because such a female was incapable of yielding assent from an incapacity of understanding.

Legislative assemblies applying the rule thus established have arbitrarily prescribed in many instances the age at which a female of ordinary intelligence is presumed to have attained such a degree of mental development as to be capable of assenting to the commission of the particular immoral act which, when discovered, ostracizes her from good society. *State v. Lee*, 33 Or. 506, 56 Pac. 415. And in *State v. Sargent*, 32 Or. 110, 49 Pac. 889, it is said that the law has determined that a female child under the age denominated is incapable of assenting. It is as though she had no mind upon the subject, no volition or sufficient discretion to give her consent to an act which is palpably wrong both in morals and in law. In other words, the law makes it just as much a wrong against a female infant to violate her person as a forcible ravishment against an adult female. It is a legal wrong as well as a moral one, and we can discover no reason why the perpetrator of the act should not be required to respond in damages as fully in the one case as in the other. Under our statute the maxim quoted above does not affect an infant, as the law conclusively says she can give no consent. In any event, the fact of an assault does not depend upon the amount of the resistance shown. Any violation of the person is an "assault" (*Alexander v. Blodgett*, 44 Vt. 476); putting his hands upon her with a view to violate her person is a "battery" (*Altman v. Eckermann*, — Tex. Civ. App. —, 132 S. W. 523).

Even against an adult it is said that 51 L.R.A.(N.S.)

conduct on the part of a person carnally assaulted short of consent is not a justification therefor. In *Dean v. Raplee*, 145 N. Y. 319, 39 N. E. 952, the age is not considered. *Dean v. Raplee*, 75 Hun, 389, 27 N. Y. Supp. 438; *Palmer v. Baum*, 123 Ill. App. 584. *Altman v. Eckermann*, *supra*, is a strong case where it is said that the touching of her person with an intent to injure her, she being incapable of giving her consent thereto, constitutes an assault. In that case it is said that rape of a female gives her a cause of action at common law, while consent, of course, defeats the charge of rape where the party is capable of giving consent; but, the appellant herein being under the age of consent as fixed by our statute, the allegations of her petition show rape by the defendant, for which she is entitled to an action for damages. *Watson v. Taylor*, 35 Okla. 768, 131 Pac. 922, is another case to the same effect. See also *Nyman v. Lynde*, 93 Minn. 257, 101 N. W. 163.

It is urged by the defendant that the charge of the plaintiff is for an assault committed by force and violence, and by reason thereof plaintiff cannot rely upon the apportionment statute as barring the defense of consent. Without the words "violently" and "forcibly" the complaint states a complete cause of action for assault upon an infant. It shows the age and the commission of the rape as defined by the statute. The criminal liability in such a case has never been questioned, and there is good reason for construing the statute strictly against the defendant in such cases; the offense being against a child.

The judgment of the lower court is reversed, and the cause remanded for a new trial.

McBride, Ch. J., and Bean and McNary, JJ., concur.

VIRGINIA SUPREME COURT OF APPEALS.

S. S. STANSBURY, Plff. in Err,
v.
CITY OF RICHMOND.

(— Va. —, 81 S. E. 26.)

Municipal corporation — inadequate water supply — liability.

1. A municipal corporation is not liable

Note. — As to liability of municipality operating a waterworks system, for breach of duty to consumer, see note to *Oakes Mfg. Co. v. New York*, 42 L.R.A.(N.S.) 286. As to the duty under contract with consumer

tor the inconvenience suffered by residents of a newly opened tract by the fact that mains laid to supply water to them prove to be inadequate, since it results from a mere error of judgment, if the defect is remedied when the municipality receives notice of it.

Constitutional law — denying compensation for loss of use of fixtures — taking of property.

2. Denying damages to a property owner for loss of the use of fixtures installed to utilize a municipal water supply which proves to be inadequate does not deprive him of his property without due process of law or deny him the equal protection of the laws.

(March 12, 1913.)

ERROR to the Law and Equity Court of the City of Richmond to review a judgment in defendant's favor in an action brought to recover damages for the alleged negligent failure of defendant to furnish plaintiff with a sufficient supply of water for domestic and sanitary purposes. Affirmed.

The facts are stated in the opinion.

Messrs. C. W. Throckmorton and S. A. Anderson for plaintiff in error.

Mr. H. R. Pollard, for defendant in error:

Providing a water supply by the city of Richmond under its charter and the general laws of the state is a function of government, carrying with it no liability for negligence in its exercise.

4 Dill. Mun. Corp. 5th ed. § 1626; Johnston v. District of Columbia, 118 U. S. 19, 20, 30 L. ed. 75, 76, 6 Sup. Ct. Rep. 923; Anderson v. East, 117 Ind. 126, 2 L.R.A. 712, 10 Am. St. Rep. 35, 19 N. E. 726; Young v. Kansas, 27 Mo. App. 101; Springfield F. & M. Ins. Co. v. Keeseville, 148 N. Y. 46, 30 L.R.A. 660, 51 Am. St. Rep. 667, 42 N. E. 405; Mendel v. Wheeling, 28 W. Va. 233, 57 Am. Rep. 664; Oaks Mfg. Co. v. New York, 206 N. Y. 221, 42 L.R.A. (N.S.) 286, 99 N. E. 540, affirming 141 App. Div. 130, 125 N. Y. Supp. 1030; Mills v. Brooklyn, 32 N. Y. 489; Giaconi v. Astoria, 60 Or. 12, 37 L.R.A. (N.S.) 1150, 113 Pac. 855, 118 Pac. 180; Hays v. Columbia, 159 Mo. App. 431, 141 S. W. 3; Kemp v. Des Moines, 125 Iowa, 640, 101 N. W. 474; Kelsey v. New York, 123 App. Div. 381, 107 N. Y. Supp. 1089; Healy v. Chicago, 131 Ill. App. 183; Breckman v. Covington, 143 Ky. 444, 136 S. W. 865; Morris v. Salt Lake City, 35 Utah, 474, 101 Pac.

373; Watters v. Omaha, 76 Neb. 855, 107 N. W. 1007, 110 N. W. 981, 14 Ann. Cas. 750, 20 Am. Neg. Rep. 111; McCourt v. Covington, 143 Ky. 484, 136 S. W. 910; McGuinness v. Allison Realty Co. 46 Misc. 8, 93 N. Y. Supp. 267, affirmed in 111 App. Div. 928, 97 N. Y. Supp. 1141; Edson v. Olathe, 81 Kan. 328, 36 L.R.A. (N.S.) 861, 105 Pac. 521; Sayre v. Northwestern Turnp. Co. 10 Leigh, 454; Maia v. Eastern State Hospital, 97 Va. 507, 47 L.R.A. 577, 34 S. E. 617; Richmond v. Long, 17 Gratt. 375, 94 Am. Dec. 461; Noble v. Richmond, 31 Gratt. 271, 31 Am. Rep. 726; Orme v. Richmond, 79 Va. 86; Terry v. Richmond, 94 Va. 537, 38 L.R.A. 834, 27 S. E. 429; Jones v. Williamsburg, 97 Va. 722, 47 L.R.A. 294, 34 S. E. 883; Miller v. Newport News, 101 Va. 432, 44 S. E. 712; Richmond v. Mason, 109 Va. 546, 65 S. E. 8, 17 Ann. Cas. 194; Lambert v. Norfolk, 108 Va. 259, 17 L.R.A. (N.S.) 1061, 128 Am. St. Rep. 945, 61 S. E. 776; Esberg-Gunst Cigar Co. v. Portland, 34 Or. 282, 43 L.R.A. 435, 75 Am. St. Rep. 651, 55 Pac. 961; Chicago v. Selz, S. & Co. 202 Ill. 545, 67 N. E. 386, 14 Am. Neg. Rep. 23; Barnes v. District of Columbia, 91 U. S. 540, 23 L. ed. 440; Child v. Boston, 4 Allen, 41, 81 Am. Dec. 680; Thayer v. Boston, 19 Pick. 511, 31 Am. Dec. 157; Sawyer v. Corse, 17 Gratt. 230, 99 Am. Dec. 445; Lynch v. Springfield, 174 Mass. 430, 54 N. E. 871, 6 Am. Neg. Rep. 573; Winona v. Botzet, 23 L.R.A. (N.S.) 204, 94 C. C. A. 563, 169 Fed. 321, 21 Am. Neg. Rep. 445.

The effect of the judgment of the law and equity court of the city of Richmond was not to deprive the plaintiff in error of his property without due process of law, and deny him the equal protection of the laws, and therefore was not in violation of § 1 of the 14th Amendment to the Constitution of the United States.

8 Cyc. 800; Union Bank v. Richmond, 94 Va. 316, 26 S. E. 821; Shenandoah Valley R. Co. v. Dunlop, 86 Va. 346, 10 S. E. 239; First Nat. Bank v. Kentucky, 9 Wall. 353, 363, 19 L. ed. 701, 704; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Dent v. West Virginia, 129 U. S. 114, 124, 32 L. ed. 623, 626, 9 Sup. Ct. Rep. 231; Terrell v. Chesapeake & O. R. Co. 110 Va. 343, 32 L.R.A. (N.S.) 371, 66 S. E. 55; Lambert v. Norfolk, 108 Va. 265, 17 L.R.A. (N.S.) 1061, 128 Am. St. Rep. 945, 61 S. E. 776; Hopkins v. Nashville, C. & St. L. R. Co. 96 Tenn. 409, 32 L.R.A. 354, 34 S. W. 1029; 6 Enc. Pl. & Pr. 439; Purcell v. Conrad, 84 Va. 557, 5 S. E. 545; Cooley, Const. Lim. 219; Daniels v. Tearney, 102 U. S. 415, 26 L. ed. 187.

to supply water for extinguishing fires, see notes to Nichols Bros. v. Contra Costa Water Co. 36 L.R.A. (N.S.) 1045, and Jones Furniture Co. v. Arkansas Water Co. 52 L.R.A. (N.S.) —.
51 L.R.A. (N.S.)

Whittle, J., delivered the opinion of the court:

This action was brought to recover damages for the alleged negligent failure of the city of Richmond to furnish the plaintiff with a sufficient supply of water for domestic and sanitary purposes. The defendant interposed a demurrer to the evidence, which the court sustained, and to that judgment this writ of error was granted.

In December, 1906, the city of Richmond annexed a large area of territory, in which Temple street, on which the plaintiff resides, is located. The water department at great expense laid water mains along Temple street for the convenience of citizens in that locality, even before the street had been graded. In December, 1911, after the system was installed, the board of health notified the plaintiff to connect his premises with the water main and sewer pipes, which he did in January, 1912. Experience showed that, while the pressure was sufficient to supply the plaintiff with water on the first floor of his dwelling, the quantity of water on the second floor was insufficient to flush his closet, and the original supply was so diminished from time to time, as other buildings were connected with the main, that in about one month he got no water at all for his bathroom. He thereupon reported these facts to the authorities, and suggested that his premises be connected with a standpipe intended to supply water to the inhabitants of an adjoining district; but his request was not immediately granted, the authorities assigning as the reason for their refusal that the district was growing so fast that the proposed diversion of water would render the supply inadequate for those the standpipe was originally intended to serve.

The present action was instituted on July 18, 1912. A few days later a petition signed by the plaintiff and other residents of that locality was presented to the chairman of the water committee, calling attention to the fact that the pressure was insufficient to flush second-floor closets, and requesting that action might be taken to remedy the defect. The committee immediately directed that the water main on Temple street be connected with the end of the pipe at Allen avenue and Cary street, which was done four days thereafter, and by that means the evil complained of was corrected.

It is apparent from the foregoing summary of the evidence that if we should sustain a recovery in this case it would rest solely upon the theory that the city had rendered itself liable in damages for the negligent adoption of a system of water

supply for the section of the newly acquired territory wherein the plaintiff resides. That there can be no such liability under the circumstances of this case is very clear. The adoption of a plan for supplying a city, or a given section of it, with water, involves the exercise of a delegated governmental power; and an error of judgment with respect to the efficiency and adequacy of such system is not in the first instance reviewable by the courts.

On the other hand, it is equally well settled that the city is liable, in a proper case, for the negligent acts and omissions of its officers in relation to the performance of such ministerial corporate duties as may be imposed upon it by law. This line of demarcation between the nonliability and liability of a municipal corporation for official negligence is well recognized by the authorities, including the decisions of this court.

Thus, in *Terry v. Richmond*, 94 Va. 537, at page 544, 38 L.R.A. 834, 27 S. E. 429. Judge Riely, upon a review of the earlier decisions, observes: "A number of cases decided by this court, in which the municipality was held responsible, were cited and relied on to support the claim of liability of the city in the case at bar; but they do not support the contention of the plaintiff in error. The liability in those cases rested upon a different ground from that which underlies this case. Its solution depends upon the application of a different principle. The act of the city, which is the subject of the complaint here, was the exercise of a delegated governmental power; but it will be found upon examination that the liability in each and all of the cases referred to was based either upon a tort committed by the city itself through its officers or agents, or upon the neglect of the city to perform some ministerial and absolute . . . duty." The learned judge illustrates the general doctrine as follows: "The duty of a municipal corporation to see that its streets and sidewalks are in safe condition, and that its sewers and drains are kept in good order, and that its other like municipal obligations are cared for, is a purely ministerial and absolute corporate duty, assumed in consideration of the privileges conferred by its charter. and the law holds the municipality responsible for an injury resulting from the negligent discharge of such duty, or the negligent omission to discharge it; but exempts it from liability for the exercise of governmental or discretionary powers."

We have quoted at some length from Judge Riely's opinion, for the reason that the principles involved are lucidly stated, and have been consistently followed by this

court in subsequent decisions, and also because they are conclusive of the present controversy.

In the light of the opinion of Mr. Justice Gray, in *Johnston v. District of Columbia*, 118 U. S. 19, 30 L. ed. 75, 6 Sup. Ct. Rep. 923, there can be no difficulty in appropriately classifying the case in judgment. At pages 20, 21, of 118 U. S., he says: "The duties of the municipal authorities, in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size, and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience . . . and the exercise of such judgment and discretion, in the selection and adoption of the general plan or system of drainage, is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land."

Judge Dillon, in the last edition of his work on Municipal Corporations, after laying down the general principle above set forth, observes: "We now add that the later cases tend strongly to establish, and may, we think, be said to establish, and in our judgment rightly to establish, that a city may be liable on the ground of negligence in respect of public sewers, solely constructed and controlled by it, where by reason of their insufficient size, clearly demonstrated by experience, they result under ordinary conditions in overflowing the private property of adjoining or connecting owners with sewage, and that the principle of exemption from liability for defect or want of efficiency of plan does not . . . extend to such a case." 4 Dill. Mun. Corp. § 1739.

This very important qualification to the nonliability doctrine is founded upon common sense and considerations of sound policy, and accords with the trend of modern thought and decision.

As we have seen, the municipality, in devising plans and systems for supplying the public with water, sewerage, and the like, exercises legislative duties involving the use of judgment and discretion, and it ought not to be held liable to civil actions for defects or want of efficiency of plan, at least during the formative or experimental stage of the enterprise; yet, after the work has been completed, and experience has demonstrated that the system is inadequate and inefficient to meet requirements, or to effect the objects for which it was intended, there can be no reason to exempt the municipality from damage suffered by an individual from its continued use.

51 L.R.A.(N.S.)

The author (Judge Dillon) in notes to § 1739, and subsequent sections, cites numerous cases to sustain the text.

In the instant case, the city with commendable promptitude took the necessary steps to furnish the plaintiff and other citizens similarly situated with additional water facilities after experience had shown the insufficiency of the original supply; and there has been nothing in connection with the discharge of its duty in that regard to subject it to a suit for damages.

We are told in the second and third assignments of error that the judgment complained of deprived the plaintiff of his property without due process of law and denied him the equal protection of the law, in violation of the 14th amendment of the Constitution of the United States and § 11, art. 1, of the Virginia Constitution; but those assignments are founded upon a misapprehension of the evidence. It is true the plaintiff expended \$160 in installing fixtures on his premises, but of this property he has in no just sense been deprived. The fixtures have never been out of his ownership or possession, and through that medium at the date of the judgment he was utilizing and enjoying the ample supply of water furnished him by the city.

Upon the whole case, we find no error in the judgment of the Law and Equity Court of the City of Richmond, and it must be affirmed.

Cardwell, J., absent.

WASHINGTON SUPREME COURT. (Department No. 1.)

STATE OF WASHINGTON EX REL.
SPRINGFIELD INVESTMENT COM-
PANY et al., Plffs. in Certiorari,

v.

SUPERIOR COURT FOR SKAGIT COUN-
TY et al.

(78 Wash. 679, 139 Pac. 601.)

Eminent domain — right to exercise power for another's benefit.

Where the right to exercise the power of eminent domain has been conferred only on corporations, a corporation has no power to exercise the right to secure property to be conveyed to an individual although he intends to use it for a public purpose.

(March 26, 1914.)

Note. — See references in footnote to *Pittsburg Hydro-Electric Co. v. Liston*, 40 L.R.A.(N.S.) 602.

CERTIORARI to the Superior Court for Skagit County to review an order determining the fact of public use and necessity in a proceeding for the condemnation of certain land. Reversed.

The facts are stated in the opinion.

Messrs. Kerr & McCord, for plaintiffs in certiorari:

The corporation had no power to exercise the power of eminent domain for another's benefit.

New Orleans Terminal Co. v. Teller, 113 La. 733, 37 So. 624, 2 Ann. Cas. 127; Williams v. Eighteenth Judicial Dist. Judge, 45 La. Ann. 1295, 14 So. 57; Edgewood R. Co.'s Appeal, 79 Pa. 257, 5 Mor. Min. Rep. 406; Re Metropolitan Transit Co. 111 N. Y. 588, 19 N. E. 645; Pittsburg, W. & K. R. Co. v. Benwood Iron Works, 31 W. Va. 710, 2 L.R.A. 680, 8 S. E. 453; Re Brooklyn, W. & N. R. Co. 72 N. Y. 245; Re Niagara Falls & W. R. Co. 108 N. Y. 375, 15 N. E. 429; Weidenfeld v. Sugar Run R. Co. 48 Fed. 616; Re Deansville Cemetery Asso. 66 N. Y. 569, 23 Am. Rep. 86; Re Staten Island Rapid Transit Co. 103 N. Y. 251, 8 N. E. 548; Denver R. Land & Coal Co. v. Union P. R. Co. 34 Fed. 396; Bridwell v. Gate City Terminal Co. 127 Ga. 520, 10 L.R.A.(N.S.) 913, 56 S. E. 624; Farist Steel Co. v. Bridgeport, 60 Conn. 278, 13 L.R.A. 590, 22 Atl. 561; State ex rel. Sylvester v. Superior Ct. 60 Wash. 279, 111 Pac. 19.

Messrs. Thomas Smith, Newman & Kindall and Clinton W. Howard, for defendants in certiorari:

Respondent is a corporation having the power of eminent domain under the law and its articles of incorporation.

State ex rel. Harlan v. Centralia-Chehalis Electric R. Power Co. 42 Wash. 632, 7 L.R.A.(N.S.) 198, 85 Pac. 344; State ex rel. Harris v. Superior Ct. 42 Wash. 660, 5 L.R.A.(N.S.) 672, 85 Pac. 666, 7 Ann. Cas. 748, 46 Wash. 511, 90 Pac. 656; State ex rel. Dominick v. Superior Ct. 52 Wash. 196, 21 L.R.A.(N.S.) 448, 100 Pac. 317; State ex rel. Lyle Light, Power & Water Co. v. Superior Ct. 70 Wash. 486, 127 Pac. 104; Postal Teleg. Cable Co. v. Oregon Short Line R. Co. 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735; Postal Teleg. Cable Co. v. Oregon Short Line R. Co. 104 Fed. 623.

Respondent is exercising the power of eminent domain for a lawful purpose in a lawful manner.

Tacoma v. Nisqually Power Co. 57 Wash. 420, 107 Pac. 199; State ex rel. Lyle Light, Power & Water Co. v. Superior Ct. 70 Wash. 486, 127 Pac. 104; Samish River Boom Co. v. Union Boom Co. 32 Wash. 586, 73 Pac. 670; State ex rel. Jones v. Superior Ct. 44 Wash. 476, 87 Pac. 521; 51 L.R.A.(N.S.)

State ex rel. Kent Lumber Co. v. Superior Ct. 46 Wash. 516, 90 Pac. 663; State ex rel. Skamania Boom Co. v. Superior Ct. 47 Wash. 166, 91 Pac. 637; State ex rel. Milwaukee Terminal R. Co. v. Superior Ct. 54 Wash. 365, 103 Pac. 469, 104 Pac. 175; North Coast R. Co. v. Northern P. R. Co. 48 Wash. 529, 94 Pac. 112; State ex rel. Harlan v. Centralia-Chehalis Electric R. Power Co. 42 Wash. 632, 7 L.R.A.(N.S.) 198, 85 Pac. 344; State ex rel. Harris v. Olympia Light & P. Co. 46 Wash. 511, 90 Pac. 656; State ex rel. Dominick v. Superior Ct. 52 Wash. 196, 21 L.R.A.(N.S.) 448, 100 Pac. 317; State ex rel. Weyerhaeuser Timber Co. v. Superior Ct. 71 Wash. 84, 127 Pac. 591.

Main, J. delivered the opinion of the court:

This proceeding involves the right of the Western Washington Power Company, a corporation, to condemn certain lands which will be flooded by the construction of a dam in connection with the development of a hydro-electric power project on the Baker river, in Skagit county, Washington. Upon a hearing before the trial court an order of public use and necessity was entered. For the purpose of reviewing this order the cause is brought here by writ of certiorari.

It is claimed that the purpose of the condemnation was to acquire land which would enable the power company to construct a dam to the height of 224 feet above the bed of Baker river at a point known locally as "The Gorge," in section 2, township 38 north, range 8 east. The water backed up thereby would cover the lands involved herein, as well as other lands not involved in this proceeding. The total cost of completing the enterprise would be approximately \$2,000,000.

To avoid confusion the parties will be referred to as petitioners and respondents, as in the superior court. On the 18th day of September, 1911, one John C. Eden entered into a written contract with Stone & Webster, a copartnership, of Boston, Massachusetts. By this contract Eden was to acquire the lands by private purchase which would be flooded by the erection of the dam, and convey them to Stone & Webster. The contract provided that, in the event the lands could not be acquired by private purchase at a reasonable price, Stone & Webster would cause a corporation to be formed with power to condemn them. The amount of the judgments and costs for the land condemned was to be deducted from the purchase price to be paid by Stone & Webster to Eden. The language of the contract covering this matter is that Stone & Webster "will form or cause to be formed a corpora-

tion with power to condemn, and will use their best efforts to effect condemnation of such lands and rights; and if such lands and rights are obtained by such condemnation proceedings the amount of the condemnation award and costs and expenses shall be deducted from the purchase price agreed on in this instrument."

In pursuance of this contract, and after a portion of the land had been acquired by Eden by purchase, and on or about the 10th day of November, 1911, the Western Washington Power Company was incorporated under the laws of the state of Maine. Subsequently it acquired the right to do business in the state of Washington. The capital stock of the corporation was \$25,000, divided into 250 shares of the par value of \$100 per share. One hundred ninety shares of the capital stock were subscribed and paid for by the Pacific Coast Power Company, a corporation, which had transferred all of its property to the Puget Sound Traction, Light, & Power Company. The latter corporation had assumed the obligations of the former. All of the subscribers to the capital stock, including the Puget Sound Traction, Light, & Power Company, were identified with the Stone & Webster interests.

The Western Washington Power Company, after qualifying under the laws of this state, instituted condemnation proceedings for the purpose of acquiring the property which had not been obtained by private purchase. Certain of these cases had gone to judgment. The judgments and costs of condemnation were paid by Eden.

Some claim is made in the respondents' brief that the evidence fails to show a public use, and also that the public interest will not be promoted by the prosecution of the enterprise. It will be admitted for the purposes of this opinion that the evidence was sufficient to show a public use and necessity. But the serious question is whether the petitioner is proceeding in good faith to acquire the lands for the purpose of itself developing the enterprise, or whether it does not intend when the lands are acquired to transfer them to Stone & Webster, a copartnership.

The legislature of this state has conferred the right to acquire the title to private property by the exercise of the right of eminent domain upon a corporation. It has not conferred this right upon an individual. Hence neither Eden nor Stone & Webster had the right to condemn.

The whole force and tenor of the evidence shows that the purpose of organizing the corporation and having it institute the condemnation proceedings was to acquire title to the property, and, after having done so, 51 L.R.A.(N.S.)

to convey the same to Stone & Webster in pursuance of their contract with Eden. It must be admitted that one witness answered categorically that Stone & Webster had assigned their contract with Eden to the petitioner. None of the facts and circumstances surrounding the assignment appear. So far as the evidence goes, it may or may not have been in writing. But this single fact cannot overcome the force and effect of the testimony, which shows that the property was ultimately to be conveyed to the copartnership. It would be easy after the condemnation proceedings had been completed to reassign the contract to Stone & Webster. If the proceeding were sustained, it would enable Eden and Stone & Webster as individuals, by the intervention of the petitioner created for that purpose, to accomplish by indirection that which they could not do directly.

The right to take private property by the exercise of the power of eminent domain is a part of the sovereign power of the state. When that power was by the legislature conferred upon a corporation, a subordinate agency, it was certainly contemplated that the agency exercising the power would do so for the purpose of developing the enterprise for which the private property was taken, and not for the purpose of acquiring title to property in order that it might be transferred to a partnership which did not have the power to condemn. Courts will look to the substance of a transaction rather than to the form. It is plain that, while in form the corporation is condemning, in substance it is the individuals. This, we think, cannot be done. The legislature has not yet conferred upon individuals the right to acquire title to private property by the exercise of the right of eminent domain.

The judgment will be reversed, and the cause remanded, with instructions to dismiss the proceeding.

Crow, Ch. J., and Ellis, Chadwick, and Gose, JJ., concur.

Petition for rehearing denied.

WEST VIRGINIA SUPREME COURT OF APPEALS.

DEWEY DEPUTY, by Next Friend,
v.

E. G. KIMMELL, Plff. in Err.

(— W. Va. —, 80 S. E. 919.)

Highway — rights of pedestrians and automobilists.

1. The rights of pedestrians and drivers

Headnotes by LYNCH, J.

of automobiles, when using streets or other public highways, are mutual, equal, and co-ordinate, except as varied by the nature of the appliance or mode of travel employed, and as long as each observes the reciprocal rights of the other, neither will be liable for any injury his use may cause.

Same — care in use.

2. A person using a public highway owes the double duty to avoid danger to himself by another having an equal right to such use, and the infliction of injury upon such other person. Both must exercise that degree of care which a reasonably prudent man would exercise under the same circumstances.

Same — duty of driver of automobile.

3. Because of the character of the vehicle and the unusual dangers incident to its use, a greater degree of care is required of the operator of an automobile while on the public highway, and especially at street crossings, than is required of persons using the ordinary or less dangerous instruments of travel. He should exercise such care in respect to speed, warnings of approach, and

the management of the car, as will enable him to anticipate and avoid collisions which the nature of the machine and the locality may reasonably suggest likely to occur in the absence of such precautions.

Same — duty to children.

4. The vigilance and care required of the operators of an automobile vary in respect of persons of different ages or physical conditions. He must increase his exertions in order to avoid danger to children whom he may see, or by the exercise of reasonable care should see, on or near the highway. More than ordinary care is required in such cases.

Same — obstructed view.

5. Where a wagon or other vehicle obscures or obstructs his view of a street crossing, when the presence thereon of others may reasonably be anticipated, extra vigilance and caution are required of the auto operator, in order to prevent injury to persons on such crossing.

Negligence — last clear chance.

6. The mere negligent act of one person

Note. — Reciprocal duty of operator of automobile and pedestrian to use care.

The early cases upon this question are gathered in the notes to *Christy v. Elliott*, 1 L.R.A.(N.S.) 215; *McIntyre v. Orner*, 4 L.R.A.(N.S.) 1130; *Gerhard v. Ford Motor Co.* 20 L.R.A.(N.S.) 232; *Weil v. Kreutzer*, 24 L.R.A.(N.S.) 557; *Lauson v. Fond du Lac*, 25 L.R.A.(N.S.) 40; *Baker v. Close*, 38 L.R.A.(N.S.) 487; and *Minor v. Stevens*, 42 L.R.A.(N.S.) 1178, to which the present note is supplementary. It will be observed that these notes do not cover the question as to the reciprocal duty of the driver of an automobile and those working or playing in the street.

The question of the duty and liability of operators of automobiles with respect to horses encountered on the highway is covered in the note to *Measser v. Bruening*, 48 L.R.A.(N.S.) 945.

The practical importance of this subject is illustrated by the large number of cases in point that have been decided since the preparation of the note in 42 L.R.A.(N.S.), a period of a little over a year.

In general—duty of operator of car.

Supplementing notes in 38 L.R.A.(N.S.) 487, 42 L.R.A.(N.S.) 1178.

The driver of an automobile is bound to anticipate the presence of pedestrians upon the streets of a city or upon rural highways, as well as to exercise reasonable care that he does not injure them after he is aware of their presence. *O'Dowd v. Newnham*, 13 Ga. App. 220, 80 S. E. 36. The court said: "The application of this principle is qualified by the rule to which we have just referred in the first division of this opinion. The pedestrian, like the driver of an automobile, in the exercise of ordinary care for his own safety and for the safety of

others, is required to anticipate the presence of persons and vehicles upon the highway. But it cannot be said that the duty which is upon the pedestrian is as urgent as that devolving upon the driver of an automobile, for the foot passenger's action or inaction in the premises is far less important to the other users of the highway. The impact of the body of a pedestrian absorbed in his own meditations, upon a passer-by, might be measurably uncomfortable, but it would seldom be hazardous to either life or limb; whereas the impact of an automobile in motion while the driver is asleep might cause as certain death as if the injured person had been wilfully pursued and wantonly crushed. The pedestrian and the automobile have equal rights upon the highway, but their capacity for inflicting injury is vastly disproportioned. It follows, also, from this, that the driver of an automobile cannot be said to be using the highway within his rights, or to be in the exercise of due care, if he takes advantage of the force, weight, and power of his machine as a means of compelling pedestrians to yield to his machine superior rights upon the public highway, designed for the use of all members of the public upon equal terms. Instances are almost a matter of daily occurrence where apparently the drivers of automobiles operate their machines as if they have been granted a right of way over the public highways, and as if it is nothing more than the duty of the pedestrian to yield precedence to the automobile, and to stop and wait until the automobile has passed before attempting to proceed in crossing a street or otherwise using the highway. If there is anything in the argument of priority, man was created before the automobile, and, to paraphrase a quotation from Holy Writ, man was not created for the automobile, but the automobile was created for man. Generally, the natural in-

will not excuse negligent injury to him by another. If, therefore, a person who negligently places himself in a situation of imminent danger is injured by one who by the exercise of reasonable care could have avoided such injury, the negligence of the former will not bar recovery.

Highway — duty to look and listen.

7. A person lawfully in a public highway may rely upon the exercise of reasonable care by drivers of vehicles to avoid injury. Failure to anticipate omission of such care does not render him negligent. A pedestrian is not bound, as a matter of law, to be continuously looking or listening to ascertain if automobiles or other vehicles are approaching, under penalty that, if he fails to do so and is injured, his own negligence will defeat recovery of damages sustained.

Negligence — duty of child.

8. In determining the question of contributory negligence, the conduct of children should not be judged by the same rules which govern that of adults. Ordinary caution for them is that degree of care and

prudence which children of the same age are accustomed to exercise under like circumstances.

Evidence — proof of facts alleged.

9. In order to recover, it is unnecessary for plaintiff to prove literally the acts of negligence averred in the declaration. If the allegations are substantially proved, this is sufficient. Hence, an instruction in an action of case for personal injury, which tells the jury that it cannot find for plaintiff unless it believes from the evidence "that the defendant was negligent in the very manner set out in the declaration," is erroneous, and should be refused.

(February 3, 1914.)

ERROR to the Circuit Court for Mineral County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

instinct of self-preservation will inspire in the pedestrian a due degree of caution for his own safety, when he is aware of the approach of an automobile, and this the law will require him to exercise. Sometimes the circumstances surrounding the approach of one of these vehicles of ponderous proportions inspire a terror which paralyzes the power of locomotion on the part of the traveler on foot, especially if he be a child of tender years. In such a case, the dangerous character of the instrumentality which the driver of an automobile is operating forbids the assertion that he has exercised even ordinary diligence, unless he has used every possible means to avoid injury to the pedestrian. On account of the ease with which injury can result from the slightest negligence or inattention in the operation of his machine, ordinary diligence requires that the driver of an automobile be constantly on the lookout, and that he have his machine in such condition as that it shall be under his perfect control. The pedestrian also is required to be on the lookout; but he has the right to assume that the drivers of all automobiles are on the lookout for him too, and if he is properly upon the public highway, which he is entitled to use equally with them, he has the right to assume that they are both willing and able to regard his rights. While, therefore, the law requires that a pedestrian and the driver of an automobile shall each anticipate the presence of the other upon the public highways, and that neither shall do any act likely to jeopardize the safety of the other, still, on account of the great disparity in their respective capacities to inflict injury, the exercise of ordinary diligence on the part of the pedestrian to look out for automobiles does not necessarily require as continuous caution as is requisite to enable an automobilist to fulfil the definition 'ordinary diligence' as applied to one 51 L.R.A. (N.S.)

having in his charge a dangerous and death-dealing instrumentality."

It is the duty of the driver of such machines as those here considered to keep a lookout in the direction in which his car is going and turning. *Eisenman v. Griffith*, — Mo. App. —, 167 S. W. 1142; *O'Dowd v. Newnham*, supra.

And in attempting to pass over a crossing which is frequented by pedestrians, he is chargeable with the duty to look, and this duty implies also the duty to see what is in plain view, unless some reasonable explanation is presented for a failure to see, and the reasonableness of such explanation is a question for the jury. *Holderman v. Witmer*, — Iowa, —, 147 N. W. 927.

And if he sees a pedestrian in peril, it is his duty to immediately take all reasonable measures to avoid injuring him. *Eisenman v. Griffith*, supra.

In a crowded city street dictates of common prudence require that an automobile should be kept under control so as to avoid, or at least minimize, the danger of a collision with pedestrians and others. *Lorah v. Rinehart*, 243 Pa. 231, 89 Atl. 967.

Greater care is required of the operator of an automobile at street crossings and in the more thronged streets of a city, than in the less obstructed streets in the open or suburban parts. *Grier v. Samuel*, — Del. —, 86 Atl. 209.

And the operator of an automobile in the city should cause it to slow up, or stop if need be, where danger is imminent and could, by the exercise of reasonable care, be seen or known in time for him to avoid accident. *Ibid*.

The degree of diligence which must be exercised in a particular exigency is such as is necessary to prevent injuring others, and in considering whether the operator of an automobile exercised due diligence, or by a failure to do so is guilty of negligence.

Messrs. Charles N. Finnell and Frank C. Reynolds, for plaintiff in error:

When both parties are chargeable with negligence, the plaintiff cannot recover if his negligence contributed in any degree as an efficient cause to the injury complained of.

Richmond Traction Co. v. Martin, 102 Va. 209, 45 S. E. 886; Carrico v. West Virginia C. & P. R. Co. 39 W. Va. 86, 24 L.R.A. 50, 19 S. E. 571; Phillips v. Ritchie County, 31 W. Va. 477, 7 S. E. 427; Shearm. & Redf. Neg. 5th ed. § 96; Slaughter v. Huntington, 64 W. Va. 237, 16 L.R.A. (N.S.) 459, 61 S. E. 155.

Messrs. R. F. Leedy and W. H. Griffith, for defendant in error:

The driver of a vehicle is bound to use

reasonable care, and to anticipate the presence on the street of other persons having an equal right with himself to be there.

Geiselman v. Schmidt, 106 Md. 580, 68 Atl. 202; Irwin v. Judge, 81 Conn. 492, 71 Atl. 573; Hennessey v. Taylor, 189 Mass. 583, 3 L.R.A. (N.S.) 345, 76 N. E. 224, 4 Ann. Cas. 396, 19 Am. Neg. Rep. 285; Lynch v. Fisk Rubber Co. 209 Mass. 16, 95 N. E. 400, 2 N. C. C. A. 298; Dugan v. Lyon, 41 Pa. Super. Ct. 52.

A person in a public street has a right to rely upon the exercise of reasonable care on the part of the drivers of vehicles to avoid causing injury, and a failure to anticipate the omission of such care does not render him negligent.

the character of the instrumentality which he is operating and the danger attached to its operation, as well as the character of the highway being traveled and the probability of inflicting injuries, are all to be taken into account. O'Dowd v. Newnham, supra.

What might be due care in the management of a horse and carriage traveling along a country road affords no standard for measuring the prudence of the driver of an automobile running over the same road at high speed. Brown v. Thayer, 212 Mass. 392, 99 N. E. 237.

And in passing upon the question whether the driver of an automobile which struck a pedestrian exercised ordinary care, the jury may consider the powerful agencies placed under the control of the driver, and the disastrous consequences to other travelers if there is mismanagement. Ibid.

An automobile has no superior right to the use of a street car track as such, like the right enjoyed by street cars. Michalsky v. Putney, 51 Pa. Super. Ct. 163.

Although both pedestrians and the drivers of automobiles have the right to pass and repass, neither can so negligently exercise this right as to injure the other. Schock v. Cooling, 175 Mich. 313, 141 N. W. 675.

And it is negligence for the driver of an automobile having ample space to pass a pedestrian on a highway, to so guide his vehicle as to strike him in passing. Ibid.

The driver of an automobile has the same right to use the highway or streets of a city, as the driver of other vehicles, and like them he must exercise reasonable care and caution for the safety of others. Grier v. Samuel, supra; Goldblatt v. Brocckebank, 166 Ill. App. 315.

It is the duty of the driver of such a machine to use ordinary care in its operation, to move at a rate of speed reasonable under the circumstances, and cause it to slow up, or to stop if need be, where danger is imminent and could, by the exercise of reasonable care, be seen or known in time to avoid an accident; and greater care is required at street crossings and in the more

crowded streets of a city than in the less obstructed streets in the open or suburban parts. Brown v. Wilmington, — Del. —, 90 Atl. 44.

The right of the driver of an automobile and of a pedestrian in the highway must be exercised in a reasonable and careful manner so as not unreasonably to abridge or interfere with the rights of the other; both are bound to the reasonable use of all their senses for the prevention of accidents, and the exercise of all such reasonable caution as ordinarily careful and prudent persons would exercise under like circumstances. Grier v. Samuel, supra.

A duty which everyone using highways owes to others is to exercise reasonable care, and to bear in mind that he does not have the exclusive right of user, whether he be a pedestrian, rider, or driver of an automobile, and the quantum of care required is to be estimated by the particular situation. Winner v. Linton, 120 Md. 276, 87 Atl. 674.

In Brown v. Thayer, supra, where a recovery was sought for an injury to a pedestrian by an automobile, it was held that public highways are not designed or maintained as thoroughfares for racing automobiles, and that those who use them for this purpose do so at their peril.

In Mosso v. E. H. Stanton Co. 75 Wash. 220, — L.R.A. (N.S.) —, 134 Pac. 941, in an action by a pedestrian to recover for an injury inflicted by an automobile, it was held that where the peril of a traveler on the highway is actually discovered, and should be appreciated, by the operator of a street car or other agency of danger, a new duty arises to exercise all reasonable care to avoid injury, and that the failure to exercise such care, if it results in injury, will render the driver liable notwithstanding the continuance of the plaintiff's negligence up to the instant of the injury.

—rights and duties of pedestrians.

Supplementing notes in 38 L.R.A. (N.S.) 488, and 42 L.R.A. (N.S.) 1179.

In using the streets all persons are bound

Gerhard v. Ford Motor Co. 155 Mich. 618, 20 L.R.A.(N.S.) 232, 119 N. W. 904.

One running an automobile is bound to take notice of a person standing in the roadway conversing with a friend sitting in a carriage, and to use care not to injure him.

Kathmeyer v. Mehl, — N. J. L. —, 60 Atl. 40, 17 Am. Neg. Rep. 688.

Defendant cannot extricate himself from the imputation of recklessness and negligence.

Hannigan v. Wright, 5 Penn. (Del.) 537, 63 Atl. 234.

Lynch, J., delivered the opinion of the court:

The injury, damages for which plaintiff

seeks recovery by an action of trespass on the case, was inflicted by defendant in the operation of an automobile on the streets of Keyser. The car collided with plaintiff at a street crossing, and within a few feet of the curb, over which he had just stepped into the street. At that time he was ten years and six months old. In company with him were two companions, one eleven, the other nine years old. They were interested in the pictures of noted baseball players, contained in a box of candy purchased by one of them at a store near the crossing. These they were examining as they leisurely approached and entered upon the crossing at the time of the collision. Defendant drove his car along Piedmont street, and thence to the left over the cross-

to exercise reasonable care to prevent collisions and accidents. Grier v. Samuel, and Brown v. Wilmington, supra.

A pedestrian and the user of an automobile have equal rights upon the public highway, and each is to use it bearing in mind the right of the other, in such a manner as not to injure the other. O'Dowd v. Newnham, supra.

The degree of care required of a pedestrian while in the street depends largely upon the place and the condition, but the degree of care required is ordinary care under the circumstances. Lewis v. Seattle Taxicab Co. 72 Wash. 320, 130 Pac. 341.

A person crossing a public street of a city is required to make reasonable use of all of his senses in order to avoid an impending danger, and if he fails to do so and is injured by reason of such failure, he is guilty of such negligence as will prevent a recovery. Grier v. Samuel, supra.

While travelers on foot passing along or crossing a public highway have the same right to use it as a vehicle of any kind, they are bound to exercise care according to the circumstances, and especially bound to the alert and watchful performance of the duty of all travelers on all highways, to look where they are going and not walk blindly into danger. Tolmie v. Woodward Taxicab Co. — Mich. —, 144 N. W. 855.

It is the duty of a foot passenger to look both ways before starting to cross a street, particularly when it is a busy thoroughfare in the heart of the business district of a large city. Davis v. John Breuner Co. — Cal. —, 140 Pac. 586.

And a pedestrian about to cross a city street must be on his guard after he starts onto the street, and must continue on the alert while crossing the entire roadway. Lora v. Rinehart, 243 Pa. 231, 89 Atl. 967.

But pedestrians are not bound to be continually looking and listening to ascertain if automobiles are approaching, under penalty that if they fail to do this and are injured, it will be assumed from this fact alone that they were negligent. O'Dowd v. Newnham, supra.

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The driver of an automobile has freedom of choice as to the part of the street he will drive upon, and a pedestrian may rely on the presumption that so long as he occupies one place or pursues a given course, he will not be run into, and a failure to keep a lookout for the approach of such vehicles is not necessarily a want of proper care. Lewis v. Seattle Taxicab Co. supra.

Persons alighting upon or walking across public streets where vehicles are constantly traveling to and fro must use ordinary care to see that they do not collide with or are not run over by them, and it is in turn the duty of the drivers of vehicles to exercise ordinary care to prevent any injury being caused to such foot passengers; the rights of such parties are reciprocal and equal, and neither has any right of way superior to the other. Brown v. Brashear, 22 Cal. App. 135, 133 Pac. 505.

A pedestrian who, in using a public highway, is in the exercise of due care for his own protection and for the safety of others, cannot, as matter of law, be held guilty of contributory negligence merely because he does not run to escape injury by an automobile. O'Dowd v. Newnham, supra.

Applications of general rules—speed.

Supplementing notes in 38 L.R.A.(N.S.) 488, and 42 L.R.A.(N.S.) 1180.

The operation of an automobile at a rate of speed in excess of that prescribed by a valid municipal ordinance is negligence *per se*. O'Dowd v. Newnham, supra.

So, it is negligence *per se* for the driver of an automobile to run his machine at about twice the maximum lawful rate of speed, and to fail to sound a warning, when approaching a pedestrian, within 12 feet of an intersecting street. Hillebrant v. Manz, 71 Wash. 250, 128 Pac. 892.

And a peremptory instruction for the defendant should not be given in an action to recover for an injury to a pedestrian who was struck by an automobile immediately after jumping from a wagon and while proceeding across the street, where there is evidence that the driver of the automobile

ing and into Orchard street. As the car entered on the crossing, it collided with two of the three boys, knocking plaintiff to the pavement, thereby causing the injury. The trial court entered judgment for plaintiff on the jury's findings on the facts. Hence the case is here on writ of error.

While defendant admits the collision and its resultant effect, he denies liability on the ground that but for the negligence of the plaintiff the collision would not have occurred. But the question of defendant's negligence, and that of plaintiff, if any, contributing to the injury, were submitted to the determination of the jury, and its findings cannot be disturbed except for good and sufficient cause.

Was defendant negligent? He was law-

fully on the public highway. It was open alike to him and to the plaintiff. Their rights thereon were mutual and co-ordinate. The rights of the one were not superior to the rights of the other. Highways are constructed and maintained at public expense, for public use by all persons alike, without limitation or restriction, save only that the use must conform to the well-established rules and regulations prescribed by law.

That the use of automobiles on the highways for business or recreation is lawful is no longer open to question. Such use involves only the application of a new appliance and mode of travel, rather than any new legal principle. It does not exclude or seriously interfere with the original modes in which the highways were used, but sim-

was running his machine at a rate of speed that was in excess of the limit fixed by the city ordinance, and that might be considered unreasonable and dangerous upon such a thoroughfare. *Bartley v. Marino*, — Tex. Civ. App. —, 158 S. W. 1156.

But the mere fact that the driver of the automobile which struck a pedestrian was violating the speed ordinance, and failed to give the proper warning of his approach, does not preclude the court from finding that the pedestrian's negligence in walking heedlessly into the street was the efficient and proximate cause of his injury, since the negligence of a plaintiff which directly contributes to the injury bars a recovery. *Davis v. John Breuner Co. supra*.

The right of the driver of an automobile on the street is no greater than that of a pedestrian, but their rights and duties are reciprocal, and whether, notwithstanding any previous negligence of the pedestrian in failing to look, the driver of the machine could have seen and have avoided the accident, had he been running at a reasonable rate of speed, or had he sounded his horn, is a question for the jury. *Hillebrant v. Manz, supra*.

A motion to nonsuit is properly refused where there is proof that the defendant's automobile was being propelled through a thickly populated public street at a high rate of speed, and that the plaintiff, a child seven years of age, who was then crossing the street, was run into and dragged a distance of about 8 or 10 feet. *Lewis v. National Cash Register Co.* 84 N. J. L. 598, 87 Atl. 345.

And in *Lorah v. Rinehart, supra*, it was held that the question whether, considering the congested condition of the city streets, the defendant's automobile, which, according to the testimony, was proceeding from 12 to 15 miles an hour, was being run at a negligent rate of speed, was properly left to the jury.

And in *Yarbrough v. Carter*, — Ala. —, 60 So. 833, the evidence in an action to recover for injuries to a pedestrian who was run into by an automobile was held sufficient to carry the case to the jury 51 L.R.A. (N.S.)

on the question of the defendant's negligence, where there was evidence tending to show that the defendant's automobile, running at between 25 and 40 miles an hour, struck the plaintiff, and that no signals were given of the approach of the machine.

So, in an action against the owners of two automobiles to recover for the death of one pedestrian and injury to another, the question of negligence on the part of the drivers of the machines is for the jury, where there is evidence that just before the accident the pedestrians were walking along the extreme right of the street; that a buggy drawn by a horse was a little distance in advance of them and between them and the left-hand side of the street; that the automobiles were approaching from the rear and were racing; that the first warning of their approach was given by the blowing of the horn on the leading machine; that the pedestrians heard it and turned and saw the approaching automobiles; that the deceased and the injured pedestrian leaped toward the left and were struck by one of the machines, which also collided with the buggy, and which, with its emergency brake set, continued on its course for 80 feet. *Brown v. Thayer*, 212 Mass. 392, 99 N. E. 237.

And in an action to recover for an injury to a pedestrian struck by an automobile while crossing a street, the question of the speed of the machine and the negligence of the operator is for the jury, where the plaintiff's evidence tends to show that the injury occurred on a dark rainy night, and that the machine struck him immediately after he saw it, knocking him down and proceeding a distance of 12½ feet after the collision, while the defendant's testimony was to the effect that his machine was going only about 2 miles an hour, and that he stopped his car before reaching the plaintiff, and did not strike him, but that he fell before the car reached him, and the injury resulted from such fall. *Bachelder v. Morgan*, — Ala. —, 60 So. 815.

And in an action to recover for the death of a person killed by an automobile while

ply adds another use in furtherance of the general object for which they were dedicated. But new appliances and modes of travel must be exercised with due regard for the rights of others using the highways, "and as long as such care is exercised, the owners will not be liable for any injury their use may cause." *Berry, Automobiles*, § 115, and numerous cases cited.

So that, in whatever manner or for whatever lawful purpose one uses a public highway, he owes a double duty: (1) To avoid danger to himself by another having the right to such use, and (2) to avoid infliction of an injury upon such other person. Both must exercise such care as reasonably prudent persons would exercise under the same circumstances and conditions,

crossing a street, the case is properly submitted to the jury and a verdict for the plaintiff justified, where there is evidence that the automobile was proceeding at a rate of from 15 to 45 miles per hour, and that no signal of its approach was given; that the deceased alighted from a street car nearly opposite his home at a regular stopping place; that as he alighted he faced in the direction from which the automobile approached, but that it was not in sight; that he spoke to a person on a wagon and proceeded across the tracks; that he saw the automobile and made motions toward it immediately before he was struck; that it carried him a distance of about 95 feet; and there is further evidence that such an automobile going at the rate of 15 miles an hour, could be stopped within 20 or 30 feet, and when going at the rate of 35 miles an hour, could be stopped within 75 feet. *Michalsky v. Putney*, 51 Pa. Super. Ct. 163.

And in a similar action, where there is evidence that although the brakes were applied, the machine which injured the pedestrian traveled more than 70 feet up a slight grade after the collision, notwithstanding there is no evidence to show within what distance the car or a similar one might be stopped, it is a question for the jury at what speed the car was proceeding, and it is improper for the court to say, as a matter of law, that it was not exceeding a certain speed. *Ackerman v. Stacey*, 157 App. Div. 835, 143 N. Y. Supp. 227.

And in *Goldblatt v. Brocklebank*, 166 Ill. App. 315, the evidence was held sufficient to show that the automobile which struck the plaintiff while he was crossing the street diagonally was recklessly and carelessly driven at an unlawful and dangerous speed, and that the driver failed to blow his horn or give any signal as he approached the crossing where the accident occurred.

If the servant of a city at the time of an accident was operating its police patrol wagon at a high and dangerous rate of speed, when considered with regard to the place and circumstances, and failed to give 51 L.R.A.(N.S.)

in order to avoid being injured or causing injury. *Indiana Springs Co. v. Brown*, 165 Ind. 465, 1 L.R.A.(N.S.) 238, 74 N. E. 615, 6 Ann. Cas. 656, 18 Am. Neg. Rep. 392; *Hall v. Compton*, 130 Mo. App. 675, 108 S. W. 1122; 28 Cyc. 27, 29; *Berry, Automobiles*, §§ 128, 150, 163, 171, 173; *Huddy, Automobiles*, §§ 84, 95, 99, 101; *Babbitt, Motor Vehicles*, § 913.

But what may be due and reasonable care in the use of a highway under some circumstances may be negligence under others. No inflexible rule applicable alike to all cases has been or can be definitely stated. Each case must be determined upon its own peculiar facts. The degree of care varies, also, to some extent with the character of the vehicle. There is an obvious difference

the plaintiff, who was walking along the highway, timely warning of its approach, and the plaintiff was free from negligence that contributed to the accident, the servant of the city was negligent, and it is liable for the injury. *Brown v. Wilmington*, — Del. —, 90 Atl. 44.

In an action to recover for an injury received by a pedestrian run into by an automobile, it is proper to allow the jury to take into consideration, in judging the speed of the car, the distance which the machine traveled before it came to a stop after the collision. *Lorah v. Rinehart*, supra.

In an action by a pedestrian who was struck by an automobile, in which the driver is charged with wantonly and wilfully injuring the plaintiff, an ordinance of the city prohibiting the running of automobiles in excess of a certain speed is admissible in connection with evidence that the defendant was violating the speed laws, and in connection with other facts and circumstances to be considered in determining whether the wrongful act complained of was wanton or wilful, although there is no count claiming damages for violation of the ordinance, and although a violation of such ordinance is simple negligence only. *Yarbrough v. Carter*, — Ala. —, 60 So. 833.

A charge in an action to recover for an injury to a pedestrian struck by an automobile, that unless the jury found that the operator of the automobile was guilty of negligence which proximately caused the injury, they should find for the defendant, and that if they believed the plaintiff guilty of contributory negligence, or his injuries to be the result of an unavoidable accident, no recovery could be had, was sufficiently favorable to the defendant where contributory negligence was not pleaded, and there was evidence that the defendant's automobile was running at an unlawful rate of speed, which directly caused the accident. *Bartley v. Marino*, — Tex. Civ. App. —, 158 S. W. 1156.

The failure of the plaintiff in an action brought to recover for an injury received through being run into by an automobile,

in that respect between the use and operation of a road wagon and an automobile. The latter has weight and power, and also greater capacity of speed and agility in its movements. It responds more readily to the will of the operator. Therefore "the operator must enlarge to a commensurate extent the degree of vigilance and care necessary to avoid injuries which the use of his vehicle has made more imminent." *Berry, Automobiles*, § 119. "Moving quietly as it does, without the noise which accompanies the movements of a street car or other ordinary heavy vehicle, it is necessary that caution should be continuously exercised to avoid collisions with pedestrians unaware of its approach. The speed should be limited, warnings of approach given, and skill

and care in its management so exercised as to anticipate such collisions as the nature of the machine and the locality might suggest as liable to occur in the absence of such precautions." *Id.* §§ 124, 154; *Huddy, Automobiles*, § 95.

On this subject the observations of the court in *Irwin v. Judge*, 81 Conn. 492, 71 Atl. 572, are pertinent: "To persons riding along or crossing our public roads, and especially our city streets, the rapidly moving automobile is a constant source of danger. Their great weight, speed power, and resulting momentum render the consequences of a collision with them much more serious than with ordinary carriages moving at even a higher rate of speed, and it is much more difficult to avoid, and much

to prove that the defendant was running his machine at a high rate of speed, does not constitute a fatal variance from a statement charging the defendant "with recklessly, carelessly, and negligently operating and running his machine at a high rate of speed, contrary to the laws of the commonwealth," and a recovery may be had where there is evidence of the defendant's negligent operation of the machine. *Dougherty v. Davis*, 51 Pa. Super. Ct. 229.

See also cases under headings, "Duty when pedestrian is crossing street diagonally," and "Duty near street cars."

—lights, signals.

Supplementing note in 38 L.R.A.(N.S.) 489.

In *Clark v. General Motor Car Co.* — Mo. App. —, 160 S. W. 578, the court stated that there was no statutory rule requiring the driver of an automobile to sound his horn or give other alarm on approaching a crossing of a public street, and that therefore the obligation of the law was the same as that imposed at common law, except for the fact that the statute required the exercise of a high degree of care on the part of automobilists at all times.

Since an automobile driver is bound to use a degree of reasonable care proportionate to the danger of the instrumentality which he is operating, and is bound, when traversing a much frequented street, to anticipate the presence of other persons having an equal right, proof in an action to recover for the death of a pedestrian who was struck by an automobile, that the machine was suddenly turned from the course it was taking and collided with the deceased, to whom no signal of warning was given by the driver, it appearing undisputed that the pedestrian exercised due care, is sufficient to authorize a finding that the driver's negligence was the proximate cause of the injury, and to render instructions upon the subject of contributory negligence unnecessary. *O'Dowd v. Newnham*, — Ga. App. —, 80 S. E. 36.

In *Winter v. VanBlarcom*, — Mo. —, 167 51 L.R.A.(N.S.)

S. W. 498, the evidence in an action to recover for an injury sustained through being run into by an automobile was held insufficient to establish negligence on the part of the defendant in failing to use proper care to control his machine, or to give any signal or warning, or in running his machine at a high rate of speed, where it tended to show that the machine stopped within 15 feet of the place of collision, it appearing from the plaintiff's evidence that he was running behind a street car, tampering with the drawbar pin, and suddenly darted, or ran to a place, in front of the automobile so close to it that the accident was unavoidable.

Where a statute requires the driver of an automobile, upon approaching a horse or a person walking, to give a reasonable warning of his approach, but does not say what the warning shall be, it is improper to extend the meaning of the statute and instruct that the driver should sound his horn or give reasonable notice with some other signal device, where there is evidence that the operator of the machine, upon approaching a child on the highway, shouted to attract the latter's attention. *Shaw v. Corrington*, 171 Ill. App. 232.

Whether the use of a gong, a horn, or other warning to pedestrians is necessary in the exercise of due diligence by the driver of an automobile, or whether the failure to give these or other cautionary signals is negligence, are questions for the jury in an action to recover for the death of a pedestrian struck by an automobile, and a charge is therefore properly refused that "there is no law requiring the operator of an automobile, while properly using the streets, to sound a gong, blow a horn, or give other warning to pedestrians of its approach." *O'Dowd v. Newnham*, *supra*.

An instruction in an action to recover for an injury sustained by being run into by an automobile, that if the jury finds that the driver's omission to sound his horn was such conduct under the circumstances as would not have characterized a reasonably prudent person's act under similar circumstances to avoid injuries to persons in

more confusing to attempt to avoid, the rapidly moving automobile than the street railway car, which has a fixed and known direction and course upon its tracks. While owners of automobiles have the right to drive them upon public streets, yet the proper protection of the equal rights of all to use the highways necessarily requires the adoption of different regulations for the different methods of such use, and what may be a safe rate of speed at which to ride a bicycle or drive a horse may be an unreasonably rapid rate at which to drive an automobile in the same place. For the reasons stated, and others which might be given, the driving of an automobile at a high rate of speed through city streets, at times when and places where other vehicles

are constantly passing, and men, women, and children are liable to be crossing, or around corners at the intersection of streets, or in passing by street cars from which passengers have just alighted, or may be about to alight, or in other similar places and situations where people are liable to fail to observe an approaching automobile . . . [the driver] is bound to take notice of the peculiar danger of collisions in such places. He cannot secure immunity from liability by merely sounding his automobile horn. He must run his car only at such speed as will enable him to timely stop it to avoid collisions. If he fails to do so, he is responsible for the damage he thereby causes." See also *Tudor v. Bowen*, 152 N. C. 441, 30 L.R.A.(N.S.) 804, 136 Am. St. Rep.

the street, and if they further find that his failure caused the injury to the plaintiff, a recovery by the latter should be allowed, does not conform to a charge in the petition that the chauffeur omitted to sound his horn when he either saw the plaintiff, or by the exercise of ordinary care might have done so, and is prejudicial in that it permits a recovery for the mere failure to sound a horn or give a warning, although the chauffeur neither saw, nor by the exercise of due care might have seen, the person crossing the street. *Clark v. General Motor Car Co.* supra.

In an action to recover for injuries received by a pedestrian through being run into by an automobile, where the lamps on the machine were not lighted, on the issue as to whether or not it was after nightfall when the accident occurred, evidence that other automobiles met before the accident had their lights burning, and that lights were lighted in the village when the plaintiff arrived there shortly afterward, is admissible as bearing on the question whether it was light or dark at the time. *Schock v. Cooling*, 175 Mich. 313, 141 N. W. 675.

See also cases under heading, "Speed."

—duty to stop, look, and listen.

Supplementing notes in 38 L.R.A.(N.S.) 490, and 42 L.R.A.(N.S.) 1182.

Cases involving the conduct of persons about to cross a railroad track at grade are to be distinguished from those involving the conduct of a pedestrian about to cross a street, since a railroad track is a place of known danger, and a train cannot turn aside, which is not true as to vehicles proceeding along the highway. *Goldblatt v. Brocklebank*, 166 Ill. App. 315.

The rule applicable to steam railroad crossings is relaxed at the usual street crossings, and a pedestrian is not required, as matter of law, to look both ways and listen, but is required only to exercise such reasonable care as the case requires. *Jessen v. J. L. Kesner Co.* 159 App. Div. 893, 144 N. Y. Supp. 407.

And in *Bachelor v. Morgan*, — Ala. —, 51 L.R.A.(N.S.)

60 So. 815, where a recovery was sought by a pedestrian who was struck by an automobile when crossing the street, there was held to be nothing in the disputed facts which, among other things, involved the speed of the machine and the manner in which the plaintiff carried an umbrella, which took the case out of the operation of the general rule that negligence is not imputed, as a matter of law, to persons crossing a street at a regular crossing without stopping, looking, and listening for automobiles or other vehicles.

—keeping lookout.

Supplementing notes in 38 L.R.A.(N.S.) 490, and 42 L.R.A.(N.S.) 1182.

The duty of exercising ordinary care to avoid injury to pedestrians who are in plain sight for at least 400 feet rests upon the drivers of automobiles approaching from the rear. *Brown v. Thayer*, 212 Mass. 392, 99 N. E. 237.

A person has a right to alight from a moving wagon which is proceeding along the center of a street, and go to either side, exercising a proper degree of care for his own safety, and the driver of an automobile owes him the duty of exercising ordinary care to avoid striking him, and it would be erroneous to say that the driver owed no such duty until he actually discovered the pedestrian, since this would be treating the latter as an intruder and a trespasser in the street. *Bartley v. Marino*, — Tex. Civ. App. —, 158 S. W. 1156.

And in *Mosso v. E. H. Stanton Co.* 75 Wash. 220, — L.R.A.(N.S.) —, 134 Pac. 941, in an action to recover for an injury inflicted by an automobile on a pedestrian while crossing the street, it was held that the failure of the driver of an automobile to keep a vigilant lookout is negligence in any event, entailing a liability for injury proximately resulting therefrom.

A pedestrian who is struck by an automobile while diagonally crossing the street is not negligent as a matter of law in failing to be continuously looking, after he starts to cross the street, to see if auto-

Ann. Cas. 646, and note; Liebrecht v. Crandall, 110 Minn. 454, 126 N. W. 69; Laufer v. Bridgeport Traction Co. 68 Conn. 475, 37 L.R.A. 533, 37 Atl. 379; Cooke v. Baltimore Traction Co. 80 Md. 551, 31 Atl. 327, 12 Am. Neg. Cas. 11; Berry, Automobiles, §§ 128, 173.

The vigilance and care required vary, also, in respect of persons of different ages or physical conditions. The operator of an automobile must increase his exertions in order to avert danger to children whom he may see, or by the exercise of reasonable diligence and attention can or should see, on or near the highway. Their lack of capacity to apprehend and guard against danger makes such care and caution neces-

276; Buscher v. New York Transp. Co. 135 App. Div. 493, 94 N. Y. Supp. 798, 15 Am. Neg. Rep. 575; McDonald v. Metropolitan Street R. Co. 80 App. Div. 233, 9 N. Y. Supp. 577; Huddy, Automobiles, § 81. In the first case cited the essence of the holding is that one in charge of an automobile is required to exercise more than ordinary care to avoid injury to children whom he meets in a public thoroughfare. Gross v. Foster, 134 App. Div. 243, 115 N. Y. Supp. 889; Berry, Automobiles, § 155.

But it is said defendant complied with all the conditions thus prescribed, and that notwithstanding the cautious and prudent operation of the car, he could not avert the

mobiles are approaching behind him, especially where he is impeded by a sack of grain upon his shoulder. Mosso v. E. H. Stanton Co. supra.

The presumption arising from the testimony of the plaintiff in an action to recover for the death of a pedestrian who was struck by an automobile, that the latter was in the exercise of ordinary care, is overcome by testimony showing that the lights on the defendant's automobile were burning brightly, and that the deceased came out of a vacant lot and either ran or walked across the sidewalk to the street, and in front of the machine, in such a direction that its lights were plainly visible if he had been looking in the direction he was going, and that there was no crossing for pedestrians at the point where the accident occurred. Carlin v. Clark, 172 Ill. App. 240.

In an action to recover for injuries to a pedestrian who was struck by an automobile while attempting to cross the street, negligence on the part of the driver of the machine is established where he testified that there was rain on his wind shield so that he could not see through it, that he looked around it when about 30 feet distant from the point of contact and saw the pedestrian, and sounded his horn, and that the pedestrian stopped, and he did not again see him until his machine was practically upon him, there being evidence by the person struck that he did not stop and that he heard no horn or other warning given, and it appearing that the accident happened after dark, but at a point where the street was well lighted. Chase v. Seattle Taxicab & Transfer Co. — Wash. —, 139 Pac. 499.

And where the person in control of an automobile, by keeping a reasonably careful lookout commensurate with the dangerous character of the agency and the nature of the locality, could have discovered and have appreciated a traveler's perilous situation in time, by the exercise of reasonable care, to avoid injuring him, and injury results from the failure to keep such lookout and to exercise such care, then the last clear chance rule applies regardless of the 51 L.R.A. (N.S.)

traveler's prior negligence, if that negligence has terminated or culminated in a situation of peril from which the exercise of ordinary care on his part would not thereafter extricate him, and the last phase applies whenever injury results from new negligence, or from a continuance of the driver's negligence after that of the traveler has ceased. Mosso v. E. H. Stanton Co. supra.

In Mosso v. E. H. Stanton Co. supra, in an action to recover for an injury sustained by a pedestrian while diagonally crossing the street, the court instructed that even though the jury found that the plaintiff was guilty of contributory negligence in not seeing the defendant's automobile approaching, yet he could recover if the driver of the automobile actually saw him, or if, by keeping a reasonably vigilant lookout, could have seen his exposed condition, in time to have avoided the injury by the exercise of reasonable care, and negligently failed to exercise such reasonable care; and by another instruction it stated that if the plaintiff was walking diagonally across the street, and at the same time the defendant's automobile was being driven by his servant in the plaintiff's direction, and the driver saw, or by the exercise of reasonable care and caution could have seen, the plaintiff in season to have stopped the automobile, altered his course, or in some way avoided the accident, but carelessly and negligently permitted the automobile to run against the plaintiff and injure him, the defendant would be liable. The reference in the first instruction to the plaintiff's negligence as "contributory" was held inaccurate and confusing as connected with the rule of last clear chance, and it was held that both instructions should have been qualified so as to have embodied the thought that if it was found that the plaintiff's negligence had prior to the instant of the injury, terminated or culminated in placing him in such a situation of danger that the exercise of ordinary care on his part alone would not thereafter have avoided injury without the co-operation of care on the driver's part, and that if the latter, by keeping a reasonably vigilant lookout, could have appreciat-

collision. That he had control of the car, that it was moving at moderate speed (varying, according to the estimate by himself, from 8 to 10 miles an hour), and that he repeatedly gave warning of the car's approach to the crossing,—though in conflict with the evidence adduced by the plaintiff,—may be conceded, and yet, under the principles announced by the authorities cited, defendant may have been negligent to such a degree as to warrant the verdict and judgment of which he complains. He admits that, at a distance of 68 feet from the place of collision, he saw plaintiff and his companions near the crossing, and leisurely approaching it from the opposite direction. He saw them; they did not see him or his car. He then knew, and they did

not know, that he intended to drive the car onto Orchard street, or that he would necessarily pass them while on the crossing. Even had they heard the signals, if given, they may have thought he would continue his course up Piedmont street,—as in fact his course seemed to be, according to testimony not contradicted. He could also observe, and perhaps did observe, their inattention to the approach of the car, thus evidently demanding greater care on his part to avoid injuring them.

That defendant was driving the car at a greater rate of speed than he seemed willing to admit appears from a reasonable interpretation of his testimony. The accident occurred after 5 o'clock P. M. He was on his way to keep a 5 o'clock engagement,

ed the plaintiff's danger in time to have avoided the injury by the exercise of reasonable care, and he negligently failed in these regards, then the plaintiff's prior negligence would not preclude him from recovering.

But the instructions, in so far as they stated the rule as to the actual discovery of peril, were held to be correct.

—looked, but did not see.

Supplementing notes in 38 L.R.A.(N.S.) 491, and 42 L.R.A.(N.S.) 1182.

The failure of a pedestrian to use reasonable care is established in an action to recover for an injury resulting from being run into by an automobile, where his testimony shows that he was a man of mature years, familiar with the use and dangers of highways, and was possessed of good sight and all his faculties; that on a clear day he was crossing one of the main thoroughfares of the city, upon which there was no rush or confusion of travel at the time, with two companions, he being on the side next to an approaching automobile coming on its proper side of the street, with a clear view in that direction for half a mile; that he looked in that direction and saw nothing, although his companion on the side farthest away saw the car and avoided it; that under those conditions he walked into the path of the machine and was thrown and injured by it. *Tolmie v. Woodward Taxicab Co.* — Mich. —, 144 N. W. 855.

A verdict for the defendant should not be directed in an action to recover for an injury received through being struck by an automobile while crossing the highway, where the plaintiff testified that he looked up the street before attempting to cross, and there was nothing there except an approaching electric car, which was some distance away, and that when about reaching the gutter on the opposite side, he was struck by the automobile without having seen it at all, since this constitutes some evidence of the exercise of due care on the part of the plaintiff. *Gouin v. Ryder*, — K. I. —, 87 Atl. 185. 51 L.R.A.(N.S.)

And under such evidence the question whether the defendant was negligent is for the jury. *Ibid.*

And the question of the defendant's negligence and the contributory negligence of the plaintiff is for the jury in an action to recover for an injury sustained by a pedestrian who was struck by an automobile while attempting to cross a street, where there is evidence that the plaintiff, before leaving the curb, looked in the direction from which the automobile which struck her came, and saw nothing approaching on the street nearer than a block away, and that she had no intimation of the approach of the machine until the ringing of its bell the instant before she was struck, while the defendant's evidence tended to show that the machine was running slowly at the time of the accident, and that the bell was sounded several times before the collision occurred. *Birch v. Abercrombie*, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020.

And it cannot be said as a matter of law that the plaintiff in an action to recover for an injury received through being run into by an automobile was guilty of contributory negligence where he testified that just before stepping from the curb to board a street car, he looked along the street in the direction from which the car which struck him came, and did not see it, although three other witnesses testified that an instant later they saw the automobile at a point on the street near where it was intersected by another street, and the inference raised from the plaintiff's testimony that the automobile was not in sight when he looked is not overcome by the evidence given by the other witnesses, but on the contrary the coincidence that no witness saw the machine at a point on the street in which the accident occurred farther away than the intersecting street was a fact from which the jury would have the right to infer that the machine swung in from the intersecting street an instant before they looked. *Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892.

See also cases under heading, "Duty near street cars."

then overdue. There is in this admission an indication of an attempt to hasten to his destination.

But, in the interval of time between his first and second view of the positions of the boys, the continuity of view, as defendant contends, was obstructed by a wagon preceding him along Piedmont street, and to the left onto Orchard street, and hence over the crossing, and around which he was obliged to pass to the right and thence also to the left in order to turn onto Orchard street. Assuming, however, the presence of the wagon at the time and place designated sufficiently proved under the conflicting testimony, it was a light and open delivery wagon, not of sufficient height to obstruct defendant's view. If it did in fact obstruct

his view, it did not deprive him of the knowledge that the crossing was in constant use by pedestrians, and of the possibility of contact with those thereon, and especially with those whom he knew would probably be thereon when the car reached it. In *Gregory v. Slaughter*, 124 Ky. 345, 8 L.R.A.(N.S.) 1228, 124 Am. St. Rep. 402, 90 S. W. 247, the plaintiff was struck by an automobile as he was following a street car which was about to stop on the opposite side of a street to permit him to board it. The defendant was driving his automobile at from 8 to 10 miles an hour on one of the principal thoroughfares of the city. He was unable to see the crossing as he approached it because the street car was between him and the crossing, and, instead of stopping

—failure to look.

Supplementing notes in 38 L.R.A.(N.S.) 491, and 42 L.R.A.(N.S.) 1183.

Failing to look for an approaching automobile before stepping into a street to take passage on a street car at the usual stopping place, or failing to look for an automobile while on the way to such car, is not negligence as a matter of law under all circumstances. *Lewis v. Seattle Taxicab Co.* 72 Wash. 320, 130 Pac. 341.

In *Davis v. John Breuner Co.* — Cal. —, 140 Pac. 586, in an action by a pedestrian to recover for injuries received through being run into while attempting to cross a street, the evidence was held sufficient to support a finding that the plaintiff walked heedlessly into the street without taking the ordinary precautions for his safety, and was guilty of contributory negligence.

And in *Blackwell v. Renwick*, 21 Cal. App. 131, 131 Pac. 94, whether a pedestrian who was struck by an automobile shortly after having alighted from a street car, and while proceeding along the street, was guilty of negligence in not looking backward to observe whether vehicles were approaching from that direction, was held to be a question for the jury. The court said: "It cannot be said that, had he observed the approach of the automobile before he and his wife started to move in a southerly direction, they could not have reasonably and prudently started on their course along the very portion of the street traversed by them up to the time of the collision. It certainly was not their duty to turn about constantly and repeatedly to observe the approach of possible vehicles from the rear, where the drivers of such vehicles could plainly observe them in time to give warning, or turn out and avoid a collision. The defendant admitted that he could have stopped his machine within a distance of about 20 feet, but he relied upon his belief that he could pass the pedestrians at their right without running any risk of injuring them."

Although a pedestrian who was struck by an automobile while crossing the street was 51 L.R.A.(N.S.)

guilty of negligence in not looking before he left the curb, the question whether he was guilty of negligence when he was struck is for the jury, where the evidence tends to show that at that time he had reached the middle of the street, and that at that point he was practically outside the zone of danger from automobiles coming from the direction of the one which struck him, and it became his duty to commence looking for vehicles coming from the opposite direction, there being an ordinance in force requiring automobiles to keep to the right and as near the right-hand curb as possible, and it appearing that the automobile which struck him was running in or near the middle of the street. *Mosso v. E. H. Stanton Co.* 75 Wash. 220, — L.R.A.(N.S.) —, 134 Pac. 941.

Where the evidence as to the speed of a pedestrian and the automobile which struck him was mere estimates, and not established facts, it was held that it could not be said as a matter of law that the person struck was guilty of contributory negligence in not looking before starting to cross the street, although from the evidence relating to speed it would appear that the automobile would have been in a position where it could have been seen by the pedestrian had he looked, as he testified he did, before leaving the curb. *Ibid.*

See also cases under heading, "Duty near street cars."

—duty when approaching street crossing.

Supplementing notes in 38 L.R.A.(N.S.) 492, and 42 L.R.A.(N.S.) 1184.

The violation of a statute fixing the rate of speed at which automobiles shall proceed at the intersection of streets, or of a provision requiring a warning to be given by such machines upon approaching pedestrians, is an act of negligence *per se*, and a violation of either provision by the driver of an automobile which strikes a pedestrian at the intersection of streets will render the defendant liable, if such negligence is the cause of the accident and the plaintiff is

his automobile until the car passed, he merely changed his direction, so as to go around the passing car, when he was brought face to face with plaintiff at a distance too short to prevent a collision. The court, holding defendant guilty of gross negligence, said: "He states . . . [the car] was going at the rate of 8 to 10 miles an hour. He was on one of the principal thoroughfares of a great city, and approaching a crossing where it was at least reasonable to expect pedestrians to be. He could not see this crossing for the reason that the street car was between him and it, and thus obscured his vision. Instead of stopping his automobile until the car passed, and he could see whether there were pedestrians on the crossing beyond, he sim-

ply changed his direction so as to go around the passing car, and by his own act was brought face to face with the appellee at a distance too short to prevent the collision at the rate he was moving. This was, in itself, gross negligence to the verge of recklessness. In practical result there was no difference between what he did and if he had shut his eyes and driven his automobile over the street crossing without observing whether anyone was in his way or not."

But there is a further infirmity in the argument based on the obstruction. The wagon turned around the corner to the left near the curb. Defendant passed to the right of the wagon, and then turned to the left onto Orchard street, thus placing the posi-

tion from contributory negligence. *Grier v. Samuel*, — Del. —, 86 Atl. 209.

In *Holderman v. Witmer*, — Iowa, —, 147 N. W. 927, in an action to recover for the death of a pedestrian, caused by an automobile which struck him at a crossing, the evidence was held sufficient to go to the jury on the question of the defendant's negligence, there being testimony from which it might be found that the deceased was half way across the street at the time of the collision, and that the machine overtook him from the rear while he was in plain view of the driver, although it was not going fast at the time of the collision.

And the question of the deceased's contributory negligence was held to be for the jury, where the evidence tended to show that the deceased was half way across the street when struck, and presumably in more danger of vehicles coming from in front than the rear, and it appearing also that the automobile was running diagonally across the intersection of the streets. *Ibid*.

And the questions whether the plaintiff was justified in his conduct, and whether there was negligence on the part of the driver of the automobile, were held to be questions for the jury in *Griffin v. Taxi Service Co.* — Mass. —, 104 N. E. 838, where there was evidence from which it might have been found that at a place of great congestion of passage, plaintiff, seeing an approaching taxicab belonging to defendant company 20 to 25 feet away, under circumstances which led him to form a judgment that there was ample time to pass in front of it, started to cross from one side of a city street to the other, and was struck and injured.

So, the question whether a pedestrian who was struck by an automobile when attempting to cross at the intersection of streets was guilty of contributory negligence is for the jury, where he saw the machine which struck him when it was a block away, and he proceeded in a uniform course without hesitation, and failed to look a second time for the machine. *Chase v. Seattle Taxicab & Transfer Co.* — Wash. —, 139 Pac. 499.

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And the question of contributory negligence was also for the jury in an action brought to recover for an injury to a pedestrian through being run into by an automobile, where there was evidence that near the intersection of streets crossing at right angles, she stepped into the street and passed in front of standing horses; that she stopped and looked both ways, saw a wagon coming and waited for it to pass; that she again looked both ways and saw no vehicle approaching, and proceeded to cross and was struck by an automobile going at an excessive speed, the approach of which was not announced by any warning. *Kurtz v. Tourison*, 241 Pa. 425, 88 Atl. 656.

And in *Huggon v. Whipple & Co.* 214 Mass. 64, 100 N. E. 1087, in an action to recover for an injury received by a pedestrian struck by an automobile while attempting to cross a busy street at a crossing, where the evidence was conflicting, the questions whether, in deciding to cross the street and in the method of carrying out that decision, the plaintiff was in the exercise of due care, and whether the driver of the automobile was negligent, and generally whether the accident was attributable to the negligence of either or both, or of neither of the parties, were held to be for the jury.

In *Bachelder v. Morgan*, — Ala. —, 60 So. 815, an action to recover for an injury to a pedestrian struck by an automobile while crossing a street at a regular crossing, the evidence was held sufficient to warrant a finding that the plaintiff was not guilty of contributory negligence in attempting to cross the street on a dark rainy night, holding an umbrella over him in such a way as to obstruct his view, or in walking in front of the defendant's slowly moving automobile.

See also cases under headings, "Speed," "Lights, signals," and "Jumping or running in front of automobile."

—duty when pedestrian is crossing street diagonally.

Supplementing notes in 38 L.R.A.(N.S.) 492, and 42 L.R.A.(N.S.) 1184.

tion of the two streets and the curbs at which he first saw them to his right. The streets at their intersection are 30 feet between the curbs. His car should have been, and so far as appears was, on the right-hand side of Piedmont street. At least the provisions of § 8, chap. 32, Acts 1911, required him to pass to the right of the intersection of the center line of the two streets in turning to the left into Orchard street. If duly attentive to the operation of his car, he had sufficient space and opportunity to observe the crossing and the danger to be avoided. But at that time he was, according to one witness whose testimony he does not deny, engaged in looking at property owned by him located immediately in front of the intersection of Orchard street and Piedmont street, with which the former

tend.

But whether defendant was negligent was a question for the determination of the jury. It did determine the question against his contention, and we cannot, under the facts and circumstances thus far detailed, reach the conclusion that its findings are not correct, especially in view of the conflict of all the evidence introduced on the trial before the jury.

We reach the same conclusion, also, upon the question of contributory negligence of the plaintiff. An accident seldom occurs which, in some aspect or view, is not in part due to the negligence of both parties affected. In this instance there was in some degree negligence on plaintiff's part. The duty imposed by law on pedestrians

The questions of negligence and contributory negligence should be submitted to the jury in an action to recover for an injury received by a pedestrian through being run into by an automobile, where there is evidence that the plaintiff, when about 15 feet from the corner of a street, sought to cross diagonally; that, as he started to cross, he looked but saw no vehicle; that when he had reached the middle of the street he looked again, and saw an automobile rounding the corner and going in a straight line along the center of the street; that he continued his course for 2 or 3 feet, and when about that distance from the curb was struck by the car; that when he first saw the car it was running 5 or 6 miles an hour, but that its speed was increased until, at the time he was struck, it was running 8 or 10 miles an hour; that instead of keeping a course along the center of the street, the machine turned toward the curb and swung in toward the plaintiff, running him down; that the distance between the curb and the nearest wheel of the car while it was in the middle of the street was 3 or 4 feet. *Fitzgerald v. Russell*, 155 App. Div. 854, 140 N. Y. Supp. 519.

And in *Fox v. Great Atlantic & P. Tea Co.* 84 N. J. L. 726, 87 Atl. 339, the question whether the plaintiff, who was run into by an automobile while crossing the street diagonally between blocks, exercised reasonable care for her safety, was held upon the evidence to be for the jury, and motions to nonsuit and direct a verdict were held to have been properly denied.

In *Havermale v. Houck*, — Md. —, 89 Atl. 314, the evidence was held entirely insufficient to prove that the injury was directly caused by the negligence of the defendant, or to show that the plaintiff exercised proper care, the testimony in effect being that the defendant was driving his machine at a lawful rate of speed in the daytime when the plaintiff, an infant, came out of a house, ran along the street, and suddenly left the curb and started to cross diagonally in front of the automobile with his back to 51 L.R.A. (N.S.)

the machine, and when about half way across was struck.

And in *Mills v. Powers*, 216 Mass. 36, 102 N. E. 912, in an action to recover for the death of a boy eleven years old, who was struck by an automobile, it was held that it could not be found that he was in the exercise of due care, where it appeared that he was riding in a wagon with his back toward the driver, and jumped off, turning his body as he did so, thus bringing his face toward the driver, and jumping backward and starting diagonally across the street, when he was almost immediately struck by the defendant's automobile coming from behind, which, according to some evidence in the case, had just turned out to pass the vehicle ahead of it.

The jury were held warranted in finding that the plaintiff, who was struck by an automobile while crossing the street diagonally in a southwesterly direction, was not guilty of contributory negligence where it appeared that the automobile approached noiselessly at an excessive speed, and that the plaintiff was looking at a vehicle coming from the north at the time he was struck by the automobile, which was proceeding toward the north, there also being testimony that he looked both ways as he was about to cross the street, and did not see the automobile which struck him. *Goldblatt v. Brocklebank*, 166 Ill. App. 315.

See also cases under headings, "Speed." "Keeping lookout," "Jumping or running in front of automobile," and "Duty to slow up or stop."

—duty to slow up or stop.

Supplementing notes in 38 L.R.A. (N.S.) 493, and 42 L.R.A. (N.S.) 1184.

The exercise of the "highest degree of care of a very careful person," provided for by § 8523, Mo. Rev. Stat. 1909, requires the driver of an automobile approaching pedestrians proceeding diagonally down the street, to stop his car where he could have done so, if, by proceeding and turning first to the right and then the left, there was

required him to exercise some care and caution for his own safety. But was his negligence, if any appears, such as to preclude recovery? We answer that question, also, in the negative, as did the jury. In its view, the negligence attributable to defendant was the proximate cause of plaintiff's injury.

As stated, the care to be exercised by pedestrians using the highways varies with the circumstances of each particular case. The mere fact of negligence will not excuse the infliction of an injury, where by due care and caution the injury may be avoided by the one inflicting it. One may negligently place himself in a situation where danger may reasonably seem imminent; yet, if injury is avoidable by another through the exercise of reasonable care, the

danger of striking the pedestrians. *Porter v. Hetherington*, 172 Mo. App. 502, 158 S. W. 469.

The defendant's testimony shows that he "recklessly, carelessly, and negligently operated and ran his automobile so as to strike, knock down, and drag the plaintiff," where the accident occurred in the daytime, and the defendant testified that he had such perfect control that he could stop his car within an inch; that he knew the plaintiff was an old man; that when about 15 feet distant he called to him to get somewhere so he could pass; that they began zigzagging back and forth, and that he did not stop his car, but kept on and collided with the plaintiff. *Dougherty v. Davis*, 51 Pa. Super. Ct. 229.

In an action to recover for an injury received by a pedestrian who was run into by an automobile, the question of the defendant's negligence is for the jury, where the evidence tends to show that he was driving his car at an excessive rate of speed, and gave no warning of his approach; that he saw the plaintiff diagonally crossing the highway between two conveyances with his back partially toward the automobile, and in its path apparently hesitating as if confused, but that he continued to drive his car at a rapid rate, making a curve to avoid striking the plaintiff, when, according to his own testimony, he could have stopped instantly. *Schock v. Cooling*, 175 Mich. 313, 141 N. W. 675.

Where the driver of an automobile which struck a pedestrian admits that he actually saw the latter in plenty of time to stop before striking, the omission in an instruction as to the driver's duty to stop the car if, "by the exercise of due care," he could have seen the pedestrian, is not erroneous. *Porter v. Hetherington*, 172 Mo. App. 502, 158 S. W. 469.

—duty near street cars.

Supplementing notes in 38 L.R.A.(N.S.) 493, and 42 L.R.A.(N.S.) 1184.

It is incumbent upon a pedestrian while 51 L.R.A.(N.S.)

carelessness of the person affected does not excuse the infliction of an injury. *Norfolk & W. R. Co. v. Spencer*, 104 Va. 657, 52 S. E. 310; *Davids, Motor Vehicles*, § 118; *Green v. Los Angeles Terminal R. Co.* 143 Cal. 31, 101 Am. St. Rep. 68, 76 Pac. 719; *Illinois C. R. Co. v. Hutchinson*, 47 Ill. 408; *Riedel v. Wheeling Traction Co.* 69 W. Va. 18, 71 S. E. 174; *Chesapeake & O. R. Co. v. Corbin*, 110 Va. 700, 67 S. E. 179.

A person in a public highway may rely upon the exercise of reasonable care on the part of drivers of vehicles to avoid injury. A failure to anticipate the omission of such care does not render him negligent. *Cæsar v. Fifth Ave. Coach Co.* 45 Misc. 331, 90 N. Y. Supp. 359; *Hayward v. North Jersey Street R. Co.* 74 N. J. L. 678, 8 L.R.A.(N.S.) 1062, 65 Atl. 737; *Kathmeyer v.*

standing in the street waiting for a car, to exercise due care for his safety. *Posener v. Long*, — Tex. Civ. App. —, 156 S. W. 591.

But it is not negligence *per se* for a pedestrian to cross in front of a moving street car without first ascertaining whether an automobile is moving in the same direction with and on the other side of the street car at a dangerous and unlawful rate of speed, since he has a right to assume that if such vehicle is there, it is being run at a lawful rate of speed. *Citizens' Motor Car Co. v. Hamilton*, 32 Ohio C. C. 407, affirmed in 83 Ohio St. 450, 94 N. E. 1103.

And one alighting from a street car has a right to assume that he occupies a position of safety within 4 feet of the steps of a street car, where an ordinance prohibits automobiles running closer, and in the absence of any warning or reason to believe that the driver of an automobile would violate the ordinance, he is not guilty of contributory negligence in failing to look up and down the street when he alights from the car, to ascertain if drivers are observing such ordinance. *Medlin v. Spazier*, 23 Cal. App. 242, 137 Pac. 1078.

And where a pedestrian had safely passed in front of an automobile in going from the sidewalk to a place in the street to board a street car 18 feet from the curbstone, and was injured when standing beside the car by reason of the driver of an automobile turning his machine away from the curbstone toward the pedestrian, to avoid hitting another person who was stepping into the street from the sidewalk, the pedestrian's negligence in going in front of the machine did not proximately contribute to her injury, and does not prevent a recovery. *Adams v. Averill*, — Vt. —, 88 Atl. 738.

Where an automobile driver sees a street car and sees that it has stopped at a regular stopping place, he is bound to assume that passengers are likely to be discharged, and should have his machine under proper control to avoid accidents. *Michalsky v. Putney*, 51 Pa. Super. Ct. 163.

But the driver of an automobile is not

Neg. Rep. 688; Hennessey v. Taylor, 189 Mass. 583, 3 L.R.A.(N.S.) 345, 76 N. E. 224, 4 Ann. Cas. 396, 19 Am. Neg. Rep. 285; Spina v. New York Transp. Co. 96 N. Y. Supp. 270; Buscher v. New York Transp. Co. 106 App. Div. 493, 94 N. Y. Supp. 798.

What may be deemed negligence by adults may not be chargeable as negligence by infants. In determining whether or not a plaintiff is guilty of contributory negligence, the conduct of children should not be judged by the same rules which govern that of adults. Ordinary care for them is that degree of care and prudence which children of the same age are accustomed to exercise under like circumstances. Huddy,

§ 161; Burvant v. Wolfe, 126 La. 767, 29 L.R.A.(N.S.) 677, 52 So. 1025; Lynch v. Shearer, 83 Conn. 73, 75 Atl. 88; Verdon v. Crescent Automobile Co. 80 N. J. L. 193, 76 Atl. 346; Marius v. Motor Delivery Co. 146 App. Div. 608, 131 N. Y. Supp. 357. "Children, wherever they go, must be expected to act upon childish instincts and impulses, and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take precaution accordingly." Fieker v. Cleveland, C. C. & St. L. R. Co. 7 Ohio N. P. 600; Harriman v. Pittsburgh, C. & St. L. R. Co. 45 Ohio St. 11, 27, 4 Am. St. Rep. 507, 12 N. E. 451. A pedestrian is not bound, as a matter of law, when using a

called upon to drive his car so as to protect passengers on street cars who see fit to jump from the cars while they are in motion, unless and until he has warning that a passenger intends to jump from a car while in motion, and the defendant in an action to recover for an injury received by one who was struck by an automobile after he had jumped from a street car while it was in motion has a right to have the jury so instructed, although they were instructed generally that both the pedestrian and the driver of an automobile are required to exercise ordinary care in their conduct while upon the street, in order to avoid doing damage or injury to each other. Brown v. Brashear, 22 Cal. App. 135, 133 Pac. 505.

The question of an automobile driver's negligence is for the jury in an action by one who was struck by the machine while standing in the street where pedestrians usually stand preparatory to boarding cars, where there is evidence that the pedestrian could have been plainly seen, and that there was plenty of room to pass him, and the driver testified that the accident occurred through the plaintiff's stepping backward in front of the machine, while the plaintiff testified that he did not move from the time he took his position until he was struck. Ouelette v. Superior Motor Mach. Works, — Wis. —, — L.R.A.(N.S.) —, 147 N. W. 1014.

And where the driver of an automobile when some distance away saw an electric car coming, and knew that the place at which he collided with the plaintiff was where cars stopped, and there is evidence that when he struck the plaintiff, who was about to take a car, he was driving from 8 to 12 miles an hour along the principal business street of a city, the question whether he exercised due care is for the jury. Adams v. Averill, supra.

So, the question whether the driver of an automobile which struck the plaintiff while he was attempting to board a street car at a regular stopping place was negligent is for the jury, where there is evidence that the defendant was driving his machine at

the rate of 25 miles an hour upon the wet pavement of a city street past a stopping street car, and within 20 feet of an intersecting street, where pedestrians were likely to be encountered in getting on or off the car. Hillebrant v. Manz, 71 Wash. 250, 128 Pac. 892.

And the question of the defendant's negligence and the plaintiff's contributory negligence was held to be for the jury, where the latter's testimony was to the effect that before alighting from a street car which had stopped at a crossing and then started, he looked back over his shoulder in the direction from which the automobile which struck him came, and that he saw no automobile, but could have seen one had it been within a distance of 100 feet, and that he heard no signal given of the approach of the machine, while the defendant's evidence tended to show that when the car stopped at the crossing, he stopped his machine in order to allow passengers to reach the sidewalk in safety, and that after the car started he proceeded to travel after it and when he was nearly across the intersection of the streets, the plaintiff swung himself suddenly from the moving car and ran directly in front of the automobile. Brown v. Brashear, supra.

So, in Winner v. Linton, 120 Md. 276, 8 Atl. 674, the question of negligence and contributory negligence in an action to recover for an injury to a child caused by being run into by an automobile just after the child had alighted from a street car was held, upon the evidence, to be a question for the jury, it appearing, among other things, that although the driver of the car had not time to stop, he could have turned and avoided the accident.

And the question whether one struck by an automobile while standing at the usual place in the street where pedestrians board street cars was guilty of contributory negligence is for the jury, where he paid no attention to the automobile horn, and testified that he did not hear it, and was not keeping a lookout for vehicles approaching from the rear, but stated that he had been standing there but a few seconds, and that

public highway, to be continuously looking or listening to ascertain if automobiles or other vehicles are approaching, under penalty that, upon his failure to do so, if he is injured, his own negligence must be conclusively presumed. *Hennessey v. Taylor*, 189 Mass. 583, 3 L.R.A. (N.S.) 345, 76 N. E. 224, 4 Ann. Cas. 396, 19 Am. Neg. Rep. 285; *Gerhard v. Ford Motor Co.* 155 Mich. 618, 20 L.R.A. (N.S.) 232, 119 N. W. 904. Such negligence, to avail as a defense, must be proved by defendant, unless it sufficiently appears from plaintiff's testimony. *Millsaps v. Brogdon*, 97 Ark. 409, 32 L.R.A. (N.S.) 1177, 134 S. W. 632.

This action was twice tried, with the same result except as to amount; the first finding being more favorable to the defend-

ant. Complaint is now made, however, that the case as submitted on the second trial, perhaps on both, was on the theory that plaintiff's injury permanently disabled him, when in fact, as defendant contends, its effect was only temporary. But, on whatever theory submitted, no substantial reason appears from the record to justify interference with the result of the trial for the reasons assigned. The plaintiff, according to the contention urged in his behalf, and to some degree sustained by the proof, was violently knocked down and run over by the car; his body and limbs were bruised; thereafter he was unconscious for several hours; his head was injured, and his memory impaired. With this proof before the jury, we cannot say the amount

one car which he desired to take had passed him, and he was intent on signaling another at the time of the injury. *Ouelette v. Superior Motor Mach. Works*, supra.

A pedestrian who intends taking a street car is not guilty of contributory negligence as a matter of law, where, before leaving the sidewalk, he looked in the direction from which the automobile which struck him was coming, but failed to see it, and did not look again in that direction after leaving the sidewalk before he was struck by the machine, it appearing that he did not step immediately in front of the automobile, nor in crossing the street obstruct its path, and was as much in view of the driver of the machine as it was in his view, and there was room to pass him on either side. *Lewis v. Seattle Taxicab Co.* 72 Wash. 320, 130 Pac. 341.

And it cannot be said as a matter of law that a pedestrian who went into the street for the purpose of taking a car, and stood looking in the direction from which the car would approach, was guilty of contributory negligence in not discovering the approach from the opposite direction of an automobile which struck him, and which was being driven upon the wrong side of the street, contrary to the ordinance of the city and the established and recognized rule of the road. *Posener v. Long*, — Tex. Civ. App. —, 156 S. W. 591.

Whether, after looking once and seeing a clear street, a pedestrian acted as a reasonably prudent man in proceeding diagonally from a point within 12 feet of the intersection of the street upon which he is walking, with another street, toward a street car which he is intent upon boarding without again turning and looking backward, in the absence of any sound of horn or other warning, is a question for the jury. *Hillebrant v. Manz*, supra.

In an action to recover for injuries resulting from an automobile colliding with one who had just alighted from a street car at the intersection of streets, where it appeared that there were but 2 feet between the curb and the machine, and not more than 18 inches between it and the side of

the street car, an instruction is properly refused that if the plaintiff, before starting to cross the street from the street car to the curb, did not look to see whether a vehicle was approaching, or if he did look and saw the automobile and nevertheless tried to cross in front of it, he was guilty of contributory negligence, is properly refused, since it ignores the situation of apparent peril which the plaintiff might have found himself in, under which a prudent man might have thought the safest thing to do was to attempt to reach the curb. *Taxicab Co. v. Parks*, 121 C. C. A. 267, 202 Fed. 909.

See also cases under headings, "Speed," "Looked, but did not see," and "Failure to look."

—duty in emergency.

Supplementing notes in 38 L.R.A. (N.S.) 494, and 42 L.R.A. (N.S.) 1186.

Where the plaintiff is without fault in attempting to cross the street, and he is placed in a perilous position by the defendant's operation of his automobile, he will not be held to the same degree of deliberation and coolness as if there were no negligence on the part of the operator of the machine. *Dougherty v. Davis*, 51 Pa. Super. Ct. 229.

And where a pedestrian passes safely in front of a street car, and is confronted by an automobile running at an unlawful rate of speed, and is in a situation of unusual peril, he is not chargeable with contributory negligence in attempting to pass in front of the automobile, if he has reasonable grounds for believing that this course would be the safest, and he is not chargeable with the consequences of error of judgment resulting from the excitement and confusion of the moment, since he is in such case required to exercise only ordinary care under the circumstances. *Citizens' Motor Car Co. v. Hamilton*, 32 Ohio C. C. 407, affirmed in 83 Ohio St. 450, 84 N. E. 1103.

The question whether a pedestrian who was struck by an automobile was guilty of contributory negligence should be left to the

returned to us reasonable. On the contrary, it seems to us reasonable and just, even though the injury thus inflicted may not in fact result in permanent physical disability.

Nor do we find the instructions amenable to the criticism urged by counsel. At least, they do not so far incorrectly propound the law applicable to the facts appearing in the record as to warrant reversal. Of these, 2 and 3 are criticized because given on the theory of permanent injury to plaintiff. If so, there is in the record evidence tending to some extent to sustain that theory. Plaintiff's mother

jury, where there is evidence that the deceased, in a moment of imminent peril, resulting from the driver negligently charging down upon her at great speed while she was crossing a street, stepped back to permit the machine to pass, and then stepped forward again immediately in front of it and that this was not in fact the best thing she could have done if there had been time for deliberation, but that it was nevertheless the result of her uncertainty of what was best to do to escape the imminent danger. *Wescoat v. Decker*, — N. J. —, 90 Atl. 290.

So, the question of the plaintiff's contributory negligence is for the jury in an action to recover for an injury to a pedestrian struck by an automobile while walking in the street, where it appears that the automobile gave no warning of its approach, and there is testimony that the machine came up behind the person injured so suddenly that he was startled and acted with some precipitation, pushing his wife as he supposed out of the way of the injury and attempting to save himself. *Blackwell v. Renwick*, 21 Cal. App. 131, 131 Pac. 94.

In *Carpenter v. Campbell Automobile Co.* — Iowa, —, 140 N. W. 225, where the plaintiff, while on the sidewalk, was struck by the defendant's automobile, which according to some evidence was suddenly turned to the wrong side of the street to avoid a motorcycle, and mounted the curb and traveled along the sidewalk without the brakes being applied, it was held proper to refuse to instruct the jury to return a verdict for the defendant for the reason that the evidence showed that the driving of the machine on the sidewalk was the result of fright and excitement, since it was for the jury to say from the evidence whether the injury could have been avoided notwithstanding such emergency by the exercise of reasonable care, and whether the emergency was due to the negligence of the defendant.

And an instruction was held not prejudicial which in effect stated that if the person operating the car has shown that such an emergency existed as to justify him to turn to the left, nevertheless he was required to have it under such control after so turning as to be able to avoid injury to others. *Ibid.*

And in this case an instruction was held 51 L.R.A.(N.S.)

that he is now forgetful; that "he complained of his head, and did all last winter; he was kept out of school a great deal." "He has a headache, and dizziness in his head." "He vomited blood nearly all night," the night of the accident, and "from 10 o'clock until 4 the next morning, and then it ran out of his mouth on the pillow." "I could not raise him up to give him anything to eat; if I raised him up he would start to vomit, and I had to keep him" in bed for a period of nine days after the accident. Instruction No. 6 fairly presents

properly refused that if the act complained of by the plaintiff was the result of excitement and confusion produced by sudden and impending peril from an approaching motorcycle, and but for such excitement the automobile would not have been driven on the sidewalk, a verdict for the defendant should be returned, since it ignored the thought that if the emergency was produced by his own negligence, it would not relieve him from liability. *Ibid.*

—skidding.

Supplementing note in 38 L.R.A.(N.S.) 495.

The question of negligence in an action to recover for the death of a person struck in the back by an automobile which skidded against the curbstone and caused the tires to burst and the machine to run upon the sidewalk is for the jury, where there was evidence that the street was wide, straight, level, and dry; that no other vehicles were in the highway, and that it was a clear morning; that the machine was going from 18 to 25 miles an hour, and that after going upon the sidewalk the car ran a distance of 30 or 40 feet with no diminution of speed before it struck the deceased. *Roach v. Hinchcliff*, 214 Mass. 267, 101 N. E. 383.

And in an action to recover for the death of a boy who was run into by an automobile while standing on a sidewalk, the question whether the driver of the machine was negligent is for the jury, where there is evidence that when turning to get out of a wet car track the defendant increased, instead of diminished, the speed of his car, which skidded and ran upon the sidewalk. *Williams v. Holbrook*, 216 Mass. 239, 103 N. E. 633.

Where the question of the defendant's negligence in an action to recover for an injury to a pedestrian by being run into by an automobile depends upon the view the jury take of his act in operating the car within, instead of outside, the groove of a wet car track, and then attempting to turn from the track by increasing, rather than lessening, his speed, and the evidence for the plaintiff shows that even with brakes set and the steering gear under full control the car would continue to move irregularly solely because of its position, the mere skidding is not an occurrence of such un-

the law applicable to the facts appearing in the record.

Instructions Nos. 1 and 3, proposed by defendant, were properly refused; the first, because it was misleading, and would have told the jury that it could not find for the plaintiff, unless it believed from a preponderance of the evidence "that the defendant was negligent in the very manner set out in the declaration." No such rigid, inflexible rule obtains. It is sufficient if plaintiff substantially proves the negligence averred. The court, therefore, properly modified the instruction accordingly. No. 3 ~~as~~ proposed

was properly refused, because not in accord with the principles herein announced. As modified and given, it presented defendant's contentions in a light more favorable than was allowable under our view of the law applicable to the facts of the case.

Defendant's objection to the competency of the plaintiff and the two boys present when the accident occurred to testify is not tenable. Their statements show sufficient capacity to understand and comprehend the nature of an oath.

Finding no reversible error, we affirm the judgment.

common or unusual character that, unexplained, it furnishes evidence of the defendant's negligence. *Ibid.*

—law of the road as affecting pedestrians.

Supplementing notes in 38 L.R.A. (N.S.) 496, and 42 L.R.A. (N.S.) 1186.

Generally, as to rules of road, see Index to L.R.A. notes, "Negligence," §§ 25, 40.

If the operator of an automobile drives his machine on the left or wrong side of the street, contrary to the statute, and an injury results to a pedestrian therefrom without fault on the part of the latter, he is entitled to recover. *Grier v. Samuel*, — Del. —, 86 Atl. 209.

In *Coughlin v. Weeks*, 75 Wash. 568, 135 Pac. 649, in an action by a husband and wife to recover for injuries sustained by being run into by an automobile, it was held that the question of negligence and also of contributory negligence was for the jury, there being evidence for the plaintiffs that they looked in both directions before attempting to cross, and saw an automobile at some distance, and that, as the machine approached them while they were crossing the street, it turned on the wrong side and struck them, while there was evidence for the defendant from which it might be found that the pedestrians were guilty of contributory negligence.

See also cases under headings, "Duty near street cars," and "Duty where pedestrian walks along street or crosses between blocks."

—jumping or running in front of automobile.

Supplementing note in 42 L.R.A. (N.S.) 1186.

In *Curley v. Baldwin*, — R. I. —, 90 Atl. 1, it was held that a verdict for the defendant was properly directed where his evidence showed that he was driving a reasonable distance behind an electric car at about 7 miles an hour, when the plaintiff, a boy eight years old, ran into the street from between two wagons standing by the curbing, and collided with the automobile, although the plaintiff testified that he looked in both directions before stepping into the street and saw only a street car approaching.

51 L.R.A. (N.S.)

And a nonsuit is properly granted in an action by a child for an injury resulting from being struck by an automobile on a public street, where there is an entire absence of testimony that the defendant was traveling at an excessive speed, or that he did not have his machine under suitable control, or failed to exercise due care, or any testimony to indicate that the child left the sidewalk until just before he was hit, or that there was anything in the situation which called for special precaution on the defendant's part to avoid the accident which was not taken. *Hyde v. Hubinger*, — Conn. —, 87 Atl. 790.

And the driver of an automobile is not liable for an injury to a four-year-old child which broke away from the hand of its custodian and ran into the street and collided at a crossing with the automobile which was proceeding on an intersecting street, it appearing that the horn on the machine was sounded and the brake applied and the speed diminished, but owing to the sudden appearance of the child the driver had no time to stop the car. *Paul v. Clark*, 161 App. Div. 450, 145 N. Y. Supp. 985.

See also cases under headings, "Duty when pedestrian is crossing street diagonally," and "Duty near street cars."

—duty where pedestrian walks along street or crosses between blocks.

The fact that there was a sidewalk along the street at the point where a pedestrian who was walking in the street was struck by an automobile, and that the walk was customarily used by pedestrians, would not alone warrant the deduction that, as a matter of law, the person struck was guilty of contributory negligence in using the street instead of such sidewalk. *Blackwell v. Renwick*, 21 Cal. App. 131, 131 Pac. 94.

In an action to recover for an injury to a pedestrian struck by an automobile while he was walking in the street, the questions whether a sidewalk existed at the place, or whether its condition, if one did exist, was such as to warrant pedestrians in the exercise of ordinary care in using the street instead of the walk, were held to be questions for the jury where the evidence as to these facts was conflicting. *Ibid.*

A pedestrian has a right to cross a street

is bound to use only reasonable care for his or her safety, and by reasonable care is meant such care as an ordinarily prudent person would exercise under the particular circumstances. *Fox v. Great Atlantic & P. Tea Co.* 84 N. J. L. 728, 87 Atl. 339.

In crossing the street in the middle of a block a pedestrian has an equal right in the street with an automobile, and is under no legal duty to anticipate any action on the part of the driver of an approaching machine that will imperil her safety, and she is under no duty to look behind her or to anticipate, without having received any warning, that the driver intended to pass her on the left side of street. *Ibid.*

In *Willis v. Harby*, 159 App. Div. 94, 144 N. Y. Supp. 154, in an action brought by one who was struck by an automobile while he was walking in the highway at a point between crossings, the testimony as to the rate of speed at which the automobile was traveling was conflicting, but it appeared that the operator of the machine did all possible upon discovering the plaintiff, to avoid striking him, and brought the machine to a standstill not more than 100 feet from the place of collision, and it was held that the evidence was insufficient to establish negligence on the part of the defendant.

A pedestrian is guilty of contributory negligence where he attempts to cross one of the principal thoroughfares of a village on a rainy night at a point between crossings, and upon being unable to reach the further side of the street because of water, proceeds to walk up the roadway with an umbrella over his head, apparently without taking any precaution for his safety. *Ibid.*

See also cases under heading, "Speed."

—duty toward person under disability.

The driver of an automobile is bound to anticipate that he may meet infirm persons on a public street, and to have his car under such control as will enable him to avoid injury, by slowing up or if necessary stopping. *Dougherty v. Davis*, 51 Pa. Super. Ct. 229.

He is bound to consider the lack of capacity of those in his way to care for their own safety, when such incapacity is known or should have been known to him, and the law exacts greater care toward those who are unable to care for themselves, as children, blind persons, and drunken persons, when such incapacity is known or should have been known to the driver. *Brown v. Wilmington*, — Del. —, 90 Atl. 44.

And there is a *dictum* in *Tolmie v. Woodward Taxicab Co.* — Mich. —, 144 N. W. 855, that the standard of duty of the drivers of automobiles in cases of children, aged persons, and those under other disabilities, when discovered, requires a higher degree of care according to the circumstances than is required as to other persons.

If a pedestrian who was struck by an automobile was proceeding in a way that would have indicated to a reasonably prudent

approach of the defendant's automobile, and the driver saw him, or in the exercise of reasonable care ought to have seen him, and observed his state of mind and discovered his peril in time to avoid striking him, and failed in this duty, he was guilty of negligence which was the proximate cause of the injury; negligence of the pedestrian if any was only the remote cause. *Chase v. Seattle Taxicab & Transfer Co.* — Wash. —, 139 Pac. 499.

But if at the time a pedestrian was struck by an automobile he was intoxicated, and the driver of the machine did not know it, or by the exercise of reasonable care would not have known it, or did not know that he was so intoxicated as to be unable to take ordinary care of himself, and the accident occurred not by the machine striking him, but by his falling against it, the case is one of pure accident or contributory negligence, and no recovery can be had. *Brown v. Wilmington*, *supra*.

A finding that the driver of an automobile, after seeing a boy thirteen years old in the street, failed to exercise ordinary care to avoid injuring him, and that such failure was the proximate cause of the boy's injury by the machine, does not establish a case of gross negligence on the part of the driver of the machine. *Quinn v. Ross Motor Car Co.* — Wis. —, 147 N. W. 1000.

An instruction in an action brought to recover for an injury to a boy who was run into by an automobile in the street, which in directing what is to be considered in determining the question of what is due care on the part of a child, leaves out the element of experience and capacity to appreciate danger, is erroneous. *Shaw v. Cornington*, 171 Ill. App. 232.

Ordinary care in the case of a child is only such care as the great mass of children of like age, intelligence, and experience ordinarily exercise under the same or similar circumstances, and it is error to apply to a child who was run into by an automobile when proceeding diagonally across a street, after having alighted from a sleigh, the tests of ordinary care which are applied to adults. *Quinn v. Ross Motor Car Co.* *supra*.

In an action to recover for the death of a boy killed by an automobile while crossing a street, it is erroneous to charge that the burden is upon the plaintiff to show that the deceased was incapable of taking care of himself in the street, in order to warrant a finding that he was not guilty of contributory negligence, since the plaintiff is thereby required to establish that the deceased, without reference to his age, intelligence, or the circumstances in which he was placed, was actually incapable of taking care of himself in the street. *Ackerman v. Stacey*, 157 App. Div. 835, 143 N. Y. Supp. 227.

—miscellaneous.

Supplementing notes in 38 L.R.A. (N.S.) 497, and 42 L.R.A. (N.S.) 1187.

It is not contributory negligence as matter of law for a person to step off the curb and try to cross the street at a time when an automobile is approaching on such person's side of the street about 100 feet away. *Schneider v. Locomobile Co.* 83 Misc. 3, 144 N. Y. Supp. 311.

It is improper in an action by a pedestrian to recover for injuries sustained by being run into by an automobile, to limit the necessity for the exercise of ordinary care on the part of the driver of the machine to the precise time when the injury occurred. *Goldblatt v. Brocklebank*, 168 Ill. App. 315.

Where a pedestrian falls in front of an automobile from mere fright or excitement, and is injured by the fall, and is not struck or injured by the machine, no recovery can be had against the driver for such injury. *Bachelder v. Morgan*, — Ala. —, 60 So. 815.

In *Schock v. Cooling*, 175 Mich. 313, 141 N. W. 675, in an action by a pedestrian to recover for an injury received through a collision with an automobile, the question of the plaintiff's contributory negligence was held to be for the jury, although it was claimed that, as a physical fact, he could not have been hit by the rear wheel of the car as claimed, unless he stepped back or turned against the car after the front wheel had passed, there being other evidence from which it might be found that the quick turning of the car to make a curve in order to avoid the pedestrian might have made it possible for the car to have inflicted the injury shown.

In an action to recover for an injury to a pedestrian by an automobile, negligence is not presumed, but must be proved, and the burden of making such proof is upon the plaintiff. *Grier v. Samuel*, — Del. —, 86 Atl. 209; *Tolmie v. Woodward Co.* supra; *Havermale v. Houck*, — Md. —, 89 Atl. 314.

So, it is incumbent upon the plaintiff in an action to recover for the death of a pedestrian claimed to have been hit by an automobile, in the absence of direct evidence, to show the existence of such circumstances as would justify the inference that the injury which caused the death was due to the wrongful act of the defendant, and exclude the idea that it was due to a cause with which the defendant was unconnected, and where, from the facts and circumstances testified to, it is equally as consistent to find that death resulted from foul play as to find that it was the result of being struck by an automobile, a recovery is not justified. *Hicks v. Romaine*, — Va. —, 82 S. E. 71.

In an action to recover for the death of a pedestrian who was struck by an automobile, where the court charged that if the jury believed that the driver of the machine was negligent to some extent, and also believed the deceased was negligent to an equal or a greater extent, a recovery could not be had, the failure of the court to charge that if the deceased and the driver

were equally negligent, no recovery could be had, is not a cause for a new trial. *O'Dowd v. Newnham*, 13 Ga. App. 220, 80 S. E. 36.

In an action to recover for an injury to a pedestrian who was run into by an automobile while crossing the street, it was held that slight negligence on the part of the plaintiff could not be said to contribute or enter as one of the concurrent proximate causes of injury resulting from palpable and continuous negligence on the part of the defendant, since to hold slight negligence as contributory would be to impose the rule of extraordinary care. *Mosso v. E. H. Stanton Co.* 75 Wash. 220, — L.R.A. (N.S.) —, 134 Pac. 841.

The rule of last clear chance is grounded in the doctrine of proximate cause, and like any other phase of proximate cause may be submitted to the jury, and it is not error to submit this question to the jury in an action to recover for an injury sustained by a pedestrian who was struck by an automobile, where the defendant's answer alleged that the injury was due to the plaintiff's own negligence, which was denied by the reply, and it was alleged in the complaint that the defendant was operating his machine recklessly and without regard to the safety of pedestrians on the highway. *Ibid.* J. T. W.

WISCONSIN SUPREME COURT.

OSWALD MEHLOS, Appt.,

v.

CITY OF MILWAUKEE et al., Respts.

(156 Wis. 591, 146 N. W. 882.)

Constitutional law — licensing dance halls — validity.

1. Requiring a license to conduct a public dance hall does not interfere with any constitutional right of liberty or property.

Municipal corporation — power to license dance hall.

2. Power to require a license to conduct a public dance hall is conferred upon a municipal corporation by charter authority to pass ordinances for government and good order of the city and the suppression of vice and prevention of crime.

Note. — Requiring license for dance hall or place where dancing is taught.

This note is supplementary to an earlier note to *People ex rel. Duryea v. Wilber*, 27 L.R.A. (N.S.) 357, on this subject.

It has been held, that an act giving cities the power to license and regulate shows, circuses, and athletic exhibitions, does not authorize an ordinance forbidding any person or persons to hold in any place where liquors are sold any ball or dance, either with or without music, without first

dance hall — reasonableness.

3. Conditioning the granting of a license for a public dance hall upon satisfactory proof of the place being fit for such gatherings as regards health, convenience, and safety, and making it subject to cancellation for violation on the premises of good order or good morals, and to the duty of keeping it in fit condition, of closing not later than 3 o'clock A. M., and not allowing anyone under eighteen years of age to attend and participate in the dancing after 10 o'clock P. M. unless accompanied by a parent or guardian, is not unreasonable.

Constitutional law — equal protection — licensing public dance halls.

4. An ordinance requiring a license to conduct a public dance hall while permitting other dances to be conducted without license does not deprive its owner of the equal protection of the law.

Municipal corporation — ordinance — validity — conferring power on mayor.

5. Arbitrary power sufficient to render the ordinance invalid is not conferred upon the mayor with respect to the granting or refusing of a license for a public dance hall, where the ordinance fixes the standard of fitness for the place where it is to be conducted, and requires the mayor to act upon the report of four city officials as to whether or not the standard has been met.

Same — permitting police to stop dance.

6. An ordinance for the regulation of public dance halls is not invalid because it confers power upon a police officer to stop a dance if any provision of the ordinance is violated, an indecent act is committed, or any disorder of a gross, violent, or vulgar character exists.

(April 9, 1914.)

A PPEAL by plaintiff from an order of the Circuit Court for Milwaukee County dissolving a temporary injunction restraining the enforcement of an ordinance for the regulation of public dance halls. Affirmed.

The ordinance sought to be restrained is as follows:

"Section 1. The term, 'public dance' or

obtaining a license for that purpose from the board of aldermen. *Loertscher v. Jersey City*, 84 N. J. L. 537, 87 Atl. 68. The court in this case, while holding the ordinance not within the power of the city as laid down in the statute, freely admitted the advisability of licensing and regulating places where liquors are sold, and of supervising dances held therein.

In *People ex rel. Ritter v. Wallace*, 160 App. Div. 787, 145 N. Y. Supp. 1041, under the law drawn to meet the constitutional objections sustained to the law under consideration in the *Wilber Case*, supra, it was held that the licensing authority may revoke or forfeit a license on the ground of noncompliance with that law, even though 51 L.R.A.(N.S.)

be taken to mean any dance or hall to which admission can be had by payment of a fee or by the purchase, possession, or presentation of a ticket or token in which a charge is made for caring for clothing or other property, or any other dance to which the public generally may gain admission with or without payment of a fee. The term, 'public dance hall,' as used herein, shall be taken to mean any room, place, or space in which a public dance or public ball may be held, or hall or academy in which classes in dancing are held and instruction in dancing given for hire.

"Sec. 2. It shall be unlawful to hold any public dance or public ball, or to hold classes in dancing, within the limits of the city of Milwaukee, until the dance hall in which the same may be held shall first have been duly licensed for such purpose. The application for such license shall be granted in the same manner as providing for the issuing of licenses under chapter 27 of the General Ordinances of the city of Milwaukee.

"Each license granted hereunder shall expire on the 1st day of July of each year, and the license shall be posted in a conspicuous place within the hall in which the dance is held.

"The annual license fee shall be five (\$5) dollars. This ordinance shall be printed in full upon each license issued, and each license shall, by its terms, be made subject to revocation, as hereinafter provided.

"Sec. 3. No license for a public dance hall shall be issued until it shall be found that such hall complies with and conforms to all ordinances, health and fire regulations of the city; that it is properly ventilated and supplied with efficient toilet conveniences, and is a safe and proper place for the purpose for which it is to be used.

"Sec. 4. The license of any public dance hall shall be forfeited or revoked by the mayor for disorderly or immoral conduct on the premises, or for the violation of any of

no conviction has been had for such noncompliance.

An ordinance declaring that any person who shall publicly perform or cause to be performed, in any place whatever, for any price, gain, or reward, any dancing or feats of uncommon dexterity and agility of the body, and any person having possession or care of any building who shall permit any performance of any kind in such building, without first having obtained a license for that purpose, shall be liable to a fine for every offense, was held in *Elizabeth v. Lytton*, 83 N. J. L. 371, 85 Atl. 341, to apply to an individual performer (a dancer in that case) who may be hired to help make up an exhibition. W. W. A.

the rules, regulations, ordinances, and laws governing or applying to public dance halls or public dances. If at any time the license of a public dance hall shall be forfeited or revoked, at least six months shall elapse before another license or permit shall be given for dancing on the same premises.

"Sec. 5. Every licensed owner of a dance hall shall, immediately upon application being received by him from any person, club, or society to lease or rent his hall for the purpose of holding a public dance or ball therein, report to the mayor of the city of Milwaukee the name and address of such person, club, or society, and the date when such public dance or ball is proposed to be held. The mayor shall at once make, or cause to be made, an investigation for the purpose of determining whether such dance or ball shall be held. If the mayor shall determine that the proposed dance or ball ought not to be held, he shall, within five (5) days after receipt of the aforesaid notice of application for lease or rental, notify the licensed owner of such dance hall, in writing, that the proposed public dance or ball shall not be held therein, and the licensed owner of such dance hall shall thereupon refuse to permit such public dance or ball to be held in such hall. Failure on the part of the licensed owner of such hall to comply with the provisions of this section shall be sufficient cause for the revocation of the license of such licensed owner.

"Sec. 6. All public dance halls shall be kept at all times in a clean, healthful, and sanitary condition, and all stairways and outer passages, and all rooms connected with a dance hall, shall be kept open and well lighted. The chief of police, a captain, a lieutenant, or a sergeant of police, shall have the power, and it shall be their duty, to cause the place, hall, or room where any dance or ball is held or given to be vacated whenever any provision of any ordinance with regard to public dances and public balls is being violated, or whenever any indecent act shall be committed, or when any disorder of a gross, violent, or vulgar character shall take place.

"Sec. 7. It shall be unlawful after 10 o'clock P. M. to permit any person to attend or take part in any public dance who has not reached the age of eighteen (18) years, unless such person be in company with a parent or natural guardian. It shall be unlawful for any person to represent himself or herself to have reached the age of eighteen years in order to obtain admission to a public dance hall, or to be permitted to remain therein when such person in fact is under eighteen years of age, and it shall also be unlawful for any person to represent

himself or herself to be a parent or natural guardian of any person, in order that such person may obtain admission to a public dance hall, or shall be permitted to remain therein when the party making the representation is not in fact either a parent or natural guardian of the other person.

"Sec. 8. The mayor shall refer all applications for dance-hall licenses to the chief of police, who shall investigate, or cause to be investigated, each application to determine whether the dance hall sought to be licensed complies with the regulations, ordinances, and laws applicable thereto, and in the making of such investigation the chief of police shall, when desired, have the assistance of the building inspector, the commissioner of health, and the chief of the fire department. The chief of police shall furnish to the mayor in writing the information derived from such investigation, accompanied by a recommendation as to whether a license should be granted or refused. No license shall be renewed except after inspection of the premises as provided herein.

"Sec. 9. All public dances shall be discontinued and all public dance halls shall be closed on or before the hour of 3 o'clock A. M.

"Sec. 10. Any person, persons, society, club, or corporation who shall violate the provisions of this ordinance shall, upon conviction thereof, be fined not less than twenty-five (\$25) dollars, and the cost of prosecution, and not more than one hundred (\$100) dollars and the cost of prosecution for each and every offense, and on default of payment thereof shall be imprisoned in the House of Correction, Milwaukee county for a period of not exceeding ninety (90) days."

Mr. Horace B. Walmsley, with Messrs. Rubin & Zabel, for appellant:

The ordinance is null and void.

State ex rel. Kennedy v. McGarry, 21 Wis. 498; Edson v. Hayden, 20 Wis. 684; 21 Am. & Eng. Enc. Law, 2d ed. 1012, 1014; Chain Belt Co. v. Milwaukee, 151 Wis. 190, 42 L.R.A. (N.S.) 899, 138 N. W. 621; State ex rel. Garrabad v. Dering, 84 Wis. 585, 19 L.R.A. 858, 36 Am. St. Rep. 948, 54 N. W. 1104; Re Frazee, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72; State v. Whitcom, 122 Wis. 110, 99 N. W. 468, Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Messrs. Daniel W. Hoan and E. L. McIntyre, for respondents:

The order dissolving the injunction was proper if the ordinance is valid, for the courts will not restrain the enforcement of a valid ordinance.

Field, 68 Wis. 540, 32 N. W. 629; Tiede v. Schneidt, 99 Wis. 201, 74 N. W. 798; Harley v. Lindemann, 129 Wis. 514, 8 L.R.A.(N.S.) 124, 109 N. W. 570; C. Beck Co. v. Milwaukee, 139 Wis. 340, 131 Am. St. Rep. 1061, 120 N. W. 293; Stark v. Backus, 140 Wis. 562, 123 N. W. 98; Benz v. Kremer, 142 Wis. 1, 26 L.R.A.(N.S.) 842, 125 N. W. 99.

The ordinance cannot be declared invalid on the ground either that it is unreasonable, or that it is against public policy.

Block v. Chicago, 239 Ill. 260, 130 Am. St. Rep. 219, 87 N. E. 1011; Peoria v. Calhoun, 29 Ill. 317; Shea v. Muncie, 148 Ind. 14, 46 N. E. 138; A Coal-Float v. Jeffersonville, 112 Ind. 15, 13 N. E. 115; 2 Dill. Mun. Corp. 5th ed. § 600; McQuillin, Mun. Ord. § 181; Borgnis v. Falk Co. 147 Wis. 327, 37 L.R.A.(N.S.) 849, 133 N. W. 209, 3 N. C. C. A. 649.

The ordinance is valid.

State ex rel. Elliott v. Kelly, 154 Wis. 482, 143 N. W. 153; Com. v. Quinn, 164 Mass. 11, 40 N. E. 1043; Pearson v. Seattle, 14 Wash. 438, 44 Pac. 884; State v. Keen, — Del. —, 82 Atl. 600; Com. v. Bow, 177 Mass. 347, 58 N. E. 1017; Downing v. Blanchard, 12 Wend. 383; Webber v. Chicago, 148 Ill. 313, 36 N. E. 70; Kosidowski v. Milwaukee, 152 Wis. 223, 139 N. W. 187; Morrill v. State, 38 Wis. 428, 20 Am. Rep. 12; Van Buren v. Downing, 41 Wis. 122; Wilcox v. Hemming, 58 Wis. 144, 46 Am. Rep. 625, 15 N. W. 435; Lowe v. Conroy, 120 Wis. 151, 66 L.R.A. 907, 102 Am. St. Rep. 983, 97 N. W. 942, 1 Ann. Cas. 341; State ex rel. Nowotny v. Milwaukee, 140 Wis. 38, 133 Am. St. Rep. 1060, 121 N. W. 658; Adams v. Milwaukee, 144 Wis. 371, 43 L.R.A.(N.S.) 1060, 129 N. W. 518, affirmed in 228 U. S. 572, 57 L. ed. 971, 33 Sup. Ct. Rep. 610; Maercker v. Milwaukee, 151 Wis. 326, — L.R.A.(N.S.) —, 139 N. W. 199; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Boston & M. R. Co. v. York County, 79 Me. 386, 10 Atl. 113; Fifth Ave. Coach Co. v. New York, 221 U. S. 467, 55 L. ed. 815, 31 Sup. Ct. Rep. 709; Holden v. Hardy, 169 U. S. 366, 392, 42 L. ed. 780, 791, 18 Sup. Ct. Rep. 383; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 750, 28 L. ed. 585, 587, 4 Sup. Ct. Rep. 652; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144; Greenberg v. Western Turf Asso. 148 Cal. 126, 113 Am. St. Rep. 216, 82 Pac. 684, 19 Am. Neg. Rep. 72, 204 U. S. 359, 51 L. ed. 520, 27 Sup. Ct. Rep. 384; Brookville 51 L.R.A.(N.S.)

Min. 311, 104 N. W. 159; People ex rel. Cumisky v. Brooklyn, 14 App. Div. 556, 632, 43 N. Y. Supp. 1088; Wallack v. New York, 3 Hun. 84; New York v. Eden Musee American Co. 102 N. Y. 593, 8 N. E. 40; Hayes v. Coatesville Opera-House Co. 139 Pa. 636, 22 Atl. 647; State v. Evans, 139 Wis. 381, 110 N. W. 241; State ex rel. Kellogg v. Currens, 111 Wis. 431, 56 L.R.A. 252, 87 N. W. 561; Arnold v. Schmidt, 153 Wis. 55, 143 N. W. 1055; C. Beck Co. v. Milwaukee, 139 Wis. 340, 131 Am. St. Rep. 1061, 120 N. W. 293; Rochester v. West. 164 N. Y. 510, 53 L.R.A. 548, 79 Am. St. Rep. 659, 58 N. E. 673; Pearson v. Seattle, 14 Wash. 438, 44 Pac. 884; State v. Schonshausen, 37 La. Ann. 42; Wilson v. Eureka City, 173 U. S. 32, 43 L. ed. 603, 19 Sup. Ct. Rep. 317; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Davis v. Massachusetts, 167 U. S. 43, 42 L. ed. 71, 17 Sup. Ct. Rep. 73; Decorah v. Dunstan Bros. 38 Iowa. 99; Wiggins v. Chicago, 68 Ill. 378; Child v. Bemus, 17 R. I. 230, 12 L.R.A. 57, 21 Atl. 539; St. Louis v. Meyrose Lamp Mfg. Co. 139 Mo. 560, 61 Am. St. Rep. 474, 41 S. W. 244; St. Louis v. Weitzel, 130 Mo. 600, 31 S. W. 1045; Com. v. Kinsley, 133 Mass. 578; Muller v. Buncombe County, 89 N. C. 171; McQuillin, Mun. Ord. § 420; Waldo v. Christman, 72 Misc. 349, 130 N. Y. Supp. 260; Re Flaherty, 105 Cal. 558, 27 L.R.A. 529, 38 Pac. 981; State v. Barringer, 110 N. C. 525, 14 S. E. 781; People ex rel. Worth v. Grant, 12 N. Y. Supp. 879, 126 N. Y. 473, 27 N. E. 964; Ex parte Ryan, 7 Ohio L. J. 50, 8 Ohio Dec. Reprint, 299; Stedman's Appeal, 14 Phila. 376.

Marshall, J., delivered the opinion of the court:

These are the basic propositions to be considered: Is the maintenance of public dance halls a proper subject for police regulation? Does the city of Milwaukee possess authority in respect to such matter? Are the means adopted legitimate?

The general nature of the police power has been too often defined to leave room for anything further to be said of a strictly original nature. This court dealt, generally, with the matter in the following and other cases: State ex rel. Adams v. Burdge, 95 Wis. 390, 37 L.R.A. 157, 60 Am. St. Rep. 123, 70 N. W. 347; State ex rel. Winkler v. Benzenberg, 101 Wis. 172, 175, 76 N. W. 345; State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 519, 107 N. W. 500; State v. Redmon, 134 Wis. 69, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep.

(N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885.

Notwithstanding mere reiteration is unnecessary and attempts to improve on what has gone before seem futile, we do well to follow that wise constitutional admonition:

"The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." Const. art. I, § 22.

That is more than a mere admonition voicing in another way the thought often expressed as "eternal vigilance is the price of liberty." It is a declaration giving emphasis to the declared purpose of the fundamental law as involving restraint of anything in legislation invading inherent rights,—that freedom for which we are "thankful to Almighty God" and for the conservation of which and security of "the blessings" for which "governments are instituted among men, deriving their just powers from the consent of the governed." It points to the very vitals of the fundamental law, and pictographs its spirit, making it visible to, and its beneficence appreciable by, the commonest understandings.

It were better, perhaps, to speak of exercisable police power in the collective sense,—as that broad conception involved in the expression: It is the sovereign authority exercisable directly, where not expressly or inferentially prohibited, and otherwise, where not so prohibited, to pass laws regulating, reasonably, all those things which appertain to the public welfare.

Things may be within the police power, in the general sense, and not in the legal sense, because expressly prohibited. Many things fall within such general sense which do not within the legal sense, because impliedly prohibited. The heresy which once had some believers, that it is a power above fundamental restraints, has been so completely exposed as to only now exist as a matter of history, which more excites our curiosity as to its origin and how the idea could have originated, in the light of any worth-while appreciation of our constitutional liberty, than challenges attention to any reason for a legitimate basis therefor. True, it is a great power. Without it the purpose of civil government could not be attained. It has more to do with the well-being of society than any other power. Properly exercised, it is a crowning beneficence. Improperly exercised it would make of sovereign will a destructive despot, superseding and rendering innocuous some of the most cherished principles of constitu-

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126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408: "It may be extended disastrously, or restrained and administered beneficially, according as the judiciary shall perform its constitutional functions. Confined within its legitimate field of reasonable regulation it is essential . . . to the full accomplishment of the purposes of civil government."

Too much significance cannot be given to the word "reasonable" in considering the scope of the police power in a constitutional sense. It took much time, notwithstanding clear declarations, over and over again, on the subject here and by the Federal Supreme and other courts (Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; Rideout v. Knox, 148 Mass. 368, 2 L.R.A. 81, 12 Am. St. Rep. 560, 19 N. E. 390, and Ely v. Niagara County, 36 N. Y. 297), for courts and text writers, in general, to appreciate that the final evidentiary test of the legitimacy of a police regulation is whether it is reasonable under all the circumstances. No court has been more emphatic on the subject than this. State v. Redmon, supra; State ex rel. Milwaukee v. Milwaukee Electric R. & Light Co. 144 Wis. 386, 397, 140 Am. St. Rep. 1025, 129 N. W. 623; State ex rel. Adams v. Burdge, 95 Wis. 390, 37 L.R.A. 157, 60 Am. St. Rep. 123, 70 N. W. 347; Bonnett v. Vallier, 136 Wis. 193, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885. In the latter case the court deduced the following from the many authorities in this and other courts:

"A police regulation must not extend beyond that reasonable interference which tends to preserve and promote enjoyment, generally, of those 'unalienable rights' with which 'all men are endowed' and to secure which 'governments are instituted among men.' . . . When it goes beyond the scope indicated and enters unto the dominion of the destructive, it is illegitimate and offends against some constitutional restraints, express or implied."

There must be reasonable ground for the police interference, and also the means adopted must be reasonable for the accomplishment of the purpose in view. So, in all cases where the interference affects property and goes beyond what is a reasonable interference with private rights, it offends against the general equality clauses of the Constitution, it offends against the spirit of the whole instrument, it offends against the provision against taking property without due process of law and

against taking property for public use without first rendering just compensation therefor. So, every police regulation must answer for its legitimacy at the bar of reasonableness.

Some confusion at one time existed on the subject discussed here, because of expressions of judges as to a law or ordinance being void for unreasonableness. No provision could be pointed to, in state or national Constitution, limiting legislative authority on that ground.

As a rule, fundamental limitations of regulations under the police power are found in the spirit of the Constitution, not in its letter; but they are just as efficient as if expressed in the clearest language. As said before, the existence of the power itself is presumed from very necessity therefor, to the end that the functions of government by, of, and for the people may be efficiently exercised, but in the very reason for its existence is seen the respect due to its limitations. The same circumstances which imply the one imply the other. There we see the dignity of the term "reasonable," which has sometimes been omitted in describing the police power under our constitutional system.

The confusion was created by failure to appreciate that, by the use of such term, the characteristic of means was referred to, instead of the effect, while the latter is the real mischief which infracts the constitutional restraints.

That is to say, the legislative effort at regulation, within the police power, is not subject to condemnation, strictly speaking, because unreasonable, but because it impairs or destroys some inherent right, instead of conserving it. In respect to inherent rights, all which conserves is reasonable; that which impairs or destroys is unreasonable. So, when it is said that an act of the legislature is unconstitutional because unreasonable, the idea involved is that the interference with some inherent right is so great as to destructively affect it and so violates its guaranteed inviolability. Thus the conception that regulation, within the constitutional scope of the police power, makes efficient, constitutional guaranties, instead of impairing or destroying them, while outside such scope the contrary is true. *State ex rel. Runge v. Anderson*, 100 Wis. 523, 533, 534, 42 L.R.A. 239, 76 N. W. 482.

Now, given a proper subject for police regulation,—it being understood that whether a given matter is such is wholly a judicial question, there is yet the field of appropriateness of means. Naturally, as the power is inherent in our system, of necessity, there must be some reasonable

basis for legislative activity in respect to the matter dealt with, else the subject is outside the scope of legislative interference. However, given a subject in respect to which there is some reasonable necessity for regulation, fair doubt in respect thereto being resolved in favor of the affirmative, in case of the legislature having so determined, the degree of exigency is a matter wholly for its cognizance.

What is said as regards legitimacy of subjects for exercise of the police power may be repeated as to appropriateness of means; while given the two elements,—legitimacy of subject and appropriateness of means,—the degree of interference within the boundaries of reason is for the legislature to decide, there being left in the end the judicial power to determine whether the interference goes so far as to violate some guaranteed right,—regulate it so severely as to materially impair it, reasonable doubts being resolved in favor of legislative discretion.

With the elementary principles stated, in evidence, we may quickly reach the vital question upon this appeal. Public meetings and meeting places which are liable to be characterized by disorderly conditions, or lead to breaches of the peace, or promote immorality, have, universally, been considered proper subjects for police regulation. Public dances and dance halls fall within the latter class. While, if conducted in a proper manner such a hall and its use may afford opportunity for innocent amusement, in the absence of any regulation, it tends to breed disorder, indolence, intemperance, immorality, and to otherwise lower the standard of people in the social state. Such places, conducted for gain, open, in general, to all who come in suitable order to be received, no other condition being exacted except the prescribed entertainment fee, are so liable to be centers of disturbance and character lowering or destruction, that they have been subjected to pretty severe regulation by statute and city ordinances, to preserve the possible benefits of such amusement places, and prevent the possible or probable abuses. They have been so regulated in Massachusetts by statute for many years. A violation of the law there is punishable much more severely than by the ordinance in question. Power is vested in administrative officers to determine the terms of the license and the terms and manner of its revocation. Neither legislative power is contemplated in the issuance of the license nor judicial power in the revocation,—only the discretion of the administrative officer, subject, of course, to answer in ju-

Does the city of Milwaukee possess authority to legislate respecting the particular subject? It is conceded that, unless it was given such authority in its charter, it does not possess it.

True, as claimed, the power in question is only conferrable by language showing such purpose with reasonable clearness. The general principle in that regard, stated in *Chain Belt Co. v. Milwaukee*, 151 Wis. 188, 192, 193, 42 L.R.A.(N.S.) 899, 138 N. W. 621, is here reaffirmed. But that does not mean that such a power can be given only expressly and unmistakably. If general terms, in the general welfare clause, show a reasonably clear purpose to clothe the municipality with such power,—reasonable clearness being satisfied by a grant in clear terms covering a broad subject,—then the detailed subjects, within the entirety, are proper matters to be dealt with.

As said in *State ex rel. Elliott v. Kelly*, 154 Wis. 482, 143 N. W. 153, the general welfare feature of the city charter of the city of Milwaukee is very broad. It evinces a legislative purpose to accord the municipality the usual powers granted to cities of the kind. There is no rule requiring such a grant to be strictly construed so as to minimize its effect, rather the rule is that it should be construed, if construction be permissible and is needed, liberally to carry out the legislative purpose. Such purpose being plain, reasonable doubts as to the meaning of language used to effect it should be resolved in favor of the end the legislature clearly had in view.

Section 3, chap. 4, Charter of Milwaukee, page 54 (Compiled 1905), shows a grant of discretionary power to the common council to pass ordinances "for the government and good order of the city . . . for the suppression of vice, for the prevention of crime . . . as they shall deem expedient, and to declare and impose penalties and to enforce the same. . . ." The term, for the "government and good order" of the city, by itself, is amply broad enough to cover the regulation of public places of amusement such as dance halls. It is very comprehensive as used in city charters. It covers the entire scope of reasonable police regulations to conserve the peace, the health, the safety, and the morals of the community, as will be seen by reference to 1 Dillon on Municipal Corporations, 4th ed. §§ 392-408, and notes. This court has so viewed its scope. *Ellinwood v. Reedsburg*, 91 Wis. 131, 64 N. W. 885.

Thus far we have found that the particular subject is a legitimate field for regulation under the police power, and that 51 L.R.A.(N.S.)

have now to see whether the means and extent of interference go beyond reasonable boundaries of conservation of the right to use property and to indulge in the amusements incident to public dances.

The plan of regulation is the usual one and the one contemplated by the charter. Its general feature is the creation of a disability to use a hall for public dances except upon condition of a permit being first obtained therefor, based on a satisfactory proof of the place being fit for such gatherings as regards health, convenience, and safety; such permit to be subject to cancellation in case of violation on the premises of good order or good morals, or of any municipal regulation of such places, and subject to a duty to obtain public approval in advance of such intended use, to keep the hall and its accessories in a fit condition for such gatherings, and not to permit the use of the hall on any day later than 3 o'clock A. M. nor after 10 o'clock P. M., to allow anyone to attend and participate in dancing who shall not have reached the age of eighteen years, unless accompanied by a parent or natural guardian, and to prevent, during any use of the premises for a public dance, any gross behavior of a disorderly, violent, or vulgar character. Those detail features are common in such ordinances, and have never been held to be, and, from an original standpoint, certainly are not, unreasonable. They seem mild rather than harsh. The penalties for violation, as regards the proprietor at least, are not immoderate.

So it seems that if there is anything unreasonable in the ordinance it must be in matter of details of a strictly administrative character.

We may well observe, in passing, that the suggestion is made that the ordinance violates some of the equality guaranties of the Federal Constitution. There is no Federal guaranty which exempts citizens of the United States from reasonable police regulations as regards person and property (*State ex rel. Kellogg v. Currans*, 111 Wis. 431, 56 L.R.A. 252, 87 N. W. 561), or which prevents legitimate classification for the purpose of police regulation. In case of such classification and the regulation effecting all members of the class alike, there is no violation of any equality clause of national or state Constitution. These principles are so well understood that it would be a waste of energy to discuss them. As the classification in this case—halls used for public dances—obviously satisfies all essentials on the subject of legitimacy, and, just as obviously, the restraints of the ordi-

class, we need not spend much time with this branch of the case, which is argued at some length in the brief of counsel for appellant.

The fact that many of the things which the ordinance was designed to guard against may occur as well at a dance where patrons attend by invitation, and that dances may be held at places and under conditions quite similar to those of such public dances as are within the ordinance, is not fatal to the classification. It is generally the case that a classification cannot be made so as to make a definite line within which may be seen all the dangers to be guarded against and without which there are no such dangers. The best that can be done is to keep within the clearly reasonable and practicable. That is accomplished where there are such general characteristics of the members of the class as to reasonably call for special legislative treatment. That may be true, generally, and yet, some of such characteristics sometimes be found to exist outside of the boundaries of the class. Exactness in division is impossible and never looked for in applying the legal test. All that is required is that there must be, in general, some reasonable basis on general lines for the division, all reasonable doubts to be resolved in favor thereof. There ends the judicial and commences the legislative function, each being dominant in its particular field. *State ex rel. Kellogg v. Currens*, supra; *State ex rel. Risch v. Policemen's Pension Fund*, 121 Wis. 44, 98 N. W. 954; *State v. Whitcom*, 122 Wis. 110, 99 N. W. 468; *Bingham v. Milwaukee County*, 127 Wis. 344, 106 N. W. 1071; *State v. Evans*, 130 Wis. 385, 110 N. W. 241.

We are unable to perceive why the principle declared and applied in those cases does not answer counsel's contention at this point. The authorities cited to support the theory of illegitimate classification do not seem to fit the situation in hand. So far as we are advised, public dance halls have commonly been put in a class for the purpose of regulation, and it has never been condemned.

On the subject of whether the administrative features of the ordinance are unduly severe, the main objection raised is in that the power is lodged in the mayor to refuse to issue a license and without assigning any reason therefor; and without there being any standard fixed for him to go by nor any method for a review. The idea seems to be that this makes the owner of a hall which he desires to devote, in whole or in part, to use for public dances, subject to the arbitrary will of the mayor.

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ordinance and the nature of the mayor's administrative duties. The ordinance, very distinctly, fixes a standard of fitness, so far as practicable, without danger of undue harshness. From the very nature of the case, minor details had to be made matter of administration by appropriate officials. The place is required to conform to all ordinances, health and fire regulations, to be properly ventilated and supplied with sufficient toilet conveniences, and to be a safe and proper place for the purposes for which it is used. Why does that not set up a quite definite reasonable standard? Before granting a license the mayor is required to refer the application therefore to the chief of police for an investigation, and report as to whether the place satisfies all the calls of the ordinance. The investigator is required to call to his assistance three officials of the city, viz., the building inspector, commissioner of health, and the chief of the fire department. After investigation with the help of such three expert assistants, the investigator is required to make a report in writing to the mayor, accompanied by his opinion as to whether the application should be granted or refused. That report the mayor is required to consider and pass judgment upon in coming to a conclusion.

In view of the foregoing, what foundation is there for the claim that the ordinance clothes the mayor with arbitrary power in the matter of passing upon an application for a license, affording him opportunity, irremediably, to act upon his personal prejudice or mere caprice or some unworthy motive? It provides for a most careful, impartial, intelligent investigation by four city officials of high station, and contemplates that the mayor will honestly apply his judgment to the result. If he should refuse a license without doing so in the particular manner suggested, or refuse, under such circumstances as to clearly indicate the existence of some improper motive therefor, judicial remedies would be found ample to redress the wrong.

Power of a municipality to confer administrative authority on the mayor, as in the ordinance in question, was upheld in *Milwaukee v. Ruplinger*, 155 Wis. 391, 145 N. W. 42. What was there said need not be repeated. We are unable to discover anything in the *Eubank Case*, 226 U. S. 137, 57 L. ed. 156, 42 L.R.A. (N.S.) 1123, 33 Sup. Ct. Rep. 76, upon which appellant's counsel rely, out of harmony with this.

When it comes to the method ordained for revoking a license, though the power is lodged in the mayor, the grounds of revocation are clearly specified, and, just as clear-

ly, by implication, it is provided that the mayor shall proceed in the performance of his duties as a quasi judicial tribunal.

There are several other details of the scheme of regulation, particularly, in respect to administrative features, which are urged should be looked upon as fatal, but we do not recognize any not the same or similar to those common to such police regulation and, generally, approved without even criticism. The authority of a police officer to put an end to a public dance upon the event of any provision of the ordinance being violated, or any indecent act being committed, or any disorder of a gross, violent, or vulgar character, is, we apprehend, common.

Complaint is made of conferring discretionary power upon the officials to act without any opportunity for any sort of a hearing. There is nothing novel about that, nor undue restraint upon liberty or property involved in it. It is a reasonably necessary provision for the preservation of good order. It would be utterly useless to attempt to suppress such acts as that feature of the ordinance is designed to reach, if before action some sort of a judicial hearing were required. It must be remembered that the police power, as before indicated, is grounded on necessity. The basic reason for it renders details of dealing with a particular subject legitimate which are reasonable under all the circumstances, and are not expressly prohibited.

It is a mistake to suppose that a government by law contemplates law to protect one in liberty to do whatever he sees fit and do it as he sees fit. When we say, ours is a government by law, and not by men, we mean that ours is a government based on rights with laws to preserve and conserve those rights, and men to administer those laws. There must be the human element or there could be no administration. Without administration, law would have no vitality. Without law to preserve and conserve rights, vitalize by proper administration, there would be no rights, and the very purpose for which governments are founded would fail of effectuation.

Other features of the ordinance to which our attention is called are as wanting in merit as those which have been discussed. They will be passed with the assurance that they have been considered with full appreciation of the nature of police regulations and their limitations; that the very existence of the power lies in the necessity for personal and property rights to be fenced about, to some extent, in order to be possessed beneficially,—really promote life and happiness,—and that freedom, under our constitutional system, means liberty 51 L.R.A.(N.S.)

to enjoy that which is inherent under such restraints as to repress that which is detrimental to a worth-while social state in order to conserve that which promotes and is necessary to it. Thus small limitations upon liberty of individual action are required,—are absolutely essential in order that rights, in the aggregate, may be possessed efficiently. The constitutional guaranty of their possession constitutionally commands such exercise of the police power as is essential to preservation and conservation thereof. The degree of such exercise rests in legislative wisdom up to the point where it would be obviously operated to destroy instead of conserve. There comes in the constitutional bar. There is the respect which all men owe to it and for which all ought to bow to it. The lesson which needs most to be learned is that liberty, under a popular government, contemplates many restraints, that such restraints are necessary to civil society, and that all must yield to them and appreciate that, within the limitations mentioned, in legislative wisdom rests the particular degree of restraint.

No more need be said in this case. It is presented with confidence and good faith, yet has no special merit. We have not found it necessary or advisable to discuss the many authorities cited to our attention. It is easy to accumulate eloquent passages from legal opinions as regards sacredness of individual liberty. That could not well be too much exalted. Yet sometimes in picturing its significance respecting some particular condition, language is used which, if not restrained to such or similar conditions, would give rise to a very mischievous idea of what liberty, in a worth-while social state, means. When understood, the citations will not support anything out of harmony with what is said in this opinion. If it were otherwise, it would not change the result, because that rests on principles which cannot be changed by any concrete situation to which they may have been applied or any mode of expression in applying them.

The order is affirmed.

MINNESOTA SUPREME COURT.

CHARLES MATTHIAS, Appt.,

v.

MINNEAPOLIS, ST. PAUL, & SAULT
STE. MARIE RAILWAY COMPANY,
Respnt.

(125 Minn. 224, 146 N. W. 353.)

Nuisance — operation of railroad.

1. The smoke, noise, and disturbance

Headnotes by HOLT, J.

tion of a railroad at and between stations should not be held a private nuisance to adjacent property affected thereby.

Same — railroad yards.

2. But as to such incidental railway facilities as shops, roundhouses, and switch yards, of the character here involved, the location and operation of which is not determined by public convenience or necessity, the railroad is liable, if thereby a nuisance is imposed upon an adjacent landowner, even though the location of the facility be proper and the operation thereof duly careful.

Same — damage to property.

3. If the ordinary careful location and operation of such railroad facility as the one here in question creates a private nuisance upon adjacent property, such property is thereby damaged within the purview of the Constitution entitling the owner to compensation.

Trial — question for jury.

4. Under the evidence, the question whether the operation of defendant's switch yard imposed a private nuisance upon plaintiff was for the jury.

(March 20, 1914.)

APPEAL by plaintiff from a judgment of the District Court for Hennepin County dismissing his action brought to recover damages for the diminution in the value of his premises by the operation of defendant's switch yard and for permanent injury to his real estate. Reversed.

The facts are stated in the opinion.

Messrs. James A. Peterson and Adolphe C. Peterson, for appellant:

The conditions as they are alleged and shown by plaintiff within the city of Minneapolis constitute a nuisance *per se*.

Joyce, Nuisances, 18; State v. Chicago, M. & St. P. R. Co. 114 Minn. 122, 33 L.R.A.(N.S.) 494, 130 N. W. 548, Ann. Cas. 1912B, 1030; St. Paul v. Haugbro, 93 Minn. 62, 66 L.R.A. 441, 106 Am. St. Rep. 427, 100 N. W. 470, 2 Ann. Cas. 580.

There is no real reason why that which this court has held to be a nuisance *per se*, and which admittedly substantially interferes with plaintiff's "reasonable and comfortable enjoyment and use" of his property, should not be held to be, merely because a railroad company may be responsible, such a damage as entitles the property

Note. — As to liability of railroad for creating a nuisance, see notes to Missouri, K. & T. R. Co. v. Mott, 70 L.R.A. 579; Louisville & N. Terminal Co. v. Lellyett, 1 L.R.A.(N.S.) 49; and Terrell v. Chesapeake & O. R. Co. 32 L.R.A.(N.S.) 371. See also later case, State v. Erie R. Co. 46 L.R.A.(N.S.) 117, and references in footnote.

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Vanderburgh v. Minneapolis, 93 Minn. 83, 100 N. W. 668; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; Pennsylvania R. Co. v. Miller, 132 U. S. 75, 33 L. ed. 267, 10 Sup. Ct. Rep. 34; Townsend v. Norfolk R. & Light Co. 105 Va. 22, 4 L.R.A.(N.S.) 87, 115 Am. St. Rep. 842, 32 S. E. 970, 8 Ann. Cas. 562; Louisville & N. Terminal Co. v. Jacobs, 109 Tenn. 727, 61 L.R.A. 192, 72 S. W. 957; Rainey v. Re. River, T. & S. R. Co. 99 Tex. 276, 3 L.R.A.(N.S.) 590, 122 Am. St. Rep. 622, 89 S. W. 768, 90 S. W. 1096, 13 Ann. Cas. 500; Booth v. Rome, W. & O. Terminal R. Co. 140 N. Y. 272, 24 L.R.A. 105, 37 Am. St. Rep. 552, 35 N. E. 592; Alabama & V. R. Co. v. King, 93 Miss. 379, 22 L.R.A.(N.S.) 603, 47 So. 857; Tidewater R. Co. v. Shartzer, 107 Va. 562, 17 L.R.A.(N.S.) 1038, 50 S. E. 407; Omaha & N. P. R. Co. v. Janacek, 30 Neb. 276, 27 Am. St. Rep. 399, 46 N. W. 478; Gainesville, H. & W. R. Co. v. Hall, 78 Tex. 169, 9 L.R.A. 298, 22 Am. St. Rep. 42, 14 S. W. 259; Reardon v. San Francisco, 66 Cal. 492, 56 Am. Rep. 107, 6 Pac. 325; Louisville R. Co. v. Foster, 105 Ky. 743, 50 L.R.A. 814, 57 S. W. 40; Garvey v. Long Island R. Co. 159 N. Y. 328, 70 Am. St. Rep. 550, 54 N. E. 57, 5 Am. Neg. Rep. 338; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; Cogswell v. New York, N. H. & H. R. Co. 103 N. Y. 15, 57 Am. Rep. 701, 8 N. E. 537; Chicago G. W. R. Co. v. First M. E. Church, 50 L.R.A. 488, 42 C. C. A. 178, 102 Fed. 85; Beseman v. Pennsylvania R. Co. 50 N. J. L. 235, 13 Atl. 164; Hudson River Teleph. Co. v. Watervliet Turnp. & R. Co. 135 N. Y. 393, 17 L.R.A. 674, 31 Am. St. Rep. 838, 32 N. E. 148.

Mr. Alfred H. Bright, with Mr. John L. Erdall, for respondent:

Defendant is not liable to the plaintiff as for a nuisance, because it has constructed and is operating its tracks in the location in question in a reasonable and careful manner and without negligence.

Carroll v. Wisconsin C. R. Co. 40 Minn. 168, 41 N. W. 661; Romer v. St. Paul City R. Co. 75 Minn. 211, 74 Am. St. Rep. 455, 11 N. W. 825; Hruska v. Minneapolis & St. L. R. Co. 107 Minn. 98, 119 N. W. 491; Church of Jesus Christ, L. D. S. v. Oregon Short Line R. Co. 36 Utah, 238, 23 L.R.A.(N.S.) 860, 140 Am. St. Rep. 819, 103 Pac. 243; Georgia R. & Bkg. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315; Beseman v. Pennsylvania R. Co. 50 N. J. L. 235, 13 Atl. 164; Pennsylvania R. Co. v. Lippincott, 116 Pa. 472, 2 Am. St. Rep. 618, 9 Atl. 871; Pennsylvania R. Co. v. Marchant, 119 Pa. 541, 4

247; Dolan v. Chicago, M. & St. P. R. Co. 118 Wis. 362, 95 N. W. 385; 2 Elliott, Railroads, 3d ed, § 1057.

The amendment to the Constitution in 1896 was not intended to change the rule in respect to what constitutes a nuisance in this state.

Dickerman v. Duluth, 88 Minn. 288, 92 N. W. 1119; Romer v. St. Paul City R. Co. 75 Minn. 211, 74 Am. St. Rep. 455, 77 N. W. 825; Walther v. Chicago & W. I. R. Co. 215 Ill. 456, 74 N. E. 461.

Holt, J., delivered the opinion of the court:

For more than twenty-five years defendant has owned a 66-foot right of way near what is now the northerly limits of the city of Minneapolis. Upon this right of way is located its main line of railway running west. It crosses Queen Avenue North, a street running north and south, at Forty-seventh Avenue North. Proceeding westerly it angles north about 15 degrees. Prior to 1909 the land north of the railroad between Humboldt and Thomas avenues, the former being nine blocks east and the latter three blocks west of Queen avenue, had been platted. South of the right of way the land is also to a large extent platted into city lots. Very few lots were ever built upon. Indeed, the general appearance along the right of way, in the neighborhood described, is that of a farming or truck gardening district. In 1909 plaintiff bought three lots fronting west on Queen avenue; the northerly boundary of these lots is the southerly boundary of defendant's right of way. Soon after the purchase, he built a small house thereon, which has since been his home. A barn has been erected and some other improvements have been made on the lots. It appears that recently defendant acquired by purchase a strip of land several hundred feet in width immediately north of its right of way, and extending from Humboldt avenue westerly over a mile. Thereafter, in March, 1912, it secured from the city council of Minneapolis the vacation of all streets in the platted portions of this strip. The object of defendant was to locate a switch yard for handling, principally, grain shipments from the West. The yard was constructed in the summer of 1912, and consists of six or seven tracks north of and parallel with the original main track and as close thereto and to each other as they well may be for safe operation. These tracks constitute the receiving yard. Some 200 feet north of these and parallel are some seven or eight tracks, termed the "classification yard."

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each other and the main track. The lead track approaching the classification yard from the west is up grade until it reaches the hump, a point about 600 feet northerly from plaintiff's dwelling. From thence east it is down grade, so that cars shunted over the hump will of their own motion run down into the classification yard. As freight trains come in from the West, the cars are placed in the receiving yard; and then in the evening a switch engine with crew comes and pulls a string of cars west of the switch for the lead to the classification yard, backs them up the lead to the hump, uncouples, and kicks or shunts them in on the proper track, to be thereafter taken to the different elevators or places of destination. This work generally lasts until morning. Thus moving cars during the stillness of the hours of night creates a great deal of unusual noise and disturbance. The cars shunted down grade slam into cars previously set out upon the tracks, slack runs in and out with a loud clatter as trains are started and stopped, and the exhaust of the locomotive becomes at times very penetrating. It is plain that the noise is a serious disturbance of the rest and comfort of plaintiff, who lives so close to the tracks. Plaintiff sues to recover damages for depreciation of the rental value of his property by the operation of this yard up to the commencement of the action, and for permanent injury, on the ground that the yard is a private nuisance to him. He does not contend that the impairment of the use, enjoyment, and value of his property might be avoided or lessened by the exercise of proper care in operating the switch yard. In addition to the disturbing noises incident to the operation of the yard, plaintiff claims that more soot, smoke, and cinders are cast upon his premises than was the case before the yard was established. When plaintiff rested, the action was dismissed on defendant's motion. Plaintiff excepted to the ruling and appeals from the judgment.

Before the adoption of the constitutional amendment providing that compensation must be paid for damaging or destroying private property for public use, as well as for taking the same, it was established by three decisions of this court that no action lies against a railroad company for damages unavoidably resulting to near-by property from the noises, smoke, or jarring incident to a proper operation of its railroad upon lands in which the person inconvenienced has no interest. Rochette v. Chicago, M. & St. P. R. Co. 32 Minn. 201, 20 N. W. 140; Adams v. Chicago, B. & N. R. Co. 39 Minn. 286, 1 L.R.A. 493, 12 Am. St.

Rep. 644, 39 N. W. 629; *Carroll v. Wisconsin C. R. Co.* 40 Minn. 168, 41 N. W. 661. In the last-mentioned case Chief Justice Gildillan states: "Railroads are a public necessity. They are always constructed and operated under authority of law. They bring to the public great benefits; to some persons more, to other persons less. The operating them in the most skilful and careful manner causes to the public necessary incidental inconveniences, such as noise, smoke, cinders, vibrations of the ground, interference with travel at the crossings of roads and streets, and the like. One person may suffer more from these than another. . . . But the difference is only in degree, not in kind. Such inconveniences are common to the public at large. If each person had a right of action because of such inconveniences, it would go far to render the operating of railroads practically impossible." With the exception of the courts of Nebraska, we believe the above rule has been applied in the face of constitutional provisions similar to the one we now have, so far as the operation of a railroad at and between stations is concerned. Reasons, more or less cogent, may be suggested for the rule. Public necessity seems to require a network of railroads penetrating everywhere, and, if every disturbance and inconvenience arising from the lawful and careful operation would give rise to a cause of action, it would disastrously affect the cost and efficiency of transportation. Furthermore, along the route of the railroad the annoyance to near-by property owners from noise, smoke, and cinders, even on lines of extensive traffic, is intermittent and of short duration. A moment or two and the disturbance is over; the atmosphere is pure. Considering the public importance of railroads, occasional and passing annoyances from their operation should be borne in silence by the individual subjected thereto. To be sure, at stations and terminals the disturbance is more incessant and of longer duration, but it may also be said that the owner of property adjacent thereto has also the benefit of sharing in the advance in values which so often attend the location of depots and railroad terminals and trackage. The greater inconvenience is likely to be offset by greater advantages. Usually population centers around railroad stations and terminal yards, and in such neighborhoods more or less smoke, dust, and distracting noises are prevalent. Factories, shops, and mills find locations near and create the same discomforts in some degree. A person building a home on a city lot has no assurance that the adjoining lot owner may not erect a factory or warehouse which 51 L.R.A.(N.S.)

may sadly interfere with the enjoyment and value of the home. The law does not redress every inconvenience or disturbance to which an owner or occupant may be put by a neighbor's use of his property. The location, the degree of annoyance, its duration, and the time of its occurrence, are all matters which bear upon the question of whether the law affords a remedy for the damage suffered.

It is not necessary to pursue this subject further, for plaintiff concedes the soundness of the rule generally adopted that disturbance, smoke, dust, and cinders from the ordinary operations of trains upon a railroad's right of way, which reach adjacent properties, causing discomfort and damage to the owners or occupants thereof, do not give rise to a cause of action. But he insists that a different rule applies to such facilities in railroading, as shops, roundhouses, and switch yards, so that, when a railroad company selects such a place for these that the operation thereof creates a private nuisance to owners of near-by property, a cause of action arises in every case where a like injury inflicted by a private person would be actionable.

Courts have distinguished between the location and operation of a railroad between and at stations, and the location and operation of such incidental but necessary equipments as railroad shops, roundhouses, and switch yards like the one here in question. These latter do not serve the public directly. Their location and operation is of no public concern except as indirectly affecting the transportation problem. In selecting a place for these, the railroad acts as an individual attending to his private business, and must be responsible as such for injuries to the property rights of others flowing from such selection and subsequent operation. In other words, in the location and operation of these incidental transportation facilities, the railroad company has a free hand, and may not shield itself from responsibility for damage to others behind any rule of public necessity or authorization by law. It is different from freight houses and yards for receiving and delivering carload shipments. Public necessity, and sometimes statutes, demand that such be located for public convenience. We therefore do not think decisions like *Atchison, T. & S. F. R. Co. v. Armstrong*, 71 Kan. 366, 1 L.R.A.(N.S.) 113, 114 Am. St. Rep. 474, 80 Pac. 978; *Georgia R. & Bkg. Co. v. Maddox*, 116 Ga. 64, 42 S. E. 315; *Taylor v. Seaboard Air Line R. Co.* 145 N. C. 400, 122 Am. St. Rep. 455, 59 S. E. 129; *Beseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164,—which state the broad doctrine that no redress is given to a pri-

concerning here, even a sound.

The location of this switch yard must be conceded proper in the sense that none other could well have been found where less people would be affected by its operation. But that does not, in our opinion, determine plaintiff's right to complain of injuries special to him. In *Romer v. St. Paul City* R. Co. 75 Minn. 211, 74 Am. St. Rep. 455, 77 N. W. 825, Chief Justice Start thus alludes to a well-established rule, that "what is authorized to be done by law cannot be a public nuisance, yet it may be a private nuisance as to individuals who are specially injured thereby." Did plaintiff show injuries special to himself? We have already stated that the testimony tended to show that during the nighttime the noise and disturbance from the operation of the switch yard were so loud, incessant, and distracting as to rob plaintiff and his family of sleep and rest; also, that large volumes of smoke, cinders, and dust were thrown upon his property, and thereby its use and value almost destroyed. Section 8085, Gen. Stat. 1913, reads: "Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, . . . is a nuisance. An action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered." In *Wood on Nuisances*, 3d ed. § 611, it is said: "It is now well settled that noise alone, unaccompanied with smoke, noxious vapors, or noisome smells, may create a nuisance, and be the subject of an action at law for damages." And in § 505 it is stated that "smoke alone may constitute a nuisance." See also §§ 495 and 497, to the effect that everyone has the right to have air diffused over his premises in its natural state, free from artificial impurities imparted by a neighbor; and that the property owner has the right to recover damages, not only for injuries affecting the corpus of his estate, but also for such as impair unreasonably the enjoyment and use thereof. Lewis on *Eminent Domain*, § 237, pertinently asks: "What valid distinction can be made between discharging smoke or noxious gases into the atmosphere, which find their way into the air of the adjoining lot and cause a nuisance, and the discharge of water or noxious liquids which flow upon adjoining property or percolate through its soil so as to create a nuisance upon the land? The operation of machinery may communicate vibrations to the air which make life a

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same time may communicate vibrations to the land which crack the walls and shake down the plaster of the houses in which they live. How can a distinction be made between the two when both kinds of injury go to the extent of materially impairing the use and enjoyment of the property?" In *Chicago, M. & St. P. R. Co. v. Drake*, 148 Ill. 228, 35 N. E. 750, the court said it was not prepared to coincide with the view that noise and disturbance from railway yards were *damnum absque injuria*. A case more frequently cited than any other on the proposition here involved is *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, which was an action against the railroad company for damages on account of the erection and operation of a shop and roundhouse so near the church that its use by the plaintiff congregation was seriously impaired from the smoke, noise, and steam emitted from the company's plant. There was a recovery. The court, after stating that the liability of the railroad company for the annoyance and discomfort caused is the same as that of individuals for similar wrongs, and that it was no defense to say that the shop and roundhouse were skilfully constructed and were necessary for the maintenance of the road authorized to run through the city, proceeds: "Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. . . . It admits, indeed, of grave doubt whether Congress could authorize the company to occupy and use any premises within the city limits, in a way which would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the company from the liability to suit for damages or compensation, to which individuals acting without such authority would be subject under like circumstances." In the opinion is the suggestion that the company might have selected another location where the injury to adjoining property would not have been so great. But it is not, therefore, to be inferred that if the railroad company, instead of locating its roundhouse and repair shop adjacent to this large church edifice of an influential congregation in the heart of the city, had placed them up against the humble house of worship of a religious organization forced by stress of circumstances to seek a cheap location in the outskirts of Washington, compensation would have been denied for similar annoy-

church property. While suitable location has a bearing on the question, it is not controlling. To properties in the heart of a city, dust, smoke, and distracting noises are appurtenant, so to speak, and therefore they cannot be injured by like matters from the operation of a railroad to the same extent that properties in the sparsely occupied and quiet suburbs are.

And as sustaining the view herein before expressed that railroad shops, roundhouses, and switch yards like the one in question here stand on a different footing from tracks between stations, passing tracks, depots, freight houses, and yards for receiving and delivering shipments, in respect to their location and operation being a private injury or nuisance which the law will redress, may be cited: *Cogswell v. New York, N. H. & H. R. Co.* 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537; *Spring v. Delaware, L. & W. R. Co.* 88 Hun, 385, 34 N. Y. Supp. 810; *Wylie v. Elwood*, 134 Ill. 281, 9 L.R.A. 726, 23 Am. St. Rep. 673, 25 N. E. 570; *Louisville & N. Terminal Co. v. Lellyett*, 114 Tenn. 368, 1 L.R.A. (N.S.) 49, 85 S. W. 881. In the last-named case it is held that a terminal railway company, in exercising the discretion conferred by the legislature to locate its yards and terminal facilities, acts at its peril not to create a nuisance to neighboring property. There the plaintiff's property was 225 feet away from the original tracks; the terminals were located beyond these. The court says: "We are of the opinion that, in so far as the growth and increase of travel and traffic into and through the station has brought discomfort to plaintiff, he is without remedy. In other words, the roads have the right to accommodate their increasing traffic and travel without liability, so long as their trains are operated without negligent disregard of the comfort and usable value of the plaintiff's property, and, for this purpose, to lay such additional tracks, side tracks, and switches into and through the station as may be required to accommodate such travel and traffic, both passenger and freight, and it is only for the additional conveniences of roundhouses, sandhouses, coal bins, coal chutes, and the switch yards and tracks necessary to operate such additional conveniences, which might be located elsewhere, though not so advantageously, perhaps, that plaintiff can complain, if they materially damage plaintiff's property." In *Townsend v. Norfolk R. & Light Co.* 105 Va. 22, 4 L.R.A. (N.S.) 87, 115 Am. St. Rep. 842, 52 S. E. 970, 8 Ann. Cas. 558, it was said: "Damage occasioned by the location of a power house [for the railway] does not stand on the same footing as dam-

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way along an authorized route." It may also be suggested that the property and persons affected by the location of shops, roundhouses, and switch yards such as this are limited and circumscribed in extent; and that those annoyed by their operation do suffer differently from those exposed to the intermittent discomforts which attend the ordinary operation of trains. The injury to those affected by these incidental railway facilities may therefore be said to be special and peculiar. The noise and smoke from shops are incessant during the ordinary work day. And here the operation of the switch yard was continuously distracting during the night. See also *Baltimore Belt R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 654, 3 Ann. Cas. 660, and *Bramlette v. Louisville & N. R. Co.* 113 Ky. 300, 68 S. W. 145. The distinction herein pointed out is also recognized in the late case of *Roman Catholic Church v. Pennsylvania R. Co.* — L.R.A. (N.S.) —, 125 C. C. A. 629, 207 Fed. 897.

It would seem to follow that if this switch yard, although properly located and operated, constitutes a private nuisance to plaintiff's use and enjoyment of his property, there is an injury to private property by a public use for which compensation must be made under the Constitution of this state as it now reads. *Lewis on Eminent Domain*, § 238, states: "If the use of property for public purposes produces a nuisance, those injured are entitled to compensation. . . . It is immaterial whether the particular use of the property in question is authorized by the legislature or not. The right not to be injured by a nuisance on adjoining land cannot be taken without compensation. . . . The Massachusetts court has held that 'the legislature may authorize small nuisances without a compensation, but not great ones.' *Bacon v. Boston*, 154 Mass. 100, 28 N. E. 9; *Com. v. Parks*, 155 Mass. 531, 30 N. E. 174; *Levin v. Goodwin*, 191 Mass. 341, 114 Am. St. Rep. 616, 77 N. E. 718. But where is the line to be drawn? The courts of New Jersey, perceiving this difficulty, have held that it cannot be drawn anywhere, and have hence concluded that the legislature can authorize all nuisances, both great and small. *Beseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164. But it is certainly more logical, more just, and more in keeping with the trend of modern decisions, to hold that no right of property can be taken, destroyed, or materially impaired without compensation."

The decisions in Nebraska, which, however, go further than in any other state uniformly hold that injurious consequences

to property such as shown herein from the operation of a railroad is an injury or damage within the constitutional provision requiring compensation, and that without regard to whether it proceeds from the operation of the railroad between stations, or from shops and the like. *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364, 42 N. W. 93; *Omaha & N. P. R. Co. v. Janecsek*, 30 Neb. 276, 27 Am. St. Rep. 399, 46 N. W. 478; *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239, 78 N. W. 521; *Stehr v. Mason City & Ft. D. R. Co.* 77 Neb. 641, 124 Am. St. Rep. 872, 110 N. W. 701, and *Kayser v. Chicago, B. & Q. R. Co.* 88 Neb. 343, 120 N. W. 554. Judge Hook, in *Mason City & Ft. D. R. Co. v. Wolf*, 78 C. C. A. 589, 148 Fed. 961, in summing up the law as it obtains in Nebraska, states: "The right of recovery under the state Constitution is not limited to those cases in which the property of a private owner is actually invaded or appropriated by a railroad company. It extends to cases where the value of the property is depreciated by the disturbance of some right, either public or private, which the owner enjoys in connection therewith. . . . The right of recovery includes damage to the property from noise, smoke, cinders, and vibrations of the ground, and the obstruction or impairment of the right of the owner to make use of public highways in the vicinity."

Judge Caldwell, in *Chicago G. W. R. Co. v. First M. E. Church*, 50 L.R.A. 488, 42 C. C. A. 178, 102 Fed. 85, in a situation somewhat parallel to *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, observes: "The smoke, cinders, offensive smells, and loud and protracted noises which constitute the nuisance to the plaintiff, are not the usual and unavoidable result of the mere operation of the defendant's trains over its track laid in the street, but they result from other uses by the defendant of the street and its track in the immediate vicinity of the plaintiff's property, which do not affect in a like injurious manner the public generally, or other abutting owners of property on the street."

We also refer to the exhaustive discussion of the subject found in the dissenting opinion of Justice Lewis, concurred in by Justice Lumpkin, in *Austin v. Augusta Terminal R. Co.* 108 Ga. 871, 47 L.R.A. 55, 34 S. E. 852, and the notes to *Louisville & N. Terminal Co. v. Lellyett*, 1 L.R.A.(N.S.) 49, and *Tidewater R. Co. v. Shartz*, 17 L.R.A.(N.S.) 1053. In *Rainey v. Red River T. & S. R. Co.* 99 Tex. 276, L.R.A.(N.S.) 590, 122 Am. St. Rep. 622, 1 L.R.A.(N.S.)

89 S. W. 768, 90 S. W. 1096, 13 Ann. Cas. 580, this language occurs: "Did the legislature intend to authorize a railroad running in the city of Austin, to establish and operate structures of the character in question, so near to the capitol as to render it unfit for the purposes for which it was constructed? The same question may be asked as to a courthouse of the county, the public school buildings and churches of the city. We should be loath to answer this question in the affirmative. Yet, if the statute empowers a railroad company to establish its shops in such proximity to a private dwelling, as to depreciate its value and to bring great discomfort upon the occupants, no sufficient reason suggests itself to our minds, why the same might not be done as to the capitol, the courthouse, and other public structures."

Cases relied on by defendant come nearly all within the principle conceded by plaintiff; namely, that in so far as disturbance, smoke, and dust emanate from the operation of a railroad between and at stations, there is no redress for the individual who may suffer in the use and enjoyment of his property. *Church of Jesus Christ, L. D. S. v. Oregon Short Line R. Co.* 36 Utah, 238, 23 L.R.A.(N.S.) 860, 140 Am. St. Rep. 819, 103 Pac. 243, was a case where increasing traffic required additional operating or passing tracks. *Hyde v. Minnesota, D. & P. R. Co.* 29 S. D. 220, 40 L.R.A.(N.S.) 48, 136 N. W. 92, related to tracks in connection with a properly located depot. *St. Louis, S. F. & T. R. Co. v. Shaw*, 99 Tex. 559, 6 L.R.A.(N.S.) 1245, 122 Am. St. Rep. 663, 92 S. W. 30, is evidently not out of harmony with *Rainey v. Red River, T. & S. R. Co.* supra, for it relates to the necessary facilities and operations of trains at a properly located station. It holds that personal discomfort to adjoining proprietors occasioned by the operation of cars in the station yards cannot be made the basis of a cause of action against a railroad company, when there is nothing improper in its selection of the particular locality for its tracks, or in the operation of its cars thereon, and no depreciation in the value of the complainant's property therefrom. The court says: "It is hardly necessary to add that side tracks at such stations are an essential part of the road, and are as much authorized and required as the main line and stations. It cannot be held, therefore, that the mere location of such tracks and stations near to the property of others gives rise to the liability here asserted. If so, the same liability would arise to everyone who might be annoyed by

one case which would be valid in support of it in the other; and yet it has often been held that no such liability can be sustained consistently with the law which authorizes the construction of such quasi public works." *Dolan v. Chicago, M. & St. P. R. Co.* 118 Wis. 362, 95 N. W. 385, holds that the undesirable consequences to near-by property from the location of a railroad stock yard for receiving cattle for shipment, as required by statute, does not constitute a private nuisance if constructed and managed with reasonable care. Even in the absence of a statute on the subject, public convenience, as already intimated, would, in most instances, require shipping stock yards near or at the station. The decisions cited from Pennsylvania, as suggested by Judge Lewis in *Austin v. Augusta Terminal R. Co.* supra, are controlled to a large extent by the wording of the constitutional provision of that state, which guarantees compensation for injury to private property for construction or enlargement of public works, thus excluding, by implication, injury from the operation thereof. In *Walther v. Chicago & W. I. R. Co.* 215 Ill. 456, 74 N. E. 461, a demurrer was sustained to a bill in equity asking that the defendant railway be enjoined from establishing a switch yard in a residence neighborhood. In the absence of allegations that the location was improper and was not required by public necessity, the court might well deny an injunction, and leave the one whose property rights are damaged to his action at law. The opinion is silent on this phase of the question; but it would be reasonable to infer from other decisions of the courts of Illinois herein before cited, or referred to in the citations, that the location and operation of a switch yard (which does not serve the public directly) so that it necessarily injures the use and enjoyment of private property by throwing thereon smoke and cinders, and causing unusual disturbances during the nighttime, would require the payment of compensation. See also *Illinois C. R. Co. v. Trustees of Schools*, 212 Ill. 406, 72 N. E. 39.

It is claimed that under *Romer v. St. Paul City R. Co.* 75 Minn. 211, 74 Am. St. Rep. 455, 77 N. W. 825, decided subsequent to the amendment of the Constitution securing private property against damage or destruction by public use, as well as against the taking thereof for such use, without compensation, there can be no recovery here. It will be noticed, however, 51 L.R.A.(N.S.)

quired to operate its cars upon the street. The disturbance created came mostly from the movement of the cars after they passed out of the barn and onto the street, and the court seems to place the refusal to regard the car barn as a nuisance upon the ground that the discomforts to plaintiffs were essentially the same as those suffered by others where the car line turns corners. The court also distinguishes a commercial steam railroad from a street railway as to the consequences to adjacent property rights, and therefore did not consider the case of *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, a controlling guide. The point that under our Constitution the right to compensation is given where damage to private property results from public use was not there raised, nor could it be for § 6137, Gen. Stat. 1913, provides that no street railway company shall exercise the right of eminent domain within the limits of a city or village. In the case of the maintenance of a private nuisance by a street railway within the city limits, the court could not well refuse to abate the same if requested, even though its maintenance might almost be a public necessity. But in the case of a commercial steam railroad the court might well refuse to abate if the railroad desired to exercise its right of eminent domain. That the constitutional amendment referred to broadened the protection of private property cannot be doubted. That there need be no physical invasion of property in order to give a right to claim compensation for damage to the same from public use is now established. *Vanderburgh v. Minneapolis*, 95 Minn. 329, 6 L.R.A.(N.S.) 741, 108 N. W. 480. That case would be decisive of this appeal in plaintiff's favor, had it appeared that the vacated Queen avenue had been opened or laid out across the original right of way.

We are of the opinion that it was a question for the jury upon this record whether the disturbances and loud noises proceeding from the operation of this switch yard during the nighttime, together with the smoke, dust, and cinders thrown upon plaintiff's premises, were such as to seriously interfere with and impair the enjoyment and value thereof which existed previous to the operation of the switch yard. It was therefore error to dismiss the action.

Judgment reversed.

VIRGINIA SUPREME COURT OF APPEALS.

HOSPITAL OF ST. VINCENT OF PAUL
IN CITY OF NORFOLK, Plff. in Err.,
v.

SALLIE W. THOMPSON.

(— Va. —, 81 S. E. 13.)

Negligence — unsafe premises — hospital — patient's attendant.

1. One who at the request of a patient about to enter a hospital accompanies him to render reasonably necessary assistance is an invitee of the hospital, to whom it owes the duty of exercising ordinary care to have the premises reasonably safe.

Charities — negligence — liability to stranger.

2. A hospital conducted as a public charity is liable for negligent injuries to one who accompanied to its building an intending patient for the purpose of rendering necessary assistance to him, as such person is not a beneficiary of the charity.

Negligence — unsafe premises — elevator entrance.

3. A hospital may be found to be negligent in maintaining an entrance to an elevator from outside the building, which resembles an ordinary doorway and is protected only by unfastened screen doors, so as to render it liable to one who, mistaking the entrance for an ordinary one, steps inside and falls down the shaft.

(March 12, 1914.)

ERROR to the Law and Chancery Court of Norfolk to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. James E. Heath and Burrow & Spindle, for plaintiff in error:

Plaintiff was guilty of contributory negligence.

Clark v. Fehlhaber, 106 Va. 803, 13 L.R.A.(N.S.) 442, 56 S. E. 817; Hilsenbeck v. Guhring, 131 N. Y. 674, 30 N. E. 580; Stanwood v. Clancey, 106 Me. 72, 26 L.R.A.(N.S.) 1213, 75 Atl. 293; Ryerson v. Bathgate, 67 N. J. L. 337, 57 L.R.A. 307, 51 Atl. 708, 11 Am. Neg. Rep. 300; Steger v. Mmen, 157 Mich. 494, 24 L.R.A.(N.S.) 46, 122 N. W. 104; Gaffney v. Brown, 150 Mass. 479, 23 N. E. 233; Massey v. Seller,

45 Or. 267, 77 Pac. 397, 16 Am. Neg. Rep. 553; Donohue v. Braff, 122 App. Div. 552, 107 N. Y. Supp. 377.

Defendant merely owed plaintiff the duty to refrain from inflicting wilful injury upon her.

21 Am. & Eng. Enc. Law, p. 475.

A charitable institution, such as defendant is, cannot be made liable in damages for the negligent acts of its servants, except where it has failed to exercise due care in the selection of the latter.

6 Cyc. 974; Downes v. Harper Hospital, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; Powers v. Massachusetts Homœopathic Hospital, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294; McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; Hearn v. Waterbury Hospital, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595; Fire Ins. Patrol v. Boyd, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553; Williamson v. Louisville Industrial School, 95 Ky. 251, 23 L.R.A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065; Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495; Parks v. Northwestern University, 218 Ill. 381, 2 L.R.A.(N.S.) 558, 75 N. E. 991, 4 Ann. Cas. 103; Farrigan v. Pevear, 193 Mass. 147, 7 L.R.A.(N.S.) 481, 118 Am. St. Rep. 494, 78 N. E. 855, 8 Ann. Cas. 1109; Thornton v. Franklin Square House, 22 L.R.A.(N.S.) 486, note, 200 Mass. 465, 86 N. E. 909; Taylor v. Protestant Hospital Asso. 85 Ohio St. 90, 39 L.R.A.(N.S.) 427, 96 N. E. 1089, 1 N. C. C. A. 438; Duncan v. Nebraska Sanitarium & Benev. Asso. 92 Neb. 162, 41 L.R.A.(N.S.) 973, 137 N. W. 1120, Ann. Cas. 1913E, 1127; Hill v. Tualatin Academy, 61 Or. 190, 121 Pac. 901; Maia v. Eastern State Hospital, 97 Va. 507, 47 L.R.A. 577, 34 S. E. 617; Trevett v. Prison Asso. 98 Va. 332, 50 L.R.A. 564, 81 Am. St. Rep. 727, 36 S. E. 373.

Mr. E. R. F. Wells, for defendant in error:

Plaintiff, in going upon the hospital premises, was an invitee, and the hospital owed her the duty to exercise reasonable care to keep its premises in a reasonably safe condition.

Clark v. Fehlhaber, 106 Va. 803, 13 L.R.A.(N.S.) 442, 56 S. E. 817; Pauckner v. Wakem, 231 Ill. 276, 14 L.R.A.(N.S.) 1118, 83 N. E. 202.

Defendant was guilty of the grossest

Note. — As to liability of charitable institution for personal injuries, see notes to Farrigan v. Pevear, 7 L.R.A.(N.S.) 481; Bruce v. Central M. E. Church, 10 L.R.A.(N.S.) 74; Thornton v. Franklin Square House, 22 L.R.A.(N.S.) 486; Hordern v. Salvation Army, 32 L.R.A.(N.S.) 62; and 1 L.R.A.(N.S.)

Basabo v. Salvation Army, 42 L.R.A.(N.S.) 1144; and see later cases McInerney v. St. Luke's Hospital Asso. 46 L.R.A.(N.S.) 548, and Barden v. Atlantic Coast Line R. Co. 49 L.R.A.(N.S.) 801. References will also be found in these notes to other annotation on analogous questions.

operation of its elevator shaft.

Foren v. Rodick, 90 Me. 276, 38 Atl. 175; *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Clopp v. Mear*, 134 Pa. 203, 19 Atl. 504; *Gordon v. Cummings*, 152 Mass. 513, 9 L.R.A. 640, 23 Am. St. Rep. 846, 25 N. E. 978.

The question whether plaintiff was guilty of contributory negligence was for the jury to decide under proper instructions from the court.

Foren v. Rodick, *supra*; *Tousey v. Roberts*, 114 N. Y. 312, 11 Am. St. Rep. 655, 21 N. E. 399; *Clopp v. Mear*, 134 Pa. 203, 19 Atl. 504; *Gordon v. Cummings*, 152 Mass. 513, 9 L.R.A. 640, 23 Am. St. Rep. 846, 25 N. E. 978; *Pauckner v. Wakem*, 231 Ill. 276, 14 L.R.A.(N.S.) 1118, 83 N. E. 202.

Defendant is not exempt from liability for the injury to Mrs. Thompson, occasioned by its negligence, because of its being a charitable institution.

Powers v. Massachusetts Homœopathic Hospital, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294; *Downes v. Harper Hospital*, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; *Bruce v. Central M. E. Church*, 147 Mich. 230, 10 L.R.A.(N.S.) 74, 110 N. W. 951, 11 Ann. Cas. 150; *Hordern v. Salvation Army*, 199 N. Y. 233, 32 L.R.A.(N.S.) 62, 139 Am. St. Rep. 889, 92 N. E. 626; *Church of Ascension v. Buckhart*, 3 Hill, 193; *Gartland v. New York Zoological Soc.* 135 App. Div. 163, 120 N. Y. Supp. 24; *Hewett v. Woman's Hospital Aid Asso.* 73 N. H. 556, 7 L.R.A.(N.S.) 496, 64 Atl. 190, 20 Am. Neg. Rep. 621; *Basabo v. Salvation Army*, 35 R. I. 22, 42 L.R.A.(N.S.) 1144, 85 Atl. 120; *Trevett v. Prison Asso.* 98 Va. 332, 50 L.R.A. 564, 81 Am. St. Rep. 727, 36 S. E. 373.

Keith, P., delivered the opinion of the court:

This was a suit brought by Mrs. Thompson against the Hospital of St. Vincent of Paul, in the city of Norfolk, to recover damages for an injury alleged to have resulted from the negligence of the defendant. There was a verdict and judgment in favor of the plaintiff for \$2,500, to which a writ of error was awarded.

Three errors are assigned to the rulings of the trial court: First, the action of the court in overruling the demurrer to the declaration; second, its refusal to give certain instructions asked for by plaintiff in error, and the giving of certain instructions asked for by defendant in error; and, third, its refusal to set aside the verdict and entering judgment thereon.

There are several grounds of demurrer 51 L.R.A.(N.S.)

elty or importance, and the underlying principles of which will be sufficiently discussed in the succeeding part of this opinion. Suffice it now to say that the declaration, in our judgment, states a cause of action, and the demurrer was therefore properly overruled.

It is assigned as error that the court refused instructions 1 and 3, asked for by the plaintiff in error, and gave instruction 4, asked for by the defendant in error.

Instruction No. 1, asked for by plaintiff in error and refused by the court, declares that a hospital which is incorporated for taking care of sick and disabled persons who may be received by it, which has no capital stock, and is not conducted for dividends or profits, is a charitable institution; and, if the jury believe from the evidence that the defendant is a charitable institution according to this definition, it cannot be held liable for the plaintiff's injury merely because its employees' negligence may have caused said injury, but that, before they can bring in a verdict for the plaintiff, they must further find that the defendant was guilty of negligence in selecting said employees.

The third instruction asked for by the plaintiff in error, and refused, tells the jury that "if they believe from the evidence that the plaintiff in this case came upon the premises of the defendant on the 31st day of July, 1912, at the time of the injury complained of, without an invitation, either express or implied, from the said defendant, then the said plaintiff was a mere licensee, and the said defendant was liable to her, if injured upon said premises, for wanton injury only, and they must find for the defendant, unless they further believe that the said plaintiff was wantonly injured while on the premises of the said defendant."

Taking up these instructions in their inverse order, and dealing first with the principle announced in the third instruction, we are of opinion that it was rightly rejected. It appears from the declaration and from the proof—indeed, all of the evidence tends to establish—that the defendant in error was an invitee, and not a mere licensee, to whom the plaintiff in error owed the duty of reasonable care. The law is correctly and, we think, sufficiently stated upon this branch of the case in instruction No. 2, given at the instance of defendant in error, as follows:

"The court instructs the jury that, if they believe from the evidence that the plaintiff on July 31, 1912, accompanied at her request a sick friend to the defendant's hospital for treatment, that the condition

sonably necessary for the plaintiff, or someone else, to accompany her, then the defendant owed to the plaintiff the duty to exercise ordinary care to have its premises in reasonably safe condition for the visit; and, if the defendant negligently failed to perform that duty, and, as the proximate consequence thereof, the plaintiff, while exercising due care, was injured, then the defendant is liable for the injuries sustained."

There is no dispute as to the facts on which this instruction is predicated, and, the facts being ascertained, it was the duty of the court to tell the jury the law which applied to them; and this, as we have said, is correctly done in defendant in error's instruction No. 2.

Instruction No. 1, asked for by plaintiff in error, presents a question of great interest. It must be conceded that the plaintiff in error is a charitable institution. That it receives compensation from patients who are able to pay for the accommodations received does not render it any the less a charitable institution in the eye of the law. This seems to be well established by the authorities. *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675.

It may also be conceded that, by the weight of authority, a beneficiary of the charity cannot hold the association responsible for negligent injuries, but the basis upon which the immunity is made to rest differs widely in the adjudicated cases. This court has never heretofore been called upon to consider this subject.

In *Trevett v. Prison Asso.* 98 Va. 332, 50 L.R.A. 564, 81 Am. St. Rep. 727, 36 S. E. 373, *Trevett*, who was a stranger to the association, obtained an injunction against it for polluting a stream which passed through his premises, upon the ground that it had created a nuisance. The association undertook to maintain that it was a public corporation, and relied upon the authority of *Maia v. Eastern State Hospital*, 97 Va. 507, 47 L.R.A. 577, 34 S. E. 617, a corporation which was held to be purely of a governmental character and under the exclusive ownership and control of the state, and was therefore not liable in damages for the negligent acts of its servants. It was held that the Prison Association could not plead immunity upon this ground; that it was not a public corporation, and, though of a benevolent character, was responsible for its torts.

The subject has, however, been considered and treated with great learning and ability by numerous courts.

In *Duncan v. Nebraska Sanitarium & 51 L.R.A.(N.S.)*

973, 137 N. W. 1120, Ann. Cas. 1913E, 1127, the supreme court of Nebraska held that a charitable institution conducting a hospital solely for philanthropic and benevolent purposes is not liable to inmates for the negligence of nurses; that a charitable hospital does not, by accepting compensation from a patient who is able to pay for room, board, and care, incur liability to such patient for the negligence of nurses. It will be observed that in this case the hospital accepted compensation from a patient who was able to pay, and, notwithstanding this fact, the court charged the jury, that "the undisputed evidence further shows that the defendant is a charitable institution maintained for philanthropic and charitable and benevolent purposes, and in no manner, directly or indirectly, for private profit or dividend paying to anyone;" and the appellate court held that this instruction was fully justified by the evidence, and was properly given. In the course of its opinion, the court said: "It is a well-established doctrine that a charitable institution conducting a hospital solely for philanthropic and benevolent purposes is not liable to inmates for the negligence of nurses. Some courts say that one accepting the benefits of such a charity exempts his benefactor from liability for the negligent acts of servants. Others assert that nonliability is based on the ground that trust funds created for benevolent purposes should not be diverted therefrom to pay damages arising from the torts of servants. Exemption from liability is frequently sanctioned on the ground that public policy encourages the support and maintenance of charitable institutions, and protects their funds from the maw of litigation. While there is a diversity of opinion as to the reasons for the rule, the doctrine itself is firmly established."

The appellate court said, further in its opinion, that, even though full compensation had been paid in the particular case by the plaintiff, it would not necessarily follow that the patient received no benefit from charity. "She occupied a room in a building maintained in part at least by donated funds intended for benevolent purposes. Necessary care, skill, and food came from the same source. On the record as made the jury should not have been permitted to find that the inmate had received no benefit from charity." For these propositions a great number of authorities are cited, which fully warrant the statement that we have made, that the fact that compensation was paid in the case before us does not alter the fact that the association was a benevolent institution.

case for us to decide, we have little hesitation in saying that what is known as the trust-fund doctrine does not appeal to us as a satisfactory footing upon which to rest the immunity of such associations. The trust-fund doctrine would establish absolute immunity, if carried to its logical conclusion, for all torts committed by such associations. It would apply to the omission to perform, or the negligent performance of, nonassignable duties, and, indeed, to negligence in all its conceivable forms. The immunity flowing from the acceptance of the benefits of such a charity, as held by decisions of many courts, rests upon a more logical foundation, and has met with approval of many courts of high standing, and the trend of modern decision seems to be in that direction.

In *Basabo v. Salvation Army*, 35 R. I. 22, 42 L.R.A.(N.S.) 1144, 85 Atl. 120, the subject was examined with the utmost care, and a vast number of authorities cited and considered. It discusses every phase of the case and every ground of exemption from liability that has been suggested. In the course of the opinion, Judge Parkhurst observes: "Some of the cases cited absolutely deny the liability of a charitable corporation in any event to pay damages for injuries arising from the negligence of its servants or agents, either to a patient or inmate or to a third party, on the ground of public policy, saying . . . that 'it would be against all law and all equity to take those trust funds, so contributed for a special charitable purpose, to compensate injuries inflicted or occasioned by the negligence of the agents or servants' of the charity, and arguing that, if such damages were to be allowed to be paid out of the trust funds, it would tend to destroy the charity, and to discourage the giving of money or other property for the establishment of charities. (Citing a number of authorities.) Other cases cited, while arguing along the same general lines of public policy, limit the exemption of charitable corporations from liability for injuries occasioned by the negligence of physicians, surgeons, nurses, and servants, and agents to cases where there has been no negligence on the part of the defendants in the selection or retention of such persons. (Again citing authorities.) We think these latter cases must be regarded as entirely inconsistent with the general proposition of the exemption of charitable corporations on grounds of public policy, set forth in the previous cases. As was said in reference to many of these cases by Gaynor, J., in *Kellogg v. Church Charity Foundation*, 128 App. Div. 214, at page 217, 112 N. Y. Supp. 51 L.R.A.(N.S.)

a ground for the nonliability for the torts of agents or servants of charitable institutions is that to pay damages for such torts would be a diversion of their funds from the trust purposes for which they are donated by the charitable, and thus a contravention of the trust; and that, as such institutions have no other funds, it would be futile to allow judgments to be taken against them in such cases. But the opinions of the judges in these same cases almost invariably except cases where the agent or servant was incompetent and there was negligence in his selection, failing to take note that it would be as much a diversion of the trust funds to pay damages for the tort of negligence in selection as for any other tort. If the rule exists, it must necessarily apply to all torts and in all cases. The only support for the argument that it does exist is found in the remarks of judges in certain rather old English cases, . . . and never had a direct application to actions of tort against charitable corporations such as are now common."

Referring to *Powers v. Massachusetts Homœopathic Hospital*, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294, Judge Parkhurst says: "After a very careful review of the authorities up to the date of decision (1901), the United States circuit court of appeals repudiated the doctrine of general exemption on the ground of public policy, and placed the exemption of the defendant in the case at bar, where it was sued for negligence of a nurse by a patient injured, upon the ground that (p. 380) 'one who accepts the benefit either of a public or of a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate, if the benefactor has used due care in selecting those servants. . . . If, in their dealings with their property appropriated to charity, they [charitable institutions] create a nuisance by themselves or by their servants, if they dig pitfalls in their grounds and the like, there are strong reasons for holding them liable to outsiders, like any other individual or corporation. The purity of their aims may not justify their torts; but, if a suffering man avails himself of their charity, he takes the risks of malpractice, if their charitable agents have been carefully selected.'"

In *Hearns v. Waterbury Hospital*, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595, the same doctrine was maintained; and in *Downes v. Harper Hospital*, 101 Mich. 553, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42, it is said: "It certainly follows

managers of the fund, or their employees, though such acts result in damage to an innocent beneficiary. Those voluntarily accepting the benefit of the charity accept it upon this condition."

Basabo v. Salvation Army, and the authorities there cited, seem to go far to establish that, with respect to the physicians, surgeons, and nurses, and other skilled attendants such as are furnished the patients, not being under the control of the corporation as to their treatment, are not to be considered as the servants of the corporation in such sense as to make it responsible under the doctrine of *respondet superior*, provided they are selected with due care, and upon this principle many of the cases relating to immunity of benevolent corporations may be logically and properly rested. Secondly, that there are certain duties to patients which are corporate duties, such as the exercise of due care in the selection of skilled and competent attendants, and the exercise of due care in the summoning of such attendants in a case where the condition of the patient requires such service, and that the agent of the corporation, whose duty it is to summon such attendants, is in such case the agent and representative of the corporation, whose negligence is deemed to be that of the corporation itself. Thirdly, that the doctrine of the general immunity of a charitable corporation from liability for damages, on the ground of public policy, as involving the diversion of trust funds from the purposes of the trust, has no logical foundation, and that, where such a corporation has funds available for the general purposes of the corporation, it may apply such funds to pay damages for which it is held liable, notwithstanding the trusts for which they are held, because the liability is incurred in carrying out the trusts and is incident to them.

The case of **Basabo v. Salvation Army**, then goes on to deal with the negligence of servants or agents of benevolent institutions resulting in injuries to third persons who are not in the relation of inmates, patients, or beneficiaries. The case of **Fire Ins. Patrol v. Boyd**, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553, is said to stand almost alone in declaring immunity to a benevolent corporation for injuries inflicted upon a stranger.

In **Hewett v. Woman's Hospital Aid Asso.** 73 N. H. 556, 7 L.R.A.(N.S.) 496, 64 Atl. 190, 20 Am. Neg. Rep. 621, a nurse in the employment of the defendant, a charitable corporation, who was receiving wages and instruction in consideration of 51 L.R.A.(N.S.)

suffering from diphtheria, of which the superintendent had notice, but neglected to give notice to the nurse. The nurse, not knowing the nature of the case, took the disease, and, for the injury to her caused thereby, brought suit. She was held entitled to recover. Exemption from liability was claimed by the defendant on the same grounds of exemption as set forth in many of the cases above cited. After examining the statutes of New Hampshire, under which the defendant was incorporated, and finding therein no express exemption from liability, the court proceeds to a careful examination of the cases holding such corporations exempt from liability on general grounds of public policy, and the court finds from the evidence that the plaintiff was a servant or employee of the defendant corporation. In stating its conclusions upon this branch of the case, the court says as follows: "If she had been employed by an individual to attend a member of his family afflicted with smallpox, of which he had knowledge, but of which he did not inform her, and she took the disease without fault on her part, and suffered damage therefrom, it would not be seriously denied that he was guilty of actionable negligence in not informing her of the danger to which he exposed her. It was his duty, arising from his employment of her, or from the contractual relation of master and servant existing between them, to warn her of the danger incident to the service which he knew, or, under the circumstances, ought to have known, and of which he knew she was ignorant, though in the exercise of ordinary care. And this duty is a nondelegable one. . . . To say that a similar duty was not imposed upon the defendant for the benefit and protection of the plaintiff, because it is a charitable corporation, is to relieve such corporations from the reasonable obligation of exercising the care ordinarily required of, or contractually assumed by, men in general in the prosecution of their legitimate business. The necessity for such an exceptional holding is not apparent. Since the property of the defendant is held for the general purpose of maintaining a hospital without other specific limitation, it is no more exempt from being appropriated to the payment of damages occasioned by the negligence of the hospital than is the property of an individual, which he holds for commercial or charitable purposes, for the consequences of his negligence."

In **Bruce v. Central M. E. Church**, 147 Mich. 230, 10 L.R.A.(N.S.) 74, 110 N. W. 951, 11 Ann. Cas. 150, the court found that

and proceeded to examine the doctrine of the exemption of such charitable corporations from liability for negligence. In this case plaintiff was an employee of a contractor engaged in decorating the church building, and sued for injuries sustained by reason of the breaking of defective scaffolding furnished by the agents of the defendant. The majority opinion, after setting forth the reasons for holding the defendant to be a charitable corporation, proceeds to the examination of the case of *Downes v. Harper Hospital*, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42, where some of the language used was consistent with the doctrine of general exemption on grounds of public policy, and says as follows: "I conclude, therefore, that we cannot hold the principle of the decision in *Downes v. Harper Hospital*, supra, inapplicable, upon the ground that the funds of the church are not charitable trust funds. This leads us to the inquiry: Is there any other ground upon which we should hold *Downes v. Harper Hospital* inapplicable? There is this distinction between *Downes v. Harper Hospital* and this case, viz., in the *Downes* Case plaintiff was a patient in defendant's hospital, and therefore a beneficiary of the charitable trust administered by the hospital corporation, while in this case he was an employee of the defendant's contractor, and not a beneficiary of the trust administered by defendant. If we hold that the principle of the *Downes* Case applies to the case at bar, we must declare that that principle exempts a corporation administering a charitable trust from all liability for the torts of its agents, and, as a corporation can act only by and through its agents, that it is exempt from all liability whatsoever for torts. What is the principle underlying the *Downes* Case? Does it exempt a corporation administering a charitable trust from all liability for torts? Those who answer this question in the affirmative cannot support their position by appealing to the reasoning of the opinion in that case. While that opinion says, 'The law jealously guards the charitable trust fund, and does not permit it to be frittered away by the negligent acts of those employed in its execution,' the pith of its reasoning, in my judgment, is contained in the following words: 'It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employees, though such acts result in damages to an innocent beneficiary. Those voluntarily accepting the benefit of the charity accept it upon this condition.'" And, after referring to a large number of cases, the 51 L.R.A.(N.S.)

Church, said: "In the latest of these cases (*Powers v. Massachusetts Homeopathic Hospital*)—the opinion is exhaustive and elaborate and discusses nearly all the authorities—it is held that the ground upon which liability is denied is that of assumed risk; the court saying: 'One who accepts the benefit either of a public or of a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity, at any rate if the benefactor has used due care in selecting those servants.'"

Coming to deal with exemption upon the ground of public policy, in *Basabo v. Salvation Army*, quoting from *Powers v. Massachusetts Homeopathic Hospital*, it is said that such exemption "must rest upon the argument that the advantage reaped by the public from such trusts justify the exemption; that is, as applied to this case, the advantages to the public justify defendant's exemption from liability for wrongs done to individuals. If this argument is sound—and its soundness may be questioned, for there are those who will deny that the advantages to the public justify the wrong to the individual—it should be addressed to the legislative, and not to the judicial, department of the government. It is our duty, as judges, to apply the law. We have no authority to create exemptions or to declare immunity."

In 147 Mich. at page 255, the opinion says: "I conclude from this reasoning that corporations administering a charitable trust, like all other corporations, are subject to the general laws of the land, and cannot, therefore, claim exemption from responsibility for the torts of their agents unless that claim is based on a contract with the person injured by such a tort, and that *Downes v. Harper Hospital* and other similar cases are consistent with this rule. They rest upon the principle, correctly stated in *Powers v. Massachusetts Homeopathic Hospital*, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294, viz., that the beneficiary of such charitable trust enters into a contract whereby he assumes the risk of such torts. It is not surprising that years should have elapsed before the correct legal principle governing these cases was announced in *Powers v. Massachusetts Homeopathic Hospital*. The discovery of correct legal principles, like the discovery of scientific and social truths, requires time and patient investigation."

In *Hordern v. Salvation Army*, 199 N. Y. 233, 32 L.R.A.(N.S.) 62, 139 Am. St. Rep. 889, 92 N. E. 626, the action was brought to recover for personal injuries sustained

boiler upon defendant's premises, through the defective condition of a runway or staging leading from a door in the boiler room. The defendant claimed exemption from liability as being a religious or charitable corporation. The court cites many of the cases above referred to where such corporations have been held to be totally immune from liability, as well as those where they have been held immune on the ground that they were performing governmental functions, and also those where the immunity is made dependent upon the relation the plaintiff bears to the defendant, and says: "In all it is recognized that the beneficiary of a charitable trust may not hold the corporation liable for the neglect of its servants. This is unquestionably the law of this state" (citing cases)—and, after discussing certain other cases in New York, where defendant charitable corporations have been held liable to third persons for negligence, repudiates the doctrine of the nonliability of trust funds for payment of damages arising from negligence.

Hordern v. Salvation Army fully approves the doctrine of *Powers v. Massachusetts Homœopathic Hospital*, supra, and the court said: "We can add nothing to the force of this reasoning, but simply express our concurrence therein, as well as in the argument of Judge Lowell." *Hordern v. Salvation Army* itself was subsequently approved by the New York court of appeals in *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 38 L.R.A. (N.S.) 481, 96 N. E. 406, Ann. Cas. 1913A, 883, 3 N. C. C. A. 444, where the court says: "It must now be regarded as settled that a charitable corporation is not exempt from liability for a tort against a stranger because of the fact that it holds its property in trust to be applied to purposes of charity."

We are much indebted, in considering this case, to the very learned and able opinion of the Rhode Island court in *Basabo v. Salvation Army*, supra, from which we have extracted with great freedom.

Applying the principles considered to the case before us, it becomes at once apparent that the defendant in error was not a beneficiary of the charity, but that she is to be considered as a stranger, and comes within the influence of the principle that a charitable corporation is not exempt from liability for torts against strangers because it holds its property in trust to be applied to the purposes of charity; a principle which seems to be fully established by courts of the highest authority and in well-considered cases.

In this connection, it may be observed 51 L.R.A. (N.S.)

sary; to which we reply that the whole subject was discussed in oral argument and in the briefs of counsel; that it is of great interest and of first impression in this state; and we felt therefore that it would be well to consider it in all its bearings.

Our conclusion is that there was no error in the instructions given or refused.

Coming to the facts of the case, we find from the evidence that they are fairly stated in the brief for defendant in error as follows: That Mrs. Davis was expecting to be confined, and her husband had made arrangements with the hospital to receive her as a pay patient. On the day in question Mr. Davis was out of the city, but, before leaving, had requested Mrs. Thompson, a friend of his wife, to look out for her and to go to the hospital with her, if necessary to go before his return to the city. About noon on July 31, 1912, Mrs. Thompson received a phone message from Mrs. Davis, telling her that she felt ill, and that she was preparing to go to the hospital, and asking her to come down and go with her. Mrs. Thompson complied with this request, and went to the apartment occupied by Mrs. Davis. She phoned to Mrs. Davis's physician, and he told her to order a carriage and proceed with Mrs. Davis to St. Vincent's Hospital. Mrs. Thompson ordered a carriage, and in the meantime Mrs. Davis phoned to St. Vincent's Hospital, and advised the authorities that she would come over in a short time, and asked them if they were prepared for her. She was informed that the hospital authorities were in waiting and in readiness for her arrival. About half-past 1 o'clock in the afternoon Mrs. Davis and her friend Mrs. Thompson went in the carriage to St. Vincent's Hospital. Before they arrived, a storm came up, and it began to rain rapidly. The driver, who was familiar with the hospital and its entrances, drove around to the rear of the hospital into an open court, and stopped his carriage at the entrance which was used by the hospital for its patients and friends accompanying them. Mrs. Davis was at the time suffering a great deal. At her request the driver got down from his seat, and rang the bell at the entrance, and then got back on his seat on the carriage. No one having responded to the summons, Mrs. Thompson suggested that she should get out of the carriage so that there would be no delay when the nurse came. This she did, and, as it was raining very hard at that time, she approached the entrance for the purpose of going inside of the hospital, and thereby protecting herself from the rain until the

doors, and, opening the door to the left, she stepped into what she thought was a hall or reception room, but, instead of that, it was an elevator shaft, and she fell to the bottom of the shaft, a distance of 4 feet 7 inches, and sustained the injuries for which she later on instituted this action.

Coming to a more particular description of the elevator, it appears that one side of the elevator shaft was an outside rear wall of the building. At the level of the ground a doorway was cut into this shaft, so that when the floor of the elevator was on a level with the surface of the ground, people could walk in and out of the elevator. This doorway was fitted up as an entrance. There was a stone doorsill at the bottom, and at the top of the doorway there was a stone lintel. There were two wooden doors which opened outwardly, and were fastened back during the summer. There were also two screen doors which opened outwardly, and which were in use in the summer months. One of these screen doors, the one to the left of a person approaching the entrance, was equipped with a handle, so that it could be opened from the outside, but there was no inside fastening on this door at all, and when the elevator was further up in the shaft there was nothing to prevent anyone from opening these doors and walking into the shaft. The lower part of these screen doors was covered with a grating, which prevented a person approaching from seeing through it into the shaft beyond. On the left-hand side of the screen doors there was a push bell, just as at any ordinary entrance door, and there was a little inclined wooden way leading up to the sill of the door. In other words, the testimony seems to show that this entrance was equipped just as any ordinary entrance into a hall or reception room is equipped. There were no signs or warnings of any kind to indicate that these doors opened into an elevator shaft instead of into a hall.

We think the evidence tends to support all the averments of the declaration and all the facts upon which the several instructions were predicated, and makes a case which was proper for the consideration of the jury, whose verdict, under proper instructions, is conclusive.

We are therefore of opinion that the trial court committed no error, and its judgment is affirmed.

Cardwell, J., absent.
51 L.R.A.(N.S.)

JOHN W. HARPER et al.
v.

CITY OF TOPEKA, Appt.

(— Kan. —, 139 Pac. 1018.)

Municipal corporation — maintenance of park — public function.

1. The maintenance of a park by a city for the sole benefit of the public, and not for any profit or benefit to the municipal corporation, is a governmental or public function.

Pleading — demurrer — admissions.

2. The allegations of the petition generally, and especially as to the physical conditions of the pond in the park, are, by the demurrer, admitted.

Negligence — pond — attractive nuisance.

3. The pond as described, being a reproduction of a natural pond, is not an attractive nuisance.

(April 11, 1914.)

A PPEAL by defendant from a judgment of the District Court for Shawnee County overruling a demurrer to a petition filed to recover damages for the alleged wrongful death of plaintiffs' son. Reversed.

The facts are stated in the opinion.

Messrs. W. C. Ralston and James W. Clark, for appellant:

In maintaining a public park, defendant is exercising a public or governmental power, and is not liable for torts committed in connection therewith.

28 Cyc. 1299, 1300; 4 Dill. Mun. Corp. § 1656; Caldwell v. Prunelle, 57 Kan. 511, 46 Pac. 949; Peters v. Lindsborg, 40 Kan. 654, 20 Pac. 490; 28 Cyc. 1302, 1303-1305; La Clef v. Concordia, 41 Kan. 323, 13 Am. St. Rep. 285, 21 Pac. 272; New Kiowa v. Craven, 46 Kan. 114, 26 Pac. 426; Pfeiffer v. Lyon County, 39 Kan. 432, 18 Pac. 506; State ex rel. Atwood v. Hunter, 38 Kan. 578, 17 Pac. 177; State ex rel. Godard v. Topeka Water Co. 61 Kan. 547, 60 Pac. 337; Freeman v. Chanute, 63 Kan. 573, 66 Pac. 647; Cherryvale Water Co. v. Cherryvale, 65 Kan. 219, 69 Pac. 176; Asher v. Hutchinson Water, Light & P. Co. 66 Kan. 496, 61 L.R.A. 52, 71 Pac. 813; Edison v.

Headnotes by SMITH, J.

Note. — Generally as to liability of a municipal corporation for injuries through unsafe conditions in parks or public grounds other than streets, see note to Bisbing v. Asbury Park, 33 L.R.A.(N.S.) 523.

As to the applicability of the doctrine of attractive nuisance to ponds, reservoirs, waterways, etc., see note to Thompson v. Illinois C. R. Co. 47 L.R.A.(N.S.) 1101.

73, 6 L.R.A. 259, 22 Pac. 528; Rowzee v. Pierce, 75 Miss. 846, 40 L.R.A. 402, 65 Am. St. Rep. 625, 23 So. 307; McIntyre v. El Paso County, 15 Colo. App. 78, 61 Pac. 237; Blair v. Granger, 24 R. I. 17, 51 Atl. 1042; Bisbing v. Asbury Park, 80 N. J. L. 416, 33 L.R.A.(N.S.) 523, 78 Atl. 196; Steele v. Boston, 128 Mass. 583; Russell v. Tacoma, 8 Wash. 156, 40 Am. St. Rep. 895, 35 Pac. 605; Clark v. Waltham, 128 Mass. 567; Park Comrs. v. Prinz, 127 Ky. 460, 105 S. W. 948.

The pond was not an attractive nuisance.

Charvoz v. Salt Lake City, — Utah, —, 45 L.R.A.(N.S.) 652, 131 Pac. 901.

Mr. Otis E. Hungate for appellees.

Smith, J., delivered the opinion of the court:

The appellees, in their petition, alleged: That they are the father and mother of Matteson Harper, deceased. That on December 5, 1911, and prior thereto, the defendant city owned and maintained a public park, known as Central Park, within the limits of said city, and kept and maintained therein a pond of water which had been constructed by the city. That near the south end of the park the pond was 7 or 8 feet deep, and on the date named was frozen over and covered with ice about 1 inch thick. That the park was in a residence portion of the city where many children lived and passed by. That the city kept and maintained open gates to said park, and paths and walks therein upon which the public was permitted to walk, one of which paths was along the south end of the pond. That for a long time prior to the accident numerous children of the locality frequently resorted to the park to play and for amusement, and especially when the park was covered with ice to slide and skate thereon. That the city neglected to make any effort to keep the children from playing about the pond, or from skating and sliding thereon, and provided no watchman to patrol said pond, or to rescue children therefrom, if any got into the pond. That on the above date Matteson Harper, then about seven years old, was going from the Central Park School, located west of Central Park, to his home on Western avenue in the city, and in so doing passed through the park, and along the south bank of the pond, which was the direct route from the school to his home. That, observing that the pond was frozen over, and lacking in judgment and discretion by reason of his youth, he was attracted thereby, and went upon the ice to slide. That he broke through the ice, fell 51 L.R.A.(N.S.)

deceased did not know the dangerous condition of the ice; but the condition was well known to the city, its officers, agents, and employees. That when the deceased was drowned, he was a strong, healthy boy, and affectionate to his parents. That, had he lived, his services would have been of the value of \$10,000 to the appellees, for which sum appellees prayed judgment. To this petition the city filed a demurrer on the ground that the petition did not state facts sufficient to constitute a cause of action. Upon the hearing of the demurrer it was overruled by the court, and the city appeals.

Ordinarily cities and other municipal corporations in the exercise of their governmental functions are not liable in damages for any neglect, or even wrongdoing, of their officers in the discharge of such duties, unless such liability is expressly imposed upon them by law. Pfefferle v. Lyon County, 39 Kan. 432, 18 Pac. 506; Peters v. Lindsborg, 40 Kan. 654, 20 Pac. 490; La Clef v. Concordia, 41 Kan. 323, 13 Am. St. Rep. 285, 21 Pac. 272; New Kiowa v. Craven, 46 Kan. 114, 26 Pac. 426; Caldwell v. Prunelle, 57 Kan. 511, 46 Pac. 949; 4 Dill. Mun. Corp. 5th ed. § 1660, p. 2895; 28 Cyc. 1305.

An exception to the rule has been made which holds cities liable for damages resulting from defects in their highways or certain conditions of notice. In Jansen v. Atchison, 16 Kan. 358, it is said: "Cities having the powers ordinarily conferred upon them respecting bridges, streets, and sidewalks within their limits, owe to the public the duty of keeping them in a safe condition for use in the usual mode by travelers, and are liable in a civil action for special injuries resulting from neglect to perform this duty."

In the second edition of the reports containing the latter case, numerous authorities are cited approving the doctrine. Neither counties nor townships, however, were held liable in this state for injuries caused by defects in bridges, culverts, or highways until the enactment of chapter 237, Laws of 1887 (§ 658 of the General Statutes of 1909). Eikenberry v. Bazaar Twp. 22 Kan. 556, 31 Am. Rep. 198; Marion County v. Riggs, 24 Kan. 255; Parr v. Shawnee County, 70 Kan. 111, 78 Pac. 449.

Another exception to the general rule stated as to the liability of cities in the state was adjudicated in Kansas City v. Siese, 71 Kan. 283, 80 Pac. 626. In that case the city was held liable in damages for maintaining an attractive nuisance in or adjacent to a street in a thickly settled

district of the city, and the doctrine was reaffirmed in *Roman v. Leavenworth*, 90 Kan. 379, 133 Pac. 551. There are, however, limitations upon the application of the doctrine. In *Tavis v. Kansas City*, 89 Kan. 547, 132 Pac. 185, the following quotation from *Peters v. Bowman*, 115 Cal. 345, 58 Am. St. Rep. 106, 47 Pac. 598, 1 Am. Neg. Rep. 4, is made with approval: "The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common, or artificial and uncommon, to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing, and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions. As to common dangers existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. But, with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different." 115 Cal. 356.

The maintenance of the park as described in the petition is clearly a governmental function. The city as a corporation derives no benefit therefrom; but the park is maintained for the benefit of the public without regard to residence. The park is not a public highway, and, unless the pond therein is an attractive nuisance, the city cannot be held liable for the accident upon any principle heretofore recognized by the courts of this state. As described in the petition, and as a matter of common knowledge, the park is not an annoyance to the public, but is a beneficent provision made by the city for open-air recreation and diversion. It adds to the happiness and healthfulness of the thousands who avail themselves of its benefits. The pond in the park adds to its beauty, and is accessory to all the beneficent purposes for which the park was established and is maintained.

By the allegations of the petition, it appears that the pond proved not only dangerous, but destructive, to the little boy who ventured thereon, and who, by reason of his tender years, was incapable of appreciating and avoiding the dangers encountered. The suggestion in the petition that the pond should have been fenced by the city, or that patrolmen should have been at the place to keep the boy from going upon the ice, is evidently impracticable. A

fence about the pond would disfigure the park and rob the pond of much of its attractiveness. So far as appears, the boy went there and upon the ice alone, and there was nothing to attract the attention of patrolmen, if such had been employed to watch the pond. The pond was dangerous at the time only because covered with a thin coating of ice.

The pond appears to be of like character, and, although made by the city, is virtually a reproduction of the ponds found in nature, and nature does not maintain attractive nuisances. That there always is possible danger of a child going upon the ice or falling into the water is true; but such an accident is as likely to occur on any like pond in nature. It has been said that there is possible danger in every step of life from the cradle to the grave, although the danger may not be foreseen. Every tree that stands in the park or in the city presents the possible danger that some boy may climb it and fall to his injury, or even death. Ordinary care requires only that means be taken to avoid such dangers as are reasonably to be apprehended,—probable dangers, not possible dangers. The imminence of the danger is ordinarily the measure of care to be taken to avoid it. There seems no reason in this case to hold the city liable which would not have been equally cogent had the boy, in going to or from school, gone through a neighbor's pasture, with the owner's consent, and met a like fate upon a pond therein. We know of no rule that imposes higher care upon a city than upon an individual.

Much reliance is placed by the appellees in the case of *Bowden v. Kansas City*, 69 Kan. 587, 66 L.R.A. 181, 105 Am. St. Rep. 187, 77 Pac. 573, 1 Ann. Cas. 955, 16 Am. Neg. Rep. 339. The syllabus reads: "A municipal corporation is performing a ministerial public duty in maintaining a fire station, and is liable in damages to an employee for personal injuries resulting from the neglect of the corporation to furnish him a reasonably safe place in which to work." Notwithstanding the use of the word "ministerial" in the syllabus, the real principle involved was the relation of employer and employee as stated in the opinion.

We have examined the authorities cited by counsel on the question submitted for additional briefs, and also the collection of authorities in extended notes to three cases in 19 L.R.A.(N.S.) 1094, 1136. The general rule we have stated is sustained by much the greater number of cases, and upon what appears to be the better reasoning in cases brought against cities or municipali-

liability is raised.

It is strenuously urged that a city should be liable for any defect or negligence in the maintenance of its parks on the same grounds as in the maintenance of its highways. The necessities of public travel at all times and under all conditions presumably impelled the courts to make the exception regarding the maintenance of the highways in cities as we have noted. Like reasons do not seem to require the extension of the exception to the maintenance of parks; at least this has not been done in this state, and we do not feel that justice would be promoted by making the further exception.

On the facts stated in the petition, it does not appear that the pond is an attractive nuisance. The demurrer should therefore have been sustained.

The order and judgment is reversed.

West, J., specially concurring:

I concur in the conclusion reached, for the reason that no actionable negligence is shown by the allegations, but I do not think that the question of governmental function is in the case; neither am I ready to concede that the reproduction of a natural pond may not be as dangerous and attractive a nuisance as any other. The statutes seem to clothe the city with authority to maintain parks, and likewise charge it with duty of proper regulation and care. Gen. Stat. 1909, §§ 831, 834.

ARKANSAS SUPREME COURT.

CITY OF TEXARKANA, ARKANSAS, et al., Appts.,
v.

HUDGINS PRODUCE COMPANY et al.

(— Ark. —, 164 S. W. 736.)

Municipal corporation — requiring license for sale of cider.

1. Charter authority to regulate any trade of a tendency dangerous to morals, health, or safety, and to prevent nuisances and declare what are such, includes power to require persons engaged in the sale of cider to procure a license.

Intoxicating liquor — license of sale of cider — excessiveness of fee.

2. A fee of \$15 per month for wholesalers, and \$10 per month for retailers, for the privilege of selling cider free from intoxicating qualities, making frequent analyses necessary to determine whether or not

Note. — As to power to prohibit or regulate the sale of "soft drinks," see note to Tolliver v. Blizzard, 34 L.R.A. (N.S.) 890. 51 L.R.A. (N.S.)

is not so excessive that the court can say that it is for revenue, rather than for regulation, and is therefore void.

(March 2, 1914.)

APPEAL by defendants from a judgment of the Miller County Chancery Court sustaining a demurrer to the answer in a suit to restrain the enforcement of a city ordinance regulating the sale of cider by wholesale. Reversed.

Statement by Smith, J.:

The appellees brought suit in the chancery court of Miller county, Arkansas, to restrain the city of Texarkana, Arkansas, and Foster Rogers, its chief of police, from enforcing a certain ordinance of that city, regulating the sale of cider by wholesale and retail. The lower court issued a temporary injunction, which was made permanent on the final hearing.

So much of the ordinance as we need consider here reads as follows:

"Sec. 3. That the selling of cider, either at wholesale or retail, within the incorporate limits of the city of Texarkana, Arkansas, is hereby declared to be a privilege, and it shall be unlawful for any person or persons to engage in the sale of cider, either at wholesale or retail, until either he or they shall have complied with the provisions of this ordinance.

"Sec. 4. That each dealer in cider within the incorporate limits of this city of Texarkana, Arkansas, shall, before engaging in said business, whether at wholesale or retail, pay into the city treasury of the city of Texarkana, Arkansas, the following license fees, namely:

"(a) Each wholesale dealer in cider shall pay the sum of fifteen (\$15) dollars per month, payable monthly on the first day of each month.

"(b) Each retail dealer in cider shall pay the sum of ten (\$10) dollars per month, payable on the first day of the month.

"Any person or persons engaging in the business of selling cider within the said city of Texarkana, Arkansas, either at wholesale or retail, without having first paid the license fee required by this ordinance, shall be subject to a fine of twenty-five (\$25) dollars for each offense; and each day that said business is so illegally carried on shall constitute a separate offense."

The complaint alleged that appellee the Hudgins Produce Company is a domestic corporation, and that the city of Texarkana, Arkansas, is a city of the first class, and that the Hudgins Produce Company is

duce business in said city, and is also engaged in the sale of sweet cider. The complaint further alleged that the ordinance was unreasonable, void, and of no effect, for the following reasons: "First, that the city of Texarkana, Arkansas, is not empowered or authorized to pass any act to declare the wholesaling and retailing of cider a privilege, or to license or regulate the same, and that the effort of the city to collect a license under the said ordinance is an illegal exaction, and an abuse of the power of the said city; and, second, that the said ordinance is a revenue measure, and that the amount of the tax is unreasonable, excessive, and void; and, third, that the ordinance is void because it contains and attempts to legislate upon more than one subject, and the subjects are not clearly expressed in the title." Appellees rely upon the first and second grounds. Appellants admitted in the answer that appellee is engaged in the wholesale grocery business in the city of Texarkana, Arkansas, and further admitted that it is engaged in the wholesale cider business; but denied that the cider sold by it was the cider commonly known as sweet cider; but it stated the truth to be that the cider sold by appellee was a cider made by a chemical process, with harmful and dangerous ingredients therein, and said cider, when fermented, contained a large percentage of alcohol, and that the carrying on of said business had a tendency dangerous to morals, health, and public safety, and came expressly within the terms and conditions of subdivision 4 of § 5648 of Kirby's Digest of the statutes of the state of Arkansas. Appellants deny the said ordinance is unreasonable and void, and deny the city was not authorized or empowered to license or regulate the wholesaling of cider, and alleged that dealing in cider, as appellee was doing, was a business properly subject to the regulation of the city council, but it denied that the license fee provided for was imposed for the purpose of raising a revenue; but say the sole purpose of said ordinance was for the regulation of said business, and the fees provided therefor were intended to pay the necessary expenses of such supervision. Appellants further alleged that, in order to ascertain the extent of the fermentation of said cider, and the adulteration thereof, it was necessary to make tests of the said cider, and that said tests are expensive, and are required to be frequently made, and that the license fee of \$15 per month will not more than pay for the inspection or tests of said cider, and the proper regulation of the sale thereof. Appellants also stated that it is a duty of the chief of police of said

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council, to inspect the places where cider is sold, and to report to the mayor any dealer who is handling intoxicating cider. A copy of said resolution was attached as an exhibit to the answer, and it reads as follows:

"Sec. 1. That the chief of police of the said city of Texarkana, Arkansas, and his assistants are hereby instructed and directed to inspect all cider offered for sale by wholesale and retail dealers within the city of Texarkana, Arkansas, and he shall see that said cider so offered for sale is pure and wholesome.

"Sec. 2. That in the inspection of the business of any wholesale dealer he may require from said dealer such reasonable proof of the quality of the cider to be sold as will satisfy him that the same is pure and wholesome.

"Sec. 3. In the inspection of cider sold at retail by dealers within said city of Texarkana, the chief of police shall see that the places at which cider is sold are not made tippling houses, and that the cider so sold at said places is pure and wholesome, and that the same is not hard nor intoxicating; it shall also be his duty to see that the places where said cider is retailed are kept in a clean and sanitary condition.

"Sec. 4. If the chief of police shall determine that any cider sold within the city of Texarkana, Arkansas, is unwholesome or intoxicating, it shall be his duty to report the seller of said cider to the mayor of the city of Texarkana, with his recommendation as to whether or not the license of said dealer should be revoked.

"Sec. 5. The chief of police shall furnish to each person granted a license to sell cider a copy of this resolution, and the same shall be considered a part of said license."

The ordinance requiring the license was passed on the 27th of May, 1913, and the resolution fixing the duties of the chief of police in regard to the inspection of the cider was passed on June 24, 1913. The complaint in this cause was filed on the 2d day of July, 1913.

Appellee says that the resolution prescribing the duties of the chief of police was passed merely to bolster up the ordinance, and that it cannot be considered in determining the validity of the ordinance. Appellee demurred to the answer, and this demurrer was sustained, and appellants electing to stand upon the demurrer, have appealed.

Mr. Frank S. Quinn, for appellants:

The defendant city had authority to pass an ordinance taxing or licensing or regulating the sale of cider.

Helena v. Miller, 88 Ark. 263, 114 S. W. 237; *Fayetteville v. Carter*, 52 Ark. 301, 6 L.R.A. 509, 12 S. W. 573; *Hot Springs v. Curry*, 64 Ark. 152, 41 S. W. 55; *Gettysburg v. Gettysburg Transit Co.* 36 Pa. Super. Ct. 598; *Northwestern University v. Wilmette*, 230 Ill. 80, 82 N. E. 615; *Russellville v. White*, 41 Ark. 485; *Ft. Smith v. Ayers*, 43 Ark. 82; 7 Cyc. 130.

Cider being a beverage liable to fermentation, and thereby becoming alcoholic, and therefore dangerous and harmful to the health, morals, and good order of the community, is a proper subject for supervision and regulation by the municipality.

Eureka Vinegar Co. v. Gazette Printing Co. 35 Fed. 570; *State v. Schaefer*, 44 Kan. 90, 24 Pac. 92; *Com. v. Reyburg*, 122 Pa. 299, 2 L.R.A. 415, 16 Atl. 351; *Carpenter v. Little Rock*, 101 Ark. 238, 142 S. W. 102; *Trigg v. Dixon*, 96 Ark. 199, 131 S. W. 695, Ann. Cas. 1912B, 509; 3 *McQuillin*, Mun. Corp. 1998; *Tiedeman*, Pol. Power, § 102; *Tolliver v. Blizzard*, 143 Ky. 773, 34 L.R.A.(N.S.) 890, 137 S. W. 509; *Monroe v. Lawrence*, 44 Kan. 607, 10 L.R.A. 520, 24 Pac. 1113; *Re Jahn*, 55 Kan. 694, 41 Pac. 956; *Lincoln Center v. Linker*, 5 Kan. App. 242, 47 Pac. 174, 6 Kan. App. 369, 51 Pac. 807, 7 Kan. App. 282, 53 Pac. 787; *Eureka v. Jackson*, 8 Kan. App. 49, 54 Pac. 5; *Pikeville v. Huffman*, 112 Ky. 360, 65 S. W. 794; *State v. Danenberg*, 151 N. C. 718, 26 L.R.A.(N.S.) 890, 66 S. E. 301; *Com. v. Henry*, 110 Va. 879, 26 L.R.A.(N.S.) 883, 65 S. E. 570; *Hardin v. Radford*, 112 Va. 547, 72 S. E. 101, Ann. Cas. 1913B, 858; *Cassidy v. Macon*, 133 Ga. 689, 66 S. E. 941; *Macon Sash, Door & Lumber Co. v. Macon*, 96 Ga. 23, 23 S. E. 120; *Daus v. Macon*, 103 Ga. 774, 30 S. E. 670.

Mr. William H. Arnold, for appellees:

There is no expressed or implied power granted to municipalities to regulate the sale of cider.

State v. Danenberg, 151 N. C. 718, 26 L.R.A.(N.S.) 890, 66 S. E. 301; *Macon Sash, Door & Lumber Co. v. Macon*, 96 Ga. 23, 23 S. E. 120; *Daus v. Macon*, 103 Ga. 774, 30 S. E. 670; *Cassidy v. Macon*, 133 Ga. 689, 66 S. E. 941; *Monroe v. Lawrence*, 44 Kan. 607, 10 L.R.A. 520, 24 Pac. 1113; *State v. Schaefer*, 44 Kan. 92, 24 Pac. 92; *Re Jahn*, 55 Kan. 694, 41 Pac. 956; *Lincoln Center v. Linker*, 5 Kan. App. 242, 47 Pac. 174; *Tuck v. Waldron*, 31 Ark. 462; *Pikeville v. Huffman*, 112 Ky. 360, 65 S. W. 794.

The ordinance in question is a revenue measure.

Smith, J., delivered the opinion of the court:

It is said that the ordinance is void 51 L.R.A.(N.S.)

because it designates the business of selling cider, either at wholesale or retail, as a privilege, and undertook to derive a revenue from the exercise of this privilege by imposing a tax so excessive that its purpose to raise revenue is made manifest. It is true the business of selling cider is referred to as a privilege; but the use of that term is not controlling in the consideration of the purpose of the ordinance. It is proper to consider not only the amount of the license fixed by the ordinance, but it is necessary also to consider the nature of the business sought to be regulated, and the probable regulation which will be necessary to effectuate the purposes of the ordinance.

Appellants say the authority to pass the ordinance in question is found in the 4th subdivision of § 5648 of Kirby's Digest, which section confers additional and enlarged powers upon cities of the first class, and that the part of said section conferring the authority for the ordinance under consideration reads as follows: "And to prevent or regulate the carrying on of any trade, business, or vocation of a tendency dangerous to morals, health, or safety . . . and to prevent, abate, or remove nuisances of every kind, and to declare what are such." To determine whether or not the ordinance in question is authorized, and the authority for its enactment conferred by the language quoted, it will be necessary for us to consider whether or not the sale of cider is a proper subject of municipal regulation; and, if it is found to be, then the further question arises whether or not the fee imposed by said ordinance was designed to cover the estimated cost of regulation, or was intended as a means of raising revenue.

Is the sale of cider a proper subject of regulation? Appellee says that, if this ordinance is not void, cities may impose a license upon all merchants as such. But we think this is not so; for, in our opinion, the sale of cider is not an improper subject of regulation. Cider is defined in 7 Cyc. 130, as: "An alcoholic beverage obtained by the fermentation of the juice of apples; a fermented liquor made from the juice of apples—formerly used of all kinds of strong liquors except wine; a drink made from the juice of apples." An interesting case which discusses the chemical composition of cider, and which shows that it may be an alcoholic and intoxicating beverage, and one which cannot lawfully be sold in a state whose statutes prohibit the sale of alcoholic or fermented liquors, is *Eureka Vinegar Co. v. Gazette Printing Co.* (C. C.) 35 Fed. 570. This is a very learned opinion, and was delivered by Justice Caldwell,

as judge of the circuit court of the eastern district of Arkansas.

The city of Lawrence, in the state of Kansas, passed an ordinance regulating the sale of cider, which was not intoxicating, and prohibited its sale in less quantity than 1 gallon, and forbade the drinking of same at the place of sale. This ordinance was attacked upon the ground that it was a violation of private rights, and was an unreasonable restraint upon trade, and was not authorized under any legislative enactment of the state. It was held that the legislative power given to city councils to enact and make all such ordinances, by-laws, rules, and regulations not inconsistent with the laws of the state, as may be expedient for maintaining the peace, good government, and welfare of the city and its trade and commerce," was a sufficient authority for the enactment of such an ordinance. It was there insisted that cider is a harmless and wholesome drink, and that the restraint upon its sale was unreasonable, in contravention of a common right, and therefore unconstitutional. In upholding that ordinance the supreme court of that state said: "The ordinance was manifestly not enacted in pursuance of the prohibitory law, nor for the regulation of the sale of intoxicating liquors. The ordinance inferentially permits the sale of cider in quantities of a gallon or more, and the penalty for its violation may be \$10, without imprisonment. These provisions are not consonant with the laws prohibiting and punishing the unlawful sale of intoxicating liquors, and hence we must infer that the ordinance was passed for the purpose of controlling the sale and disposition of cider that was not intoxicating. It will be observed that the ordinance regulates, rather than prohibits, the sale of cider, and the legislative power to regulate the sale of an article or liquid which in some stages is harmless and in others hurtful is no longer open to question. The juice of apples quickly changes from fresh to hard cider, and hard cider is presumptively not only a fermented, but an intoxicating, liquor. *State v. Schaefer*, 44 Kan. 90, 24 Pac. 92. It is difficult to show when the change occurs and when it reaches such a state as will produce intoxication. It may have been thought that the drinking of cider might foster a taste for strong liquors, and that, if the unrestricted sale of cider by the glass was permitted, the officers might be easily deceived as to the character of the drinks sold, and that a tippling shop might be carried on under the guise of a place to sell cider. In the interest of the health of the people, and the peace and good order of the communities, it was deemed wise to regulate the traffic. To sell it by the glass and allow

it to be drunk upon the premises where sold was deemed to be subversive of good order, and dangerous to the health and morals of the people, and hence the city imposed a regulation that it should not be sold in less quantities than 1 gallon, and should not be drank at the place of sale. Such a regulation violates no private right, and does not unreasonably or improperly restrain trade." The court then proceeds to show that, while there is no provision of the statutes of Kansas directly authorizing the enactment of such an ordinance, yet that the city possessed authority to pass the ordinance under the general welfare clause, which authorized city councils "to enact and make all such ordinances, by-laws, rules, and regulations, not inconsistent with the laws of the state, as may be expedient for maintaining the peace, good government, and welfare of the city and its trade and commerce." *Monroe v. Lawrence*, 44 Kan. 607, 10 L.R.A. 520, 24 Pac. 1113. It is a matter of common observation that, where the sale of liquor has been prohibited, a common method of violating the law which works this prohibition is to engage ostensibly in the sale of what is ordinarily called soft drinks, and that cider is one of the drinks so sold. And we know, too, from the authority of the cases herein cited, that, by processes of fermentation, cider may cease to be sweet, and become intoxicating.

Other interesting cases on this subject are those of *Com. v. Reyburg*, 122 Pa. 299, 2 L.R.A. 415, 16 Atl. 351; *Re Jahn*, 55 Kan. 694, 41 Pac. 956; *Lincoln Center v. Linker*, 5 Kan. App. 242, 47 Pac. 174, s. c. 6 Kan. App. 369, 51 Pac. 807, and 7 Kan. App. 282, 53 Pac. 787; also *Eureka v. Jackson*, 8 Kan. App. 49, 54 Pac. 5.

At the time of the passage of the ordinance in question, it was unlawful to sell intoxicating liquors of any character within 10 miles of the city of Texarkana, it having been made so by Act No. 26 of the Acts of the General Assembly of 1913, prohibiting "the sale or giving away or storing or keeping stored for another person any alcoholic liquors, or any spirituous, ardent, vinous, malt, or fermented liquors, or any compound or preparation thereof commonly called tonics or medicated liquors," which act of the general assembly was approved February 7, 1913. This ordinance does not give one who pays the fee therein provided the right to sell any kind of cider, the sale of which is made unlawful by the special act of general assembly above mentioned. Evidently one of the purposes of the ordinance is to obtain information if cider was sold which it was unlawful to sell. The resolution dated June 24, 1913, expressly so provides. But, even though

we may not consider this resolution in ascertaining the purpose of the ordinance, the answer alleged that the chief of police had frequent inspections made by chemical analysis to ascertain the character of cider being sold by the various dealers therein in the city. It cannot be said that the purpose of an ordinance is not that of regulation, simply because the ordinance contains no provision for the inspection or regulation of the business to be licensed thereunder. In the cases of the *Helena v. Miller*, 88 Ark 263, 114 S. W. 237, where a municipal ordinance of the city of Helena imposed an annual license fee of \$25 upon hotels and \$15 upon boarding houses, the contention was made that the ordinance was void, as having been passed for the purpose of raising revenue, and not for the purpose of regulation, because no provision was contained in the ordinance providing for the inspection or superintendence of the business there licensed; but the court held that the ordinance should not be declared void on that account. We have many cases which discuss the authority of municipal corporations to impose a license, such as is imposed by the ordinance now under consideration, and it has been said in a number of these cases that it is our duty to indulge every reasonable presumption in favor of the validity of the ordinance, and not to declare it void, unless it plainly appears to be so. In the case of *Helena v. Miller*, supra, it is said: "It is difficult for the court to draw the line precisely between amounts which are reasonable and those that are unreasonable. The license fee fixed by an ordinance may, however, be so high that the court will, on the face of it, declare it to be unreasonable (*Stamps v. Burk*, 83 Ark. 351, 104 S. W. 153), or so low that the court will declare it to be reasonable." A leading case on this subject, and one which has been generally quoted in the different opinions of this court, is the case of *Fayetteville v. Carter*, 52 Ark. 301, 6 L.R.A. 509, 12 S. W. 573, in which case it was said: "A fee sufficient to cover the expense of issuing the license, and to pay the expenses which may be incurred in the enforcement of such police inspections or superintendence as may be lawfully exercised over the business, may be required. It is obvious that the actual amount necessary to meet such expenses cannot, in all cases, be ascertained in advance, and that 'it would be futile to require anything of the kind.' The result is, if the fee required is not plainly unreasonable, the courts ought not to interfere with the discretion exercised by the council in fixing it; and, unless the contrary appears on the face of the ordinance requiring it, or is established

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by proper evidence, they should presume it to be reasonable."

In the case of *Trigg v. Dixon*, 96 Ark. 199, 131 S. W. 695, Ann. Cas. 1912B, 509, an ordinance of the city of Texarkana, Arkansas, which imposed a license of \$50 upon all persons engaged in the business of a butcher, was upheld. That ordinance was upheld as having been authorized both under § 5438 of Kirby's Digest, giving cities and towns power to establish and regulate markets, and also under § 5648, subdiv. 4, giving cities of the first class authority to prevent or regulate the carrying on of any trade, business, or vocation of a tendency dangerous to morals, health, or safety, and it was said there, as has been said in numerous other cases: "The power to regulate includes the power to license as a means of regulating." Upon consideration of the decisions in various cases of our own, as well as of other courts, we think the test of the reasonableness of an ordinance imposing a license for the purpose of regulation may be said to be that, if it is such a sum as is so manifestly excessive, and out of proportion to the regulation which will probably be required to make the ordinance effective, so that it is certain the city will derive a profit from the enactment of the ordinance, then, in all such cases, it may be said that the purpose of the ordinance is to raise revenue, and such ordinances are void, when no statute authorizes their enactment for the purpose of raising revenue.

Upon the other hand, if the amount of the regulation is uncertain, and its cost is indeterminate, depending upon circumstances, which may vary, and it does not appear that the license imposed is so out of proportion to the probable cost of its enforcement so that the ordinance will necessarily be the source of income to the municipality, such ordinances should not be declared invalid, as having been passed for the purpose of raising revenue, rather than the purpose of regulation, although they may, in fact, prove to be the source of profit to the municipality.

Is the sale of cider a proper subject of regulation? Appellee says that, if this ordinance is not void, cities may impose a license upon all merchants as such.

We conclude, therefore, that the sale of cider, either by wholesale or retail, is a proper subject of municipal regulation; and that the license imposed by the ordinance in question is not so excessive that we can say, as a matter of law, it was passed for the purpose of revenue; and the decree of the court sustaining the demurrer to appellants' answer is therefore reversed, and the cause will be remanded, with directions to overrule said demurrer.

F. G. MORITZ
v.
LEWIS CONSTRUCTION COMPANY et
al., Respts.,
and
THEODORE FLECK et al., Appts.
(— Wis. —, 146 N. W. 1120.)

Mechanics' Lien — material consumed in form for concrete works.

A lien may be claimed for lumber furnished and used in the erection of a building for shoring, that is, support for the concrete while it is setting, so far as the lumber is destroyed or depreciated in value by such use, under a statute giving a lien for materials furnished "for or in or about" the erection of a structure.

(May 1, 1914.)

Note. — Mechanics' Lien: materials wholly or partially consumed in process of work, but not becoming a part of the structure.

The purpose of the present note is to supplement that appended to *B. F. Avery & Sons v. Woodruff & Cahill*, 36 L.R.A. (N.S.) 866, which contains the earlier cases on the point, and refers to annotation on related subjects. A later note of interest in this connection is appended to *Speer Hardware Co. v. Bruce Bros.* 42 L.R.A. (N.S.) 354, and deals with mechanics' liens upon premises for an improvement not placed thereon, but having a physical or beneficial connection therewith.

The earlier note shows that until recently the courts consistently denied liens for materials which, though employed or consumed in the work, became no part of the structure; but, as also pointed out in that note, there appears to be a tendency to relax that rigid rule, several late cases allowing liens to the extent to which the materials are consumed or depreciated in the work.

Efforts have been made to distinguish decisions denying liens for materials used, but not incorporated into the improvement, upon the ground that it appeared in such cases that such materials were not consumed, but were taken away and used for other purposes by the contractor. For example, one case sought to be distinguished in that way is *Kennedy v. Com.* 182 Mass. 480, 65 N. E. 828, which is set out in the earlier note, and which denies a lien for lumber for concrete forms. It is true that, as has been said, the statement of the facts in that case recites that the lumber was not consumed, but was removed, but in rendering the decision the court declared generally and without qualification that, to require a lien under the Massachusetts act giving a lien for materials used in the construction of a public building, it is neces-

ary judgment of the Circuit Court for Milwaukee County in favor of the defendant Lumber Company in an action to foreclose a mechanics' lien. Affirmed.

Statement by Kerwin, J.:

This action was brought to foreclose a mechanics' lien. The respondent Sanb's Lumber Company furnished certain lumber to the contractor, who was engaged in building a reinforced concrete building on the land of appellants. The lumber was used for what is known in the trade as shoring; that is wooden forms are constructed, into which the concrete is poured, and in which it remains until it has set, when the shoring is removed. The shoring is often used several times in constructing the same building. The case was sent to a referee, who made his report and findings, and his findings were substantially

sary to show that the materials are a part of the completed structure,—that they have entered into it and become a part of the reality. Therefore, this case in no way militates against the statement in the earlier note that the earlier cases on the question denied liens upon general grounds.

Attempts have also been made to distinguish for like reasons, the case of *Rittenhouse & E. Co. v. Brown*, 254 Ill. 549, 98 N. E. 971, reported since the preparation of the earlier note. That case too recites that the "false work" was taken away by the contractor, and the court, in denying a lien, emphasizes the fact that the false-work lumber never became, and was not intended to become, the property of the owner of the building, but belonged to the contractor who bought it, used it for the temporary purpose for which he obtained it, and took it away to be used for his own purposes. But although the court concedes that the lumber was depreciated in value by the use, it does not allow a lien to the extent of the depreciation, and the opinion plainly shows that the real reason for denying the lien is that the lumber did not enter into and become a part of the building.

The modern extension of mechanics' liens to materials employed in temporary processes is well exemplified by the case of *Chamberlain v. Lewiston*, 23 Idaho, 154, 129 Pac. 1069, allowing a mechanics' lien for lumber used in a cofferdam constructed for the purpose of laying an intake pipe for a waterworks system. Having first determined that the destruction of the work by flood did not affect the right to a lien, and without alluding to the question whether the lumber was consumed or depreciated by such use, or whether but for the flood it could have used again, the court allowed a lien upon general grounds, saying: "When the city contracted for the laying of this pipe and doing of this work, its agents and officers knew at the time that it would be necessary to construct a coffer-

Sands Lumber Company was entitled to a lien for the shoring furnished, or any part thereof.

The court made findings at great length covering all the issues in the case between the different parties. We shall refer only to those material and attacked upon this appeal, namely:

"That the defendant Sands Lumber Company, at the request of the Lewis Construction Company, furnished lumber which was used in the construction of the building in question in the manner and to the extent hereinafter more particularly found; that said lumber was furnished on or between the 1st day of September, 1910, and the 7th day of October, 1910, and was of the value, at customary and reasonable rates, of \$1,021.23; that on the 19th day of November, 1910, the Lewis Construction Company

dam or use some other means or method that would accomplish the same result, in order to do the work and make the repair that the contract called for. If this be true, and it undoubtedly is, then we fail to see what difference it makes to the city whether this labor and material was employed and used in building the cofferdam or in procuring some other means or contrivance through and by which the work should be carried on and completed. When a man contracts to have a building erected, he knows that the contractors and builders will be obliged to have scaffolding and other material that does not actually go into the building, but which may practically be used and consumed and destroyed in the course of the work. Such material and the labor incident thereto is as much a part of the contract as if it were specified and set forth in the contract itself." The court cites with approval *Barker & S. Lumber Co. v. Marathon Paper Mills Co.* 146 Wis. 12, 36 L.R.A.(N.S.) 875, 130 N. W. 866, and *E. R. Darlington Lumber Co. v. Westlake Constr. Co.* 161 Mo. App. 723, 141 S. W. 931, which are cited in the earlier note and which mark the modification of the old rule against liens for temporary work. The *Chamberlain Case* was followed in *Potlach Lumber Co. v. Lewiston*, 23 Idaho, 167, 129 Pac. 1073.

So, the Kansas court has recently held that lumber furnished for and used in the making of forms for a concrete structure, as provided in the contract and specifications for its erection, which is largely consumed and rendered valueless by such use, is "material" within the meaning of a mechanics' lien law. *Chicago Lumber Co. v. Douglas*, 89 Kan. 308, 44 L.R.A.(N.S.) 843, 131 Pac. 563. In reaching this conclusion, the court said: "These forms operated to enhance the value of the land on which they were used as did the labor in setting them up. They were finally taken down and removed, but the life and substance of 51 L.R.A.(N.S.)

paid from said Lewis Construction Company, together with interest thereon from said 10th day of November, 1910.

"That the lumber furnished by the Sands Lumber Company was used in the construction of false work or forms into which the concrete was poured, which constituted the walls of the said building; that the said lumber was thus used three or four times in the construction of this building, and that after it was thus used, about 75 per cent of all the lumber could not be used again, but became mere kindling, and was of practically no value; that the remaining 25 per cent of said lumber was fairly good, but full of holes, and could be, and was actually in part, used again in other concrete work, on other buildings not belonging to the defendants Fleck, but that said 25 per cent of said lumber was second-

the material had been used up in the erection of the building. The material cannot be regarded as a part of the contractors' plant, because it was impregnated with cement and rendered practically unfit for other uses. It was used directly in the construction of the building, and, being consumed in that use, it can be fairly said that, within the meaning of our statute, it entered into and was used in the erection of the building. It is clear that it came within the terms of the bond, as it was 'material furnished and used in and about said contract work.'"

Attention is also directed to *Pacific Sash & Door Co. v. Bumiller*, 162 Cal. 664, 41 L.R.A.(N.S.) 296, 124 Pac. 230; allowing a lien for lard oil applied to the threads of pipe joints, insulated wire for drop lights, plaster for soldering joints, asbestos comprising a part of the electric switchboard, and soapstone used on the inside of pipes to facilitate the pulling of wires through the same. In allowing these items the court contented itself with saying merely that the contention that these materials did not enter into or become a part of the structure was unfounded.

The Iowa court expressly recognizes the right to a lien for lumber consumed in constructing false work for the erection of a bridge, distinguishing the cases in which a lien is claimed for tools, machinery, and equipments furnished the contractor. *Empire State Surety Co. v. Des Moines*, 152 Iowa, 552, 132 N. W. 837, denying rehearing of 152 Iowa, 531, 131 N. W. 870.

While this note, like the earlier one, excludes cases involving the right to liens for tools and equipment furnished the contractor, reference may be made to *Farmers' Irrig. Co. v. Kamm*, 55 Colo. 440, 135 Pac. 766, in which materials used in erecting a temporary shelter for men and teams were placed in the same category as tools and equipment of the contractor, and were therefore held not lienable. L. A. W.

hand lumber, and worth about \$10 per thousand.

"That the 75 per cent of the lumber furnished by said Sands Lumber Company, which, as heretofore found, could not be used again, was actually consumed in the erection and construction of the building in question, and has entered into and formed part of such completed structure; that the 25 per cent of the lumber furnished by this defendant, which became secondhand lumber, was not entirely consumed in its use in or about the erection or construction of said building, but was in part a tool or appliance; that said 25 per cent has been, by its use in said building, diminished in value to the extent of \$133.14, for which sum, in addition to the sum of \$465.92, balance due upon the 75 per cent above mentioned, the defendant Sands Lumber Company is also entitled to lien, making a total of \$599.06, with interest as aforesaid."

The court found the amount due the respondent Sands Lumber Company in accordance with the above findings, and ordered judgment therefor and a lien on the premises. Judgment was entered accordingly, from which this appeal was taken by the appellants, Theodore Fleck and Otto Fleck, owners of the premises.

Messrs. Otjen & Otjen, for appellants:
A materialman is not entitled to a lien for shoring.

Oppenheimer v. Morrell, 118 Pa. 189, 12 Atl. 307; *McAuliffe v. Jorgenson*, 107 Wis. 132, 82 N. W. 706; *Avery & Sons v. Woodruff & Cahill*, 144 Ky. 227, 36 L.R.A.(N.S.) 870, 137 S. W. 1088.

No lien is given for the depreciation of the value of a tool or appliance.

Barker & S. Lumber Co. v. Marathon Paper Mills Co. 146 Wis. 12, 36 L.R.A.(N.S.) 875, 130 N. W. 866.

Messrs. Lorenz & Lorenz, for respondent lumber company:

A materialman furnishing lumber for false work for concrete construction is entitled to a lien to the extent of the value of the lumber actually consumed in the work.

Ibid.; *Avery & Sons v. Woodruff & Cahill*, 144 Ky. 227, 36 L.R.A.(N.S.) 866, 137 S. W. 1088; *E. R. Darlington Lumber Co. v. Westlake Constr. Co.* 161 Mo. App. 723, 141 S. W. 931; *Chicago Lumber Co. v. Douglas*, 89 Kan. 308, 44 L.R.A.(N.S.) 843, 138 Pac. 563.

Kerwin, J., delivered the opinion of the court:

It is contended by appellant that the Sands Lumber Company acquired no lien 51 L.R.A.(N.S.)

for any of the lumber used in shoring, because it did not become a part of the structure, and, further, that the findings to the effect that 75 per cent of the lumber was consumed in the construction of the building, and that 25 per cent was depreciated in value, as specified in the findings, are not supported by the evidence. A careful examination of the evidence convinces that the findings are well supported by the evidence. The question whether the Sands Lumber Company was entitled to a lien upon the established facts is a more delicate question. In a case recently decided by this court (*Barker & S. Lumber Co. v. Marathon Paper Mills Co.* 146 Wis. 12, 36 L.R.A.(N.S.) 875, 130 N. W. 866), it was held that where lumber was furnished and used in a cofferdam, which dam was no part of the building, but was afterwards torn or blown out and the lumber thereby became destroyed, or practically so, the materialman furnishing the lumber was entitled to a lien upon the structure, though no part of the lumber became a part of it. It appeared that the cofferdam was a structure built in order to facilitate the construction of a concrete dam on the premises, to furnish water power to operate the mill in process of construction on the premises. The cofferdam was a temporary affair, and became useless after construction of the permanent or concrete dam.

While the right to a mechanics' lien must be found in the statute, this court has held that the statute must be liberally construed, with a view of carrying out its intention and remedial purpose. The statute gives a lien for materials furnished "for or in or about" the erection of the structure, and the question here is whether the shoring used in the reinforced concrete building was furnished for, in, or about the building. There is no question here but what the material was furnished and delivered to be used in the building, and was in fact used for shoring, but did not remain in the building after the concrete had become set, and 25 per cent of it was removed and used for other purposes, though considerably depreciated in value by use in appellant's building. Seventy-five per cent, as the court found, was practically consumed or destroyed by use.

This case is very similar in principle to *Barker & S. Lumber Co. v. Marathon Paper Mills Co.* supra. There the lumber did not remain in the structure, but was practically destroyed in the use. Here the lumber was actually used in the construction by supporting the concrete until it hardened and was self-supporting, and then was removed. It was thus used several times in the construction, and after the

building was finished had become so damaged that 75 per cent of it was practically destroyed and of no value, except for kindling wood, as the evidence shows and the court found.

It has been held that mechanics' liens may be allowed for the value of explosives used in preparing the ground for the building of the structure, upon the principle that where the material is used directly upon the structure instrumental in producing the final result and actually consumed in use, it may be said to form a part of the structure. See cases cited in *Barker & S. Lumber Co. v. Marathon Paper Mills Co.* 146 Wis. at page 22. The logic of these decisions is, as said by this court in the *Barker Case*, that the material is consumed necessarily in the process of constructing the building, and that its life has gone into the fabric of the structure. This necessarily is peculiarly applicable to the instant case. The shoring had physical contact with the building in its construction. It added to the value of the completed structure, and its life and substance had in effect gone into the structure to the extent, at least, that the material was consumed. We think it clear, therefore, that the *Sands Lumber Company*, furnisher of the material, had a lien for the 75 per cent of the lumber consumed.

Nor do we see any solid reason for denying a lien for the amount of depreciation of the remaining 25 per cent of the lumber used for shoring. This lumber was likewise used in the construction of the building, but in such use was not wholly consumed, but was consumed or destroyed to the extent found by the court below, and for which amount of destruction or consumption a lien was awarded. Thus, the whole amount of consumption of the lumber used in the construction of the building was held lienable. This ruling is, we think, in harmony with *Barker & S. Lumber Co. v. Marathon Paper Mills Co.* supra, and late cases in other jurisdictions. *Avery & Sons v. Woodruff & Cahill*, 144 Ky. 227, 36 L.R.A.(N.S.) 866, 137 S. W. 1088; *E. R. Darlington Lumber Co. v. Westlake Constr. Co.* 161 Mo. App. 723, 141 S. W. 931; *Chicago Lumber Co. v. Douglas*, 89 Kan. 308, 44 L.R.A.(N.S.) 843, 131 Pac. 563.

In *Avery & Sons v. Woodruff & Cahill*, supra, it was held that the materialman had a lien for lumber furnished for shoring in construction of concrete building, where the lumber was in greater part consumed in the building; and the case of *United States Fidelity & G. Co. v. Probst*, 30 Ky. L. Rep. 63, 97 S. W. 405, is distinguished.

E. R. Darlington Lumber Co. v. West-
51 L.R.A.(N.S.)

lake Constr. Co. 161 Mo. App. 723, 141 S. W. 931, holds that where the material is consumed in whole or in part the claim is lienable. This was a case of lien for shoring used in the construction of a concrete building.

True there are cases holding that no lien exists for lumber used to make molds for concrete work; as, for example, *Rittenhouse & E. Co. v. Brown*, 254 Ill. 549, 98 N. E. 971. But it will be seen the lumber was not destroyed or consumed in that case, but was taken away and used again. In the case of *Kennedy v. Com.* 182 Mass. 480, 65 N. E. 828, the lumber was not consumed, but was moved away and used on other jobs.

It is further insisted by appellant that since the lumber was not totally destroyed, no lien can be had for any part, because the statute does not cover a case of partial destruction or consumption, and that the lienable and nonlienable portions of the lumber cannot be distinguished. No reason is perceived why a lien cannot be had to the extent that the lumber has been consumed, although a part was saved. The case of *E. R. Darlington Lumber Co. v. Westlake Constr. Co.* supra, is in point upon this proposition. There the lumber was consumed in part only, and the court said: "Where certain material is provided for by the contract in erection of a structure, and is furnished and used accordingly, and is either in whole or in part consumed in its use, the materialman is entitled to a lien for the material thus consumed in the erection of the structure, to the extent of the consumption of its reasonable value, regardless of the fact whether or not such material formed a permanent part of the structure when completed. Consumption of value means the depreciation in the market value of the material by the use provided for by the contract." There is no question here of the inseparable, indistinguishable, lienable, and nonlienable articles. The case does not come within the decisions cited by the appellant, namely, *Allen v. Elwert*, 29 Or. 428, 44 Pac. 823, 48 Pac. 54, and *Rinzel v. Stumpf*, 116 Wis. 287, 93 N. W. 36, where from the contract and articles delivered the value of the lienable and nonlienable articles could not be ascertained. In the *Rinzel Case* the lien claim represented a stipulated lump contract price, and the articles consisted of fixtures which were lienable and others which were nonlienable. So it will be seen that that case, as well as *Allen v. Elwert*, supra, are clearly distinguishable from the instant case. In the case at bar all the lumber was lienable; therefore the materialman was entitled to a lien for the value of such

ILLINOIS SUPREME COURT.

JOSIE I. BLUME, Appt.,
v.
PITTSBURG LIFE & TRUST COMPANY.

(263 Ill. 160, 104 N. E. 1031.)

Insurance — lapse — claim for paid-up insurance within six months.

Under a provision in an insurance policy that in case of lapse for nonpayment of premium, the insured may within six months surrender the policy and take paid-up insurance for the cash surrender value, surrender of the policy within the specified time is necessary to preserve the right to the option, and in the absence of such sur-

Note. — Effect of failure to apply for paid-up insurance within time stipulated.

As to right of beneficiary to exercise option upon default in payment of premium, see note to New York L. Ins. Co. v. Noble, 45 L.R.A.(N.S.) 391.

As to whether option provisions in policies of life insurance operate automatically, see Jones v. Provident Sav. Life Assur. Soc. 25 L.R.A.(N.S.) 803.

The question considered in the present note is covered in the note to Lenon v. Mut. L. Ins. Co. 8 L.R.A.(N.S.) 193, and this note includes only the later decisions upon the point.

As stated in the earlier note, the Arkansas and Kentucky decisions, which hold that time is not of the essence of a provision of a life insurance policy stipulating that the assured must make application for a paid-up policy within a specified time, although apparently supported by reason and justice, are against the result reached by the courts of other states, with the possible exception of Maine.

The conclusion of the Arkansas and Kentucky courts was also concurred in by the court in Ingersoll v. Mutual L. Ins. Co. 156 Ill. App. 568, but the supreme court of Illinois, in BLUME v. PITTSBURG LIFE & T. Co., reached the opposite result.

The insurance companies have, since the writing of the earlier note, to which this is supplemental, attempted, but without success, in several cases in Kentucky to obtain a different holding from that reached in the earlier cases in that state.

Thus, in a subsequent case it was held that, although a policy provided that the demand for a paid-up policy must be made within three months from the date of a default in the payment of the premium, a 51 L.R.A.(N.S.)

A PPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Municipal Court of Chicago in defendant's favor in an action brought to recover the amount alleged to be due under a life insurance policy. Affirmed.

The facts are stated in the opinion.

Mr. Edward O'Bryan, with Mr. Edward O'Bryan, Jr., for appellant:

Time is not of the essence of the contract between the parties.

Ingersoll v. Mutual L. Ins. Co. 156 Ill. App. 568; Manhattan L. Ins. Co. v. Patterson, 109 Ky. 624, 53 L.R.A. 378, 95 Am. St. Rep. 393, 60 S. W. 383; Lenon v. Mutual L. Ins. Co. 80 Ark. 563, 8 L.R.A.(N.S.) 193, 98 S. W. 117, 10 Ann. Cas. 467; Washington L. Ins. Co. v. Miles, 112 Ky. 74, 66 S. W. 740; Montgomery v. Phoenix Mut.

demand made within five years from that time was sufficient. Equitable Life Assur. Soc. v. Amos, 145 Ky. 167, 140 S. W. 172.

And in Dawson v. Equitable Life Assur. Soc. 32 Ky. L. Rep. 86, 105 S. W. 422, where the policy apparently contained a provision requiring a return of the policy and a demand for paid-up insurance within six months after a default in the payment of a premium, it was held that time was not of the essence of the contract, and that the insured was entitled to a paid-up policy if a demand was made within a reasonable time; but it was held that a demand must be made, at the latest, not more than five years after a lapse.

In United States L. Ins. Co. v. Wood, 32 Ky. L. Rep. 1120, 107 S. W. 1193, where a policy provided that after it had been in force a specified time, upon the nonpayment of premiums a paid-up policy should be allowed, in accordance with a statute which provided that in case of a lapse in the payment of the premium, the insurer should, on demand and surrender of the policy within six months after a lapse, apply the reserve as agreed in the application and policy, it was held that the insured, under the agreement in the policy, was entitled only to a paid-up policy, and that he was not put to an election between paid up and extended insurance, and that he had a reasonable time in which to demand and secure the benefits of a paid-up policy, and that a demand made by bringing suit to compel the issuance of such a policy within five years after the occurrence of a lapse was made within a reasonable time.

But in Wilson v. Washington L. Ins. Co. 31 Ky. L. Rep. 717, 103 S. W. 339, where the policy stipulated that if the insured failed to pay any premium, the insurer would, upon application made within six months from the date of the lapse, issue

Co. v. Fairbairn, 102 Ky. 80, 35 L.R.A. 504, 80 Am. St. Rep. 343, 42 S. W. 1097; Bruce v. Continental L. Ins. Co. 58 Vt. 257, 2 Atl. 710; 9 Cyc. 604; McDonnell v. Alabama Gold L. Ins. Co. 85 Ala. 401, 5 So. 120; Southern Mut. L. Ins. Co. v. Montague, 84 Ky. 653, 4 Am. St. Rep. 218, 2 S. W. 443; Sheerer v. Manhattan L. Ins. Co. 16 Fed. 720; Dorr v. Phoenix Mut. L. Ins. Co. 67 Me. 438.

Forfeitures are not favored in law, and, being for the benefit of the company, are strictly construed against it.

Ferguson v. Union Mut. L. Ins. Co. 187 Mass. 8, 72 N. E. 358; Hull v. Northwestern Mut. L. Ins. Co. 39 Wis. 397; Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234, 24 L. ed. 689; Traders' Mut. L. Ins. Co. v. Johnson, 200 Ill. 359, 65 N. E. 634; Illinois Life Assn. v. Wells, 200 Ill. 445, 65 N. E. 1072.

Messrs. John H. Rollins and Frank Ewing, for appellee:

To entitle the insured, who has default-

a paid-up policy for a proportionate amount, a lapse of seven years before making a demand after a failure to pay a premium was held to bar the insured's right to compel the insurer to issue a paid-up policy.

In Hatcher v. Equitable Life Assur. Soc. 134 Ga. 652, 68 S. E. 581, where the provision was that the insurance should become forfeited upon a failure to pay the premium, but that the insured might within six months after forfeiture surrender the policy and receive a paid-up policy, a recovery after the death of insured, which occurred about three years subsequently to his default, was denied, there having been no offer to surrender the original policy, which had been lost, or demand made to have a new one issued or a copy of the original policy established for purposes of surrender and cancellation in accordance with the contract.

It has been held that a failure to make a demand within the five years allowed in Kentucky is not excused because of a letter from the insurer giving the amounts of the surrender value and paid-up insurance, and stating that unless otherwise agreed the offer will not be binding after the expiration of six months. Dawson v. Equitable Life Assur. Soc. supra.

Nor because the policies had been marked void by the insurer and reported as forfeited to the insurance commissioner, it not being alleged that the insured had any knowledge of these facts within five years of the default. Ibid.

In Equitable Life Assur. Soc. v. Amos, supra, it was held that no particular form of demand for a paid-up policy was necessary.

And a letter from the insured to the insurer, after he had paid the premium for a long time and a default had occurred, stating that he had fully decided not to

paid-up policy under the terms of a policy which provides that the insured will be entitled to a paid-up policy on demand and surrender of the original policy within a specified time, the demand therefor and surrender of the original policy must be made within the time limited in the original policy.

Knapp v. Homeopathic Mut. L. Ins. Co. 117 U. S. 411; 29 L. ed. 960, 6 Sup. Ct. Rep. 807; Wells v. Vermont L. Ins. Co. 28 Ind. App. 620, 62 N. E. 501, 63 N. E. 578; Grevenig v. Washington L. Ins. Co. 112 La. 879, 104 Am. St. Rep. 474, 36 So. 790; Bonner v. Mutual L. Ins. Co. — Miss. —, 36 So. 538; Inloes v. Prudential Ins. Co. 109 Mo. App. 104, 82 S. W. 1089; McLaughlin v. Equitable Life Assur. Soc. 38 Neb. 725, 57 N. W. 557; Hudson v. Knickerbocker L. Ins. Co. 28 N. J. Eq. 167; Stayner v. Equitable Life Assur. Soc. 22 Miss. 53, 49 N. Y. Supp. 380; Jones v. Northwestern Mut. L. Ins. Co. 22 Ohio L. J. 318; Equitable Life Assur. Soc. v. Evans,

pay any more on the policy and that the matter had to be settled sometime, and asking what amount of paid-up insurance would be given, there being a difference between the parties as to the amount which should be allowed, was held to be a sufficient demand for paid-up insurance. Ibid.

And it is not necessary, to entitle the beneficiaries to relief, that it should appear that the insured and the insurer agreed upon the amount of the paid-up policy the former was entitled to, or that he made a demand for a paid-up policy of a specified amount, or that he declined to accept a paid-up policy for the amount offered. Ibid.

And it was held that it did not follow from the fact that he declined to accept a paid-up policy for the amount offered by the insurer, that he did not demand a paid-up policy. Ibid.

The insured's wife, who is the beneficiary of a policy, is a proper, but not a necessary, party to a suit to compel the insurer to issue a paid-up policy after a lapse in the payment of the premium, and the fact that she does not become a party to the suit until more than five years after the lapse will not preclude the husband from maintaining the suit. United States L. Ins. Co. v. Wood, supra.

In Haas v. Mutual L. Ins. Co. 90 Neb. 808, 134 N. W. 937, Ann. Cas. 1913B, 919, it was held that the provisions in a policy giving the insured options in case of lapses in the payment of premiums should be considered in connection with the law as to the nature of the life insurance contract and the fact of there being no forfeiture clause, and that, while the insured might exercise one of the options upon default, he was not bound to do so, but he had the right to rely upon the main contract, and not upon the ancillary provisions.

J. T. W.

25 Tex. Civ. App. 563, 64 S. W. 74; *Cravens v. New York L. Ins. Co.* 148 Mo. 583, 53 L.R.A. 305, 71 Am. St. Rep. 628, 50 S. W. 519; *Bussing v. Union Mut. L. Ins. Co.* 34 Ohio St. 222; *Smith v. National L. Ins. Co.* 103 Pa. 177, 49 Am. Rep. 121; *Smith v. Continental L. Ins. Co.* 3 Ins. L. J. 63; *Keyser v. Mutual L. Ins. Co.* 104 Ill. App. 72; 3 Cooley, Briefs on Ins. 2417.

A contract of life insurance is not for a year with the privilege of renewal from year to year by paying annual premiums, but is an entire contract of insurance for life, subject to discontinuance and forfeiture for nonpayment of the stipulated premium.

New York L. Ins. Co. v. Statham, 93 U. S. 24, 23 L. ed. 789, 19 Am. Rep. 512; *Abell v. Penn Mut. L. Ins. Co.* 18 W. Va. 400; *McMaster v. New York L. Ins. Co.* 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10; *Whitehead v. New York L. Ins. Co.* 102 N. Y. 152, 55 Am. Rep. 787, 6 N. E. 267; *Mutual Ben. L. Ins. Co. v. Robertson*, 59 Ill. 123, 14 Am. Rep. 8.

Vickers, J., delivered the opinion of the court:

Appellant, Josie I. Blume, brought an action of assumpsit against the Pittsburgh Life & Trust Company on a policy of life insurance for \$5,000, seeking to recover \$760 claimed by her as paid-up insurance under said policy. The trial court rendered judgment against her for costs. The record was removed to the appellate court for the first district by a writ of error to the municipal court of Chicago. The appellate court affirmed the judgment below, and granted a certificate of importance and an appeal to this court.

The life policy was issued by the Security Trust & Life Insurance Company upon the life of George A. Blume. After the issuance of the policy the Security Trust & Life Insurance Company transferred all of its assets and liability policy holders to the appellee, the Pittsburgh Life & Trust Company. George A. Blume paid five annual premiums on said policy of insurance, and gave his note for \$196 for the premium falling due October 15, 1905, upon which he paid \$75.30. The last payment was made May 1, 1906. The insured died November 29, 1910. The following provisions are in the policy:

"6. Paid-up values.—If the full premiums on this policy be paid, as already provided, for not less than three complete years, it can be surrendered within six months from the date of lapse for the amount of nonparticipating paid-up life insurance specified in the accompanying table.

"7. Cash value.—If the full premiums on 51 L.R.A. (N.S.)

this policy be paid, as already provided, for not less than five complete years, it can be surrendered within six months from the date of lapse for the amount of cash specified in the accompanying table.

"8. Reinstatement.—This policy will be reinstated, on written application from the insured, after nonpayment of any premium, subject to satisfactory evidence of good health furnished on the company's blank and the payment of the premiums then due, with interest at the rate of 6 per cent for the time elapsed."

"11. Premiums.— . . . If any premium is not paid on or before the day it is due, this policy shall become void and all payments previously made shall remain the property of the company, except as hereinbefore provided."

The table accompanying the policy referred to in clauses 6 and 7 shows that the insured might have surrendered his policy after it had lapsed, and received either \$35 as a cash surrender value, or a paid-up policy for \$760. The policy was not surrendered by the insured in his lifetime, nor did he make any request for paid-up insurance, or otherwise indicate that he desired to avail himself of either of the options stipulated in the policy. On October 6, 1906, the Security Trust & Life Insurance Company wrote the insured that if he desired to reinstate his policy it would be necessary for him to furnish a satisfactory certificate of good health, and that until said certificate was furnished the policy stood lapsed. There was no reply made to this letter. After May 1, 1906, when the insured made a partial payment upon his note for the sixth premium, he seems to have paid no further attention whatever to his insurance contract.

Appellant's contention is that when the policy lapsed for the nonpayment of the premium it was automatically converted into a paid-up contract for the amount of insurance specified in the table, and that the provision requiring the insured to elect within six months whether he would take the cash surrender value or paid-up insurance is not a condition precedent with which the insured was required to comply, or, differently stated, the contention is that the limitation of six months in which it is provided that the policy may be surrendered and paid-up insurance substituted is not of the essence of the contract. We are not aware that the precise question thus raised has heretofore been considered by this court, although it has frequently arisen in other jurisdictions. A question somewhat similar to the one involved here was decided in *Phoenix Mut. Life Ins. Co. v. Baker*, 85 Ill. 410, and there this court held that

where a party takes a policy of insurance on his life for five years, with the privilege, at any time after the payment of three annual premiums, of taking a paid-up policy by a surrender of the original policy, if he wishes to avail himself of this privilege he must do so before the policy expires. It was held that if he waited until the expiration of the five years, his right to take a paid-up policy will be gone, for the reason that he would then have nothing to surrender for a paid-up policy. In that case the policy was a five-year term policy and expired by its own terms at the end of the period fixed. At the end of the term, the contract having expired, the insured would have nothing to surrender in exchange for a paid-up policy. By the terms of the policy involved in the case at bar, the policy lapsed for the nonpayment of premium, with the proviso that the insured might, within six months, surrender his policy and take paid-up insurance for a specified amount, or the cash surrender value thereof. The policy does not provide that upon a failure or neglect of the policy holder to surrender his policy within the prescribed period and apply for paid-up insurance, the original policy shall stand as a paid-up policy, but, on the contrary, the provision is that if the insured does not, within six months, make his election and surrender the policy, at the end of that period all rights of the insured thereunder, of every kind and character, are forever gone. This seems to be the clear meaning of the language of the contract. The relation of an insurance company to its policy holders is purely contractual. There is ordinarily no element of trust relation involved. The parties, being competent to contract, had a legal right to insert such provisions in the agreement as they saw proper, and it is the duty of courts to construe and enforce agreements as made, and not to make new contracts for parties.

Our conclusion is that the right to paid-up insurance or surrender value was conditioned upon the surrender of the old policy within six months from the time it lapsed for the nonpayment of the premium, and that a failure on the part of the insured to make an election within the time caused the forfeiture, which was conditional in the first instance, to become absolute after the expiration of six months. This view is supported by the decided weight of authority outside of this state. *Knapp v. Homeopathic Mut. L. Ins. Co.* 117 U. S. 411, 29 L. ed. 960, 6 Sup. Ct. Rep. 807; *Bonner v. Mutual L. Ins. Co.* — Miss. —, 36 So. 538; *Cravens v. New York L. Ins. Co.* 148 Mo. 583, 53 L.R.A. 305, 71 Am. St. Rep. 628, 50 S. W. 519; *McLaughlin v.* 51 L.R.A. (N.S.)

Equitable Life Assur. Soc. 38 Neb. 725, 57 N. W. 557; *Atty. Gen. v. Continental L. Ins. Co.* 93 N. Y. 70; *Equitable Life Assur. Soc. v. Evans*, 25 Tex. Civ. App. 563, 64 S. W. 74; *Meyer v. Manhattan L. Ins. Co.* 144 Ind. 439, 43 N. E. 448; *Straube v. Pacific Mut. L. Ins. Co.* 123 Cal. 677, 56 Pac. 546; *Bussing v. Union Mut. L. Ins. Co.* 34 Ohio St. 222; *Smith v. National L. Ins. Co.* 103 Pa. 177, 49 Am. Rep. 121; *Universal L. Ins. Co. v. Devore*, 88 Va. 778, 14 S. E. 532. See also 2 *Joyce, Ins.* §§ 1184, 1185.

The supreme court of Arkansas, in *Lenon v. Mutual L. Ins. Co.* 80 Ark. 563, 8 L.R.A. (N.S.) 193, 98 S. W. 117, 10 Ann. Cas. 467, and the supreme court of Kentucky, in *Manhattan L. Ins. Co. v. Patterson*, 109 Ky. 624, 53 L.R.A. 378, 95 Am. St. Rep. 393, 60 S. W. 383, are the only courts that seem to have taken an opposite view of this question. The appellate court for the first district, in *Ingersoll v. Mutual L. Ins. Co.* 156 Ill. App. 568, following the Arkansas and Kentucky cases, reached the same conclusion announced by those courts. Aside from the fact that those cases are opposed to the decided weight of authority in the United States, we are not deeply impressed with the reasoning upon which the conclusions in those cases rest.

The judgment of the Appellate Court for the First District is correct, and the same will be affirmed.

MARYLAND COURT OF APPEALS.

HARRIS JOFFE et al., Appts.,

v.
NIAGARA FIRE INSURANCE COMPANY
OF NEW YORK.

(116 Md. 155, 81 Atl. 281.)

Insurance — account books — failure to protect — short absence.

1. Leaving account books in an exposed position in the store when locking and leaving it for luncheon, with the intention

Note. — Divisibility of insurance.

I. Introduction, 1048.

II. Questions affecting divisibility.

a. Gross premium, 1050.

b. Entirety of risk, 1053.

c. Separate valuation.

1. In general, 1056.

2. Classes of the same kind of property, 1057.

d. Special language of contract, 1058.

e. Extent of remaining insurable interest, 1063.

f. Property included by mistake, 1063.

g. Fraud, 1063.

h. Statutes, 1065.

of being absent a half hour, violates a provision in a policy of insurance on stock and fixtures requiring the books to be kept in an iron safe or in some place not exposed to a fire which would destroy the property insured, when the building is not actually open for business.

Same — on stock and fixtures — divisibility.

2. A policy of insurance on stock and fixtures is indivisible, so that if it is rendered void as to the stock by the failure to keep the books in a place not exposed to fire which might destroy the stock, it is void as to the fixtures also.

(June 23, 1911.)

III. Special kinds of contract.

- a. Mutual policies, 1066.
- b. Open policies, 1066.
- c. Separate contracts, 1066.

IV. Kinds of property covered by policy.

- a. Separate buildings, 1066.
- b. Building and contents, 1066.
- c. Fixtures and personal property, 1068.
- d. Different classes of personal property, 1068.

I. Introduction.

The earlier cases on this subject will be found collected and discussed in the note to *Wright v. Fire Ins. Asso.* 19 L.R.A. 211. There has been very little change in the attitude of the courts since the publication of the earlier note, but such alteration of views as have taken place have been in favor of the divisibility of a policy covering different kinds of property separately valued. An insurance contract, in the absence of statute prescribing its form, is like any other contract; that is to say, just what the parties make it. It is to be interpreted with a view of giving expression to the real intention of the parties as gathered from the language of the written document.

In *Taylor v. Anchor Mut. F. Ins. Co.* 110 Iowa, 625, 57 L.R.A. 328, 93 Am. St. Rep. 261, 88 N. W. 807, the court, after referring to the conflict over the question whether the entirety of the premium is conclusive as to the entirety of the contract, said: "We think, however, the great weight of authority at the present time is to the effect that the question is one of the intention of the parties, and that if the condition of the property is such that the risk as to one class of property would be affected by the destruction of the other, then it must be presumed that the breach of condition as to one class is a violation of the contract, also, as to the other class, because the company would not have insured the one except upon the condition imposed as to the other; while, if the loss of the one class of property could not affect the risk as to the other, then it must be presumed that there was no intention that the conditions as to one should apply to the risk as to the other." 51 L.R.A.(N.S.)

A PPEAL by plaintiffs from a judgment of the Baltimore City Court in defendant's favor in an action brought to recover the amount alleged to be due on a policy of fire insurance. Affirmed.

The facts are stated in the opinion.

Mr. George R. Gaither, for appellants:

The question of the kind of books to be kept, if books are kept, and the question as to their sufficiency for the purpose of the business conducted, is a question of fact for the jury to determine, and not a point of law to be decided by the court.

Liverpool & L. & G. Ins. Co. v. Kearney.
180 U. S. 132, 45 L. ed. 460, 21 Sup. Ct.

In *Hanover F. Ins. Co. v. Crawford*, 121 Ala. 258, 77 Am. St. Rep. 55, 25 So. 912, it is said: "It does not necessarily follow that because all the items insured are covered by one policy, that a breach of a condition subsequent in the policy will avoid it as to all the items or subjects covered. And, indeed, it does not necessarily follow that because there are many items or subjects insured by the policy that it may not be avoided as to all of them. Whether either of these results flow from a breach of a condition in a policy must depend upon the nature and character of the condition and the purpose to be accomplished. They are usually adopted by insurance companies to protect themselves against fraud, and they have been recognized and enforced by the courts as valid stipulations whenever they are reasonable. Whenever nothing but injustice will be accomplished by the enforcement of a condition, the courts cannot presume that it was the intention of the parties to have so contracted as to that particular item of property insured. The law will be guided by a respect to general convenience and equity and by the good sense and reasonableness of the particular case, for it must be supposed that it was the intention of the parties that such construction should take place."

In *Hanover F. Ins. Co. v. Crawford*, supra, in discussing a contract such as has just been referred to, the court said: "We are aware that in many of the states it is held that a policy like the present one is an entire contract, and a false warranty will avoid the entire policy. In others, the rule is different, and, unless the false warranty is of such a nature as to increase the hazard or risk assumed by the insurance company as to all the subjects separately valued, the assured is allowed to recover for the loss or destruction by fire of those not falling under the influence of this construction. This latter rule is declared by the courts, holding it to be the fairer one, and more clearly carrying out the intention of the parties to the contract."

But the insurance contract, where the form is not prescribed by statute, is made by the insurer, and the insured usually knows very little about it. He accepts the contract in good faith, pays his premium,

Fed. 709; Prudential F. Ins. Co. v. Alley, 104 Va. 356, 51 S. E. 812; Brown v. Palatine Ins. Co. 89 Tex. 590, 35 S. W. 1060; Western Assur. Co. v. Altheimer Bros. 58 Ark. 565, 25 S. W. 1067; Malin v. Mercantile Town Mut. Ins. Co. 105 Mo. App. 625, 80 S. W. 56; Western Assur. Co. v. Glathery, 115 Ala. 213, 67 Am. St. Rep. 26, 22 So. 104; Liverpool & L. & G. Ins. Co. v. Ellington, 94 Ga. 785, 21 S. E. 1006.

The books were safely kept in accordance with the requirements of the iron-safe clause

and does not think much about the language of the policy. While this does not excuse his lack of knowledge of the terms of his contract, it has nevertheless led the courts to be extremely cautious in declaring forfeitures, especially for technical breach of the conditions of the policy.

In some of the cases, in construing policies as divisible, the courts invoked the rule of strict construction as against forfeiture. German Ins. Co. v. Miller, 39 Ill. App. 633.

It is a familiar rule that forfeitures are not favored, that contracts will be strictly construed to avoid forfeitures, and that the burden is upon him who claims a forfeiture to clearly show that he is entitled to it. Born v. Home Ins. Co. 110 Iowa, 379, 80 Am. St. Rep. 300, 81 N. W. 676.

The attitude of the courts might well be said to be that forfeitures of contracts are not favored,—especially insurance contracts. The rule against forfeitures has undoubtedly been strained to its limit to help the insured out of the consequences of a bad bargain, and this has probably been a good thing not only for the insured, but also, in the long run, for the business of the insurer. It is only by keeping in mind the object the courts have had in view, that their reasoning in interpreting the language of some of the insurance contracts can be understood.

This note is limited to a discussion of the kinds of contract of insurance which are severable, as between the insurer and insured; but it does not cover the divisibility of marine contracts because of termination of the voyage before completion,—the question in Ogden v. New York Firemen Ins. Co. 12 Johns. 114. Nor does it cover the divisibility of a contract of insurance as between subsequent and prior insurers, which was the question in Columbian Ins. Co. v. Lynch, 11 Johns. 233. It also excludes the question of what constitutes joint policies, and whether, for example, under such a policy, if the right of action is barred as to one of the parties, it is barred as to all. On this point see Monaghan v. Agricultural F. Ins. Co. 53 Mich. 238, 18 N. W. 797, and Perry v. Mechanics' Mut. Ins. Co. 11 Fed. 478.

A distinction must be made between 51 L.R.A. (N.S.)

Rep. 326; Major v. Insurance Co. of N. A. 112 Mo. App. 235, 86 S. W. 883; Jones v. Southern Ins. Co. 38 Fed. 19; Sun Ins. Co. v. Jones, 54 Ark. 376, 15 S. W. 1034; Phoenix Ins. Co. v. Schwartz, 115 Ga. 113, 57 L.R.A. 752, 90 Am. St. Rep. 98, 41 S. E. 240.

Plaintiffs are entitled to recover as to the fixtures, regardless of what the verdict of the jury might be as to the iron-safe clause, concerning the stock of goods.

Hanover F. Ins. Co. v. Crawford, 121 Ala. 258, 77 Am. St. Rep. 55, 25 So. 912;

cases in which the question is as to the forfeiture of the entire policy because of breach of condition as to part of the property, and the question whether there has been any forfeiture at all because of something done with respect to part of the property.

For example in Phoenix Ins. Co. v. Lorenz, — Ill. App. —, 29 N. E. 604, a provision in a policy that "if the property shall hereafter become mortgaged or encumbered this policy shall be null and void" was held to mean all of the insured property, so that the policy was not avoided by the mortgaging of part of the property.

And where real and personal property were insured in one policy in which it was provided that "if the property shall hereafter become mortgaged or encumbered" the policy shall become null and void, it was held that it was the property, and not a part of it, the mortgaging of which rendered the policy void, especially where the policy was to be avoided by the procurement of other insurance "on any of such property." Born v. Home Ins. Co. 110 Iowa, 379, 80 Am. St. Rep. 300, 81 N. W. 676.

And where a policy "on household and kitchen furniture, useful and ornamental, beds, bedding, . . . musical instruments," etc., was held not rendered void by a chattel mortgage on a piano which was one of the articles covered by it, as in North British & M. Ins. Co. v. Freeman, — Tex. Civ. App. —, 33 S. W. 1091, the court said that in order to render a policy void by a mortgage under a clause providing that the entire policy shall become void if the subject of insurance be personal property and become mortgaged, etc., the mortgage must have been upon the subject insured; that is, the entire property. The mortgages having reference to a part of the property, they cannot defeat the policy.

And in Sullivan v. Mercantile Town Mut. Ins. Co. 20 Okla. 460, 129 Am. St. Rep. 761, 94 Pac. 676, in holding that under the stipulation that the entire policy and each and every part thereof shall become void if the subject of insurance be personalty, and be or become encumbered, a forfeiture cannot be claimed because one item of personal property insured by said policy, separately set out, and separately valued there-

Williams v. Virginia State Ins. Co. 106 Va. 259, 55 S. E. 680; 19 Cyc. 674; German Ins. Co. v. Miller, 39 Ill. App. 633; Phenix Ins. Co. v. Pickel, 119 Ind. 155, 12 Am. St. Rep. 393, 21 N. E. 546; Continental Ins. Co. v. Ward, 50 Kan. 346, 31 Pac. 1079; Trabue v. Dwelling House Ins. Co. 121 Mo. 75, 23 L.R.A. 719, 42 Am. St. Rep. 523, 25 S. W. 848; Wright v. Fire Ins. Co. 12 Mont. 474, 19 L.R.A. 211, 31 Pac. 87; Home F. Ins. Co. v. Bernstein, 55 Neb. 280, 75 N. W. 839; Pratt v. Dwelling House Mut. F. Ins. Co. 130 N. Y. 206, 29 N. E. 117.

Messrs. W. Calvin Chesnut and Gans & Haman, for appellee:

The plaintiffs' store was not actually open for business at the time of the fire.

Bakhaus v. Caledonian Ins. Co. 112 Md. 695, 77 Atl. 310; Reynolds v. German American Ins. Co. 107 Md. 110, 15 L.R.A. (N.S.) 345, 68 Atl. 262; Maryland Casualty Co. v. Gehrmann, 96 Md. 647, 54 Atl. 678; Fidelity Mut. Life Asso. v. Ficklin, 74 Md. 180, 21 Atl. 680, 23 Atl. 197; Wineland v. New Haven Security Ins. Co. 53 Md. 277; Mutual Ben. L. Ins. Co. v. Wise, 34 Md. 597; 1 Wood, Fire Ins. 448; 2 Cooley, Briefs on Ins. 1817-1831; 1 Clement, Fire Ins. 263-273; 19 Cyc. 761-764; 13 Am. & Eng. Enc. Law, 2d ed. 355-357; Aetna Ins. Co. v. Johnson, 9 Ann. Cas. 466 note; Aetna Ins. Co. v. Lipsitz, 14 Ann. Cas. 1079, note; Southern Ins. Co. v. Parker, 61 Ark. 207, 32 S. W. 507; St. Landry Wholesale Mercantile Ins. Co. v. New Hamp-

in, was encumbered by mortgage, where the subject of the insurance was partly real and partly personal property, the court said that the unquestioned meaning and effect of the words, "each and every part thereof," in the policy in controversy, is to render the policy an indivisible contract; and, if any part of same shall become void, then each and every part thereof shall be void. The holding under the facts of the case was that there was no forfeiture at all.

And in *Dow v. National Assur. Co.* 26 R. I. 379, 67 L.R.A. 479, 106 Am. St. Rep. 728, 58 Atl. 999, a policy covering household furniture of every description, containing a standard statutory clause that the policy shall be void if the interest of the insured be other than unconditional and sole ownership, unless other ownership be assented to in writing, was held to be wholly avoided where it appeared that a considerable portion of the furniture was owned by others than the insured or was bought on the instalment plan. The court said: "When insurance is contracted upon property as a whole, it is no answer to say that the insured owned a part of it. A new element would be introduced into the contract. We cannot say that the contract would have been made as it was, or even at all, if the fact had been known that only a small part of the property belonged to the plaintiff. Such a fact is deemed to be so important that it is no longer merely a provision of contract, but of statute; for the statute prescribes the clause in question. The terms of it apply to the policy as a whole. The policy is made void, not void simply as to the part of the property in which there may not be absolute ownership and valid as to the rest. We see no room for such a construction of the terms of the policy."

And where a policy for a specified sum on household and kitchen furniture specified generally, as "beds and bedding, linen, family wearing apparel, trunks, satchels, printed books and music, musical instruments, sewing machines," etc., it was held that the contract was not avoided because of the fact that the insured was not the

sole owner of a sewing machine. *Cooper v. Insurance Co.* 96 Wis. 362, 71 N. W. 606. The court said: "It was intended to cover all the property of the classes named of which the plaintiff should be possessed with proper title, at the place designated, at any time during the life of the policy. If some articles of the classes named, which were in plaintiff's possession, should not be his property, it simply was not intended to insure such. That could not affect the contract as to other property in his possession of which he had proper title. The contract, in this sense and to this extent, is certainly divisible, and was intended to be so."

So, in *Brehm Lumber Co. v. Svea Ins. Co.* 36 Wash. 523, 68 L.R.A. 109, 79 Pac. 34; and in *Worley v. State Ins. Co.* 91 Iowa, 150, 51 Am. St. Rep. 334, 59 N. W. 16, the question was whether a forfeiture occurred through vacancy of one of several buildings insured; that is to say, whether the condition as to vacancy had been broken at all. Cases of this kind are not, of course, authorities on the question of the divisibility of the contract, and are therefore excluded.

And finally, cases which turn not upon the question of divisibility, but upon the question of whether the facts bring the parties within the rule as to divisibility, are not discussed.

For example, where a policy for \$1,800 on a gristmill and \$700 on machinery had been renewed several times by receipts in which the risk was distributed, and was finally renewed in general terms for \$2,500 without distribution of risk, it was held that the intention was that the risk should not be distributed, the policy applying to both building and machinery. *Driggs v. Albany Ins. Co.* 10 Barb. 440. Cases of this kind are considered to be beyond the scope of this note.

II. Questions affecting divisibility.

a. Gross premium.

Some of the decisions as to the divisibility of the insurance contract have turned upon

The books kept by the insured did not comply with the requirements of the iron-safe clause.

19 Cyc. 762; Phoenix Ins. Co. v. Sherman, 110 Va. 435, 66 S. E. 81; Fire Assn. of Philadelphia v. Calhoun, 28 Tex. Civ. App. 409, 67 S. W. 153; Coggins v. Aetna Ins. Co. 144 N. C. 7, 8 L.R.A. (N.S.) 839, 56 S. E. 506; Houff v. German-American Ins. Co. 110 Va. 585, 66 S. E. 831; Pelican Ins. Co. v. Wilkerson, 53 Ark. 353, 13 S. W. 1103; Sun Mut. Ins. Co. v. Dudley, 65 Ark. 240, 45 S. W. 539; J. W. Gillum & Co. v. Fire Assn. of Philadelphia, 106 Mo. App. 673, 80 S. W. 283; Hollenbeck & Co. v. Mercantile Ins. Co. 133 Mo. App. 57, 113

Ill. App. 370; Everett-Hickey-Ragan Co. v. Traders' Ins. Co. 121 Ga. 228, 104 Am. St. Rep. 99, 48 S. E. 918; Home Ins. Co. v. Rogers, — Tex. Civ. App. —, 128 S. W. 625; Orient Ins. Co. v. Dorroh-Kelly Mercantile Co. — Tex. Civ. App. —, 126 S. W. 616; German Ins. Co. v. Beville, — Tex. Civ. App. —, 126 S. W. 31; 2 Cooley, Briefs on Ins. 1822, 1823.

The failure to comply with the iron-safe clause avoided the policy both as to the stock and as to the fixtures.

Agricultural Ins. Co. v. Hamilton, 82 Md. 96, 30 L.R.A. 633, 51 Am. St. Rep. 457, 33 Atl. 429; Bowman v. Franklin F. Ins. Co. 40 Md. 632; Norris v. Connecticut F. Ins. Co. 115 Md. 174, 80 Atl. 960, Ann.

the question of the entirety of the premium. The weight of authority is against the proposition that a policy otherwise severable is rendered indivisible by the fact that a gross premium is stipulated. A distinction must be made between cases in which merely a gross premium is named, and those in which there is a gross premium and separate valuations. There would appear to be not much room for dispute as to the indivisibility of a policy of the former kind.

Where the policy is issued for a gross sum and covered different articles of property, not separately valued, the contract is entire and indivisible, and a breach of the condition of the policy as to encumbrances as to part of the property avoided the policy as a whole. Fitzgerald v. Atlanta Home Ins. Co. 61 App. Div. 350, 70 N. Y. Supp. 552.

In Burr v. German Ins. Co. 84 Wis. 76, 36 Am. St. Rep. 906, 54 N. W. 22, it was held that where the property covered by a policy is all personal and situated in the same warehouse, and the premium paid is a gross sum, the whole policy is avoided by the subsequent change of interest by virtue of a levy and seizure of part of the property. The court said: "The property insured being so situated that any increase in the risk, as to any portion thereof, necessarily increased the risk as to the whole, it is very obvious that the whole risk was a unit, and the contract of insurance an entire indivisible contract."

An insurance policy upon a quantity of cranberries insured for a gross sum is indivisible; and a breach of a condition against change of possession, as to part of the cranberries, will avoid the policy as to the whole. Carey v. German Ins. Co. 84 Wis. 80, 20 L.R.A. 267, 36 Am. St. Rep. 907, 54 N. W. 18.

But even where the different kinds or classes of property are separately valued, it has been held that the contract is entire where but one premium covering the insured property is paid.

In Massachusetts a policy covering a dwelling house and stable separately valued, upon which but one premium is paid, has 51 L.R.A. (N.S.)

been held entire, so that it is wholly void if void in part. Thomas v. Commercial Union Assur. Co. 162 Mass. 29, 44 Am. St. Rep. 323, 37 N. E. 672.

In Gore Dist. Mut. F. Ins. Co. v. Samo, 2 Can. S. C. 411, a contract of insurance for a gross sum on a building and contents separately valued for one premium was held to be entire so as to be wholly avoided by a misrepresentation as to encumbrances affecting the realty. Recovery was also denied on the ground that the policy was made subject to the provision of a statute providing that "the concealment of any encumbrances on the insured property, or on the land on which it may be situated, . . . shall render the policy void, and no claim for loss shall be recoverable thereunder, unless the board of directors shall see fit, in their discretion, to waive the defect."

In Pennsylvania a contract of insurance in consideration of one premium, insuring separate houses for a gross sum but valuing them separately,—two dwelling houses being insured for \$2,000 at \$1,000 each and a house situated on an alley in the rear of the two buildings being insured for \$400,—was held to be entire, so that a breach of condition as to vacancy of the house on the alley avoided the contract as to the other two. Kelly v. Humboldt F. Ins. Co. 4 Sadler (Pa.) 99, 6 Atl. 740.

In Iowa the early rule that when a premium on a policy is in a gross sum the contract is not divisible although the amount of insurance on different items of property is fixed, was held not changed by a provision that the premium will be 15 per cent of the amount insured, where it is clear that the premium was not 15 per cent and that part of it which was to be paid was a gross assessment on the entire insurance. Kahler v. Iowa State Ins. Co. 106 Iowa, 380, 76 N. W. 734. The policy in this case was on a grain elevator and machinery, and there was a false representation as to the ownership of the building, which was held to avoid the whole contract.

The prevailing opinion, however, as already stated, is against the gross premium test as to the divisibility of the contract.

Co. v. Knight, 111 Ga. 622, 52 L.R.A. 70, 78 Am. St. Rep. 216, 36 S. E. 821; Coggins v. Aetna Ins. Co. 144 N. C. 7, 8 L.R.A. (N.S.) 839, 56 S. E. 506; St. Landry Wholesale Mercantile Co. v. New Hampshire F. Ins. Co. 114 La. 146, 38 So. 87, 3 Ann. Cas. 821.

Boyd, Ch. J., delivered the opinion of the court:

The appellants sued the appellee on a policy of insurance which included what is known as the iron-safe clause. At the conclusion of the case, the court refused two prayers offered by the plaintiffs, and granted two, instructing the jury to render a

In many of the cases, cited in other subdivisions of the note, holding insurance contracts divisible, the premium was entire. In others, while it does not clearly appear whether it was or not, the fair inference is that it was, and, in any event, no emphasis is laid upon the point, showing that it was not deemed important. In some cases, however, the question has been directly raised and decided against the contention of the entirety of the policy.

The broad rule laid down in the earlier Iowa decisions was modified in Taylor v. Anchor Ins. Co. 116 Iowa, 25, 57 L.R.A. 323, 93 Am. St. Rep. 261, 88 N. W. 807. Referring to the prior decisions, the court said: "In Garver v. Hawkeye Ins. Co. 69 Iowa, 202, 28 N. W. 555, the proposition is broadly laid down that where the premium is in gross the contract is not divisible, and a breach of warranty as to a part of the property will vitiate the policy as to the whole. But it is to be noticed that there the policy covered a barn and certain horses, and the court might well have held that the risk so far as the horses were concerned was involved in any risk affecting the barn; and the conclusion was therefore in accordance with the rule which we think to be the proper one, although we do not regard the reason given as satisfactory. In Kahler v. Iowa State Ins. Co. 106 Iowa, 380, 76 N. W. 734, the view expressed in the Garver Case, was qualified so as to leave the way open for adopting the position which we now take. We therefore hold on this question, as involved in the case before us, that entirety of premium does not necessarily prove that the contract is indivisible, and that where it appears from the terms of the policy that distinct items or classes of property were separately insured the policy may be valid as to one item or class, although it is invalid as to another item or class, by reason of breach of conditions of the policy with reference thereto, provided it appears, also, that the risk which it was intended to exclude by the condition which is broken does not apply to the other items or classes of property. In this case, a chattel mortgage on the cows 51 L.R.A. (N.S.)

for our consideration.

The appellants were engaged in the millinery business, trimming hats and selling them. They had been on High street, in Baltimore city, but, on the 23d of January, 1909, moved to Baltimore street, where they still were at the time of the fire at which the loss occurred, November 26, 1909. The policy of insurance was for the term of one year from the 22d of September, 1909, being for \$1,000 on the stock of merchandise and \$200 on the furniture and fixtures. The business was run by Mrs. Mankowitz, the wife of one, and Miss Joffe, the daughter of the other, appellant. Miss Joffe was absent the day of the fire by reason of illness,

and horses could not in any way affect the nature of the risk as to the dwelling house and contents, and therefore we find that a breach of a condition in the policy as to the one class of property did not invalidate the insurance as to the other."

In Kentucky although the premium is entire, a contract has been held severable where separate values are placed upon different classes of property insured. Thompson v. Farmers' Mut. Ins. Co. 10 Ky. L. Rep. 232.

In Nebraska a policy naming a single premium, and classifying the property insured, and limiting the insurance to a stated amount on each class, is held divisible, so that a breach of condition as to encumbrances on the real estate will not avoid the contract as to personal property. Johansen v. Home F. Ins. Co. 54 Neb. 548, 74 N. W. 866, citing State Ins. Co. v. Schreck. 27 Neb. 527, 6 L.R.A. 524, 20 Am. St. Rep. 696, 43 N. W. 340, and Phenix Ins. Co. v. Grimes, 33 Neb. 340, 50 N. W. 168.

In Missouri a policy covering several separate articles or species of property separately insured at different amounts stated in the policy was held severable, although the insurance is for a gross sum and premium, so that a breach of condition as to the encumbrances on the real estate will not avoid the policy as to the personalty. Crook v. Phenix Ins. Co. 38 Mo. App. 582. The policy in this case did not contain such a clause as was stated *obiter* in American Ins. Co. v. Barnett, 73 Mo. 364, 39 Am. Rep. 517 would render the policy indivisible.

In Pratt v. Dwelling House Mut. F. Ins. Co. 130 N. Y. 206, 41 N. Y. S. R. 303, 29 N. E. 117, it was said that whatever the rule may be elsewhere it is settled in New York state that where insurance is made on different kinds of property separately valued, the contract is severable even if but one premium is paid and the amount insured is the sum total of the valuation.

And in Texas where a condition of the policy breached was, "and unless such books and inventories are produced and delivered to this company for examination, this pol-

the store on that day. Mr. Mankowitz was a tailor, but he kept the books, paid the bills, etc., for the millinery business, going to the store every night, and at other times when he was not engaged in his regular occupation. He was not working the day of the fire, but some time before it started he had left the millinery store to pay a bill which was due. When Miss Joffe was there, it was her custom to go to dinner at 12 o'clock and return at half past 12, and then Mrs. Mankowitz would go; but as Miss Joffe was not there on November 26, 1909, Mrs. Mankowitz and Miss Rosen left for dinner at the same time,—12 o'clock. Mrs. Mankowitz went to her brother-in-law's,

She locked the store door, and while she was at luncheon heard an alarm of fire, and upon going out on the street found it was at their store. After the fire was discovered, a neighbor broke the door open, but the stock of goods was practically ruined by fire and water, and the fixtures were very much injured.

By the first prayer granted, the jury was instructed "that it appears from the plaintiffs' own evidence that they failed to comply with the provision of the policy sued on, known as the iron-safe clause," and by the second "that it appears from the plaintiffs' own evidence that the plaintiffs did not keep the books required by the condition of

icy shall be null and void, and no suit or action shall be maintained hereon," and the policy covered a stock of goods in a specified amount as well as other property, it was held that the fact that the policy was issued for a gross premium would not make the contract entire so as to prevent recovery for the property insured other than the stock. *Sun Mut. Ins. Co. v. Tufts*, 20 Tex. Civ. App. 147, 50 S. W. 180. The court said: "The books and inventories to be kept could serve only one purpose, that of affording means by which the amount of loss on stock could be ascertained, and had no relation whatever to the other property."

b. Entirety of risk.

In some instances the courts have declared policies entire, although the property was insured under separate valuations, where the risk as to all of the property is increased by a breach of the contract as to part of it. This would seem to be a very important inquiry, for, manifestly, it may well be said that if the insurer had known of the increased hazard he would not have issued a policy on any of the property.

"It may be said," declared the court in *Taylor v. Anchor Mut. F. Ins. Co.* 116 Iowa, 625, 57 L.R.A. 328, 93 Am. St. Rep. 261, 88 N. W. 807, "that several cases in which courts have announced the unqualified rule that a breach of condition as to one class or item of property covered by the policy will constitute a breach of the contract as to all the property covered, are cases where the different classes or items of property were so situated with reference to each other that the risk as to one constituted a risk as to all."

It has been held that breach of condition as to encumbrances on either personalty or realty, or false statements as to title or encumbrances as to realty, where the policy covers both a house and its contents, so increases the risk on the whole subject of insurance as to render the contract indivisible.

In *McKernan v. North River Ins. Co.* 206 51 L.R.A. (N.S.)

Fed. 984, it was held that a policy insuring a dwelling house and furniture separately valued, containing a provision that "this entire policy unless otherwise provided by agreement, indorsed hereon or added hereto, shall be void, . . . if the hazard be increased by any means within the control or knowledge of the insured; . . . or if the subject of insurance be personal property and be or become encumbered by a chattel mortgage," was rendered wholly void by a chattel mortgage. The court said: "Encumbrance of insured property increases the hazard to the insurer, because it lessens the interest of the insured in the property to the amount of the encumbrance, and to that extent at least lessens his interest in protecting the property from loss or destruction. And if the hazard was increased as to the household furniture, it was of necessity increased as to the dwelling house which contained it, for the entire property was insured as one risk, and was so closely connected and associated together that the destruction of a part by fire would almost inevitably result in the destruction of the whole."

Where false statements as to the title of the insured in real estate, and as to encumbrance thereon, were made before the issuance of the policy, which also covered personal property therein, it was held that the entire contract was avoided thereby. *Ætna Ins. Co. v. Resh*, 44 Mich. 55, 38 Am. Rep. 223, 6 N. W. 114. The court said: "If it was for the interest of the insured to cause or suffer a loss of the building, because he had not the interest therein he had represented, it would, we think, be idle to say that such fact would not increase the risk upon the personal property in such building. It would be very unsafe, therefore, to assume that the company would have taken a risk upon the personal property, separate from the building, and therefore, because the rate and the amount insured upon the personal can be separated from that on the building, to hold that the contract is divisible. That the company would have taken a risk upon the personal property alone, to a like amount and at

the defendant.
The clause in this policy relied on was as follows:

Iron-Safe Clause. Warranty to Keep Books and Inventories, and to Produce Them in Case of Loss.

The following covenant and warranty is hereby made a part of this policy:

1st. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or

the same rate, we may assume, even with full knowledge that the insured had no title to the building; but it would be hazardous to assume that, with such knowledge, the company would have written upon both the personal property and the building, so that upon the whole policy the insured would be more interested in a loss of both than in their protection."

Breach of warranty of title in an insurance policy with respect to the building will avoid the insurance on the contents, although building and contents were insured for separate amounts for an entire premium, where the risk upon both items is the same. *Goorberg v. Western Assur. Co.* 150 Cal. 510, 10 L.R.A.(N.S.) 876, 119 Am. St. Rep. 876, 89 Pac. 130, 11 Ann. Cas. 801.

But it has also been held that insurance upon a building and its contents is a single, and not a distinct, risk, so that such a policy is wholly avoided by false swearing as to personal property destroyed which renders the policy void as to that class of property, although the premium is distributed partly to the realty and partly to the personalty. *Worachek v. New Denmark Mut. Home F. Ins. Co.* 102 Wis. 88, 78 N. W. 411.

Different classes of personal property situated in the same building have been declared subject to the same risk. The nature of the condition broken might, however, have some effect on this question. If, for example, there was a false statement as to the ownership of the building in which the insured property was located, it is apparent that this might affect the entire property covered by the policy. If, however, there was a breach of condition as to encumbrances on part of the property, it is not so clear that the entire risk would be affected.

In *McWilliams v. Cascade F. & M. Ins. Co.* 7 Wash. 48, 34 Pac. 140, however, under a policy for a gross sum on different classes of personal property in a building, separately valued, the property insured including a piano valued at \$200, it was held that since the property was all situated in the same building it was therefore 51 L.R.A.(N.S.)

the unearned premium from such date shall be returned.

2d. The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit, from date of inventory as provided for in the first section of this clause and during the continuance of this policy.

3d. The assured will keep such books and inventory and also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night, and at all times when the building mentioned in this policy is not actually open for busi-

all subject to the same risk, so that where there was a breach of the contract as to sole ownership of the piano the whole policy was avoided.

Different buildings insured under a single policy may also be so situated with reference to one another as to be subject to the same risk, so that a breach of condition as to one of them will avoid the entire contract.

Although a policy of insurance against fire, lightning, tornado, and windstorm, so written as to place separate valuations upon separate subjects of insurance, will ordinarily be severable, it will not be so if the risk intended to be excluded by a condition which has been violated affected the item of property for the destruction of which a recovery is sought. *Republic County Mut. F. Ins. Co. v. Johnson*, 69 Kan. 146, 105 Am. St. Rep. 157, 76 Pac. 419, 2 Ann. Cas. 20. In this case the subject of insurance was a house, hay and grain, and a double graincrib. The graincrib stood between 200 and 300 feet from the house. The condition breached was the clause against vacancy. The graincrib was blown down while the house was unoccupied. The court said: "In the policy under consideration there is nothing whatever to indicate that the company would have insured the hay and grain at all except as it fell under the protection of a guardian of the premises, or that it would have entertained for a moment an application for the insurance of an isolated unfrequented corner and stable, the prey of the elements, devoted merely to the shelter of unused implements and machinery, and subject to be made the rendezvous of tramps. To assume that it would have done so involves an absolute and perfectly arbitrary repudiation of the conspicuous purpose of the vacancy clause in the contract. Any ordinary individual in charge of premises would exercise a preservative superintendence over them,—would take some steps to anchor a ruffed or toppling stack of hay before he would suffer it to scatter before the wind; and would secure loosened boards about the crib, close-widening apertures, brace-racked timbers, and otherwise fortify

keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building. In the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon.

Mr. Mankowitz admitted that they did not have a safe, but testified that every night he carried such books as they had to his brother's store, which, according to his evidence, was about six or seven houses away, and according to that of his brother was about ten houses, from the one in which the fire occurred. He arranged with his

the rigidity of the structure against storms."

On the other hand, it has been held that the risk on personal property in a building covered by the same policy is not increased by a misstatement as to the ownership of the ground on which the building stood.

A policy for a gross premium, insuring a storehouse for \$200 and a stock of goods therein for \$3,800, is not avoided as to the goods by the fact that the insured was not the owner in fee of the ground in which the building stood, where there was no misrepresentation or concealment of the facts on his part. *Coleman v. New Orleans Ins. Co.* 49 Ohio St. 310, 16 L.R.A. 174, 34 Am. St. Rep. 565, 31 N. E. 279. The court said: "Forfeitures do not readily find favor in the law, and courts are reluctant to declare and enforce them, if by reasonable interpretation it can be avoided. It is not likely that in this case the small amount of insurance on the storehouse constituted any inducement for the insurance placed upon the stock of goods; and it does not appear that the rates upon these classes of property were different, nor how it could make any difference if they were, since the only effect, in this respect, of holding the contract severable, is that the insurance company is enabled to retain the whole of the premium, which it accepted as the consideration for the insurance of all the property, for the lesser risk on part of the property only; and it is not to be presumed that the premium for the insurance of part only of the property would exceed that accepted for the risk on all of it. It was not shown at the trial that the plaintiffs were guilty of any misrepresentation or intentional concealment concerning the title to the land on which the storehouse stood. No inquiry was made of them about it. The subject was not a matter of negotiation between the parties in effecting the insurance, and the plaintiffs were ignorant of the condition, for the breach of which the company claims the right to forfeit the whole policy. If the position taken by the company be correct, the condition was broken when the policy was issued, and there was, therefore, 51 L.R.A. (N.S.)

the latter's store every night, when the plaintiffs' store was closed, and then taken back in the morning. They were kept in a drawer in the brother's store, as the latter's safe was already full. On the morning of the fire, Mr. Mankowitz got the books and took them to the store.

We do not understand the appellee to claim that the plaintiffs could not keep the books at the brother's, as they were kept there, but the important question is whether the store was actually open for business at the time of the fire, within the meaning of the policy. As the books and inventory were not kept in a safe, it was undoubtedly the duty of the plaintiffs to keep them in some place, not exposed to a fire which

no consideration for the premium that was paid, for no risk attached; and yet the company, while asserting the invalidity of the contract, holds on to its fruits. This is not a very consistent position, nor a very just one. A just result is reached, and, as we think, the lawful one, by holding, as we do, that the contract of insurance in this case is severable, and the breach of the condition as to the title of the land does not defeat the plaintiff's right to recover for the loss of the stock of goods insured by the policy in suit."

The *Coleman Case* was followed in *Phillips v. Ohio Farmers' Ins. Co.* 13 Ohio C. C. 679, 6 Ohio C. D. 266, in which it was held that a policy on a building, furniture, etc., separately valued, was divisible so that there might be a recovery on the personal property although there had been a breach of condition as to encumbrances and an overstatement of value in respect to the real estate.

A breach of a condition as to part of a policy as to encumbrances on a house will not avoid the policy as to furniture therein separately appraised, where the risk is not affected thereby. *Loehner v. Home Mut. Ins. Co.* 17 Mo. 247, affirmed in 19 Mo. 628.

So, the violation of the iron-safe clause has been held not to affect the risk in the building in which the personal property was.

The violation of the iron-safe clause of the policy covering a storehouse, fixtures, and stock of goods will not prevent the insured from recovering for the loss of the storehouse and fixtures. *Hanover F. Ins. Co. v. Crawford*, 121 Ala. 258, 77 Am. St. Rep. 55, 25 So. 912. The court said: "We are unable to see how a failure to comply with the condition could possibly affect the risk upon the building and fixtures. If broken by the assured and a loss occurs by fire, the assured loses the value of his goods, and this, too, whether the fire is occasioned by his wilfulness, neglect, accident, or the incendiarism of another. There could then be no inducement for him to destroy the building, or the building and its contents. Unlike the case, in this respect where there

would destroy the building, at night, and at all times when the building was not actually open for business. It cannot be doubted that in a literal sense the building was not actually open for business when the fire occurred, and it would seem to be equally clear that if it had been open the probabilities are that the fire would not have been so disastrous (if it had occurred at all), and, at any rate, the books could have been easily saved. They are thus described in the testimony: "Three of them were small books of the size of the one produced, and one was a 200-page ledger; the book produced was a book about 12 inches long by 4 inches wide by three quarters of an inch thick, weighing about 6 ounces. The ledger was a little wider

and a little thicker." An inventory, made just before they moved to Baltimore street was in one of the books. All but one of them was totally destroyed by the fire, and that was what Mr. Mankowitz called "the sales book." They could by reason of their size very easily have been taken to his brother's when Mrs. Mankowitz went there to dinner.

It is true that she only expected to be absent about half an hour, but she was gone long enough for the fire to make such headway that, according to the plaintiffs' claim, the stock was practically destroyed and the fixtures very much damaged. If it be conceded that the plaintiffs had such books and inventory as this clause required, the very object of the requirement was de-

is a misrepresentation as to ownership of a building containing machinery more or less attached to the building, and both the building and the machinery are the subjects of insurance in the same policy. Here, we can well see how the hazard or risk upon the machinery would be increased if there was a false warranty as to the ownership of the building. The assured might be induced, if allowed to recover for loss of machinery, notwithstanding his false warranty which would deprive of the right to recover for the loss of the house, to destroy the house for the purpose of getting the insurance upon the machinery. . . . Whatever may be the rule as to the effect of false warranties, we are clearly of the opinion that the condition under consideration as to its application cannot, by any rule of construction consonant with justice and reason and the manifest intention of the parties, be made to so apply to the building and fixtures as that a breach of it would defeat his recovery for their loss."

Attention should also be called to the fact that recovery on part of the property, where the policy covered a building and its contents, has also been allowed in a number of cases in which the question of entirety of hazard is not discussed. For illustration see *infra*, IV. b. See also cases cited in note to *Wright v. Fire Ins. Asso.* 19 L.R.A. 211.

c. Separate valuation.

1. In general.

Separate valuation of each kind or class of property insured is held, in some jurisdictions, to be controlling on the question of the entirety of the contract.

The New York rule is that having made the property distinct subjects of insurance by separately valuing it, by distributing the insurer's risk among the several subjects of insurance, and limiting its risks as to each, the parties to the contract will be deemed to have intended as many distinct insurances as there may be subjects of insurance; and the avoidance of the policy by breach of its condition as to one of the subjects of insurance 51 L.R.A. (N.S.)

ance will not have the effect of avoiding it as to the others, in the absence of language clearly indicating that such was the intention of the parties. *American Artistic Gold Stamping Co. v. Glens Falls Ins. Co.* 1 Misc. 114, 20 N. Y. Supp. 646.

In *Merrill v. Agricultural Ins. Co.* 10 Hun, 428, an action on a policy which insured separately and in separate sums, a dwelling house and barns and certain personal property in each of the buildings, it was held that a breach of the condition as to encumbrance of the real estate did not affect the insurance on the rest of the property.

In *Kiernan v. Agricultural Ins. Co.* 81 Hun, 373, 63 N. Y. S. R. 146, 30 N. Y. Supp. 892, it was held, under a policy insuring a dwelling house and personal property therein in separate amounts, and providing that "if the subject of insurance be personal property and be or become encumbered by chattel mortgage," and also that "if the property, real or personal, covered by this policy, be or become encumbered by mortgage, trust deed, judgment, or otherwise, this entire policy shall be void unless otherwise provided," etc.,—that a breach of the condition as to the real property left the policy good as to the personality.

In *Kansas*, a contract of insurance is held severable where separate valuations are placed upon different subjects of insurance, as, for example, \$800 on a dwelling house and \$200 on the furniture therein. *German Ins. Co. v. York*, 48 Kan. 488, 30 Am. St. Rep. 313, 29 Pac. 586.

In *Missouri* breach of condition as to additional insurance as to part of property covered by a policy will not invalidate it as to other property included therein and separately valued. *Jenkins v. German Ins. Co.* 58 Mo. App. 210.

In *Oregon* a contract placing \$1,600 on a dwelling house and \$400 on the personality therein was held severable so as not to render the whole contract void by a breach of condition as to sole ownership of the house. *Oatman v. Bankers' Fire Relief Asso.* 66 Or. 388, 133 Pac. 1183, 134 Pac. 1033.

And in *Texas* breach of warranty as to

feated by reason of the plaintiffs' representative leaving them where they were, unprotected in case of fire in her absence. If an insured can relieve himself of the obligation of his warranty to produce the books and inventory in case of fire, by shutting up his store for half an hour with no one in it, and claiming the books, etc., were kept, but were destroyed, there is but little protection to the insurer by such a clause, and it might as well be abandoned. If it can be done for half an hour, then why not for an hour or more?

Such a clause in an insurance policy should undoubtedly receive "a fair and reasonable interpretation," as the authorities have frequently said of it; but it will be observed that in considering such a question

as the one now been largely gov of each particu tempting to lay there is no qu caused the loss fault or neglig naturally shrink terpretation on will deprive the cover, by reason fense, if that ca even then, when are clear and un right to make ne or ignore those simply to avoid view of the many

the ownership of personalty insured does not defeat the right of recovery for loss of real estate included in the same policy and separately valued. *Georgia Home Ins. Co. v. Brady*, — Tex. Civ. App. —, 41 S. W. 513. The court said: "It is well established that stipulations as to ownership are warranties only as to property specified in such stipulations, and, upon a policy embracing real and personal property, such stipulations are divisible."

But in *Wisconsin* a misrepresentation as to existing encumbrances as to part of the property covered by a policy and separately valued avoids the whole contract, since it is entire. *Schumitsch v. American Ins. Co.* 48 Wis. 26, 3 N. W. 595. "The reason," said the court, "is that the contract of insurance is entire, and the insurer has the right to know what the interest of the insured in the property is, and to have disclosed all material facts affecting the risk; for the risk is assumed upon the express condition that these facts have been accurately and truly stated in the application."

And in *Washington*, where a provision of a policy was that it should be void if the interest of the insured in the property covered thereby were other than that of sole owner, it was held that a breach of condition as to a piano insured avoided the contract as to other classes of property covered by the policy and separately valued. *McWilliams v. Cascade F. & M. Ins. Co.* 7 Wash. 48, 34 Pac. 140. The court said: "The respondent accepted this policy with all its provisions and conditions, and it would be neither reasonable nor equitable to permit her, after she has violated one of its conditions as to a part of the risk, to now assert that this condition only affected that particular portion of the risk to which the breach related. . . . To hold the appellant liable upon this policy would be to impose upon it an obligation which it never agreed to assume, and would be equivalent to making a contract for the parties different from that which they themselves made, and then enforcing it against one of them for the benefit of the other. This the court must decline to do. Insurance com- 51 L.R.A. (N.S.)

panies, like private right to ma tion to their bu subserve their ow with such compa freely entered i upon both the as if they are violat is thereby relea thereunder."

It has been held a marine policy, of bales of cotton amount per bale ance of each bale of N. A. 5 Clarks said: "In what valuation of an show that that ar Was intended to without a valuation just as well. The nothing to do with insured? The ins by force of the purpose, and is j the same extent, whether the artic valued singly, or at all."

2. Classes of the

It would hardly tion that the div contract does not of property whic valued. The reas there is a separate risk as to each cla ble policy; but not of which each clas covers a house therein, in a fixed and a specified sur contains a provisio and part of the gaged, the rule as mean that there r property not mortg and personal; but

insured than they seemed ready to do for themselves, although the clause has been very generally recognized as valid and reasonable, and has been declared to be useful and desirable, not simply for the insurer, but for the honest insured.

It may be that it might be well to require by legislation insurance companies making use of it to make it so prominent in the policies, or to give such notice of it, as will leave no question about the insured having notice of it, when it is inserted in or attached to a policy, as we do not understand that all standard policies on stocks of merchandise contain it; but in this case the plaintiffs knew of it, and hence do not

sit by taking their books out of the building when the store was not actually open for business, and presumably they knew the object of such a provision. If they had had a safe in the store, it would not have been unreasonable to require them to place those four little books in the safe before shutting up the store and leaving it without protection. The undoubted fact is that the storeroom was left unprotected long enough to give the fire such headway as to consume the contents before anyone could extinguish it. Customers not only could not enter the room, but those who discovered the fire could not, until the door was finally broken open. And, as we have

good as to the realty. In other words, under such a contract there is only one division, and that is between the realty and the personality. The courts hold that there can be no recovery for the loss on personal property although only a part of it was mortgaged.

Although a policy covering different classes of property valued separately is severable, it is indivisible as to each class so valued. If, for example, a stock of goods is separately valued in a policy covering goods and building, an encumbrance of part of the goods will invalidate the insurance on the entire stock. *Home F. Ins. Co. v. Bernstein*, 55 Neb. 260, 75 N. W. 839.

A policy on a stock of merchandise and on barbers' furniture and fixtures, separable as to these two classes of property, is invalidated as to the furniture and fixtures by a mortgage of a portion of them, contrary to the provision of the policy. *Vucci v. North Britain & M. Ins. Co.* 88 N. Y. Supp. 986.

Where a policy insures both real and personal property, a breach of the condition as to sole ownership as to part of the personal property avoids the entire contract as to the personal property. *Springfield F. & M. Ins. Co. v. Green*, — Tex. Civ. App. —, 36 S. W. 143. The court said that the contract as to real and personal property was divisible, and that it might fail as to one class of property and be sustained as to the other, but that as to personal property it was entire.

d. Special language of contract.

The question of divisibility of risk has sometimes turned upon the special language of the contract. In the last analysis, of course, the question, as stated, is one of intention, to be determined from the words in which the agreement is expressed. Where the language is not prescribed by statute it would seem to be not a difficult matter so to draw the contract as to relieve it from any ambiguity as to its entirety or severability. It is not likely, however, that a provision that "the policy" shall be avoided 51 L.R.A.(N.S.)

for a breach of any of its conditions would prevent the contract from being declared divisible, if it were otherwise so.

In *Dacey v. Agricultural Ins. Co.* 21 Hun, 83, a dwelling house and certain classes of personal property were insured under separate valuations. The policy contained, among other things, a provision that "if the property shall become encumbered by mortgage . . . then and in every such case the policy shall be null and void until the written consent of the company at the home office is obtained." Part of the property was mortgaged before a loss occurred. The written consent of the company not having been obtained, it was held that the policy was void as to the property mortgaged.

It would seem that a provision that the "entire" policy shall become void by a breach of any of its conditions would be deemed to evidence an intention to make the contract nondivisible, but there is a conflict of opinion upon this question.

It has been held that a policy insuring furniture for a certain sum, and providing that "this entire policy shall be void" for a breach of its conditions, is manifestly entire, and is therefore rendered wholly void by a breach of its conditions as to a part of the property. *Dumas v. Northwestern Nat. Ins. Co.* 12 App. D. C. 245, 40 L.R.A. 353.

And under a provision that "this entire policy, unless otherwise provided by agreement indorsed thereon or added hereto, shall be void . . . if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days," the policy, covering both a house and personal property therein, was held to be rendered wholly void by the nonoccupancy of the house. *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, 30 L.R.A. 633, 51 Am. St. Rep. 457, 33 Atl. 429.

In *Shoup v. Dwelling-House F. Ins. Co.* 51 Mo. App. 286, a stipulation that the "entire policy" would be avoided by misrepresentation as to title was held to render the contract void as to personal property as well as real estate by breach of the condi-

already indicated, the store being closed, without anyone in charge, and the books being left there exposed, have deprived the insurer of the kind of evidence of the loss it was by the express terms of the contract entitled to. We do not feel justified in saying that because it was intended to close the store for half an hour, and then open it again, it was during the half hour in which the fire occurred actually open for business, and hence the clause in the policy does not apply. The provision not only says the building must be open for business to avoid the necessity of putting the books in a safe, or, in the alternative, keeping them in some place where they would not be exposed to a fire in the building, but it says actually open for business. It can-

not be correctly open for business, locked up, without an hour, and no one to protect the property. It will be a clause a policy inventory is hence we held American Ins. Co. (N.S.) 345, 68 had become not failing to take limited, and thus making an inventory before a loss be applicable here keep the books

tion as to the latter class of property. The court in this case was greatly influenced by the decision of *Holloway v. Dwelling-House Ins. Co.* 48 Mo. App. 1, which was afterwards reversed in 121 Mo. 87, 25 S. W. 950, see *infra*.

In *Elliott v. Teutonia Ins. Co.* 20 Pa. Super. Ct. 359, a policy covering three items: (1) A stated amount on certain stock; (2) a stated amount on certain machinery; (3) a stated amount on factory and office fixtures,—providing that the entire policy should be void for a breach of its conditions, was declared wholly invalidated by a failure of the insured to disclose to the insurer that the former did not own the machinery.

In *Germier v. Springfield F. & M. Ins. Co.* 109 La. 341, 33 So. 361, misrepresentation as to the ownership of a house where the representation was specifically declared in the policy to constitute a warranty, was held to avoid the contract as to the personal property, under a provision "that the entire policy shall be" void if there be either concealment or misrepresentation as to that subject.

And in *Germania F. Ins. Co. v. Schild*, 69 Ohio St. 136, 100 Am. St. Rep. 663, 68 N. E. 706, it was held that an insurance policy which contains a stipulation that "this entire policy shall be void" on certain named conditions, is not a severable risk, although the amount of insurance is distributed among different classes or articles of property. As to this point the *Coleman Case*, *supra*, was distinguished.

On the other hand, it seems to be the prevailing opinion that the word "entire" does not refer to the whole risk, but merely to that part of the property covered by the policy as to which there has been a breach. The repugnance of courts against declaring a forfeiture of the entire policy for a technical breach of conditions touching part of the risk has undoubtedly led to the adoption of this rule, which seems, upon first examination, contrary to the plain language of the contract. There is, however, some room for the operation of the word "entire," even under this construction; for, manifest-

ly, where the policy covers two or classes of property, the policy may also cover in any of these classes, may insure under separate policies, might rule that the forfeiture would not invalidate the policy by a breach of conditionality. Nevertheless, that the provision that the entire policy, any part of the policy, although the breach only to part of the property, if part of it to the provision: the construction of the forfeiture of the policy, mit recovery on the policy may seem to be said that the wholly meaning any rate, is well known.

Where a policy covers a dwelling house and contents thereof, it is "the entire policy" of condition as to the dwelling house void as to personal property the forfeiture of the policy by change of the dwelling house. *House Ins. Co.* 142 Am. St. Rep. 421, 68 N. E. 421. The court said: "When a policy covers a dwelling house and separate contents, a part on the dwelling house require two separate policies, merely they are not merged together does not merge the policy alone were destroyed policy applying to the dwelling house alone the basis of recovery of making a contract in the case. The policy is legal made is severable ing to indicate the

provided, and, "in the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon." The latter does not make a policy null and void merely because the assured does not keep his books in a safe, or as provided in the alternative, but the failure to produce the books and inventories has that effect, and constitutes a bar to recovery for a loss sustained. In other words, if there had been no fire, the closing of the store on this occasion would not have invalidated the policy, but as the fire did occur, and did confessedly prevent the books and inventories from being produced, then there can be no recovery in the

absence of such books and inventories, unless the assured did what they agreed to do for the safe-keeping of the books and inventories, or can be excused from not doing so.

In that connection, we would add that we would have no hesitation in holding that if an assured, acting in good faith, placed the books in a safe which he believed to be fire-proof, or in some place which he had the right to believe was not exposed to a fire which would destroy the building, the mere failure to produce the books would not necessarily be a bar to his recovery. On the contrary, we could readily concur in the view taken by the Supreme Court in *Liverpool & L. & G. Ins. Co. v. Kearney*, 180 U. S. 132, 45 L. ed. 460, 21 Sup. Ct. Rep. 326, and other cases on such a ques-

assumed the risk on the house without taking one also on the goods, nor *vice versa*. The contract as to each admitted of being separately executed as to the separate subjects of insurance. The application is for separate insurance, and it is kept distinct in the policy." This case was followed in *Hollaway v. Dwelling House Ins. Co.* 121 Mo. 87, 25 S. W. 850, reversing 48 Mo. App. 1.

The fact that the risk is divisible, however, does not mean that the contract may in all cases be treated as if there were two separate and distinct policies. See on this point *Howe Ins. Co. v. Connelly*, II. g. Fraud, *infra*.

The New York rule as to the severability of an insurance contract is not affected by a provision that "this entire policy shall be void," etc., in case of a breach of the condition. *American Artistic Gold Stamping Co. v. Glens Falls Ins. Co.* 1 Misc. 114, 20 N. Y. Supp. 646.

In *Donley v. Glens Falls Ins. Co.* 184 N. Y. 107, 76 N. E. 914, 6 Ann. Cas. 81, the court said: "Whatever our views might be if the question were new, we regard it as settled that where, by the same policy, different classes of property, each separately valued, are insured for distinct amounts, even if the premium for the aggregate amount is paid in gross, the contract is severable, and a breach of warranty as to one subject of insurance only does not affect the policy as to the others, unless it clearly appears that such was the intention." In this case the provision was that the entire policy should be void in case of a breach. The court said that the recent cases hold that this means the entire policy so far as it relates to the subject of insurance affected by the breach, because a severable policy is equivalent to so many policies as there are classes of property separately valued. In other words, the breach avoids the entire policy relating to the risk to which the warranty applies.

A policy on a stock of goods separately valued, and a store and fixtures separately valued, otherwise a severable contract, is not rendered indivisible by a provision that 51 L.R.A. (N.S.)

the entire policy shall be void in case of condition broken. *Adler v. Germania F. Ins. Co.* 17 Misc. 347, 39 N. Y. Supp. 1070. The court said: "It is not within the power of the insurer to make a divisible contract an entire contract by calling it so, and we must seek an intention agreeable to the kind of contract which he was actually making; that is to say, a policy embracing more than one subject and entire as to each subject. That intention we think is quite manifest. It will be observed that the provision in which the words, 'this entire contract,' occur, refers to the 'subject of insurance' becoming encumbered by chattel mortgages. The subject of insurance, in a policy insuring separate risks, means the subject of each separate risk, as to each of which there is, under the cases, a divisible contract or policy; and the provision that the entire policy would be void if the subject of insurance becomes encumbered means that the whole insurance upon that particular subject or risk should be so affected. A portion only of the goods separately insured might be mortgaged, but under this clause avoiding the entire policy in case the subject of insurance be mortgaged, the insurer provided that the entire insurance upon all the goods in that class should be void though only a part were mortgaged. As to each class of insurance the policy is entire, and not otherwise, and the insurer must be deemed to have had that legal distinction in view when employing the term under consideration."

In *Miller v. Delaware Ins. Co.* 14 Okla. 81, 65 L.R.A. 173, 75 Pac. 1121, 2 Ann. Cas. 17, the court said: "We think that the rule should be established here that where, by a policy, different classes of property are insured, and each class is separated from the others and insured for a specific amount, and there is a breach of the contract as to one class of the property insured, the contract should be considered not as one entire in itself, but as one which is severable, and in which the separate amounts specified may be distinguished, and a recovery had for one or more of them without regard to

books and inventory referred to in the policy means a failure to produce them if they are in existence when called for, or if they have been lost or destroyed by the fault, negligence, or design of the insured," and, as the failure to produce them in this case was by reason of the fault and negligence of the plaintiffs in leaving them in the store when it was not actually open for business, they cannot be excused.

The cases relied on by the appellants on this point were *Sun Ins. Co. v. Jones*, 54 Ark. 376, 15 S. W. 1034; *Jones v. Southern Ins. Co. (C. C.)* 38 Fed. 19; *Major v. Insurance Co. of N. A.* 112 Mo. App. 235, 86 S. W. 883; and *Phoenix Ins. Co. v.*

first named, which referred to the same fire, it was held that the store was still open for business. In the Missouri case, a physician who had a drug store responded to an urgent call to see an ill patient, and during his absence of ten or fifteen minutes the fire occurred. He had a safe, but did not put the books in it in his absence, and did not remember whether he had locked the door of the store. The court said the store was still open for business. In the Georgia case, there was a suspension of business, caused by a fire raging in the neighborhood and threatening the building. In none of those cases did the courts think the parties were at fault, but w. cannot say

the other, provided the contract is not affected by any question of fraud, unlawful act condemned by public policy, or any increase of the risk to the company on the whole property insured because of the breach." It was held that the rule was not affected by the fact that the provision as to forfeiture was that "this entire policy shall become null and void."

A policy covering different classes of property separately valued, including a certain amount on machinery, is not rendered void by a mortgage of a cotton press particularly described, although the contract contained a provision that the entire policy shall be void if the subject-matter of the insurance is personal property and becomes encumbered by chattel mortgage. *Delaware Ins. Co. v. Harris*, 26 Tex. Civ. App. 537, 64 S. W. 867.

A policy on a stock of goods and certain furniture and fixtures, providing that this entire policy shall be void if the subject of insurance be "personal property and be or become encumbered by chattel mortgage," is not rendered entirely void by a chattel mortgage on the stock. *Spring Garden Ins. Co. v. Brown*, — Tex. Civ. App. —, 143 S. W. 292. The court said: "The policy does not provide for a forfeiture, in whole or in part, if part only of the subject of insurance be or become encumbered with a chattel mortgage."

And in Texas it is also held that where the provision for the forfeiture of the entire policy depends upon the breach of the provision "if the subject of insurance be personal property, and be or become encumbered," there is no forfeiture at all if the policy covers both real and personal property. This ruling would, of course, take the case beyond the scope of this note, which assumes that there is a breach of condition and forfeiture as to part of the property.

"In *Hartford F. Ins. Co. v. Walker*, — Tex. Civ. App. —, 60 S. W. 820, it was held that a false statement as to encumbrances on part of the subject of insurance does not render void the entire policy which provides: "This entire policy, unless otherwise provided by agreement indorsed there- 51 L.R.A. (N.S.)

on or added thereto, shall become void . . . if the subject of insurance be personal property, and be or become encumbered." The court said that as a forfeiture under this special clause of the policy can only take place where the subject of insurance named in the policy is all personal property which is or may be encumbered, the forfeiture cannot be claimed if the "subject of insurance" is both real and personal property; nor would it avoid the policy as to the personal property, though separately set out and separately valued, because by the terms of the contract the forfeiture is not to take place unless the subject of insurance (that is, all the property named in the policy) is encumbered, and it is not stipulated that if a part of the subject of insurance is encumbered the whole policy shall be void.

But where a policy provides that if "either real or personal property, or any part of it, be encumbered," etc., the entire policy and every part of it shall be void," it has been held that the contract is not severable, even in New York, where the rule is that the mere provision that the "entire" policy shall be void for a breach of any of its conditions does not render the contract indivisible. See *Smith v. Agricultural Ins. Co.* 118 N. Y. 518, 23 N. E. 883, the leading case on this point cited in earlier note to *Wright v. Fire Ins. Asso.* 19 L.R.A. 211.

And in *Knowles v. American Ins. Co.* 66 Hun, 220, 21 N. Y. Supp. 50, affirmed in 142 N. Y. 641, 37 N. E. 567, where hop crops of two years were insured in one policy under separate valuations and it was held that a breach of warranty as to encumbrances upon the crop of one year would not avoid the policy as to the crop not mortgaged, the rule is recognized; for the court pointed out that the policy did not provide that it should be avoided if the property "or any part of it" should be encumbered. The court said: "The clause avoiding the policy if the property insured is encumbered should not [under such a policy as was before the court] be held to apply to a separate class of property separately insured in the policy and unencumbered, any more than if such separately insured and

9 L.R.A.(N.S.) 687, 56 S. E. 643, as annotated in 9 Ann. Cas. 466, a number of cases are cited on the various phases of the iron-safe clause, and, although some of them may not be entirely in accord with the conclusion reached by us, none of them have gone so far as we would have to go in order to relieve the appellants of the consequences of their own deliberate acts, which resulted in this loss. In this state we have not followed the construction of insurance contracts adopted by some other courts, but, as Judge McSherry said in *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, 30 L.R.A. 633, 51 Am. St. Rep. 457, 33 Atl. 429: "In *Kelly's Case*, 32 Md. 421, 3 Am.

1034, this court repudiated the principle of interpretation adopted in some cases that insurance contracts are to be construed most strongly against the underwriter, and adopted the sounder view that the intention of the parties, as gathered from the whole instrument, must prevail."

As in our judgment the plaintiffs cannot recover by reason of the provision contained in § 3 of this clause, it is unnecessary to discuss the question whether sufficient books were kept, or whether the inventory made at High street was a sufficient compliance with the clause.

The only remaining question for our consideration is whether the policy can be

unencumbered property was so insured by a separate policy."

So, in Texas, where the condition is that the entire policy should be void if the subjects of insurance "or any part thereof" be or become encumbered by mortgage or otherwise, and there was a vendor's lien on the land on which the house insured stood, it has been held that the entire policy including the amount covering the personal property is avoided thereby. *Curlee v. Texas Home F. Ins. Co.* 31 Tex. Civ. App. 471, 73 S. W. 831, 986.

Where the condition of the policy is against encumbrance of "the property," and not against the encumbrance of the property or any part thereof, it has been held not wholly broken by a mortgage of a part of the property, consisting of separate articles and capable of specific valuation, and that in such case the insurance would be vitiated as to the part so mortgaged only. *German Ins. Co. v. Miller*, 39 Ill. App. 633. The court upheld the rule of strict construction against the insurer, saying: "The modern tendency of adjudication is in the direction of greater strictness in construing conditions under which forfeitures are set up by the companies, and of applying with greater freedom the equitable doctrines of waiver and estoppel. This tendency has been induced largely by the modern methods of the insurance business, whereby the agents of the companies solicit risks, and, in order to obtain them, make representations and assurances calculated to mislead and to produce a want of care and scrutiny in reference to the language used in applications and policies."

In *Allen v. Merchants' Mut. Ins. Co.* 30 La. Ann. 1386, 31 Am. Rep. 243, in holding that where a policy covered furniture at a store and also in a warehouse, and there was a breach of the condition of the policy as to the additional insurance on the warehouse, the whole contract was void. The court said: "There was but one policy insured by the defendant, and the stipulation covering subsequent insurance applied to the property as a whole, and that was that the insurance then effected should not be

good if the plaintiff afterward effected any other 'on the property hereby insured.'" It does not appear from the report of the case whether there were separate valuations of the property.

In *Coggins v. Aetna Ins. Co.* 144 N. C. 7, 8 L.R.A.(N.S.) 839, 119 Am. St. Rep. 924, 56 S. E. 506, a policy on a storehouse and goods contained therein, separately valued, was held entirely avoided by a breach of the iron-safe clause, the court placing its decision on the ground that the premium was entire; that the policy contained a provision that "failure to comply with such clause shall constitute a perpetual bar to any recovery thereon," and also a further provision that "the goods are insured" while they are contained in the storehouse, and not elsewhere," making the risk on the goods and building substantially identical. The court said: "We are of opinion that the great weight of authority, as well as the better reason, establishes the positions that when, to the fact that the premium is entire, there is added the fact of identity of risk, the obligation is single, and, on breach of the stipulation, all recovery is barred."

In *Royal Ins. Co. v. Martin*, 192 U. S. 149, 48 L. ed. 385, 24 Sup. Ct. Rep. 247, it was held that a policy under which a building and a stock in trade contained therein were separately insured for distinct and different amounts is not avoided as respects the insurance on the building by a change in the ownership of such stock in trade without notice to the insurance company, although the policy provides that it shall cease to be in force as to any property thereby insured which shall pass from the insured to any other person otherwise than by due operation of law, unless notice thereof be given to the company.

In *Home F. Ins. Co. v. Bernstein*, 55 Neb. 260, 75 N. W. 839, a provision that "if the property now is or becomes . . . encumbered by mortgage or otherwise" the policy shall be void, it was said does not mean that the entire property covered thereby or the entire class of property, separately valued.

jurisdiction, have differed greatly on that question, but in this state the decisions have adopted the view that such a contract as this is an entire one. In *Associated Firemen's Ins. Co. v. Assum*, 5 Md. 165, there was a policy of insurance to the amount of \$1,000,—\$700 on stock of books and stationery, and \$300 on music, musical instruments, fancy goods, bronze powder, and medicines. The policy provided that if the assured "shall hereafter make any other insurance on the hereby insured premises" he shall notify the company, "or, in default thereof, this policy shall cease and be of no effect." The court held: "That the proper construction of the covenant is

insurance office without notice to the appellants, as provided in the covenant, the policy thereby becomes void and of no effect." In *Bowman v. Franklin F. Ins. Co.* 40 Md. 620, the policy contained a provision that an encumbrance on the property insured must be assented to by the company; "otherwise the policy shall be void." Part of the insurance was on the building, and part on the machinery therein, and there were judgments against the owner, which were liens on the real estate. Judge Alvey said: "The difficulty in the plaintiff's way is that the contract is entire. The consideration for it was entire; and in such case the contract is held to be entire, although its sub-

must be mortgaged, in order to render the policy invalid as a whole or as to the class of property separately valued.

In *Davis v. Boardman*, 12 Mass. 80, a policy was taken out in this country for \$3,000 on a ship and \$1,000 on her cargo, and contained the provision that should the vessel and cargo be insured in England in time to attach, the American policy was to be canceled. Insurance was procured in England on the vessel alone. Upon the abandonment of the ship the contention of the insured was that, as the American policy was to be void only in case the vessel "and" cargo were insured in England, the condition had not been fulfilled, and the policy was therefore in effect as a whole, but the courts held that the intention of the parties was otherwise, and that the insured could recover only on that part of the American policy that covered the cargo.

e. Extent of remaining insurable interest.

In *Western Massachusetts Ins. Co. v. Riker*, 10 Mich. 279, it was held that a breach of a condition in a policy against alienation by the conveyance of an undivided one-third interest in the property avoided the policy as a whole, although the unconverted interest exceeded the amount of the policy.

f. Property included by mistake.

The fact that a piano was included in a policy by mistake, and separately valued therein, was held not to avoid the contract as to other property covered by the policy. *Herzog v. Palatine Ins. Co.* 36 Wash. 611, 79 Pac. 287. The court said: "The rule established by the great weight of authority, and the rule which we believe to be the correct one in such cases, is this: Where a policy of insurance is issued, covering different classes of property, and each class is insured for a specific sum, a breach of the contract of insurance as to one or more classes does not avoid the policy as to the other classes not affected by the breach, in 51 L.R.A. (N.S.)

the absence of fraud, act condemned by public policy, or an increase of risk on the whole property insured, by reason of the breach as to a part."

The contract would not be avoided as to the building, on the theory that, since there was a mistake as to the piano, there was no meeting of minds and therefore no contract. *Ibid.* The court said that the argument could not apply to the building, as to which there was no mistake.

g. Fraud.

Although the courts may hold a contract of insurance divisible for any of the various reasons discussed in the foregoing subdivisions of the note, where certain conditions of the policy have been broken, the rule does not, in the absence of statute, extend to wilful fraud.

It has been held in Missouri, for example, that the rule that a policy on different articles of property at different valuations is severable, so that a breach of condition as to one class of property will not prevent recovery on another, does not apply where the insured is guilty of wilful fraud, such as wilful false swearing as to the amount of his losses, with the intent and purpose of deceiving and defrauding the company. *Hall v. Western Underwriters' Asso.* 108 Mo. App. 476, 81 S. W. 227. The court said: "In such circumstances, he has no standing in a court of justice, and cannot receive the aid of the courts to collect any part of his claim. If he be allowed to collect the true amount of his loss, then he would run no risk in attempting to perpetrate his fraud, and there would be no punishment whereby he, and others, might be deterred from like attempts."

The equities in favor of the insured who is guilty of merely a technical and unintentional breach of the policy are not present where he has been convicted of fraud. Provisions of policies avoiding the entire contract for fraud as to part of the property insured would seem to be reasonable, and they have been so held.

The provision of the contract being that

jects may consist of several distinct and wholly independent items. Moreover, the stipulation in regard to the forfeiture applies to the policy as an entirety." See also *Agricultural Ins. Co. v. Hamilton*, supra, and *Norris v. Connecticut F. Ins. Co.* 115 Md. 174, 80 Atl. 960, Ann. Cas. 1912D, 79.

In this case the consideration was not only entire, but the stipulation as to the forfeiture applied to the policy as an entirety,—“this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon.” That the authorities differ widely on this subject can be seen by reference to the note to *Republic County Mut. F. Ins. Co. v. John-*

son, in 2 Ann. Cas. 22. See also *Aetna Ins. Co. v. Johnson*, 127 Ga. 491, 9 L.R.A. (N.S.) 667, 56 S. E. 643, 9 Ann. Cas. 470, and the case of *Coggins v. Aetna Ins. Co.* (1907) 144 N. C. 7, 8 L.R.A. (N.S.) 839, 119 Am. St. Rep. 924, 56 S. E. 506, where cases on both sides are cited. But in view of our own decisions on the question of the divisibility of the contract, and of the language of the policy itself, we feel constrained to hold that there can be no recovery in this case for the reasons given. The judgment will therefore be affirmed.

Judgment affirmed; the appellants to pay the costs.

“all fraud,” etc., “shall cause a forfeiture of all claim under this policy,” it was held that false swearing as to a stock of grain insured avoided the policy as to the buildings, machinery, and fixtures covered thereby. The court considered this construction of the contract to be in accordance with the intention of the parties, and held that such a construction was reasonable. After pointing out that a policy of insurance is a contract, in the making of which, peculiar and great confidence must, of necessity, be reposed by the insurer in the insured, the court said: “Now, where, instead of there being no good reason to suspect fraud or false swearing on the part of the insured in making out his preliminary proofs, it is proved that his claim of his alleged loss on one of the subjects insured was fraudulent and false, and that the amount of loss designated in his said proof of loss, sworn to by him as aforesaid, was fraudulent and false, so far as the said subject was concerned, is it unreasonable for the policy to provide that in such a case the insured shall forfeit all claim under the policy, not only as to the said subject, but also as to all other subjects included in the policy? Having been proved to be guilty of fraud and falsehood in regard to one of the subjects included in the policy, it is not unreasonable to suppose that he may be guilty of the like wrongs in regard to the other subjects included therein. He may be so guilty, and the insurer may have no means of proving such guilt. He may himself have been the author of the burning of which he complains, or he may have obtained the insurance for the very purpose of obtaining money, by committing fraud and perjury in regard to one or more of the subjects insured. He was capable of either of these crimes, as he was capable of the crime which was proved upon him.” *Moore v. Virginia F. & M. Ins. Co.* 28 Gratt. 508, 26 Am. Rep. 373.

So, where a policy provided that “any fraud or attempt to defraud or deceive on the part of the insured, or any misrepresentation in the proofs or examination as to the loss or damage, shall forfeit all claims under this policy,” it was held that a fraudulent statement as to the amount of

personal property destroyed vitiated the whole contract. *German Ins. Co. v. Reed*, 9 Ky. L. Rep. 929.

Under a policy providing that “this entire policy shall be void . . . in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after loss,” it was held that false swearing touching the burning of wearing apparel avoided the policy as to the house and household furniture. *Fowler v. Phoenix Ins. Co.* 35 Or. 559, 57 Pac. 421. The court said it had found no case where fraud or false swearing affected the consideration wherein the contract was deemed to be divisible, except in Texas, where the statute is held to be the controlling factor in the construction.

But without emphasizing any special provisions of the contract with respect to its avoidance for fraud, it has been held that a policy insuring a building and contents is rendered wholly void by a fraudulent misrepresentation of value of personal property in proof of loss, under a statute requiring the declaration by the insured that the account furnished is just and true, and declaring that any fraud or false statements in the statutory declaration shall avoid the policy. *Harris v. Waterloo Mut. F. Ins. Co.* 10 Ont. Rep. 718.

And that breach of a condition of a policy covering different classes of personal property, as to subsequent encumbrances on part thereof, invalidates the whole contract, where the insured claims payment for loss of mortgaged property. *Schumitsch v. American Ins. Co.* 48 Wis. 26, 3 N. W. 595.

And especially will recovery be denied the insured where the company brings an action in equity to cancel a policy on the ground of false swearing as to personal property and proof of loss, and the insured files a cross complaint asking a recovery for the loss of a house covered by the same policy. *Home Ins. Co. v. Connelly*, 104 Tenn. 93, 56 S. W. 828. The court said: “To permit the cross complainant, coming as she does with a confession of fraud and false swearing, to recover, would be in disregard of that fundamental maxim of equity, that ‘he that doeth inequity shall not have equity.’ It

is true that this maxim has its proper limitation. It does not extend to any misconduct, however gross, which is unconnected with the matter of litigation, and with which the opposite party has no concern, but it does control the administration of equitable remedies where the misconduct is in regard to, or at all events connected with, the subject of controversy, so that it has in some measure affected the equitable relation of the parties arising out of the same transaction. 1 Pom. Eq. Jur. § 399. We can conceive of no case that affords better scope for the application of this rule than the present."

If a contract covering different kinds or classes of property were considered to be an insurance on each kind or class thereof, as if two separate contracts had been entered into, then, undoubtedly fraud as to part of the property would not avoid the insurance on the rest. If, for instance, the insured takes out a separate policy on a house and another policy on furniture contained therein, it would hardly be maintained that fraudulent proofs of loss as to the furniture would affect the right of the insured to recover on the house. It has been urged that a policy for an entire premium on different kinds of property separately valued is in effect not one contract, but several; that is to say, a separate contract for each kind of property covered. But it has been held in a case involving false proofs of loss that this is not so; that a contract may be divisible, and yet not, in effect, more than a single agreement, so that false proofs of loss as to part of the property would avoid the policy as to the rest.

In *Home Ins. Co. v. Connelly*, supra, in holding that a policy for an entire premium on a house and furniture separately valued was avoided *in toto* by false swearing in proofs of loss as to personal property, the court said: "It does not follow that, because such a policy is severable, that it is to be taken as if separate and distinct policies, covering each a separate piece of property, were issued at the same time. While it is an apportionable contract, yet that it is not two distinct and separate contracts is certain, not only from the fact that the premium paid is entire, but also from this consideration, that separate suits could not be maintained where all the property insured had been destroyed by one and the same fire. In such an event a recovery for the loss of one of the subjects of insurance, there can be no doubt, would bar a recovery in an independent suit for the loss of another subject of the same insurance, upon the principle that a plaintiff cannot split a single cause of action into parts."

But the rule denying the insured the right of any recovery in case of fraud may be affected by statute, as pointed out in *Fowler v. Phoenix Ins. Co.* supra.

In Texas, where art. 3089 of the Revised Statutes provides that "a fire insurance policy, in case of total loss by fire of property insured, shall be held and considered to be a liquidated demand against the company 51 L.R.A. (N.S.)

for the full amount of such policy, provided, that the provisions of this article shall not apply to personal property," it was held that since the provision of the policy that "the entire policy shall be void, . . . in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss," could not be applicable to real estate because of the statute, a policy covering both the building and furniture separately valued would not be avoided as to the real estate by false statement as to the value of personal property in the proofs of loss. *Sullivan v. Hartford F. Ins. Co.* 89 Tex. 665, 36 S. W. 73.

And under a statute providing that "whenever any policy of insurance shall be written to insure any real property, and the property insured shall be wholly destroyed without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and measure of damages when destroyed," it has been held that fraudulent statements as to the value of real estate in proof of loss will not avoid the policy, because under the statute such representations are not material; but that where a policy covers both real and personal property, and there are fraudulent representations as to either the value or quantity of personal property destroyed, the entire policy is avoided. *Oshkosh Packing & Provision Co. v. Mercantile Ins. Co.* 31 Fed. 200.

n. Statutes.

In *King v. Tioga County Patrons' Fire Relief Asso.* 35 App. Div. 53, 54 N. Y. Supp. 1057, under a policy insuring both real and personal property, the rule as to severability was maintained although the company urged that, by the provisions of the statute under which it was incorporated (Laws of 1880, chap. 362), and by its by-laws, the company was authorized only to insure such personal property in connection with the building in which the same was contained, so that the contract could not be deemed severable; it appearing that the company would not have assumed the risk of the personal property separate from the building in which it was situated. The court said that in the *Pratt Case*, 130 N. Y. 206, 29 N. E. 117, in which the contract was held severable, the company was organized under the same statute.

In *Thurber v. Royal Ins. Co.* 1 Marv. (Del.) 251, 40 Atl. 1111, under a statute requiring that in contracts of insurance of real property the value agreed upon shall be indorsed on the policy, and providing that where any owner shall effect any subsequent insurance upon any higher value than so agreed, all insurance as well as that subsequently obtained shall become void, it was held that where a policy covered both real

policy as to the personalty. The court did not, however, rest its decision on the ground that the contract was severable, but on the ground that the statute was penal, and expressly confined the forfeiture to the realty.

So, a policy covering both real and personal property, fixing the amount to be paid on each specifically in case of loss, is not avoided as to the personal property by the subsequent insurance of the real estate upon a larger value than the one agreed upon in the policy, since by the statute a forfeiture is specifically confined to the realty. *Ibid.*

For effect of statute on the divisibility of the contract in case of fraudulent proof of loss, see II. g. Fraud, *supra*.

For effect of statute on question of divisibility, see also *Gore Dist. Mut. F. Ins. Co. v. Samo*, II. a.

III. Special kinds of contract.

a. Mutual policies.

In a number of the cases in which it is held that a policy covering both realty and personalty is entire, although the property is separately valued, the decision turns upon the fact that the insurance was made by a mutual company, which had a lien for premium upon the property insured which would be impaired by the breach of condition as to part of the property.

In *Carleton v. Patrons' Androscoggin Mut. F. Ins. Co.* 109 Me. 70, 39 L.R.A. (N.S.) 951, 82 Atl. 649, it was said to be familiar law that a mutual insurance policy on a building and furniture therein is entire, and that, being void on account of prior insurance on the building, is void as to the furniture.

For earlier cases on the point, see note to *Wright v. Fire Ins. Asso.* 19 L.R.A. 211.

The mutual-insurance company cases must therefore stand by themselves. They are not authority for a ruling as to entirety of other policies. They are closely analogous, however, to cases in which the decision as to divisibility turns upon the nature of the risk.

b. Open policies.

Under an open or floating policy on grain or malt, or grain in the process of malting in a house occupied as a malt house and for storage purposes, providing that the policy should be void if the subject of insurance should become encumbered by chattel mortgage without consent of the company indorsed upon the policy, it was held that the encumbrance of part of the property in violation of this condition merely rendered the property so covered not subject to the insurance within the terms of the policy, leaving the policy valid as to the rest. *Coleman v. Phenix Ins. Co.* 3 App. Div. 65, 38 N. Y. Supp. 986. The court said: "The terms of the policy are such as obviously secured 51 L.R.A. (N.S.)

or a portion of it as he saw fit, during the life of this contract. When, however, he exercised that right and dealt with the property by sale or mortgage, from that moment the property sold or mortgaged ceased to be covered by this policy of insurance, for from that moment it failed to answer the description and conditions of the policy, and ceased to be the 'subject of insurance.'"

c. Separate contracts.

Where personal property was insured some time after real property, and, instead of being covered by a new policy, was evidenced by an additional paper attached to the original policy, it was held that a breach of the condition as to sole ownership of the real estate would not invalidate the contract as to the personal property. *Continental Ins. Co. v. Gardner*, 23 Ky. L. Rep. 335, 62 S. W. 886. The court said: "This rule should certainly apply where the insurance of the personal property was really a separate contract, made independently long after the policy was issued, when the paper evidencing this additional insurance was attached to the policy as a more convenient method of reducing the contract to writing. There was no evidence here of fraud or bad faith, and we are unable to see that the condition of the original policy as to the title to the land should prevent a recovery for the personal property."

IV. Kinds of property covered by policy.

a. Separate buildings.

Under a policy stipulating a separate amount of insurance on each building insured, a representation or warranty relating exclusively to one of the buildings will not defeat a recovery of the insurance on the other. *Rogers v. Phenix Ins. Co.* 121 Ind. 570, 23 N. E. 498.

Where four dwelling houses were insured at \$250 each, it was held that the fact that at the time of the fire two of them were unoccupied, so as to violate the policy as to them, would not prevent the recovery as to the other two. *Speagle v. Dwelling House Ins. Co.* 97 Ky. 646, 31 S. W. 282.

b. Building and contents.

It has been pointed out that the question has been raised as to the entirety of the risk where a building and its contents are insured under a single policy, although separate valuations are placed on each kind of property. There is a conflict of opinion as to the divisibility of such a contract, but in most of the cases the question of the effect of the situation of the property on the hazard is not discussed.

A policy covering a barn and its contents, placing different valuations upon the different subjects of insurance, is severable.

ut only that part in respect to which the reach occurs. *Continental Ins. Co. v. Vard*, 50 Kan. 346, 31 Pac. 1079.

Where a policy is on a dwelling house and various classes of personal property, including household furniture, etc., described separately, different and separate amounts being specified on the dwelling and personal property, the contract is divisible, and is not avoided as to personal property by a violation of its conditions as to subsequent encumbrances on the realty. *Kansas Farmers' F. Ins. Co. v. Saindon*, 53 Kan. 323, 36 Pac. 983.

Recovery for loss of personal property covered by a policy, and separately valued, may be had although there is a breach of warranty as to title as to the realty included in the contract. *Stephens v. German Ins. Co.* 61 Mo. App. 194.

A policy of insurance on a building and various articles of personal property therein, separately valued, is not forfeited as to the personal property by virtue of a lack of title to the land, under a provision that the entire policy shall be void if the "subject of insurance be a building on ground not owned by the insured in fee simple," since the building is not alone the subject of insurance. *Bills v. Hibernia Ins. Co.* 87 Tex. 547, 29 L.R.A. 706, 47 Am. St. Rep. 121, 29 S. W. 1063.

In *Home Ins. Co. v. Smith*, — Tex. Civ. App. —, 32 S. W. 240, the court, on the authority of the last-mentioned case, set aside its former decision in 29 S. W. 264, in which it was held that breach of the condition of the policy covering real and personal property as to the title of the real estate avoided the whole policy.

A policy covering a storehouse, fixtures, and goods separately valued is divisible so as not to avoid the policy as to the building and fixtures by a breach of the iron-safe clause. *Georgia Home Ins. Co. v. McKinley*, 14 Tex. Civ. App. 7, 37 S. W. 606.

In *Murphy v. Northern British & M. Co.* 61 Mo. App. 323, a policy of a gross premium covering a stock of goods and building, separately valued, was held to be severable, so that it might be void as to one class of property and valid as to another. Failure of the insured to demand an arbitration as to the personalty was held not to affect his right to recover for loss of the realty.

In *Roberts, W. & T. Co. v. Sun Mut. Ins. Co.* 13 Tex. Civ. App. 64, 35 S. W. 955, it was held that a breach of the iron-safe clause would not affect the policy as to the building in which the stock of goods insured was contained, both building and goods being covered by the same policy for a gross premium, where the property was separately valued. The court said: "We are of the opinion that the iron-safe clause could have had no reference to the house insured, but must have referred to that part of the property affected by the clause, and we prefer to follow that line of decisions 51 L.R.A.(N.S.)

sarily work a forfeiture as to the house. . . . There is nothing in the language of the iron-safe clause that would indicate that it was the intention of the parties to include in the forfeiture anything but the personal property. It is not the spirit of the law to favor or enlarge forfeitures by loose and liberal construction to that end."

In *Mitchell v. Mississippi Home Ins. Co.* 72 Miss. 53, 48 Am. St. Rep. 535, 18 So. 86, in holding that a policy on a stock of goods and store fixtures separately valued is not entire so as to be wholly invalidated by failure to observe the iron-safe clause, the court said: "The requirement of the iron-safe clause is that the last inventory, and the books of account of sales and purchases, shall be kept in such safe, or in some secure place other than on the premises where the insured property was kept, and that a failure to produce the inventory and books after loss shall avoid the policy; but all this has reference only to such articles of merchandise as constitute the stock in trade. The store fixtures and furniture, and the restaurant furniture, including the cooking stove, were never designed to be embraced in the inventory of stock on hand, or to be entered and carried on the books of account showing purchases and sales of goods by the insured. As to these, the policy was not avoided by appellant's failure to observe the iron-safe clause. The contract was divisible, and it may be true that appellant could be defeated of a recovery for the sum for which the stock of goods was insured, and yet might have been entitled to recover for the furniture and fixtures of the store and restaurant. The case is not to be confounded with those in which any recovery for any part of the sum insured has been denied because of misrepresentations or frauds of the insured."

But in *Springfield F. & M. Ins. Co. v. Phillips*, 16 Ky. L. Rep. 352, it was held that although a policy insured a house for one sum and furniture for another, if the insurance was procured by one contract, any misstatement or concealment as to any material fact which would invalidate the insurance as to any of the subjects will invalidate it as to the other.

And under a policy insuring a stock of goods and the building in which it is contained, the premium being for a gross sum, a breach of warranty relating solely to the goods,—in this case a violation of the iron-safe clause,—bars recovery not only as to the personal property, but also as to the building. *Southern F. Ins. Co. v. Knight*, 111 Ga. 622, 52 L.R.A. 70, 78 Am. St. Rep. 216, 36 S. E. 821. The court said: "It was competent for the parties to make two separate and distinct contracts,—one covering the goods and the other the building; but they did not see proper to do this. They combined the two, and made the consideration moving toward the insurer a gross sum. They further provided that the contract, not a part of it, should be void under cer-

to take an inventory of the stock of goods the plaintiffs should be precluded from recovering the value of the building. But this does not affect the question. The question is, What have they agreed upon? If there was any room to doubt as to the intention of the parties, that construction which is most reasonable and most consonant with justice would be applied. But there is none. The parties have deliberately chosen to enter into an agreement whereby the policy shall be forfeited if the insured fails to do certain things; and he has failed to comply with this agreement. In such a case there is but one thing for the courts to do, and that is, to enforce the agreement as made."

The court in this case was further of the opinion that its decision was in accord with the weight of authority, saying: "The question as to whether a policy of insurance such as is involved in the present case constitutes a separable or an entire contract is no new question. It has been the subject of numerous decisions by the courts in this country, and they are in hopeless and irreconcilable conflict. The weight of authority is to the effect that the contract is entire, and that the breach of a warranty which relates solely to one class of property will avoid the entire policy, if the contract so provides."

It would appear, however, that the weight of authority is on the side of the divisibility of the contract.

c. Fixtures and personal property.

In *Manchester Fire Assur. Co. v. Feibelman*, 118 Ala. 308, 23 So. 759, a policy contained separate valuations of the fixtures, wines, liquors, etc., and of the pool tables of the insured. The company asserted that the latter had violated the whole policy by having a mortgage on three of the pool tables, contrary to one of the conditions of the contract. It was held that the insurance as to each of these subjects was divisible, and that the insured might recover for the loss of the other items notwithstanding he had violated the policy as to the pool tables.

d. Different classes of personal property.

The fact that a policy covers different classes of personal property separately valued, instead of different kinds of property such as realty and personalty, does not seem to affect the general rule as to divisibility of insurance contracts which may prevail in any jurisdiction.

It has been held that a policy covering hay and grain in separate amounts is severable so as not to render the entire policy void because of breach of condition as to encumbrances as to part of the property. *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 535, 41 Pac. 513.

In *Dwelling House Ins. Co. v. Butterly*, 33 Ill. App. 626, affirmed in 133 Ill. 534, 51 L.R.A. (N.S.)

valued separately, the sale or encumbrance of any part of the property avoided the policy only as to the specific articles sold or encumbered.

In *Home Ins. Co. v. Delta Bank*, 71 Minn. 608, 15 So. 932, a policy covering a stock of goods in a certain building, though void as to part of the stock by reason of a violation of the iron-safe clause, was held good as to the balance thereof kept in a separate apartment and as to which there had been no violation of the policy.

And in *Light v. Greenwich Ins. Co.* 106 Tenn. 480, 58 S. W. 851, a policy for a gross sum distributed among various classes of personal property separately valued was held a severable contract.

The New York rule as to the severability of an insurance contract on different subjects of insurance separately valued is not altered by the fact that the policy covered different classes of personal property so valued, and not real estate and personal property. *American Artistic Gold Stamping Co. v. Glens Falls Ins. Co.* 1 Misc. 114, 20 N. Y. Supp. 646. The court said that the decisions upholding the severability of the contract were not upon the ground that all of the property insured was not of the same species.

But in *Phoenix Ins. Co. v. Public Parks Amusement Co.* 63 Ark. 187, 37 S. W. 959, the fact that separate amounts of insurance are apportioned to separate items and classes of personal property does not necessarily make the policy indivisible.

In this case the policies covered "the following specified or located property, only to an amount not exceeding the actual cash value of the property herein described, at the time of such loss, and in no event to exceed \$2,500, as follows: '\$1,250 on their forty horses, not to exceed \$125 on any one horse in case of loss; \$875 on their rolling stock and vehicles of all kinds, including hacks, carriages, buggies, carts, and wagons; \$375 on their harness, saddles, bridles, whips, blankets, robes, office and stable furniture, and fixtures of all kinds, including feed on hand.'" It was held entire, so that a breach of condition as to the statement of ownership, which renders it void as to part of the property, affected it in the same manner as to the rest. H. C. S.

ALABAMA SUPREME COURT.

EX PARTE S. E. LOGAN et al

(— Ala. —, 64 So. 570.)

Chattel mortgage — attachment by mortgagee — effect.

1. A mortgagee of chattels does not lose

Note. — Waiver of lien of chattel mortgage by attachment or execution.

The earlier cases on this subject will be

his lien thereon by levying an attachment upon the property as that on the mortgagor, either by estoppel or waiver, where by statute the equity of redemption is subject to levy and sale under execution.

Judgment — in favor of claim in attachment proceedings — effect in subsequent detinue proceedings.

2. A judgment in favor of one who claims adversely property attached by a mortgagee as that of the mortgagor is not *res judicata* in a subsequent proceeding in detinue by the mortgagee against the mortgagor under his mortgage.

(February 5, 1914.)

PETITION for certiorari to the Court of Appeals to review a judgment affirming a judgment of the City Court of An-

niston in plaintiff's favor in an action against petitioners to secure possession of certain property in accordance with the provisions of a chattel mortgage. Writ denied.

The facts are stated in the opinion.

Messrs. O. M. Alexander, Merrill & Walker, and J. M. Foster, for appellants:

The levy by one having title to chattels, of an execution upon the chattels as the property of the defendant in execution, is a binding election to abandon and release his title, and estops him from afterward suing to recover the chattels on the strength of such title.

Campbell v. Kauffman Mill. Co. 42 Fla. 328, 29 So. 435; Lehman v. Van Winkle, 92 Ala. 443, 8 So. 870; Kolaky v. Loveman,

found in the notes to *Dix v. Smith*, 50 L.R.A. 714, and *Kansas City Live Stock Commission Co. v. Bank of Hamlin*, 24 L.R.A.(N.S.) 400.

In addition to the latter case, and the other cases cited in the notes referred to, the position of the Alabama supreme court in *EX PARTE LOGAN*, that the levy of an attachment or execution, at the instance of the mortgagee, does not waive the lien of the chattel mortgage, is further supported by the opinion of the appellate court in this case (9 Ala. App. 450, 63 So. 766), and other cases cited in the present note.

Thus, in *Flores v. Stone*, 21 Cal. App. 105, 131 Pac. 348, rehearing denied in 21 Cal. App. 111, 131 Pac. 351, it was held that there was no waiver, where one who, after attaching mortgaged chattels for a debt entirely independent of the mortgage debt, discovered the existence of the mortgage, took an assignment of the same and the notes secured thereby; prosecuted his action to judgment, and procured the insurance and levy of an execution on the property, which, however, was not sold, the attachment being released, a large part of the property having been claimed as exempt from execution. The court quotes the opening statement in the note in 50 L.R.A. 714, as to the grounds and limitation of the doctrine of *Dix v. Smith*.

So, in *Stein v. McAuley*, 147 Iowa, 630, 27 L.R.A.(N.S.) 602, 140 Am. St. Rep. 332, 125 N. W. 336, it was held that the lien of a chattel mortgage was not waived by the levying of an attachment, subsequently dismissed without trial of the attachment suit, on the mortgaged chattels, for the debt secured by the mortgage; and further that a waiver did not result from the mere fact that the chattel mortgagee put the mortgagor to the expense of defending the attachment. The court in this case also recognized the distinction between cases where the interest of the mortgagor is subject to levy, and where it is not, citing in this connection the note to *Dix v. Smith*, 50 L.R.A. 714.

So, in *Green v. Bass*, 83 Ohio St. 378, 94 N. E. 742, Ann. Cas. 1912A, 828, it is held 51 L.R.A.(N.S.)

that the owner of a senior chattel mortgage does not, by recovering a judgment on the note which it secures, and causing an execution to be levied on the mortgaged chattels, waive the priority of his lien, the levy having been abandoned.

And in *J. I. Case Threshing Mach. Co. v. Johnson*, 152 Wis. 8, 139 N. W. 445, it was held that there was no waiver where the mortgagee, after the maturity of the note secured by the chattel mortgage, recovered judgment thereon and procured an execution to be levied on the mortgaged property, under which the property was advertised for sale, the levy, however, having been released the day before the sale. The court said: "It is fast coming to be generally accepted that where the mortgagor is recognized, as here, to have an equity of redemption, even after maturity of the debt, . . . he has an interest in the property which may be mortgaged by him or levied upon and sold by his creditors, and that the mortgagee is in no worse position in that respect than any other creditor."

In *Sheets v. Hocker*, 34 Okla. 676, 128 Pac. 725, it was held that there was no waiver of the lien of a chattel mortgage, where a judgment creditor of the mortgagor took an assignment of the mortgage and the debt secured thereby, and an execution was subsequently levied on the mortgaged property, but was subsequently returned because the property had been sold under the mortgage. The court observed that the evidence did not show an intention to waive; but that the execution was placed in the hands of the constable before the defendant learned of the existence of the mortgage, and that, as soon as the execution creditor learned of the mortgage, he bought it, and from that time proceeded under it, and proceeded promptly. The case was distinguished from *Dix v. Smith*, 9 Okla. 124, 50 L.R.A. 714, 60 Pac. 303, on the ground that in that case the creditor proceeded with the attachment; while in this case he proceeded with the mortgage, and instructed the officer not to proceed under the execution.

G. H. P.

Smith, 9 Okla. 125, 50 L.R.A. 714, 60 Pac. 303; 7 Cyc. 55.

The equity of redemption remaining in a mortgagor of chattels cannot be seized under execution on a judgment for the mortgage debt.

Powell v. Williams, 14 Ala. 476, 48 Am. Dec. 105; Boswell v. Carlisle, 55 Ala. 554; Porter v. Wheeler, 105 Ala. 459, 17 So. 221.

Mr. James F. Matthews, for appellee:

An equity of redemption in mortgaged chattels is by statute subject to levy and sale in this state.

Heffin v. Slay, 78 Ala. 182; Bingham v. Vandegrift, 93 Ala. 283, 9 So. 280; Gassenheimer v. Molton, 80 Ala. 521, 2 So. 652; Stein v. McAuley, 147 Iowa, 630, 27 L.R.A. (N.S.) 692, 140 Am. St. Rep. 332, 125 N. W. 336; Byram v. Stout, 127 Ind. 195, 26 N. E. 687; Barchard v. Kohn, 157 Ill. 579, 29 L.R.A. 803, 41 N. E. 902; Dix v. Smith, 50 L.R.A. 716, note; Madson v. Rutten, 16 N. D. 281, 13 L.R.A. (N.S.) 554, 113 N. W. 872; Kansas City Live Stock Commission Co. v. Bank of Hamlin, 79 Kan. 761, 24 L.R.A. (N.S.) 490, 101 Pac. 617, 17 Ann. Cas. 956.

After the determination of the claim suit, the claimant could not convey a good title to the property, upon principles of estoppel, superior to the plaintiffs' outstanding prior title.

McConeghy v. McCaw, 31 Ala. 447; Gassenheimer v. Molton, 80 Ala. 521, 2 So. 652; Barker v. Bell, 37 Ala. 354.

Mayfield, J., delivered the opinion of the court:

The questions presented for decision are as follows:

Does the mortgagee of a chattel estop himself from maintaining an action of detinue to recover the mortgaged property by levying an attachment or execution upon the property as the property of the mortgagor?

If not estopped, does such levy amount to a waiver of the right or title of the mortgagee?

If the mere levy does not work an estoppel or waiver, is a claim suit instituted after the levy, between the mortgagee and a third party, which results in favor of the third party, *res judicata* in a detinue suit by the mortgagee against the mortgagor, as to the same property?

The trial court and the court of appeals answered each of the questions in the negative, and the defendant mortgagor seeks certiorari to have reviewed the judgment 51 L.R.A. (N.S.)

The exact questions are new in this court, so far as our investigation goes. They have been decided by other courts, however; but the trouble is they have been decided differently in the several courts. The questions, or some of them, have been answered in the affirmative by the supreme courts of Massachusetts and of Arkansas and other states, and in the negative by the supreme courts of Illinois, Indiana, Kansas, Iowa, North Dakota, and of other states.

The rule of law is thus stated by the supreme court of Massachusetts: "A party holding personal property by virtue of a mortgage or pledge may waive his claim under such mortgage or pledge, and attach the property in a suit to recover the debt for which the mortgage or pledge was given Buck v. Ingersoll, 11 Met. 226, 232. Such attachment is, in itself, a waiver of the claim under the mortgage. The liens respectively created by mortgage and by attachment on the same property are essentially different, and cannot coexist. They affect very differently, also, the rights of third persons. A stranger may attach personal property subject to the encumbrance of a prior lien by attachment, with no responsibility for such prior lien; if the lien is by mortgage, he must pay the amount secured by such mortgage, before his attachment is effectual. We have no need to discuss the question whether the same rule shall apply to an attachment of the equity of redemption of personal property to secure the payment of the mortgage debt as applies to the equity of redemption of real property, for, in this commonwealth, the equity of redemption of personal property is not attachable." Evans v. Warren, 122 Mass. 304.

The Arkansas court thus states the rule, citing a number of authorities: "The levy of the attachment amounted to an assertion by appellants that the property was subject to seizure and sale under the attachment. But, as this could not be true if the lien of the mortgage still existed, the levy of the attachment was the same as a denial on the part of appellants that the mortgage lien existed, and was in effect a waiver on their part of the lien created by the mortgage. In other words, having sued out an attachment, levied it upon the property in question, and prosecuted the attachment suit to judgment, they must be held to have waived rights which were inconsistent with such a course of procedure. The mortgage lien, being inconsistent with such attachment, was thereby waived, and appellants have nothing upon which to

base their action of replevin." *Cox v. Harris*, 64 Ark. 216, 62 Am. St. Rep. 187, 188, 41 S. W. 426.

The Indiana and Illinois courts criticized the rules declared by the Massachusetts and Arkansas courts as being technical and artificial, and declined to follow. See *Byram v. Stout*, 127 Ind. 195, 26 N. E. 687; *Barchard v. Kohn*, 157 Ill. 579, 29 L.R.A. 803, 41 N. E. 902. In the latter case it is said: "The main case which holds that an attachment of the mortgaged property by the mortgagee for the mortgage debt is a waiver of his lien under the mortgage is *Evans v. Warren*, 122 Mass. 303. The decision in that case was placed upon the ground substantially that the liens created by mortgage and by attachment upon the same property are essentially different, and cannot coexist, for the reason that under the Massachusetts statutes the equity of redemption of personal property is not subject to attachment, and hence, if the mortgagee causes an attachment to issue against the mortgaged property, it is a waiver of the mortgage lien. The cases which hold that the attachment operates as a waiver of the plaintiff's rights under the mortgage do so upon the general grounds that a person cannot avail himself of inconsistent remedies in relation to the same matter, and, having chosen and carried into effect one remedy, he cannot resort to a different one, involving a repudiation of the grounds upon which the first one was based; that the suit on the mortgage and the attachment suit are inconsistent, because the one proceeds upon the ground that the mortgagee is the owner of the property, and the other upon the ground that the mortgagor thereof is owner; that, when the debt matured, the mortgagee had the right to take the property under the mortgage, he having the legal title, subject only to a right of redemption; and that, by bringing the attachment suit, he elects to treat the property as the property of the debtor, and cannot, by seeking to enforce his mortgage, assert an ownership and right of possession in himself antedating the attachment. The reasoning in *Evans v. Warren*, supra, was held to be unsatisfactory, and its doctrine was repudiated in *Byram v. Stout*, supra. In the latter case the mortgagee in a chattel mortgage brought an action to foreclose it, and a junior mortgagee set up as a defense that the complainant had previously brought suit upon the evidences of debt secured by his mortgage, and had therein issued a writ of attachment and levied it upon the mortgaged property, and had thereby released his mortgage lien; but the court held that the attachment was not a waiver of the mortgage lien, and did not 51 L.R.A. (N.S.)

estop the mortgagee from claiming under his mortgage, basing its decision mainly upon the ground that in Indiana the mortgagee in a chattel mortgage is a mere lien holder. *Jones, Mortg.* § 565. In support of the conclusion that the mortgagee of personal property is a mere lien holder, Indiana decisions are there referred to, holding that personal property under mortgage may be levied upon and sold by execution subject to the mortgage lien."

The Massachusetts doctrine is thus criticized by an annotator of the case of *Dix v. Smith*, 50 L.R.A. 714: "The decision in the principal case, while the logical result of the view taken of the nature and effect of a chattel mortgage, and of the construction placed upon the statute governing attachments, rests upon strictly technical grounds. To render applicable the theory of the case, that the lien of a chattel mortgage and the lien of an attachment are inconsistent, and cannot coexist, since the first imports legal title in the mortgagee, and the second legal title in the mortgagor, not only the common-law doctrine that a chattel mortgage operates to transfer the legal title to the mortgagee, but also the common-law rule that a mere equitable right, such as the equity of redemption remaining in the mortgagor, is not subject to levy, must have been left undisturbed, both by statute and judicial decision. Even in a jurisdiction where the doctrine that the legal title is in the mortgagee has not been abandoned, there is no necessary inconsistency between the lien of a chattel mortgage and the lien of an attachment, though asserted by the same person, if, either by statute or judicial decision, the equity of redemption in the mortgagor is made subject to attachment. While the statute involved in the principal case affords the means of reaching by attachment property that has been mortgaged, the opinion emphasizes the fact that the statute contemplates the payment and discharge of the mortgage before the lien of the attachment can attach, so that the statute does not impair either of the doctrines of the common law referred to. The theory and decision of the principal case have the support of *Evans v. Warren*, supra, which is substantially like it, except that there the attachment, which was subsequently dissolved, was issued for the debt secured by the mortgage. The court took the view that the liens were essentially different, and could not coexist, pointing out that the legal title was in the mortgagee, and that the equity of redemption in personal property was not attachable."

Whatever might be the correct doctrine in this state but for our statutes, our statutes certainly change the law from that de-

clared by the supreme courts of Massachusetts and Arkansas. Section 4091 of our Code expressly makes the equity of redemption in either land or personal property subject to levy and sale under execution. This being true, the doctrine of estoppel or waiver cannot apply to or result from the levy of an execution by the mortgagee, upon the mortgaged chattels.

It is true that this court in the case of *Fuller v. Eames*, 108 Ala. 464, 19 So. 366, held that, where there was a conditional sale of chattels, the vendor retaining title until the purchase price was paid, and the vendor attached the property as that of the vendee, he was thereby estopped from bringing an action of detinue to recover the same property, thereby claiming that it was the vendor's, and not the vendee's. In that case this court said: "In this attachment proceeding, the plaintiff unequivocally recognized the property as defendant's, and sought to subject it in a manner wholly inconsistent with the retention of the title in himself when he sold the property to defendant. He thereby waived any title he might have had to the property, and could not afterwards institute this suit, maintainable only on the theory of title in himself. *Thomason v. Lewis*, 103 Ala. 426, 15 So. 830; *Montgomery Iron Works v. Smith*, 98 Ala. 644, 13 So. 525; *Lehman v. Van Winkle*, 92 Ala. 443, 8 So. 870; *Tanner & D. Engine Co. v. Hall*, 89 Ala. 628, 7 So. 187."

In that case, as is pointed out, the two remedies were inconsistent, and not concurrent, and, the vendor having elected to attach the property as that of the defendant, and to hold him liable for the purchase price, he would not be allowed to have the property and also to have the purchase price.

In the case at bar, as to mortgaged chattels, the statute changes the rule, if it would not otherwise be different. The equity of redemption in chattels being subject to levy and sale under execution, the levy, of course, was not a claim inconsistent with that of the mortgagee's title, and, for this reason, the pleas setting up estoppel, election, or waiver, on account of this levy, were no defense to the action of detinue; hence no error intervened in the trial court or in the court of appeals as to the rulings on demurrer to these pleas.

The claim suit was a contest between the mortgagee and a third party. In this suit the issue was, by virtue of the statute, whether the property was that of the defendant, the mortgagor, and whether it was subject to the process. The title to the property as between the mortgagee and the mortgagor was not therefore put in

issue, nor decided, so far as the pleas show, and therefore the result of that claim suit was not shown to be *res judicata* of the detinue suit between the mortgagee and the mortgagor.

In this state the mortgagee has three remedies against the mortgagor, either of which he is at liberty to pursue, or he may pursue any two or all concurrently: He may bring an action at law to recover the debt, an appropriate action to recover possession of the property, and may foreclose the mortgage, and sell the property. But, if he pursue one or more, each suit must be tried and determined on the principles applicable and prevailing in the forum in which the particular remedy is sought.

The questions were treated fully by the court of appeals in an able opinion by Walker, P. J., in which we entirely concur, and, but for the fact that the question is one of first impression in this court, it might well be disposed of by our merely adopting the opinion of the court of appeals.

The writ of certiorari is therefore denied.

Anderson, Ch. J., and Sayre, Somerville, De Graffenried, and Gardner, JJ., concur. McClellan, J., thinks the writ of certiorari prayed for should be denied for the reasons and upon the considerations set forth in the opinion of the court of appeals.

DISTRICT OF COLUMBIA COURT OF APPEALS.

THOMAS D. HILL, Appt.,

v.

CHESAPEAKE & POTOMAC TELEPHONE COMPANY.

(42 App. D. C. 170.)

Negligence — public telephone device — safety of passageway.

A telephone company which installs in a store operated by another a slot telephone apparatus for the use of the public is bound to provide a safe passageway to and from such apparatus, and is liable in damages for injury to one who, without fault on his part, falls through a trapdoor negligently

Note. — On the question as to the responsibility of one utilizing space in a store of building in the general occupancy of another, with respect to the condition of the premises, no cases have been found in addition to *HILL v. CHESAPEAKE & P. TELEPH. Co.* and the case therein set out, *Sullivan v. New York Teleph. Co.* 157 App. Div. 642, 142 N. Y. Supp. 735. No attempt has been made to find cases, if any, dealing with the general question as to the responsibility of a lessee of a portion of a build-

left open in the passageway by the store-keeper.

(April 6, 1914.)

APPPEAL by plaintiff from a judgment of the Supreme Court sustaining a demurrer to the declaration in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. W. Gwynn Gardiner and Baline Coppinger for appellant.

Messrs. Henry B. F. Macfarland, Charles Cowles Tucker, J. Miller Kenyon, Edward S. Bailey, and Horace G. Macfarland, for appellee:

There is no allegation that defendant was in possession of the store, or that it could or did exercise any dominion or control over the passageway to and from the telephone on the premises.

29 Cyc. 567; *Sullivan v. New York Teleph. Co.* 157 App. Div. 642, 142 N. Y. Supp. 735; *Mead v. Ph. Zang Brewing Co.* 43 Colo. 1, 95 Pac. 284; *Bishop, Non-Contract Law*, § 852.

Liability for an injury from a nuisance or from defective repairs upon premises depends upon the power to prevent the injury by abating the nuisance or making the repairs, and therefore rests upon him who has the possession and control of the premises.

Milford v. Holbrook, 9 Allen, 17, 85 Am. Dec. 735; *Shipley v. Fifty Associates*, 101 Mass. 251, 3 Am. Rep. 346; *Elliott v. Pray*, 10 Allen, 378, 87 Am. Dec. 653; *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295; *Nash v. Minneapolis Mill Co.* 24 Minn. 501, 32 Am. Rep. 349; *Detviller v. Rolled Plate Metal Co.* 110 App. Div. 773, 97 N. Y. Supp. 419.

Defendant, not being in control, is not liable.

El Paso v. Causey, 1 Ill. App. 531; *Curry v. Dorr*, 210 Mass. 430, 97 N. E. 87.

Mr. Chief Justice Shepard delivered the opinion of the court:

This is an action of damages by plaintiff, Thomas D. Hill, appellant against C. J. Conlon and the Chesapeake & Potomac

ing for conditions existing in parts used in common by all tenants. For one of the recent cases dealing with a tenant's responsibility to his employees in such circumstances, see *Hawkes v. Broadwalk Shoe Co.* 207 Mass. 117, 92 N. E. 1017. To this case is appended in 44 L.R.A.(N.S.) 1123, a note dealing with the question whether the parts of the building subject to such common use are a part of the works and ways of a particular tenant within the meaning of the employers' liability act.

41 L.R.A.(N.S.)

Telephone Company for injuries received through the negligent opening of a trapdoor in the floor or premises of Conlon, while plaintiff was on his way to use the public telephone maintained by the telephone company in the rear part of Conlon's room.

The telephone company demurred to the declaration. Demurrer was sustained, and plaintiff declining to amend, judgment was entered dismissing his action against the telephone company.

Later, he dismissed the action against Conlon, pending his appeal from the judgment for the telephone company.

The case presented is substantially this: Conlon was in the possession of a storeroom in which he sold liquors and cigars. By some arrangement between them, the terms of which are not stated, the telephone company erected an apparatus in the rear part of Conlon's room for public service. It was the ordinary slot machine. The proposed user goes to the apparatus, signals the central office, drops the required coin in the slot, and obtains the service paid for. Plaintiff knew of the situation of the telephone and had used it several times. Desiring its use on March 6, 1913, he entered the room, and on his way to the apparatus fell into an open space in the floor, caused by the opening of a trapdoor therein, negligently opened and left unguarded.

It may be assumed, as necessarily inferred from the allegations of the declaration, that Conlon was the owner or lessee of the premises, but not lessee of the telephone apparatus, which belonged to and had been installed by the telephone company for public use. The telephone company collected its charges from users by means of the slot machine. There was an implied invitation to the public to enter Conlon's premises and use the telephone. Under these circumstances was it the duty of the telephone company to provide or see to it that there was maintained a safe passage to and from the telephone apparatus, and is it liable to plaintiff for injuries sustained through negligent failure to maintain a safe passageway?

The question is a novel one. Research of counsel and of the court has discovered no precedent decision directly in point. That there is no precedent is of little importance, for it is more than likely that the exact situation has never before occurred. The case of *Sullivan v. New York Teleph. Co.* 157 App. Div. 642, 142 N. Y. Supp. 735, relied on by appellee, has some bearing upon the question, but is not directly in point. The facts in that case are that Barr occupied certain premises as a shoe store. He made a request for the installation of a

templated that the company should keep an account of the messages sent from the station and render monthly statements thereof; that the tolls collected by the subscriber should be at rates prescribed by the company, and that the subscriber should conspicuously display such sign or signs as the company should furnish; that all signs, booths, or other equipment furnished should remain the property of the company, and should be returned on demand in good order, reasonable wear excepted; that the company should have access to its property for the purpose of inspection, repair, etc.; that the contract might be terminated by either party at the end of six months on ten days' notice served in writing; that the subscriber, who collected the tolls, was to pay to the company 80 per cent of all tolls charged by it for messages from said station.

Plaintiff came in to use the telephone and was directed to it by Barr. While passing to the desk of the cashier to pay the charges, she stepped into an opening in the floor, within a few feet of the telephone, caused by one of Barr's employees lifting a trapdoor leading to the basement, while she was using the telephone.

In the trial court plaintiff recovered judgment against both defendants. In the appellate division this was affirmed as to Barr, and reversed as to the telephone company. The court said: "It follows from these provisions that the defendant Barr had a direct interest in the use of the telephone, and had possession thereof as lessee or bailee. It was his duty, therefore, in inviting and permitting patrons to use the telephone, to exercise reasonable care to maintain his premises in a reasonably safe condition."

The telephone company was not liable because it said: "It was not in the possession of the premises, and although it shared with the defendant Barr in the profits arising from the use of the telephone, it was in no manner interested with him in the use of the premises, which were in his exclusive possession, with the exception that the company reserved the right of access to the telephone for the purpose of repairs or removal. The trapdoor was not opened in connection with the use of the telephone, or in the business of furnishing telephone accommodations to the public, in which Barr and the company were jointly interested."

Without attempting any criticism of the conclusions of the learned court, it is sufficient to say that there is a considerable difference in the facts of that case and this. 51 L.R.A. (N.S.)

Co. 102 U. S. 577, 579, 26 L. ed. 233, 234, 7 Am. Neg. Cas. 349. That case decides as in Sullivan's case, supra, that the owner of premises who invites or induces others to come upon his premises for any lawful purpose is liable for any injury sustained through the unsafe condition of the premises or its approaches. See also *Bell v. Central Nat. Bank*, 28 App. D. C. 580.

If the telephone company had leased and occupied the building for use as a public station it would clearly be within the rule stated. So likewise if it had leased from Conlon the use of part of his room for the maintenance of its station, with an approach thereto, which it invited the public to use, it would be liable for negligent maintenance of the approach. But such are not the facts directly alleged in the declaration. Apparently, Conlon was the lessee or owner of the room in which he carried on a business of his own, and with his assent, under some arrangement not averred, the telephone company installed therein its station for public service, fixing its charges and collecting the same through its slot-box device. Conlon, apparently, had no interest in either. He was neither the lessee of the station equipment, nor co-partner with the company in its receipts. So far as the ordinary uses of the telephone were involved, it was no matter of necessary inquiry or concern of the public whether the telephone company was the owner or independent lessee of the room, or a sub-tenant of Conlon. The station was maintained for public use and profit therefrom.

As before stated, the telephone company, inviting the public to use it for hire, would be liable for the unsafe condition of its approaches were it owner or lessee of the premises.

Can it, then, escape liability by opening its station in the premises of another, inviting the public to enter and do business with it, and taking no care for the safety of its patrons?

In either case the purpose of the station and the invitation to use it are the same. Ought it then, by avoiding the direct maintenance of its station in a building or room of its own, and making some arrangement for the use of a room owned or controlled by another, to escape all liability for negligent maintenance of the necessary approach to its station by members of the public desiring to use it for lawful purposes? Could it do indirectly what it could not do directly?

No matter by what arrangement or contract it may have obtained the use of a space on or near the rear wall for the erec-

tion of its public service station, with the consequent right of its patrons to enter and use the portion of the floor necessary to go to and from the same, it ought to be held liable for negligence in the maintenance of said space. Keeping no special servant to exercise ordinary care in the maintenance of the safety of the approach, it may well be held to have devolved that special service upon Conlon, making him, to that extent, at least, its servant to perform its necessary duties. So that whether the telephone company leased the use of the wall and necessary floor space, and negligently suffered others to render it unsafe for the users of its telephone, or whether Conlon was its servant for the purpose of reasonably safe maintenance of the same approaches, upon which it invited the public to enter, we are of the opinion that the telephone company is liable for an injury to one of the public entering for the lawful use of its service, occasioned by its own negligence or that of its servant or agent, whichever he may be called.

It was error, therefore, to sustain the demurrer; and the judgment is reversed with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

ILLINOIS SUPREME COURT.

RE ESTATE OF FREDERIC ULLMANN,
Deceased.

ELIZABETH ULLMANN, Exrx., etc., of
Frederic Ullmann, Deceased, Appt.

(263 Ill. 528, 105 N. E. 292.)

Succession tax — rate — deduction of
exemption.

The amount of an estate passing by will
which is exempt from succession tax is to

Note. — Succession tax: is exempt portion of estate to be included or excluded in determining amount for purpose of fixing rates.

The rule under the Minnesota statute is in accord with RE ULLMANN, that the exempt portion of the estate should be excluded in determining the amount for the purpose of fixing the rate. State ex rel. Holdridge v. Probate Ct. 111 Minn. 297, 126 N. W. 1070; State ex rel. Gage v. Probate Ct. 112 Minn. 279, 128 N. W. 18. See also State ex rel. Foot v. Bazille, 97 Minn. 11 6 L.R.A.(N.S.) 732, 106 N. W. 93, 7 Ann. Cas. 1056, where the statute was so construed, although the principal point considered was its constitutionality. The Minnesota act provides for a tax upon inheritances "the value of which exceed \$10,000, 51 L.R.A.(N.S.)

be deducted from the entire amount so passing in order to determine the rate of tax, where the tax provides for a certain rate when the amount passing exceeds a certain sum, and a less rate when it is less than that sum, provided that the tax is to be levied only upon the excess of a specified minimum.

(Carter and Craig, JJ., dissent.)

(April 23, 1914.)

APPEAL by the devisee from an order of the County Court for Cook County, fixing the amount of the inheritance tax on the transfer to her of the property of her deceased husband under his last will and testament. Reversed.

The facts are stated in the opinion.

Messrs. Ullmann, Hoag, & Davidson,
for appellant:

The rate at which a legacy to a wife is taxable under the inheritance tax law of this state, where such legacy, after deducting the exemption of \$20,000, to which the wife is entitled, does not exceed \$100,000, is \$1 for every \$100.

People v. Koenig, 37 Colo. 283, 85 Pac. 1120, 11 Ann. Cas. 140; Re Durfee, 79 Misc. 655, 140 N. Y. Supp. 594; Re Saunders, 77 Misc. 54, 137 N. Y. Supp. 438; Re Fayerweather, 143 N. Y. 114, 38 N. E. 278; 27 Am. & Eng. Enc. Law, 2d ed. 340; Dos Passos, Inheritance Tax Law, 2d ed. 75; Re Vassar, 127 N. Y. 1, 27 N. E. 394; Re Stewart, 131 N. Y. 274, 14 L.R.A. 836, 30 N. E. 184; Re Kennedy, 113 App. Div. 4, 99 N. Y. Supp. 72; Re Harbeck, 161 N. Y. 211, 55 N. E. 850; Re Swift, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096; Re Day, 181 Ill. 73, 50 L.R.A. 519, 54 N. E. 646.

Messrs. P. J. Lucey, Attorney General,
and Thomas J. Young, Assistant Attorney General, for the People:

The granting of an exemption is a matter of grace on the part of the legislature,

and upon such excess only;" and that the tax shall be computed upon the "full and true value of such inheritance . . . above such excess, at the following rates, viz.: (1) when such valuation is over \$10,000 and less than \$50,000, the rate shall be 1½ per cent thereof; (2) when such valuation is \$50,000 or over, and less than \$100,000, the rate shall be 3 per cent thereof; (3) when such valuation is \$100,000 or over, the rate shall be 5 per cent thereof." Accordingly in the first Minnesota case cited it was held that a legacy whose total value was \$58,000 was subject to a tax of only 1½ per cent, since, the exemption of \$10,000 being deducted, the excess upon which the rate should be based was \$48,000.

A question similar to the above, but differently decided, has arisen in several cases; that is, whether the exempt portion should

tion should not be strictly construed, and should not be extended by judicial interpretation.

Re Timken, 158 Cal. 51, 109 Pac. 608; Supreme Lodge, M. A. F. O. v. Board of Review, 223 Ill. 54, 79 N. E. 23, 7 Ann. Cas. 38; People ex rel. Huck v. Western Seaman's Friend Soc. 87 Ill. 246; Sanitary Dist. v. Martin, 173 Ill. 243, 64 Am. St. Rep. 110, 50 N. E. 201; Re Swigert, 119 Ill. 83, 59 Am. Rep. 789, 6 N. E. 469; Bloomington Cemetery Asso. v. People, 170 Ill. 377, 48 N. E. 905; People ex rel. Kochersperger v. Chicago Theological Seminary, 174 Ill. 177, 51 N. E. 198; Zellers v. White, 208 Ill. 518, 100 Am. St. Rep. 243, 70 N. E. 669.

The language of the statute clearly and plainly fixes the rate of taxation in inheritance-tax matters upon the basis of the fair market value of the property received, without reference to the amount of exemption given.

Re Timken, 158 Cal. 51, 109 Pac. 608; Blakemore & B. Inheritance Taxes, 324, 325; Re Bull, 153 Cal. 715, 96 Pac. 366.

Farmer, J., delivered the opinion of the court:

This is an appeal by Elizabeth Ullmann,

be included in determining the portion of the estate to which the lowest rate is applicable, leaving the balance of the estate subject to the higher rate, or whether the exemption should be deducted from the entire estate in the first instance. For example, in Re Timken, 158 Cal. 51, 109 Pac. 608, an estate was valued at \$63,000 and the exemption allowed was \$4,000. The statute provided for what was called a "primary rate," "where the property . . . exceeds in value the exemption . . . and shall not exceed in value \$25,000." For estates exceeding \$25,000 a multiple of the primary rate was provided. And it was held, as to the estate in question, that, for the purpose of determining the amount to which the various rates should apply, the amount of the exemption should not be deducted from the entire estate in the first instance, but should be included in the first \$25,000, to which the "primary rate" applied; in other words, that the "primary rate" should apply to only \$21,000, and the higher rates should apply to the balance over \$25,000.

The same construction was placed upon the statute in Re Bull, 153 Cal. 715, 96 Pac. 366, although the point was not discussed.

A similar construction was placed upon the New York statute in Re Elletson, 75 Misc. 582, 136 N. Y. Supp. 455. The statute provided for a tax "at the rate of 1 per centum on any amount in excess of \$5,000, up to the sum of \$50,000; 2 per centum on any amount in excess of \$50,000." And the question raised was whether, 51 L.R.A. (N.S.)

deceased, from a judgment of the county court of Cook county fixing the inheritance tax on the transfer of property to her under the last will and testament of her husband.

Frederic Ullmann died testate on March 29, 1911. By his will he devised all his property to his widow, Elizabeth Ullmann, and named her as executrix of said will. The property which passed under the will was appraised at \$116,534.73. Deducting the exemption allowed by statute of \$20,000 left the taxable cash value of the property received by appellant \$96,534.73. The county court held this amount was taxable at the rate of \$2 on each \$100 valuation, and fixed the tax accordingly at \$1,930.69. Appellant has brought the case to this court by appeal, and insists the court erred in adopting the rate of \$2 on the \$100 valuation of the taxable property, and contends that the rate should have been \$1 on each \$100 valuation. This is the only question presented by this appeal, and involves a construction of § 1 of the inheritance tax act of 1909. Under that section, appellant was entitled to \$20,000 of the estate of her husband exempt from the tax, and she contends that the rate of the tax is to be determined from the value of the

after exempting \$5,000, a tax should be imposed of 1 per cent on \$50,000, and 2 per cent on the balance, or of 1 per cent on \$45,000 and 2 per cent on the balance, the latter construction being adopted.

Practically the same question was before the court in Re Jourdan, 151 App. Div. 5, 135 N. Y. Supp. 172, although in this case the part of the statute allowing exemptions was not construed, but only that part providing that if the estate "shall exceed the amount of \$25,000 over and above the exemptions hereinbefore provided the rate of taxation shall be as follows: Upon all amounts in excess of the said \$25,000, and up to and including the sum of \$100,000, twice the primary rates," with similar provisions for progressive rates as to higher amounts; and it was held that only \$75,000 was subject to taxation at twice the primary rate; that the balance of the estate, over \$100,000, was subject to the higher rates.

Cases such as Re Mason, 69 Misc. 260, 126 N. Y. Supp. 998, holding that, under a statute allowing an exemption of \$500, and providing that if the estate is "of more than \$500, it shall be taxable" at a certain rate upon the clear market value of the property, the full valuation, and not merely the excess over the exemption, is taxable where there is no question as to different rates which might be applicable, are not within the scope of the note.

As to constitutionality of succession taxes, see note to Rodman v. Com. 33 L.R.A. (N.S.) 592.

R. E. H.

property after deducting the exemption. Appellee contends the rate is fixed by the value of the property received by appellant under the will of her husband, but is to be computed upon the value of the property after deducting the exemption. There is no dispute as to the value of the property subject to the tax. The only dispute is as to the rate the property is liable to be taxed.

Section 1 of the act of 1909 (Laws of 1909, p. 311) imposes a tax upon the transfer of all property to persons, institutions, or corporations "not hereinafter exempted," when the transfer is by will or by the intestate laws of this state. When the transfer is to or for the use of certain persons, including the wife, "the rate of tax shall be \$2 on every \$100 of the clear market value of such property received by each person, when the amount so received exceeds in amount the sum of \$100,000, and one dollar on each \$100 of the clear market value of such property received by each person when the amount so received is \$100,000 or less: . . . Provided, that any gift, legacy, inheritance, transfer, appointment, or interest which may be valued at a less sum than \$20,000 shall not be subject to any such duty or taxes, and the tax is to be levied in the above cases only upon the excess of \$20,000 received by each person."

Appellee contends the meaning of this language is that the total value of the property received fixes the rate of taxation, and not the value of property received less the exemption allowed, and this was the view of the county court in fixing the tax. We do not think that is a correct interpretation of the language used or of the intention of the legislature, as indicated by the act. It is clear the tax is imposed only upon property not exempted by the act. If the property that passed to appellant by the will of her husband had not exceeded in value \$20,000, it would have been exempt from liability to the inheritance tax. As the property she received exceeded that sum, its value in excess of \$20,000 was liable to the tax. We understand the statute to mean that the rate is to be determined from the value of the "property received" subject to the tax. We do not believe that the statute warrants the construction that the rate of the tax was to be determined from the total value of the property received by appellant. Twenty thousand dollars in value of that property was not liable to the tax, and the rate could only be determined from the value of the property that was liable to the tax. This appears to us unquestionably to have been the meaning and intent of the legislature, as indicated by the language used 51 L.R.A.(N.S.)

in the 1st section of the act. The most that can be said in support of the opposite side is that the language used leaves the legislative intent in some doubt. In that case the doubt would be required to be resolved in favor of appellant; for the tax sought to be collected is a special tax, and the law imposing it is required to be construed strictly against the government, and in favor of the taxpayer. In *Re Fayerweather*, 143 N. Y. 114, 38 N. E. 278; *Re Vassar*, 127 N. Y. 1, 27 N. E. 394; *Re Harbeck*, 161 N. Y. 211, 55 N. E. 850; 27 Am. & Eng. Enc. Law, 340; *People v. Koenig*, 37 Colo. 283, 85 Pac. 1129, 11 Ann. Cas. 140. In our opinion, the tax should have been fixed at the rate of \$1 on the \$100 valuation of the property liable to the tax, which was \$96,534.73.

The judgment of the county court is reversed, and the cause remanded, with directions to fix the tax and enter judgment upon that basis.

Reversed and remanded, with directions.

Carter and Craig, JJ., dissenting.

Petition for rehearing denied June 3, 1914.

OKLAHOMA SUPREME COURT. (Division No. 2.)

CITY OF PURCELL, Plff. in Err.,

v.

J. H. STUBBLEFIELD.

(— Okla. —, 139 Pac. 290.)

Municipal corporation — change of liability for streets.

1. A municipal corporation in the Indian territory, prior to statehood, being governed by the Arkansas laws, was not liable for injuries resulting to persons from defective streets and obstructions along and across the sidewalks thereof, and on November 16, 1907, by the terms of the enabling act (act June 16, 1906, chap. 3335, 34 Stat. at L. 267), the laws governing municipal corporations in Oklahoma territory, and then in force, were extended over towns and cities in the Indian territory, and these laws imposed a duty on municipal corporations and their officers to maintain the streets and sidewalks in a safe condition for the

Headnotes by GALBRAITH, C.

Note. — Liability of municipality for injury by falling of sign.

For earlier cases on this question, see notes in 19 L.R.A.(N.S.) 517, and 20 L.R.A.(N.S.) 646.

As to the question of liability, generally, for injury from falling of object suspended

2. On January 28, 1909, it was the duty of the city of Purcell, being a city of the first class under the statutes of Oklahoma, to use reasonable care to keep its streets and sidewalks in a safe condition for persons using the same, and for failure to perform this duty said city was liable in damages to one injured by a sign falling and striking him, which had been permitted to remain across and above the sidewalk on one of its streets; the negligence of such person not contributing to such injury.

Act of God — windstorm — fall of sign.

3. When a heavy wooden sign, permitted to remain suspended over and above a street, is blown down by a severe wind, and strikes and injures one lawfully passing along the street, the city cannot relieve itself from liability by asserting that the injury was caused by an act of God, unless it also shows that the wind was unprecedented, and was the sole cause of the injury.

(February 28, 1914.)

ERROR to the District Court for McClain County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. J. W. Hocker, for plaintiff in error:

A municipality governed by the laws in force in the Indian territory, by the acts of Congress not being liable for injuries resulting from the negligence of its officers in failing to maintain its streets and sidewalks in a safe condition, the adoption of the Constitution did not make the city liable for an injury happening after statehood, caused through the negligence of its officers, occurring prior to the statehood.

Blaylock v. Muskogee, 54 C. C. A. 639, 117 Fed. 125; *Arkadelphia v. Windham*, 49 Ark. 139, 4 Am. St. Rep. 32, 4 S. W. 450; *Ft. Smith v. York*, 52 Ark. 84, 12 S. W. 157; *Hume v. New York*, 74 N. Y. 264; *Detroit v. Osborne*, 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012; *Jones v. Boston*, 104 Mass. 75, 6 Am. Rep. 194;

over street, see notes to *Waller v. Ross*, 12 L.R.A.(N.S.) 721, and *McCrorey v. Garrett*, 24 L.R.A.(N.S.) 139.

While a careful search has disclosed no cases in addition to those set out in the above mentioned notes, *Baillie v. Wallace*, 24 Idaho, 706, 135 Pac. 850, is of interest because of its similarity to cases within the scope of this note.

In that case the municipality was held liable for injuries to a pedestrian who struck his head on a sign attached to a

building and permitted by the city to extend over the street. The contention of the city was that, inasmuch as there was no ordinance prohibiting such obstructions over the sidewalk, it had not been negligent in permitting the sign to remain. The court stated that the statute giving the city control of its streets, and imposing upon it the duty to keep them free from nuisances, could not be evaded by refusing to enact ordinances for that purpose.

E. L. D.
Jones v. Boston, 104 Mass. 75, 6 Am. Rep. 194; *Muncie v. Hey*, 164 Ind. 570, 74 N. E. 250, 18 Am. Neg. Rep. 51; *Hume v. New York*, 74 N. Y. 264; *Norman v. Teel*, 12 Okla. 69, 69 Pac. 791; *Abbott, Mun. Corp.* § 1033.

Defendant would not be chargeable with negligence by the falling of the sign into the street, the proximate cause of the falling being a sudden gust of wind, or wind of extraordinary violence, which could not, with the exercise of reasonable foresight, have been contemplated.

Olsen v. Meyer, 46 Neb. 240, 64 N. W. 954; *Nitro-Phosphate & O. Chemical Manure Co. v. London & St. K. Docks Co. L. R. 9 Ch. Div. 503*, 39 L. T. N. S. 433, 27 Week. Rep. 267, 1 Eng. Rul. Cas. 276.

Messrs. J. F. Sharp, John E. Luttrell, and J. B. Dudley, for defendant in error:

The laws of Oklahoma with reference to liability of municipalities for the negligence of its officers in failing to maintain its streets in reasonably safe condition apply, and not the laws of Arkansas.

Glenn v. Ardmore, 32 Okla. 414, 122 Pac. 658; *State ex rel. Kline v. Bridges*, 20 Okla. 533, 94 Pac. 1065; *State ex rel. West v. Ledbetter*, 22 Okla. 251, 97 Pac. 834.

A city of the first class, under the laws of Oklahoma, is liable for damages for personal injuries sustained by reason of the negligence of its officers in failing to keep and maintain its streets and sidewalks in a reasonably safe condition.

Oklahoma City v. Meyers, 4 Okla. 686, 46 Pac. 552; *Norman v. Teel*, 12 Okla. 69, 69 Pac. 791; *Stillwater v. Swisher*, 16 Okla. 585, 85 Pac. 1110.

It is the duty of a municipal corporation to keep its streets and sidewalks in a reasonably safe condition, both as to obstructions overhead and under foot.

Ibid.; *Guthrie v. Swan*, 6 Okla. 423, 41 Pac. 84; *Fairfax v. Giraud*, 35 Okla. 659.

building and permitted by the city to extend over the street. The contention of the city was that, inasmuch as there was no ordinance prohibiting such obstructions over the sidewalk, it had not been negligent in permitting the sign to remain. The court stated that the statute giving the city control of its streets, and imposing upon it the duty to keep them free from nuisances, could not be evaded by refusing to enact ordinances for that purpose.

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131 Pac. 159, 6 McQuillin, Mun. Corp. § 2775; Bohen v. Waseca, 32 Minn. 176, 50 Am. Rep. 564, 19 N. W. 730; Grove v. Ft. Wayne, 45 Ind. 429, 15 Am. Rep. 262; Hume v. New York, 74 N. Y. 265; Langan v. Atchison, 35 Kan. 318, 57 Am. Rep. 165, 11 Pac. 38; Gray v. Emporia, 43 Kan. 704, 23 Pac. 944; Elam v. Mt. Sterling, 132 Ky. 657, 20 L.R.A.(N.S.) 512, 117 S. W. 250.

The question as to whether or not the defendant city was negligent in permitting said sign to remain suspended was a question of fact to be submitted to and determined by the jury.

Stillwater v. Swisher, 16 Okla. 585, 85 Pac. 1110; Fairfax v. Giraud, 35 Okla. 659, 131 Pac. 159; St. Louis, I. M. & S. R. Co. v. Hopkins, 54 Ark. 209, 12 L.R.A. 189, 15 S. W. 610; Moriarty v. Lewiston, 98 Me. 482, 57 Atl. 790, 16 Am. Neg. Rep. 73; Smith v. New York, 17 App. Div. 438, 45 N. Y. Supp. 239, 3 Am. Neg. Rep. 264; Americus v. Johnson, 2 Ga. App. 378, 58 S. E. 518; Welsh v. Amesbury, 170 Mass. 437, 49 N. E. 735; Miller v. Canton, 112 Mo. App. 322, 87 S. W. 96; Hennepin v. Coleman, 132 Ill. App. 604.

Galbraith, C., filed the following opinion:

On the 13th of October, 1909, J. H. Stubblefield commenced this action in the district court of McClain county against the city of Purcell, a city of the first class, under the statutes of Oklahoma, to recover damages for personal injuries resulting to him from its alleged negligence. It is charged in the petition that on the 28th day of January, 1909, while passing along Main street, one of the principal thoroughfares of the defendant city, and near the location of the United States postoffice therein, about 1 o'clock in the afternoon of said day, a heavy wooden sign, which the defendant city had permitted to be suspended and remain over the sidewalk, and immediately over and above the heads of persons passing along said sidewalk, broke loose from its fastenings, fell upon the plaintiff, striking him upon the head and severely injuring him, cutting and lacerating his head and right eye, making a wound $1\frac{1}{2}$ inches in length, and otherwise injuring him, from which he suffered great bodily pain and mental anguish, loss of time, etc., to his damage in the sum of \$2,500, and that said sign had been permitted by the defendant city to be suspended in a careless and negligent manner from the roof of an awning over the sidewalk, supported by small wires, and said wires had become worn, rusted, and twisted so as to greatly weaken their strength, and render them unsafe to hold said sign against the force of the ordinary

winds prevalent in that locality; that this sign had been permitted to remain in this unsafe condition for months prior to plaintiff's injury; and that the plaintiff was without knowledge of the dangers threatening and imminent to persons passing along the street beneath it, and that he was without fault or negligence. The defendant city denied its responsibility for the hanging of said sign, or permitting it to remain across the street, and that it had neither actual nor constructive notice of the danger, and denied any negligence or carelessness on its part, and as a special defense alleged that the falling of the sign was due to an extraordinary wind that was blowing at the time, and that the accident was caused by an act of Providence, and the city was therefore not liable.

A reply was filed by the plaintiff, and the cause was submitted to the court and a jury, and a verdict rendered in favor of the plaintiff in the sum of \$500. Upon the overruling of the defendant's motion for a new trial, an appeal was perfected to this court by petition in error and case-made.

The several assignments of error are grouped and discussed in the plaintiff in error's brief under three propositions, viz.:

"First. A municipality governed by the laws in force in the Indian territory, by the acts of Congress not being liable for injuries resulting from the negligence of its officers in failing to maintain its streets and sidewalks in a safe condition, did the adoption of the Constitution make the city liable for an injury happening after statehood, caused through the negligence of its officers occurring prior to statehood?

"Second. Is a municipal corporation in Oklahoma an insurer of the safety of its streets, or only chargeable with the exercise of ordinary care and diligence in preventing the erection and maintenance of dangerous objects over its sidewalks by the occupant of the abutting property?

"Third. Would a municipal corporation in Oklahoma be chargeable with negligence by an object suspended above its streets falling into the street, the proximate cause of the falling being a sudden gust of wind, or wind of extraordinary violence, which could not, with the exercise of reasonable foresight, have been contemplated?"

It is insisted that a negative answer should be returned to each of these questions.

It may be conceded that a municipal corporation in the Indian territory prior to statehood was not liable to an individual for injuries produced by the negligence of its officers in the construction and maintenance of the streets and sidewalks therein (as was held by the circuit court of ap-

Real. 12 following the decisions of the highest court in Arkansas, from which state the law governing such cities was adopted by act of Congress).

It is argued that, inasmuch as the sign causing the injury to the plaintiff was erected by a citizen prior to statehood, and since, under the law governing cities in the Indian territory prior to statehood, the city could not be held liable for the injury, then under the schedule of the Constitution providing that "no existing rights, actions, . . . shall be affected by the change in the forms of government," etc., the laws in force in Oklahoma territory and extended over the state by the enabling act (§ 394, Wilson's Stat. being § 589, Rev. Laws 1910), giving the city council the right to prohibit and prevent all encroachments into and upon the sidewalks, etc., and the power to regulate the building of stairways, windows, doors, awnings, and all other structures, etc., projecting upon, over, and adjoining sidewalks along the streets of the city, and the construction of this statute placed upon it by the supreme court of the territory, holding municipal corporations liable for damages of the character complained of in the instant case, were not applicable, and did not apply to cities located in what was formerly the Indian territory part of the state, and therefore the defendant city is not liable in the instant case. This argument is not sound. The injury not having been received until fourteen months after statehood, the cause of action did not arise prior to that time. So far as the instant case is concerned, upon the advent of statehood, there were no "existing rights, actions," to be affected by the change in the laws and government. The laws then in force in Oklahoma territory relating to municipal corporations were applicable to municipal corporations in the Indian territory. These laws having been extended throughout the entire state on November 16, 1907, by the terms of the enabling act, the obligations and the duties thereby imposed were controlling in the defendant city the same as in other cities of the same class throughout the state. The defendant city is charged in the petition not only with negligence in permitting this sign to be erected and supported in the manner it was, but it is also charged with negligence in permitting it to remain in the position in which it was placed, being a menace and danger to persons passing along the street beneath it,—a clear charge of failure to discharge a plain duty imposed upon the defendant city by the laws by which it was governed subsequent to state-

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hood, and since the law extended over the defendant city at statehood imposed new duties and obligations upon it, among which was the duty of keeping and maintaining its streets and sidewalks in a safe condition for persons using the same in a lawful manner, and, for failure to discharge this duty after such laws were extended over and placed in force throughout the entire state, the defendant city was liable the same as cities organized under the statutes of Oklahoma. See *Norman v. Teel*, 12 Okla. 69, 69 Pac. 791; *Stillwater v. Swisher*, 16 Okla. 586, 85 Pac. 1110; *Oklahoma City v. Meyers*, 4 Okla. 686, 46 Pac. 552; *Guthrie v. Swan*, 6 Okla. 423, 41 Pac. 84; *Fairfax v. Giraud*, 35 Okla. 659, 131 Pac. 159.

The rule is announced in *Norman v. Teel*, supra, as follows: "A municipal corporation is bound by law to use ordinary care and diligence to keep its streets and sidewalks in a reasonably safe condition for public use in the ordinary modes of traveling, and, if it fails to do so, it is liable for injuries sustained by reason of such negligence, provided, however, that the party injured exercises ordinary care to avoid the injury. Ordinary care as applied to this class of cases means that degree of care and caution which might reasonably be expected from an ordinarily prudent person under the circumstances . . . at the time of the injury, and this is a question of fact for the jury to determine."

In *Fairfax v. Giraud*, 35 Okla. 659, 131 Pac. 159, the second paragraph of the syllabus is as follows: "A person traveling on a public street of a city, which is in constant use by the public, while using the same with reasonable care and caution, has a right to presume that such street is in reasonably safe condition, and is reasonably safe for ordinary travel by night, as well as by day, throughout its entire width, and is free from all dangerous holes and obstructions." And the third paragraph of the syllabus reads as follows: "In an action against a municipal corporation for personal injuries, there is no presumption that the plaintiff or defendant is guilty of negligence, and, in order to entitle the plaintiff to recover, it is sufficient for him to show that the defendant was guilty of negligence, with nothing in the circumstances establishing contributory negligence on his part; and, when such facts are proven, it devolves upon the defendant to prove affirmatively that the plaintiff was guilty of contributory negligence."

It appears from the evidence that the de-

fendant city had no ordinance regulating the erection or hanging of signs along its streets, and that it had no actual notice of the danger of this particular sign, still, if, by the use of ordinary diligence by its officers, the danger could have been discovered, it is charged with actual knowledge. It is said by the supreme court of Oklahoma territory, in *Norman v. Teel*, supra, on this question: "The sufficiency of notice to fasten liability upon a city for a defective sidewalk is a question of fact to be determined by a jury under all the circumstances surrounding the particular case. It is not essential that the corporation shall have actual notice. If the defective condition of the street or sidewalk has existed for such a period of time, by the exercise of ordinary care and diligence, the city authorities could have repaired the defect, and placed the street or sidewalk in a reasonably safe condition, and it fails to do so, then it is liable for any injuries that may be occasioned thereby by reason of such negligence, provided the injured party was in the exercise of ordinary care."

The fact that a sign 9 feet and 10 inches in length, 17½ inches wide, and weighing 44 pounds, was permitted to remain suspended over the walk for more than a year after statehood, and prior to the accident, and whether the city during these months should have discovered the dangers incident to the sign hanging in the manner and position it was, and its failure to remove it or cause it to be securely fastened constituted negligence, was a question of fact for the jury to determine. The jury by its verdict found that the defendant city was negligent in this, and this finding, being supported by the testimony, is conclusive on that point.

In answer to the third contention of the plaintiff in error that it cannot be held liable because the injury was occasioned by the act of God, it is only necessary to say that the evidence shows that on the day and at the time of the injury a strong wind was blowing in Purcell. There was a conflict in the testimony as to whether such winds were unprecedented, or were reasonably to be expected at that season of the year in that locality. The character of the wind and its relation to and connection with the accident were questions of fact for the jury. Even if it were admitted that the wind was unprecedented on that day, and that there had never been such a wind as that before, yet, if the accident was not due entirely to this wind, but the strong wind in connection with the negligence of the defendant operated as an efficient and contributory concurrent cause, then the defendant would still be liable. The defini-

tion of an act of God, as given by this court, is, "an act of God, such as an unprecedented rainfall and resulting flood, which will excuse from liability, must not only be the proximate cause of the loss, but it must be the sole cause. If, however, the injury is caused by an act of God, commingled with the negligence of the defendant, as an efficient and contributing concurrent cause, and the injury would not have occurred except for such negligence, the defendant will be liable." *Missouri, K. & T. R. Co. v. Johnson*, 34 Okla. 582, 126 Pac. 567. Applying this definition to the facts of this case, in order for this defense to avail the defendant city, it must be found that the wind that day was of an extraordinary and unprecedented velocity, and that this wind was the sole cause of the sign falling and the resulting injury. No one can say upon this record that the wind, extraordinary though it may have been, was the sole cause of the accident, nor that the negligence of the city and its officers in allowing this sign to remain swinging over the sidewalk for fourteen months was not a contributing cause of the accident.

The jury may have found from the evidence that this large sign suspended over the sidewalk, supported by small wires, bent and rusty, so that a gentle breeze caused it to swing back and forth, was a danger and menace to persons passing under it, at any time; and when the gentle zephyrs down Purcell way should lash themselves into the fury of a gale, it became a real peril to any one passing that way; and that, if the defendant city had discharged the duty imposed upon it by law, the sign would have been removed long prior to January 28, 1900, the date of the accident.

Exceptions were saved to a number of instructions given by the court, and also to the court's refusal to give a number of instructions requested by the plaintiff in error. It does not seem to be necessary to examine these instructions in detail, since the court, in its instructions to the jury, covered the theory of the law as hereinbefore set out, namely, that subsequent to statehood the duty was imposed upon the defendant city by the statute to use reasonable care and caution to keep its streets and sidewalks in a safe condition for public travel; and whether or not this duty had been properly discharged by the defendant, and whether or not it had notice of the dangerous condition of this sign, these several issues were properly submitted to the jury under the instructions. The plaintiff in error embodied its theory as hereinbefore discussed in the requested instructions, and we are constrained to hold

that the court did not err in refusing to adopt the theory of the law of this case as set out in these requested instructions; and it was not error to refuse to give them.

No sufficient reason appearing for disturbing the judgment appealed from, we conclude that the same should be affirmed.

Per Curiam:

Adopted in whole.

OKLAHOMA SUPREME COURT.
(Division No. 1.)

NORMAN MILLING & GRAIN COMPANY,
Plff. in Err.,
v.
E. A. BETHUREM.

(— Okla. —, 139 Pac. 830.)

Municipal corporation — power over streets.

1. A city has power of control over its streets, including spaces occupied by trees and wires thereon, but must act in good faith, and not abuse its exercise of this power.

Headnotes by THACKER, C.

Note. — Liability to abutting owner for mutilating trees in highway by erecting poles or stringing wires.

The early cases dealing with the above question are treated in the notes to Cartwright v. Liberty Teleph. Co. 12 L.R.A. (N.S.) 1125, and Slabaugh v. Omaha Electric Light & Power Co. 30 L.R.A. (N.S.) 1084, which the present note brings down to date.

The easement of a city in the street does not include the right to erect poles and wires in such a manner as to destroy shade trees, to the damage of property owners, and a public-service corporation is liable to an owner of property for injury to trees located in the parkway between the sidewalk and the pavement in front of his property, which were practically destroyed by placing wires and poles through their tops. Rienhoff v. Springfield Gas & Electric Co. — Mo. —, 162 S. W. 761.

Although the mile circle upon which the city of Raleigh is situated was purchased by the state, and the city, so far as is within those limits, was divided into lots and sold, reserving the title to the streets to the state, the city, for the purpose of its government and management, can, in its discretion, cut down or trim up the trees bordering the streets, and cannot be restrained unless in cases of wilfulness or oppression. Moore v. Carolina Power & Light Co. 163 N. C. 300, 79 S. E. 597.

Subject to this right, the abutting owners 51 L.R.A. (N.S.)

Highways — title to trees in.

2. An abutting lot owner has an equitable easement in trees grown by him on a street, notwithstanding fee in city, which will enable him, as such special owner, to maintain action for wrongful injury thereto, deprecating value of such lot.

Same — conflict between trees and wires.

3. Both owner of abutting lot having an equitable easement in trees on street and owner of wires thereon may be in lawful occupancy of a street; and, in such case, mutual and reasonable accommodation is due from each to the other.

Same — right to trim trees.

4. Ordinarily, an abutting lot owner growing trees on a street is a potential occupant of sufficient space, in addition to that actually occupied, for the perfection of the growth of such trees, and, without due compensation, cannot be excluded from any portion of such space to give exclusive occupancy to an owner of wires other than the city; and an owner of wires thereafter voluntarily occupying such space is not entitled, without due compensation, to injuriously trim such trees to sever or prevent contact with wires.

Same — liability for trimming trees.

5. Ordinarily an owner of wires, voluntarily strung within space already potentially occupied by trees grown by the abutting lot owner, who injuriously cuts back such trees from contact with such wires,

in that circle have an easement or property in the shade trees standing along the sidewalk which the law will protect. Ibid.

And the city cannot transfer to any individual or a quasi public corporation, for its convenience and profit, this superior right, which it can exercise only for the public benefit. Ibid.

And a quasi public corporation, empowered by its charter to place its poles and wires along the streets of the city for the purpose of carrying electric lights, cannot invade the property right of an abutting owner in a shade tree standing on the sidewalk without compensation. Ibid.

Even if it is necessary for such a company to run its wires through the tree and cut its limbs, it can do so only upon compensating the abutting owner. Ibid.

And such an owner is entitled to compensation for the deterioration of his property caused by the cutting of trees, whether the cutting was skilfully or unskilfully done. Ibid.

In St. Paul Realty & Assets Co. v. Tri-State Teleph. & Teleg. Co. 122 Minn. 424, 142 N. W. 807, it was held that, under § 2927, 1 Rev. Laws 1905, authorizing telephone companies to erect poles and lines in roads and streets subject to municipal police regulation, the license to construct is not exclusive of the rights of abutting owners, but the rights of both must be so exercised as not unnecessarily to impinge upon, interfere with, or impede those of the other.

pages to his 100.

municipal corporation — power to permit tree trimming.

5. Only public necessity, as contradistinguished from necessity of private owner of poles or wires, will justify the city's commission, and only the latter will justify her such owner in excluding the other from space first rightfully occupied by the other by trees or wires on the street.

(February 3, 1914.)

ERROR to the District Court for Cleveland land County to review a judgment in plaintiff's favor in an action brought to join defendant from injuring or destroying plaintiff's trees. Affirmed.

The facts are stated in the Commission's opinion.

Messrs. B. F. Williams and Munden & Morton, for plaintiff in error:

Defendant is not liable for damage done by necessarily cutting the limbs of the trees under the law and its franchise.

Overholser v. Oklahoma Interurban Traction Co. 29 Okla. 571, 119 Pac. 128; Meyer v. Standard Teleph. Co. 122 Iowa, 514, 98 N. W. 300; Nichols v. New York & P. Teleph. & Teleg. Co. 126 App. Div. 184, 110 N. Y. Supp. 325.

And it was held that duty devolves upon telephone company to construct, maintain, and operate its lines with due regard to the property rights of those who own and occupy lands adjacent thereto, and who also have interests in those portions of the road or street occupied by both, and that he trimming of trees growing on adjacent property and on the boulevard must, if practically possible, be done in such manner as not to injure them. Ibid.

And in this case the evidence was held sufficient to warrant a verdict for an abutting owner against a telephone company for injuries to trees on the former's land and on the boulevard in front of it, which were caused by the swinging of, and electrical discharges from, the company's wires. Ibid.

In Southwestern Teleg. & Teleph. Co. v. Smithdeal, 103 Tex. 128, 124 S. W. 627, it was held that a property owner has a right to grow trees upon the sidewalk in front of his property, and that, if the damages to the trees by telephone wires contribute to a depreciation in the market value of his property, the injury will be considered in ascertaining the damages.

On a subsequent appeal of this case in 104 Tex. 258, 136 S. W. 1049, modifying — Tex. Civ. App. —, 126 S. W. 942, in which a claim for damage to trees was included, it was held that where telephone lines were erected in the street before the plaintiff purchased his property, he could not recover damages to the property which 51 L.R.A.(N.S.)

Guthrie v. Nix, 5 Okla. 555, 49 Pac. 917; Smith v. Leavenworth, 15 Kan. 81; Knickerbocker Ice Co. v. Forty-second Street & G. Street Ferry R. Co. 176 N. Y. 408, 68 N. E. 864; Chicago v. Wright, 69 Ill. 318; Denver & S. F. R. Co. v. Domke, 11 Colo. 247, 17 Pac. 777; Shirk v. Chicago, 195 Ill. 298, 63 N. E. 193; Emerson v. Babcock, 66 Iowa, 257, 55 Am. Rep. 273, 23 N. W. 656.

The title to trees is in the city, and same may be disposed of if it suits the city.

Mt. Carmel v. Shaw, 155 Ill. 37, 27 L.R.A. 580, 46 Am. St. Rep. 311, 39 N. E. 584; Baker v. Normal, 81 Ill. 108; State, Consolidated Traction Co., Prosecutor, v. East Orange Twp. 61 N. J. L. 202, 38 Atl. 803.

The mere fact that abutting owners are permitted to plant trees does not change the rule that the city has an absolute right to control trees.

Baker v. Normal, 81 Ill. 108.

Mr. W. L. Eagleton, for defendant in error:

Defendant was a trespasser *ab initio* in going upon the parking and cutting trees of plaintiff without her consent and without condemnation proceedings.

Although title to the streets was and is

resulted from the presence of the structures before he became the owner, but that he was nevertheless authorized to recover damages resulting from subsequent changes in the construction of the lines, or additions which increased the existing servitude.

It was further held that if it is shown by a property owner that wires or cables strung in the street in front of his property, if left in place, will kill or destroy the trees growing along the sidewalk, he is entitled to a mandatory injunction requiring their removal; but that where it is not made to appear that injury will result to the trees, the granting of such an injunction is improper. Ibid.

In Moore v. Carolina Power & Light Co. supra, it was held that forms of action are no longer matters of supreme importance, and that an ordinary action by an abutting owner for damages caused by the cutting of trees in front of his property might, if necessary, be styled an action to recover damages under the right of eminent domain.

In Com. v. Miller, 47 Pa. Super. Ct. 193, an owner of property on the opposite side of the street from that on which it was alleged trees had been cut by line-men erecting poles and stringing wires was held not an abutting property owner within the meaning of an act providing a penalty for cutting or injuring trees on public highways without the agreement of abutting property owners. J. T. W.

in the city of Norman, yet the property right in the trees in said parking was in plaintiff.

Southern Kansas R. Co. v. Oklahoma City, 12 Okla. 82, 69 Pac. 1051; *Lovejoy v. Campbell*, 16 S. D. 231, 92 N. W. 25; *Smith v. Leavenworth*, 15 Kan. 81; *Guthrie v. Nix*, 5 Okla. 555, 49 Pac. 918; *Paola v. Wentz*, 79 Kan. 148, 131 Am. St. Rep. 290, 98 Pac. 775; *Remington v. Walthall*, 82 Kan. 234, 31 L.R.A.(N.S.) 957, 108 Pac. 112; *Heller v. Garden City*, 58 Kan. 263, 48 Pac. 841; *St. Louis & S. F. R. Co. v. Love*, 29 Okla. 523, 118 Pac. 259; *Daily v. State*, 51 Ohio St. 348, 24 L.R.A. 724, 46 Am. St. Rep. 586, 37 N. E. 710; *Memphis Bell Teleph. Co. v. Hunt*, 16 Lea, 456, 57 Am. Rep. 237, 1 S. W. 159; *Bradley v. Southern New England Teleph. Co.* 66 Conn. 559, 32 L.R.A. 280, 34 Atl. 499; *Board of Trade Teleg. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Clay v. Postal Teleg. Cable Co.* 70 Miss. 406, 11 So. 658; *McCrudden v. Rochester R. Co.* 77 Hun, 609, 59 N. Y. S. R. 892, 28 N. Y. Supp. 1135.

Plaintiff is entitled to damages.

Cooley, Torta, 318; *Lovejoy v. Campbell*, 16 S. D. 231, 92 N. W. 26; *Paola v. Wentz*, 79 Kan. 148, 131 Am. St. Rep. 290, 98 Pac. 775; *Moore v. Carolina Power & Light Co.* 163 N. C. 300, 79 S. E. 596.

Messrs. W. M. Newell and W. J. Jackson also for defendant in error.

Thacker, C., filed the following opinion:

Plaintiff in error will be designated as defendant, and defendant in error as plaintiff, in accord with their respective titles in the trial court.

In August, 1909, and at all times since about January, 1903, defendant, a public-service corporation, owned and operated electric current wires strung about 24½ or 26½ feet above the ground, and almost immediately over the center of the tops of certain black locust trees, about 17 or 18 in number, in a parking on a street in the city of Norman; and plaintiff, the abutting lot owner, having, in about 1896, set and since cultivated these trees, had whatever interest in them these facts and the act of March 2, 1905, together impart to her; but prior to and without regard to this act, she, as abutting lot owner and grower of the trees, notwithstanding the fee-simple title to the street was in the city (*Guthrie v. Nix*, 5 Okla. 555, 49 Pac. 918; *Blackwell, E. & S. W. R. Co. v. Gist*, 18 Okla. 516, 90 Pac. 889; *McKay v. Enid*, 26 Okla. 275, 30 L.R.A.(N.S.) 1021, 109 Pac. 520, and also as a complement of the rule, see § 610, Stat. 1890, the same being § 588, Rev. Laws 1910), which was also the general owner of the trees (*Mt. Carmel v. Shaw*, 155 Ill. 37, 27 L.R.A. 580, 46 Am. 51 L.R.A.(N.S.)

St. Rep. 311, 39 N. E. 584), had and has such equitable easement in and special ownership of the trees as to entitle her to bring and maintain an action for wrongful injury to them resulting in consequential injury to and depreciation in value of her abutting lot. At the time defendant's wires were strung (January, 1903), these trees were small and their tops far from interfering; but, in August, 1909, as a result of about six years' additional growth, they came in contact with and extended some 7 or 9 feet above the wires, and thus presented a condition requiring severance and precautions against recurrence of contact, unless it was feasible to so insulate the wires and so protect such insulation as to thus afford protection to the trees, wires, and users of the streets from injury resulting from such contact, which does not appear. At that time (August, 1909), defendant cut off the tops and some of the branches of these trees, cutting off some 10 or 12 feet of the tops, and cutting the branches back in some instances to where they were an inch or more in diameter. The act of cutting was without regard to avoidance of exposure of cut ends of branches to weather, and without regard to immediate injury to stubs, the branches being hacked, and in some instances so as to leave a forked cut; and, in deference to the verdict of the jury, at least, we may say that as a result, these trees fell into a state of progressive deterioration in health which, at the time of the trial, had resulted in the death of one or two and, perhaps, presaged the death of others.

Plaintiff brought this action and recovered \$100 as her damages for the consequential injury to and depreciation in value of her abutting lot, and the defendant attempted to justify the cutting by showing, but the trial court, upon objection made, did not permit it to show, that on January 10, 1903, by virtue of its due acceptance at that time of an ordinance enacted by the city of Norman on December 2, 1902, and which had been duly published, it acquired and has since had a franchise incidentally purporting to authorize it to so cut the tops and branches of trees. The terms of this ordinance granted to the defendant a franchise for twenty-one years, "with full right, power, and authority to erect, maintain, extend and operate a plant of machinery, poles, wires and all other apparatus and appliances within the corporate limits of the city of Norman, for the purpose of generating and furnishing to the city of Norman and its inhabitants electricity for light, heat and power, and for said purpose to enter upon and use the streets, alleys and public grounds of said city, and place and maintain thereon such

poles, wires, apparatus and appliances as may be necessary and proper, and shall have the right to trim trees to prevent branches from coming in contact with wires and to remove such trees when necessary for the proper placement and maintenance of same, subject to the terms and conditions hereinafter provided." Another section of this ordinance provides "that said poles and wires shall be erected and placed under the direction of the city care and erect poles and wires in places wherein said grantee [the defendant] shall deem necessary." The ordinance does not limit defendant to such precise place for poles or wires as would have prevented the stringing of the wires higher or more to one side of the trees, or elsewhere than in the parking, nor, perhaps, would any public purpose which would justify cutting the trees be apparent therefrom if such limitation had been imposed, and the defendant strung its wires so as to occupy a space well within that which should at the time reasonably have been anticipated as necessary for perfection in the growth of plaintiff's trees. It appears that the defendant, in stringing its wires, both voluntarily and unnecessarily invaded space which at that time must reasonably have been anticipated as necessary for the perfection of the growth of the trees, and thus potentially occupied by their grower, the plaintiff. The court treated defendant as a trespasser *ab initio* upon proof of the foregoing state of facts, and instructed the jury in effect that, if plaintiff was damaged, she was entitled to recover as such damages the difference between the value of her lot before and its value after the cutting.

It is here contended by defendant that it was not a trespasser *ab initio*, and that the true measure of damages, if any, is the depreciation in the value of the plaintiff's lot by such trimming as was not reasonably necessary to sever the contact of trees and wires and keep them apart, if there was any such trimming, or, in other words, the difference between the value of the lot with the trees trimmed so far as reasonably necessary and its value with the trees trimmed as they were, if such trimming went beyond what was proper and necessary.

The widely divergent views of the courts and authors of text-books upon the question of the rights and duties of owners of trees and owners of wires upon the same street, under authority express or implied from the city, and of the liability of the latter owners for damages to the former for cutting back such trees, to sever or prevent contact with the wires, are well illustrated by the following citations: *Moore v. Carolina Power & Light Co.* 163 N. C. 300, 79 S. E. 596; *Southwestern*

Teleg. & Teleph. Co. v. Branham, — Tex. Civ. App. —, 74 S. W. 949; *St. Paul Realty & Assets Co. v. Tri-State Teleph. & Teleg. Co.* 122 Minn. 424, 142 N. W. 807; *Slabough v. Omaha Electric Light & P. Co.* 87 Neb. 805, 30 L.R.A.(N.S.) 1084, 128 N. W. 505; *Rosenthal v. Goldsboro*, 149 N. C. 128, 20 L.R.A.(N.S.) 809, 62 S. E. 905, 16 Ann. Cas. 639; *Com. v. Byard*, 200 Mass. 175, 20 L.R.A.(N.S.) 814, 86 N. E. 285; *State v. Graeme*, 130 Mo. App. 138, 108 S. W. 1131; *Cartwright v. Liberty Teleph. Co.* 205 Mo. 126, 12 L.R.A.(N.S.) 1125, 103 S. W. 982, 12 Ann. Cas. 249; *Osborne v. Auburn Teleph. Co.* 111 App. Div. 702, 97 N. Y. Supp. 874; *Barber v. Hudson River Teleph. Co.* 105 App. Div. 154, 93 N. Y. Supp. 993; *Nichols v. New York & P. Teleg. & Teleph. Co.* 126 App. Div. 184, 110 N. Y. Supp. 325; *Meyer v. Standard Teleph. Co.* 122 Iowa, 514, 98 N. W. 300; *Bronson v. Albion Teleph. Co.* 67 Neb. 111, 60 L.R.A. 426, 93 N. W. 201, 2 Ann. Cas. 639; *Cumberland Teleph. & Teleg. Co. v. Cassidy*, 78 Miss. 666, 29 So. 762; *McAntire v. Joplin Teleph. Co.* 75 Mo. App. 535; *Wyant v. Central Teleph. Co.* 123 Mich. 51, 47 L.R.A. 497, 81 Am. St. Rep. 155, 81 N. W. 928; *Van Siclen v. Jamaica Electric Light Co.* 45 App. Div. 1, 61 N. Y. Supp. 210; *Southern Bell Teleph. & Teleg. Co. v. Francis*, 109 Ala. 224, 31 L.R.A. 193, 55 Am. St. Rep. 930, 19 So. 1; *Bradley v. Southern New England Teleph. Co.* 66 Conn. 559, 32 L.R.A. 280, 34 Atl. 499; *Southern Bell Teleph. & Teleg. Co. v. Constantine*, 9 C. C. A. 359, 23 U. S. App. 56, 61 Fed. 61; *Tissot v. Great Southern Teleg. & Teleph. Co.* 39 La. Ann. 996, 4 Am. St. Rep. 248, 3 So. 261; *Memphis Bell Teleph. Co. v. Hunt*, 16 Lea, 456, 57 Am. Rep. 237, 1 S. W. 159; *Stephens & C. Transp. Co. v. Western Union Teleg. Co.* 8 Ben. 502, Fed. Cas. No. 13,371; *Board of Trade Teleph. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453. Also see: *Jones, Teleg. & Teleph. Cos.* § 128; 37 Cyc. 1642, 1643; and 28 Am. & Eng. Enc. Law, 2d ed. 540; *Croswell, Electricity*, § 209; *McQuillin, Mun. Corp.* § 1652, p. 3473; *Id.* § 1326; *Jaggard, Torts*, p. 143; *Elliott, Roads & Streets*, § 806.

Our own conclusions are as follows:

First. Subject to the requirement that it must act in good faith, and not abuse its exercise of power, a city has the power of control over its streets, including the parkings and all spaces occupied by both the trees and wires thereon; and this power is paramount to any right that either the grower of trees or the owner of wires may acquire thereon. Sections 586-591, Stat. 1890, found with some amendments in §§ 572-575, Rev. Laws 1910: 28 Cyc. 851, 947, 953; *McQuillin, Mun. Corp.* § 1327; *Robinson v. Spokane*, 66 Wash. 527, 120

Pac. 101, Ann. Cas. 1913C, 1012; Rosenthal v. Goldsboro, 149 N. C. 128, 20 L.R.A. (N.S.) 809, 62 S. E. 905, 16 Ann. Cas. 639; Frostburg v. Wineland, 98 Md. 239, 64 L.R.A. 627, 103 Am. St. Rep. 399, 56 Atl. 811, 1 Ann. Cas. 783; Wright v. Austin, 143 Cal. 236, 65 L.R.A. 949, 101 Am. St. Rep. 97, 76 Pac. 1023.

Second. An abutting lot owner, even though the fee of the street and general ownership of the trees be in the city, has, without the aid of statute, an equitable easement, and therefore a special ownership, in the trees which will enable him to maintain an action for wrongful injury thereto which depreciates the value of his lot. McQuillin, Mun. Corp. § 1326; Donahue v. Keystone Gas Co. 181 N. Y. 313, 70 L.R.A. 761, 106 Am. St. Rep. 549, 73 N. E. 1108, 18 Am. Neg. Rep. 203; Adams v. Syracuse Lighting Co. 137 App. Div. 449, 121 N. Y. Supp. 762.

Third. As stated in *St. Paul Realty & Assets Co. v. Tri-State Teleph. & Teleg. Co.* 122 Minn. 424, 142 N. W. 807, decided July 11, 1913, by the supreme court of Minnesota: "Both the company and the landowner may be in lawful occupancy of the street. The abstract right of neither can be said to be superior, and each must be regarded of the rule that property rights must be so exercised as not unnecessarily to impinge upon, interfere with, or impede those of another."

In such case, mutual and reasonable accommodation is due from each to the other; and slight injury to trees by necessary and reasonable trimming cannot be made the predicate of an action where the wires are rightfully in position and their owner has not voluntarily, or to any considerable extent, invaded space first actually or potentially occupied by the special owner of trees growing on the street when the wires were strung.

Fourth. Ordinarily such special owner of trees may neither be excluded from the occupancy of such space as her trees actually occupy, or such additional space as should be reasonably anticipated as necessary for their perfection in growth as is thus potentially occupied by them to make room for the exclusive occupancy of such space, or any part thereof, by the owner of wires, other than the city itself; and if such owner of wires within such space cuts back the trees to sever or prevent their contact with the wires, and thus injures the trees and depreciates the value of the abutting lot of such special owner, the latter is entitled to and may recover damages therefor.

Fifth. Only where public necessity, as contradistinguished from any necessity of either the private owner of the trees or the

private owner of the wires, justifies such an act, may the city authorize either such private owner to invade and exclude the other from space first rightfully and actually or potentially occupied by the other, and so inflict any substantial injury or damage upon such other, without due compensation.

Sixth. A necessity for trimming trees resulting from the voluntary stringing of wires by defendant within the space which it must, at the time, have anticipated would be and which was required for the perfection of the growth of the trees, is a necessity for which defendant is blamable, and cannot be urged as justification of any substantial injury to the trees.

The burden of proof was, of course, upon plaintiff to make at least a prima facie case of liability against defendant; but it appears from the foregoing statement of facts that she has done this, and the said ordinance of the city purporting to authorize defendant to trim trees would not justify the trimming, nor constitute a defense against the recovery of the actual damages given.

Tested by the foregoing observations, it does not appear that there is any reversible error in the trial of this case in the court below; and the judgment of that court should be affirmed.

A petition for rehearing having been filed, the following response was handed down on April 4, 1914:

We have examined the several propositions urged in petition for rehearing without discovering any sufficient reason for change in the conclusions heretofore reached.

In respect to the principal question in the case, it is but a reiteration of the view heretofore expressed, with only slight change in form, to say that a right to occupy a street for the purpose of putting in position and maintaining posts and electric current wires does not include the right to occupy each and every portion of such street, and the defendant violated the rule of "mutual accommodation" announced in the opinion heretofore handed down in this case. If the city of Norman had limited defendant's right to that particular space and portion of the street which was necessary for the perfection of the growth of plaintiff's trees, the question as to whether the city had acted in bad faith and had abused its exercise of power would still remain for determination before this case could be reversed; but there was no compulsion by the city in this regard, and there was no necessity for trimming these trees unless made by the voluntary and wrong-

ful act of the defendant in setting its posts and stringing its wires where it did.

In our opinion the petition for rehearing should be denied, and there should be adherence to the original opinion.

Per Curiam:

Adopted in whole.

OKLAHOMA CRIMINAL COURT OF APPEALS.

EX PARTE GEORGE E. WINTERS.

(— Okla. Crim. Rep. —, 140 Pac. 164.)

Bribery — one holding himself out as officer.

1. A person who holds himself out as an officer under color of authority, and who solicits and accepts a bribe, has no right to defend and be discharged on the ground that, as a matter of law, he had no right to act as such officer.

Same — denial of office.

2. One cannot hold himself out as an officer of the law and prostitute the public trusts and debauch the public conscience by

Headnotes by ARMSTRONG, P. J.

Note. — Bribery as affected by lack of, or defect in, title to office.

As to the jurisdiction or authority of officer to act in the matter as element of bribery, see note to *People v. Jackson*, 15 L.R.A.(N.S.) 1173.

The general rule seems to be that offering, giving, soliciting, or accepting a bribe constitutes bribery where the one soliciting or accepting the bribe, although not an officer *de jure*, was acting under color of title to an office embraced in the pertinent statute, but that where there is no color of office there is no bribery. Some of the reported cases, however, are, on the face at least, seemingly conflicting, but in the main are reconcilable when one considers the fact that the cases are often governed by variant statutes, and keeps in mind the above-noted distinction between cases where the one bribed is an officer *de facto*, and those cases where he is not an officer *de jure* and is acting without color of title or authority.

EX PARTE WINTERS is illustrative of those cases wherein it is held that one who holds himself out as an officer, and as such solicits or accepts a bribe, cannot defeat the charge by saying that as a matter of law he had no right to act as such officer.

So, in *Diggs v. State*, 49 Ala. 311, the court, in holding that a *de facto* county solicitor was indictable for bribery notwithstanding his appointment was defeasible and invalid, said: "It is difficult for us to conceive of a more evil and dangerous proposition than that one who intrudes into or

soliciting and accepting bribes, and be exonerated by the courts of this state, on the ground that he had no legal right to act in the capacity he assumed. If he is officer enough to solicit and accept a bribe, he is also officer enough to be sent to the penitentiary for his conduct.

(April 27, 1914.)

APPPLICATION for a writ of habeas corpus to secure petitioner's release from custody to which he had been committed for committing the offense of bribery. Writ denied.

The facts are stated in the opinion.

Messrs. Hargis & Conwell, for petitioner:

Petitioner is entitled to a discharge.

Re *Patswald*, 5 Okla. 789, 50 Pac. 139; *Ex parte Show*, 4 Okla. Crim. Rep. 416, 113 Pac. 1062; *Ex parte McClure*, 6 Okla. Crim. Rep. 241, 118 Pac. 591.

Messrs. Charles West and C. J. Davenport, for the State:

A person holding himself out as an officer, under color of authority, cannot solicit bribes and endeavor to corrupt other persons, and, when prosecuted, defend on the ground that he had no right to act as such officer.

usurps a public office, assumes its duties, and exercises its powers, can commit official crimes and shield himself from punishment by alleging that his crimes were only additions to his intrusion or usurpation. Admissions, on which another is induced to act, become conclusive on the party making them; and it is immaterial whether they were made innocently or fraudulently. . . . If this be true, what satisfactory reason can be given for not applying the same principle to one who deliberately assumes and exercises the duties and powers of a public office? He holds himself out to the world as an officer; he becomes entitled to protection as such; he can exercise the duties, and take the emoluments, until he is ousted; and he must be amenable as if he was the rightful officer."

And in *Com. v. Wotton*, 201 Mass. 81, 87 N. E. 202, it was held that one who was only *de facto* a member of the Lowell Water Board was subject to prosecution for soliciting a bribe under Massachusetts Rev. Laws, chap. 210, § 7, which relates to the soliciting and accepting of bribes, it being said that "no reason can be urged for punishing the acceptance of a bribe by an officer *de jure* which does not apply with equal force when a bribe is accepted by an officer *de facto*."

And in *People v. McCann*, 247 Ill. 130, 93 N. E. 100, 20 Ann. Cas. 496, it was held that a *de facto* police officer who became such by assuming and discharging the duties of such an officer could not excuse the acceptance of a bribe upon the ground that he had not been legally appointed to the of-

Ellington v. State, 7 Okla. Crim. Rep. 252, 123 Pac. 186; State v. Duncan, 153 Ind. 320, 54 N. E. 1066; State v. Gardner, 54 Ohio St. 24, 31 L.R.A. 660, 42 N. E. 999; Diggs v. State, 49 Ala. 311; Florez v. State, 11 Tex. App. 102.

Armstrong, P. J., delivered the opinion of the court:

This is an original action begun in this court by George E. Winters for the writ of habeas corpus. The petition alleges that an information has been filed in the district court of Osage county by the county attorney of said county, charging petitioner

with bribery. The information is as follows:

So, in State v. Duncan, 153 Ind. 318, 54 N. E. 1067, which is discussed and quoted in EX PARTE WINTERS, it was held that a *de facto* gravel road engineer could not defend a charge of bribery by proof that he was not an officer *de jure*.

And in State v. Ray, 153 Ind. 334, 54 N. E. 1067, which was a prosecution for conspiracy to bribe the defendant in State v. Duncan, *supra*, it was held, following the principle announced in that case, that the fact that Duncan was not an officer *de jure* did not afford a defense to the charge of conspiracy to bribe him.

And in State v. Gardner, 54 Ohio St. 24, 31 L.R.A. 660, 42 N. E. 999, referred to in EX PARTE WINTERS, Spear, J., in concurring in the majority holding that one charged with offering a bribe to a city commissioner could not defend on the ground that the statute under which such commissioner held office was unconstitutional, in answer to the contention "that the title of the office is an essential ingredient of the crime, and that an unconstitutional act cannot create a material element of a crime," among other things, said: "How is the corruption, the guilt of one who attempts to pollute the fountains of justice by bribing its acting officers, and thus cheat his neighbors and the community, any the less substantial, or the state's case against him any the less meritorious, because it may turn out that the officer's title would not stand the test of a quo warranto? . . . If the acting commissioner be good enough officer to be bribed ought he not to be held good enough officer to answer the designation of the statute in order to punish the briber? It is insisted that to convict the defendant in this case would override the maxim that an element of a crime cannot be supplied by estoppel. Let us see. Could the commissioner, had he accepted the bribe, be heard to say he was not an officer? Surely not. Wherein lies the difference? Why should there be a difference? Why should the venal scoundrel who, dealing with the other as an officer, invents the wickedness and tempts him, be let off by a mere technicality? The statute which pre-

scribes punishment for accepting a bribe also prescribes punishment for giving it. What a travesty on justice would be presented by the judgment of a court, acting on the same facts, and applying the same criminal statute, which says to the tempted officer, you will go to the penitentiary, and to the wily fowler who spread the net, and gather in his grasp the ill-gotten gain, you may go free."

So, in Florez v. State, 11 Tex. App. 102, it was held sufficient for the state to prove, under an indictment for offering to bribe a "deputy sheriff," that such officer was a deputy sheriff *de facto*, he having as a matter of fact not qualified as directed by statute. The court, after saying that if the party is an officer *de facto*, that is, acting notoriously in that capacity, and is bribed or offered a bribe, those who bribe or offer to bribe him are liable to prosecution, and they cannot defend upon the ground that he is not an officer *de jure*, continued as follows: "To hold that deputy sheriffs, constables, and jailors, who have the custody of prisoners charged in a great many cases with capital felonies, can be bribed to discharge the felons, and when those guilty of the bribing are sought to be brought to justice and punishment, that they can plead that the custodians of prisoners were not in every particular legally appointed, would be a terrible doctrine indeed. Moral obliquity obtains in the one case as well as the other. The injury to public justice being the same, the defense, if one at all, is strictly technical, without foundation, as we think, in principle, and evidently against justice."

But, as above stated, it has been held that a charge of bribery cannot be sustained where the one soliciting or accepting a bribe is neither holding an office embraced within the bribery statutes nor acting under color of title to such an office.

Thus, in Messer v. State, 37 Tex. Crim. Rep. 635, 40 S. W. 498, it was held that an allegation that defendant offered a bribe to "a deputy constable, . . . a peace officer, and a guard of the defendant," to let him escape, was not sustained by proof that the offer was made to a private citizen in whose custody the defendant had been temporarily put after his arrest, the ground

and there wrongfully, unlawfully, and feloniously accept and receive the sum of \$15, good and lawful money of the United States for himself, for and in consideration of an agreement and understanding with one W. T. Crabtree, that he, the said W. T. Crabtree, should be permitted to violate the provisions of the prohibitory liquor laws of the state of Oklahoma, in this, to wit: To sell, barter, give away, and otherwise furnish intoxicating liquors at Avant, in said county and state, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Oklahoma.

The assistant attorney general filed a demurrer to the petition.

In our judgment the pleadings raise only one question which is entitled to our consideration in this proceeding; that is, Does a person who holds himself out as an officer under color of authority, and who solicits and accepts a bribe, and endeavors to and does corrupt other persons, have a right to defend and be discharged upon the contention that, as a matter of law, he had no right to act as such officer, therefore the accepting of a bribe was not a violation of the statute? It is not necessary for us to determine in this proceeding the

of the decision being that such custodian was not a peace officer within the meaning of the statutes prohibiting the offering of bribes to certain enumerated officers, but was simply a private citizen placed in charge of a prisoner without any authority of law.

And in *Naill v. State*, 59 Tex. Crim. Rep. 484, 129 S. W. 630, Ann. Cas. 1912A, 1268, an indictment charging an offer to bribe an "acting assistant city attorney" was held fatally defective where the charter of the city showed that there was no such officer in existence, and the statute provided punishment for bribery or offering to bribe "any executive, legislative, or judicial officer," etc. It was further held in this case that a "deputy" city attorney was not an "assistant city attorney," and that the person to whom the bribe was offered, although acting as a deputy, was neither an official *de jure* nor *de facto*.

In *Thomson v. United States*, 37 App. D. C. 461, it was held that giving or offering to give a bribe to a person who had assumed the duty of inspecting paper for postal cards, but who as a matter of fact had no such authority, although he was postal-card agent, did not constitute bribery within the meaning of District of Columbia Code, § 861, 31 Stat. at L. 1330, chap. 854, which provides for the punishment of any person who gives or offers to give money "to any person acting in any official function," since the giving or offering was not to someone who was charged by law with acts official in character, and within his legal duty. The court said: "Under the government's contention, if a person not connected with the government service in any way had assumed to inspect such paper or any consignment thereof, and the defendant, under the mistaken belief that such person really was a government agent or employee, had offered him a bribe, the offense of bribery would have been complete. Such cannot be the law. Before there can be an official function, there must be some duty, some responsibility."

In *Re Yee Gee*, 83 Fed. 145, it was held in construing U. S. Rev. Stat. § 5451, U. S. Comp. Stat. 1901, p. 3680, which makes it an offense to offer, etc., any money to "any officer of the United States, or to any person

acting for or on behalf of the United States in any official function under or by authority of any department or office of the government, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may be brought before him in his official capacity, . . . or with intent to influence him to commit, or aid in committing, or to collude in or allow any fraud, or make opportunity for the commission of any fraud on the United States, or to induce him to aid, do, omit to do, any act in violation of his official duty,"—that one who offered a bribe to another who was an official interpreter, to secure a particular translation of certain Chinese letters which were to be used in a certain contemplated criminal proceeding, had not committed an offense under the statute, where such interpreter had not at the time of the offer been officially appointed to serve as an interpreter at this particular contemplated criminal proceeding; the court saying that "an offer made to a person in contemplation of a mere probability that he may be called to perform official functions, and intended to influence his conduct in performance of such functions if he shall be so called, does not violate this statute."

And in *United States v. Dietrich*, 126 Fed. 676, it was held not to be an offense under U. S. Rev. Stat. § 1781, U. S. Comp. Stat. 1901, p. 1212, making it a criminal offense for any "member of Congress, or any officer or agent of the government," to receive or agree to receive a bribe for procuring or aiding to procure any office or place for another from the government, for a Senator elect who has not yet been seated to receive a bribe for procuring and aiding to procure for the giver an appointment as a postmaster.

And see *State v. Graham*, 96 Mo. 120, 8 S. W. 911, wherein it was held that a court erred in refusing to charge a jury impaneled to try one for offering a bribe to the mayor of a city to appoint defendant to an office, that in order to convict defendant it devolved upon the state to prove that the said mayor "was an officer of the city of S. and authorized to make" the appointment in question.

G. J. C.

right and power of the state enforcement officer, as that office existed at the time of the filing of this petition, and at the time he is alleged to have appointed the petitioner as a deputy enforcement officer, to lawfully make such appointment, nor is it necessary in our judgment to determine that persons so appointed were entitled to act as officers. It has been the policy of this court since its organization to assume every reasonable position possible, tenable with the view of aiding the enforcement of the law and the maintenance of good government in Oklahoma. As said by this court in *Ellington v. State*, 7 Okla. Crim. Rep. 252, 123 Pac. 186, which was an embezzlement case wherein a guardian was prosecuted for embezzling moneys of his ward, and who attempted to defend on the ground that the money embezzled by him did not legally belong to his ward, therefore it was no crime for him to embezzle it, that, "if he was agent enough to collect this money, he was agent enough to be punished for its embezzlement." The same might be said of the petitioner; if he was officer enough to solicit and accept a bribe, he was also officer enough to be sent to the penitentiary for so doing. Corruption and debauchery are not tolerated in civilized communities. It makes no difference for the purpose of this prosecution whether the state enforcement officer had the right and power to appoint deputies, as a matter of law, or not; if he did make such appointments, and such appointees assumed to act and hold themselves out as officers of the law, they were amenable to the criminal statutes of this state for soliciting and accepting bribes, and the good of society demands that any such persons so accepting bribes be punished. In this position we are not wholly without support by the authorities.

In *State v. Duncan*, 153 Ind. 320, 54 N. E. 1067, the supreme court of Indiana, in considering a similar question, said: "Bribery is an offense against public justice. The essence of it is the prostitution of a public trust, the betrayal of public interests, the debauchment of the public conscience. If one admits the doing of the things that produce these results, shall he escape by saying that he had no right to act at all? It would seem passing strange if the consequences of one breach of law might be evaded by showing another." In the Indiana case the accused was a gravel road engineer, and was prosecuted for accepting a bribe. His defense was based on the contention that there was no valid law authorizing his appointment. The supreme court of Indiana says that he could not thus prostitute the public trust and debauch the public conscience, and urges that,

although he accepted the bribe, he had no authority to act as an officer. The petitioner was appointed as an officer; he assumed to act and exercise the duties of an officer; he will not now be permitted to say he had no authority in the premises.

The supreme court of Ohio, in *State v. Gardner*, 54 Ohio St. 24, 31 L.R.A. 660, 42 N. E. 999, promulgated a similar doctrine. In the Ohio case Gardner was prosecuted for offering a bribe to one purported to hold an office. His defense was that such office did not legally exist. The court held that he could not maintain any such defense.

In *Price v. State*, — Okla. Crim. Rep. —, 137 Pac. 736, we had under consideration a question involving the principle now under discussion. In that case Price was prosecuted for embezzling money as an attorney. He had moved from another state to Oklahoma, but had not been legally admitted to the bar in Oklahoma. His defense was based on the contention that, not having been legally admitted to the bar, he could not be charged with embezzlement as a lawyer. In determining that question, we said: "Where a lawyer from another state moves into Oklahoma, and, without securing admission to the bar of this state, holds himself out to the public as a lawyer, accepts business as such, and embezzles money collected by him as a lawyer, he cannot escape punishment upon the ground that he was never legally admitted to the bar of Oklahoma." See also *Florez v. State*, 11 Tex. App. 102.

We are of opinion that the demurrer should be sustained, and the petition dismissed; and it is so ordered.

Doyle and Furman, JJ., concur.

WASHINGTON SUPREME COURT. (Department No. 1.)

MESKILL & COLUMBIA RIVER RAILWAY COMPANY, Respt.,

v.
F. W. LUEDINGHAUS et al., Appts.

(78 Wash. 366, 139 Pac. 52.)

Damages — eminent domain — route for logging railroad.

The damages to be awarded for the appropriation of a right of way for a logging railroad through a canyon cannot include the value of the property for the

Note. — As to special value of property for purpose for which it is taken as an element of compensation in condemnation proceedings, see notes to *Sargent v. Merriam*, 11 L.R.A.(N.S.) 996, and *McGovern v. New York*, 46 L.R.A.(N.S.) 392.

watershed of the stream which flows through will eventually pass down the canyon, the timber belongs to strangers to the proceeding, so that the route to be taken it depends upon their will alone.

(February 28, 1914.)

APPEAL by defendants from a judgment of the Superior Court for Lewis County in plaintiff's favor in a proceeding to condemn a right of way for a logging railroad. Affirmed.

The facts are stated in the opinion.

Mr. W. A. Reynolds, with Messrs. John Shackleford and F. D. Oakley, for appellants:

Defendants should have been permitted to show any depreciation in value of the land by reason of the construction of the proposed logging road.

Seattle & M. R. Co. v. Murphine, 4 Wash. 48, 30 Pac. 720; Portland & S. R. Co. v. Skamania Boom Co. 59 Wash. 191, 109 Pac. 14; Chicago, M. & St. P. R. Co. v. Alexander, 47 Wash. 131, 91 Pac. 626; Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; Missouri, K. & T. Co. v. Roe, 77 Kan. 224, 15 L.R.A. (N.S.) 79, 94 Pac. 259.

Messrs. Forney & Ponder and Dysart & Ellsbury, for respondent:

Defendants cannot show the value of the land for public railroad purposes.

Powers v. Hazelton & L. R. Co. 33 Ohio St. 429; Moulton v. Newburyport Water Co. 137 Mass. 163; Munkwitz v. Chicago, M. & St. P. R. Co. 64 Wis. 403, 25 N. W. 438; Grays Harbor Boom Co. v. Lownsdale, 54 Wash. 88, 102 Pac. 1041, 104 Pac. 267.

Main, J., delivered the opinion of the court:

The purpose of this action was to acquire title to real property by the exercise of the right of eminent domain.

At the time the action was instituted, the appellants were the owners of the east half of the southeast quarter of section 8, township 13, range 4 west, W. M., in Lewis county, Washington. Across this land from south to north extends what is known as Hope creek canyon. This is a narrow defile, with the hills on either side rising precipitously. The width of the canyon at its narrowest point, measuring from the foothills on the one side to the foothills on the other, is estimated by the witnesses to be from 45 to 75 feet. Down this canyon flows a small stream, known as Hope creek, which empties into the Chehalis river at a point to the north of the appellants' land. Covering the watershed of Hope creek is a 51 L.R.A. (N.S.)

The respondent sought to condemn a right of way across the land above described, 60 feet wide, and extending through Hope creek canyon, for the purpose of the construction and operation of a toll logging road; the primary purpose being to enable the respondent to convey the logs from lands owned by it to the Chehalis river. Upon a hearing the court entered an order of public use and necessity. In due time the case came on for trial before the court sitting with a jury to determine the damages. Upon the trial the appellants offered evidence to show the value of the property taken for the purpose of a toll or public logging road, based upon the assumption that all the logs from the watershed of Hope creek would eventually pass down this canyon, as they claimed it was the most available outlet. This evidence was rejected as too remote and speculative.

The appellants were permitted to prove, not only the value of the land for the use to which it was then devoted by the owners, but for any purpose for which it was then reasonably and naturally adapted. The jury returned a verdict assessing the damages at the sum of \$250. Upon the verdict judgment was entered, from which judgment the present appeal is prosecuted.

The primary question to be determined is the correctness of the court's ruling in excluding evidence as to the value of the land taken for a toll or public logging road when used in connection with the logging of the watershed of Hope creek; the timber upon this watershed being owned by neither of the parties to the action.

The general rule is that in estimating the value of the land taken, and damages to the remainder, if any, not only the use to which the property is then devoted may be considered, but any purpose for which it is at the time reasonably and naturally adapted. Seattle & M. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. 720; Portland & S. R. Co. v. Skamania Boom Co. 59 Wash. 191, 109 Pac. 814; Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206. In the case last cited it is said: "So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisalment in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the com-

munity, or such as may be reasonably expected in the immediate future."

We think the evidence offered did not come within the rule stated. The timber upon the watershed of Hope creek was owned by other parties. When it would be logged and in what manner, and by what route the logs would be transported, were matters which were contingent upon the will of the owners alone. This being true, the value, if any, which the logging of that particular land might add to the value of the land in Hope creek canyon would be remote and speculative. Such damages are not allowed. *Munkwitz v. Chicago, M. & St. P. R. Co.* 64 Wis. 403, 25 N. W. 438; *Powers v. Hazelton & L. R. Co.* 33 Ohio St. 429. In the case last cited the land was sought to be condemned for railroad purposes. Upon the trial the owners proposed to prove that the ravine through which the proposed right of way ran had a special value as the only roadway to market for coal on lands not owned by them, and the amount of rent that had been and could be obtained per ton for conveying coal on their railroad from mines belonging to other persons. This evidence was rejected by the trial court. The appellate court, in passing upon the ruling, said: "The difference in the value of the owner's property with the appropriation and that without it is the rule of compensation. This difference must be ascertained with reference to the value of the property in view of its present character, situation, and surroundings. It cannot be enhanced by proving facts of a contingent and prospective character, such as the probable rents that may be derived from the property, or its special value as a prospective monopoly of a roadway to the adjoining lands of other persons."

Complaint is also made of instructions given and the failure to give certain requested instructions. But we find no error in this regard.

The judgment will be affirmed.

Crow, Ch. J., and Ellis and Chadwick, JJ., concur.

Petition for rehearing denied.

WISCONSIN SUPREME COURT.

ISABEL COVAULT

v.

GEORGE P. NEVITT, by Guardian *ad Litem*, Appt.

(157 Wis. 113, 140 N. W. 1115.)

Infant — liability for negligence of servant.

1. An infant is not liable for injury to

a pedestrian by the negligence of a janitor in charge of his building in opening doors in the adjoining sidewalk, the infant being absent, and not directing or consenting to the act, since the infant has no power to form a contract relation with a servant which will render him liable under doctrine of *respondent superior*.

Same — necessities — janitor services.

2. The services of a janitor for a building belonging to an infant are not necessities, a contract for which will bind the infant.

(May 1, 1914.)

Note. — Responsibility of infant for tort of his servant or agent.

As to liability of a lunatic for torts of committee, guardian, or employee, see note to *Gillet v. Shaw*, 42 L.R.A.(N.S.) 87.

Generally, as to liability of infant for tort, see notes to *Lowery v. Cate*, 57 L.R.A. 673, and *Briese v. Maechtle*, 35 L.R.A.(N.S.) 574; and as to estoppel of infant by false representations as to his age, see also notes to *Commander v. Brazile*, 9 L.R.A.(N.S.) 1117; *Tobin v. Spann*, 16 L.R.A.(N.S.) 672; *Putnal v. Walker*, 36 L.R.A.(N.S.) 33; and *County Board of Education v. Hensley*, 42 L.R.A.(N.S.) 643; and the case of *International Land Co. v. Marshall*, 19 L.R.A.(N.S.) 1056.

Upon the question as to an infant's acts in inducing another to enter into a contract with him by representing that he is of age, as constituting the offense of false pretenses, see note to *Com. v. Ferguson*, 24 L.R.A.(N.S.) 1101.

The position taken in *COVAULT v. NEVITT*, that the doctrine of *respondent superior* is inapplicable to render an infant liable for the torts of one acting for him, is supported by the comparatively few cases in point. Thus, the court, in *Burns v. Smith*, 29 Ind. App. 181, 94 Am. St. Rep. 268, 64 N. E. 94, said: "The only tortious acts for which an infant can be made responsible are those committed by himself, or under his immediate inspection and express direction, and he cannot otherwise be made liable for the wrong of those assuming to act for him. In law, an infant cannot become a master, or be responsible as a master for the negligence or want of skill of his agent or servant. As he cannot create an agency, he cannot appoint a servant, and therefore cannot delegate powers to another."

So, it has been held that an infant is not liable for the malicious prosecution, in his name, by his next friend, of a suit which was commenced without his knowledge or authority, even though he expressly assented to the suit after he had knowledge of it. "He cannot become a trespasser by such assent, being liable only for his own personal acts." *Burnham v. Seaverns*, 101 Mass. 300, 100 Am. Dec. 123.

And an infant, not being responsible for

APPEAL by defendant from an order of the Circuit Court for Winnebago County overruling a demurrer to the complaint in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servant. Reversed.

Statement by Kerwin, J.:

Action against an infant to recover for negligence of servant. The complaint, among other things, alleges that the defendant, an infant, owned real estate on a public street in the city of Oshkosh, upon which there was a store building abutting on the street; that the defendant maintained trapdoors in the sidewalk opposite said premises; that defendant had in his employ one Powers, who was janitor of said store building, and who used the trapdoors as means of ingress and egress from the basement of the building; that on November 16, 1912, said servant, while performing his duties as janitor, negligently raised and opened said trapdoors; "that said servant failed and neglected to give any warning or notice of the intended raising and opening of said trapdoors, as aforesaid, to possible pedestrians who might be lawfully walking along said public side-

walk at said time;" that "wholly because of the negligent manner of raising and opening the trapdoors aforesaid, by defendant's servant, as hereinbefore set forth, plaintiff was tripped, causing her to fall against the sidewalk with great force and violence." The defendant demurred to the complaint for the reason that it appeared upon the face thereof that it did not state facts sufficient to constitute a cause of action. The court below overruled the demurrer, with leave to the defendant to answer upon payment of \$10 costs. The defendant appealed from the order overruling the demurrer.

Messrs. Thompson, Thompson, & Jackson, for appellant:

The infant defendant, having no power to contract, cannot be held liable for the servant's negligence.

22 Cyc. 514; Lowery v. Cate, 108 Tenn. 54, 57 L.R.A. 673, 91 Am. St. Rep. 744, 64 S. W. 1068; Schenk v. Strong, 4 N. J. L. 87; Prescott v. Norris, 32 N. H. 101; Cooley, Torts, 2d ed. 128; Sikes v. Johnson, 16 Mass. 389; 16 Am. & Eng. Enc. Law, 2d ed. 308; Tyler, Infancy & Coverture, p. 184; Cunningham v. Illinois C. R. Co. 77 Ill. 178; Burns v. Smith, 29 Ind.

the trespasses or unauthorized acts of his guardian, is not liable for the rents and profits of land which the guardian has wrongfully occupied as a part of the infant's estate. Cunningham v. Illinois C. R. Co. 77 Ill. 178.

So, in Robbins v. Mount, 4 Robt. 553, 33 How. Pr. 24, an action against infant devisees of real property to recover damages for an injury to a tenant's property by water thereon, in which it was claimed that the rule of *respondet superior* applied, and that the infants were responsible for the negligence of their agents,—although the case seems to have turned upon the fact that the evidence entirely failed to connect the infants with the persons whose negligence caused the injury,—the court said: "An infant . . . is incapable in law of appointing an agent. . . . Such legal incapacity, however, does not exempt him from the consequences of his tortious acts. In respect to those, he is held responsible, if *doli capax* when the wrong is done. But such tortious acts must be committed by the infant himself, or under his immediate view, or by his direction or authority. As he cannot create an agency, he cannot appoint a servant, and therefore cannot delegate powers to another, nor can he guarantee or insure the fidelity, care, or skill of such other. The foundation of the rule *respondet superior* is that the principal holds out his agent as competent and skilful, and fit to be trusted, and thus, in effect, warrants his fidelity and good conduct in all matters within the scope of the agency. An infant, being incapable of con-

tracting, cannot warrant the competency or skill or care of a person with whom the relation of agent cannot exist. . . . All these rules necessarily include both the right and power to constitute the relation of master and servant. Such relation exists only in contract, and requires the same capacity in the contracting parties as in the formation of any other agreement. If either is incapable of contracting, there is no mutuality, and neither is bound. . . . The result of this review of the principles of agency is, that the liability of principals for the negligence or other misconduct of their agents arises for the express or implied authority of the latter, and the implied guaranty of the former, and has its foundation in the contract, which creates the relation, and by which it is implied that persons shall not suffer by the negligence of those they employ. . . . In the case of an infant, these principles cannot be applied. He cannot in law become a master, or be responsible as a master, for the negligence or want of skill of his servant."

And it is immaterial that an infant, sought to be held liable for the negligence or tortious acts of an agent, is married, as "the marriage of an infant with the consent of the father is an emancipation only to the extent as to enable him to make contracts for his own services, and to apply his wages to the support of his family. Otherwise it does not enlarge his power to contract, nor does it remove the disabilities of infancy so that he is bound by his contracts, except for actual necessities;" and

94; Robbins v. Mount, 33 How. Pr. 24, 4 Robt. 553; Holden v. Curry, 85 Wis. 510, 55 N. W. 965; Hampel v. Detroit, G. R. & W. R. Co. 138 Mich. 1, 108 Am. St. Rep. 275, 100 N. W. 1002, 17 Am. Neg. Rep. 84; Roberts, W. & G. Duty & Liability of Employers, 66, 67; Parsons, Contr. 9th ed. 360; Schouler, Dom. Rel. 4th ed. § 423, p. 639; 1 Jaggard, Torts, 160.

A contract for janitorship is distinctly not a contract for necessities.

Hollingsworth, Contr. 31; 22 Cyc. 584, 585; 16 Am. & Eng. Enc. Law, 2d ed. 276, 277; Tupper v. Cadwell, 12 Met. 559, 46 Am. Dec. 704; Horstmeyer v. Connors, 56 Mo. App. 115; Phillips v. Lloyd, 18 R. I. 99, 25 Atl. 909; Allen v. Lardner, 78 Hun, 603, 29 N. Y. Supp. 213; Freeman v. Bridger, 49 N. C. (4 Jones, L.) 1, 67 Am. Dec. 258; Price v. Sanders, 60 Ind. 310; Ryan v. Smith, 165 Mass. 303, 43 N. E. 109; Hall v. Acken, 47 N. J. L. 340; McCarty v. Carter, 49 Ill. 53, 95 Am. Dec. 572; Wornack v. Loar, 11 Ky. L. Rep. 6, 11 S. W. 438; Jones, Liens, 1239; Bloomer v. Nolan, 36 Neb. 51, 38 Am. St. Rep. 690, 53 N. W. 1039.

Messrs. Earl P. Finch and Frederic J. Eaton for respondent.

he still has no power to appoint an agent. Burns v. Smith, supra.

In Smith v. Kron, 96 N. C. 392, 2 S. E. 533, the court said: "The next exception, not necessary to be decided in disposing of the appeal, in view of the absence of any evidence to sustain it, is to the ruling that infants, not being able to make binding contracts, except for necessities in a proper case, are incapable of forming such a relation with an agent as to render them liable for his torts, done in prosecuting the objects of the alleged agency. This is what we understand the ruling to be, and we give it our unqualified assent." But "if the instruction goes beyond the liability growing out of, and inseparable from, the relation of principal and agent, formed by contract, positive or implied, and protects the infant of sufficient intelligence and judgment from accountability for torts involved and done in the necessary prosecution of the business of the agency and the attainment of its ends, we are not prepared to concur in its correctness in law. We do not see why the rule in such case, *qui facit per alium, facit per se*, does not apply. But however this may be, the instruction was irrelevant and not hurtful to the appellants, for there was no evidence presenting a state of facts to which it was applicable."

And in Sikes v. Johnson, 16 Mass. 389, "the question . . . was, whether a *feme covert* or a minor might be charged as trespassers for having procured another to commit an assault and battery. And it was holden that they might; for all per- 51 L.R.A.(N.S.)

court:

The question presented is whether an infant owner of property is liable *respondent superior* for the negligent act of a person in the employment of the infant and in charge of such property, where the infant in no way personally participated in such act. The contention of counsel for appellant is that he is not liable, for the reason that he cannot appoint an agent, and that while he may be held for torts committed by himself, he is not liable for the torts of one acting for him in his absence and without his direction or consent.

On the part of the respondent it is insisted that the defendant is liable upon the ground that the party who committed the tort was in the discharge of a lawful duty for the defendant, in the course of which he committed the tort; therefore the defendant is liable. It is true that an infant may be liable for his personal torts. But it seems to be well settled that an infant cannot be made liable for the torts of one acting for him, because he has no power to appoint an agent or servant, and thereby create the relation of master and servant. The liability of a master for the torts of his servant rests on contract existing between master and

sons aiding and abetting, or counseling and procuring, a trespass to be done, are principals, whether present or not. So are those who afterwards assent to a trespass done for their benefit: and there is no exception in the law in favor of *femes covert* or minors. The cases cited to the contrary relate to civil acts, done by the command of persons not having capacity to make contracts; and because such commands are in the nature of a contract, they are void. But trespasses are analogous to crimes, which *femes covert* and minors may be answerable for, although not personally present at the commission of them."

The position taken in COVAULT v. NEVITT is supported by Cooley, as is apparent from the quotation in the opinion from that author (1 Cooley, Torts, 3d ed. p. 188). Mr. Labatt, however, in a discussion of the general subject of contracts made by infants as employers, suggests that "upon the analogy of the doctrine applied in respect to other contracts, it would seem that the contract of an infant for the hire of a servant should, if not clearly prejudicial, be regarded as being merely voidable at his own option; and that, until it has actually been disaffirmed by him, it should be deemed to subsist for all purposes, both as between himself and the servant, and with reference to third persons." (1 Labatt, Mast. & S. § 109.) And among the other consequences from that theory he deduces "that he [the infant] will be answerable for such torts as might be committed by the servant in the course of his employment."

A. C. W.

servant, and an infant, having no power to contract, cannot be held for the torts of the servant. Cooley, Torts, 3d ed. p. 188; 22 Cyc. 514, 620; 16 Am. & Eng. Enc. Law, 2d ed. 308; Reeve, Dom. Rel. 3d ed. 519; 26 Cyc. 968; Burns v. Smith, 29 Ind. App. 181, 94 Am. St. Rep. 268, 64 N. E. 94; Cunningham v. Illinois C. R. Co. 77 Ill. 178; Sikes v. Johnson, 16 Mass. 389; Schenk v. Strong, 4 N. J. L. 87; Lowery v. Cate, 108 Tenn. 54, 57 L.R.A. 673, 91 Am. St. Rep. 744, 64 S. W. 1068; Hampel v. Detroit, G. R. & W. R. Co. 138 Mich. 1, 110 Am. St. Rep. 275, 100 N. W. 1002, 17 Am. Neg. Rep. 84; Smith v. Kron, 96 N. C. 392, 2 S. E. 533; Prescott v. Norris, 32 N. H. 101; Roberts, W. & G. Duty & Liability of Employers, pp. 66, 67; Wood, Mast. & S. 2d ed. §§ 4-6; Burnham v. Seaverns, 101 Mass. 360, 100 Am. Dec. 123; Armitage v. Widoe, 36 Mich. 124; Holden v. Curry, 85 Wis. 504, 55 N. W. 965.

Cooley states the rule concisely thus: "As the doctrine *respondet superior* rests upon the relation of master and servant, which depends upon contract, actual or implied, it is obvious that it can have no application in the case of an infant employer, and he, therefore, is not responsible for torts of negligence by those in his service. Nor can he be made a trespasser by relation through the ratification of a wrongful act which another has assumed to do on his behalf, but without his knowledge." 1 Cooley, Torts, 3d ed. p. 188.

In order to create a liability here there must not only be a valid contract between defendant and the janitor, but the acts of the janitor must be in the line of his employment under the contract. The doctrine of *respondet superior* rests upon the performance of duty in the course of employment, and such duty rests upon contract. Kumba v. Gilham, 103 Wis. 312, 79 N. W. 325, 6 Am. Neg. Rep. 412. In order to make one liable for the tort of another, the relation of master and servant must exist. King v. New York C. & H. R. R. Co. 66 N. Y. 181, 23 Am. Rep. 37; Burns v. Smith, 29 Ind. App. 181, 94 Am. St. Rep. 268, 64 N. E. 94. The general rule is that, since an infant "cannot create an agency or appoint a servant, and therefore cannot delegate powers to another, he cannot guarantee or insure the fidelity, care, or skill of such other." 22 Cyc. 620, and cases cited.

It is clear that in the instant case the alleged contract could only be sustained, if at all, upon the ground that it was a contract for necessities; and it is equally clear that such a contract is not a contract for necessities. 22 Cyc. 584, 585; Hollings-

worth, Contr. p. 31; 16 Am. & Eng. Enc. Law, 2d ed. 276.

The general rule respecting necessities is that they must be such as to supply the personal needs of the infant. Tupper v. Cadwell, 12 Met. 562, 46 Am. Dec. 704. Manifestly the contract in this case is not a contract for necessities under which a liability could be enforced, nor for the benefit of the infant. It has been held that repairs or improvements of a minor's real estate under certain circumstances are not necessities for which the minor can be held liable. 22 Cyc. 595; Tupper v. Cadwell, supra; Price v. Sanders, 60 Ind. 310. And it has been held that a materialman furnishing material to a minor for use in a building can have no lien therefor. Hall v. Kjer, 47 N. J. L. 340; McCarty v. Carter, 49 Ill. 53, 95 Am. Dec. 572; Wornack v. Loar, 11 Ky. L. Rep. 6, 11 S. W. 438; Bloomer v. Nolan, 36 Neb. 51, 38 Am. St. Rep. 690, 53 N. W. 1039; Jones, Liens, 1239. By citing the foregoing cases we do not approve them in every particular, nor do we pass upon the question whether a lien would exist under any circumstances, but cite the cases as showing to what extent courts have gone upon the subject.

Even if the alleged contract of janitorship in question were executed, it would not be binding on the minor if he were not benefited by it, and, if benefited, only to the extent of the benefit. 22 Cyc. 583; Ryan v. Smith, 165 Mass. 303, 43 N. E. 109.

If the alleged contract were voidable, it could be repudiated at any time before the defendant arrived at the age of twenty-one years. It is clear from all the authorities that upon the allegations of the complaint the alleged contract between Powers, the janitor, and defendant could not render defendant liable for the tort of Powers. The defendant had no connection with the alleged tort committed by Powers; had no knowledge of it until after it was committed; neither created nor maintained any nuisance upon the property which in any way contributed to the injury. Upon the facts admitted by the demurrer the acts complained of are solely the acts of the janitor; hence no liability is shown against the defendant. Beven, Workmen's Compensation, 4th ed. pp. 281, 282, and cases cited. The cause of action set up in the complaint is the alleged negligence of Powers, the janitor. The liability of the defendant as claimed by plaintiff rests upon the doctrine of *respondet superior*, and, as we have seen, no liability exists upon that ground. That an infant may be held on a contract for necessities received by him to the extent of the benefits, and that some contracts of an infant are voidable and not

absolutely void, and that infants are liable for torts committed by them personally, may be conceded, and authorities upon these propositions need not be discussed.

The question here is whether a valid contract creating the relation of master and servant between the infant and his alleged servant can be made. We think it clear that it cannot. True, as held in *McCabe v. O'Connor*, 4 App. Div. 354, 38 N. Y. Supp. 572, cited by respondent, an infant may be held liable for maintaining a nuisance upon his property, for that is his personal tort. Other cases are cited by respondent which involve the question of personal torts by the infant. But in the case at bar the complaint is specifically grounded upon the tort of Powers as servant of the defendant.

It is contended by respondent that an infant may appoint an agent to do an act which is clearly to his advantage, citing *Story, Agency*, § 6, *Mechem, Agency*, § 54, and *Ewell's Evans, Principal & Agent*, p. 13. The rule of these authorities is based upon cases of benefits received by the infant and the necessities of the case. *Story, Agency*, § 6, lays down the doctrine that infants are incapable of either wholly or partially appointing an agent, and that an infant cannot authorize one to do an act which is to his prejudice. *Ewell's Evans, Principal & Agent*, pp. 12, 13, and 14 refers to the rule laid down by *Story*, and also to the infants' relief act 1874, Stat. 37 and 38 Vict. chap. 62.

It has been held that an infant might appoint an agent to do an act unquestionably to his advantage—as to receive seisin of an estate conveyed to him. The reason of the rule is based upon the advantage received and the necessities of the case. Suppose an infant should appoint an agent to purchase necessities, and the agent should purchase and convert them to his own use; could the infant be held liable for the purchase price? Or suppose the agent agreed to pay double what the articles purchased were worth; could the infant be compelled to pay the agreed price? We think not.

It is argued that in any event the contract between Powers and the defendant is voidable only, and not void. On this proposition *Patterson v. Lippincott*, 47 N. J. L. 457, 54 Am. Rep. 178, 1 Atl. 506; *Mechem, Agency*, § 54, 22 Cyc. 583, and *Jones v. Valentines' School*, 122 Wis. 318, 99 N. W. 1043, are relied upon. But these authorities go to the extent of holding that the contract will be enforced only to the extent of the benefits received by the infant, and that a voidable contract may be ratified by the infant after becoming of age. They are merely in line with the general rule, and do not hold or intimate that an infant can

be held for a tort committed by one acting for him.

Patterson v. Lippincott, supra, is to the effect that a contract for the infant's benefit is voidable, and may be ratified after becoming of age, and that the defense of infancy is a personal privilege. *Jones v. Valentines' School*, supra, holds that an infant is bound by implied contract to pay reasonably for necessities furnished him, but is not liable upon executory contracts to furnish them, nor upon express contract, but that such an executory contract is voidable, and not absolutely void, and when repudiated by the infant he must, so far as he reasonably can, make or offer to make restitution. But it has been held that the contract of an infant may be avoided by him without making restitution where restitution is impossible. 22 Cyc. 613. It has also been held that the avoidance of a voidable contract by a minor makes the contract void *ab initio*, as though no contract had ever existed. *Vent v. Osgood*, 19 Pick. 572; *Rice v. Boyer*, 108 Ind. 472, 58 Am. Rep. 53, 9 N. E. 420; *Mustard v. Wohlford*, 15 Gratt. 329, 76 Am. Dec. 209.

In 22 Cyc. at page 514, the general rule is stated that an infant cannot appoint an agent, and that such act is absolutely void; but it is said that such act may be voidable, and the case of appointment of an agent to sell a note is cited, where it is held that the infant may, on coming of age, ratify or disaffirm the act. At page 593 the general rule is stated that contracts of infants may be voidable, subject to being disaffirmed or affirmed at majority. The theory of voidable contracts of infants is that they may be sustained for the advantage of the minor, but that they cannot be enforced during infancy if not beneficial to the infant, and, if beneficial, they can be enforced only to the extent that they are beneficial. And so jealous is the law of the rights of infants that, where a tort is committed by an infant growing out of a contract, the infant is not liable if the basis of the cause of action be contract. 22 Cyc. 621; *Lowery v. Cate*, 108 Tenn. 54, 57 L.R.A. 673, 91 Am. St. Rep. 744, 64 S. W. 1068; *Schenk v. Strong*, 4 N. J. L. 87; *Prescott v. Norris*, 32 N. H. 101; *Sikes v. Johnson*, 16 Mass. 389; *Collins v. Gifford*, 203 N. Y. 465, 38 L.R.A. (N.S.) 202, 96 N. E. 721, Ann. Cas. 1913A, 969.

Counsel for respondent cites us to *Labatt on Master and Servant*, where the idea is advanced that an infant ought to be held liable for the acts of his servant in the course of his employment. 1 *Labatt, Mast. & S.* 2d ed. p. 379. The learned author, however, cites no authority to support the position, and admits that there is a sin-

gular dearth of judicial authority respecting the points. He does not attempt to meet the elementary doctrine that the relation of master and servant does not exist between an infant and his servant. Nor does he refer to the universal doctrine that infants can be held on voidable contracts only to the extent of the benefits received. All we have is the statement of the learned author, which, indeed, standing alone, is entitled to great respect, but we do not feel that it can outweigh principle and authority against it. Mr. Labatt, however, frankly admits the authorities are not with him, and does not take a decided position, but suggests an argument on the point.

The cases cited by counsel for respondent where the personal tort of the infant was the basis of the cause of action rest upon a different principle. Infants are, of course, liable for their personal torts, but here, upon the allegations of the complaint, the cause of action rests upon the doctrine of *respondet superior*; therefore the complaint states no cause of action.

The order appealed from is reversed, and the cause remanded, with instructions to sustain the demurrer, and for further proceedings according to law.

Siebecke, J., took no part.

UNITED STATES SUPREME COURT.

ERIE RAILROAD COMPANY, Plff. in Err.,
v.

JOHN WILLIAMS, Commissioner of Labor
of the State of New York.

(233 U. S. 685, 58 L. ed. —, 34 Sup. Ct.
Rep. 761.)

Constitutional law — who may question statute.

1. A railway company cannot complain

Note. — Validity and effect of statute regulating time of payment of wages.

The earlier cases on this subject are collected in the notes to Re House Bill No. 1230, 28 L.R.A. 344; Lawrence v. Rutland R. Co. 15 L.R.A. (N.S.) 350; Arkansas State Co. v. State, 27 L.R.A. (N.S.) 255; and New York C. & H. R. R. Co. v. Williams, 35 L.R.A. (N.S.) 549.

The notes to State v. Northern P. R. Co. 15 L.R.A. (N.S.) 134, People v. Erie R. Co. 29 L.R.A. (N.S.) 240, and Erie R. Co. v. People —, L.R.A. (N.S.) —, on the general subject of state regulation of relation between railroad companies engaged in interstate commerce and their employees, include some cases involving the validity of state statutes relating to the time of payment of wages, as affected by the commerce clause. That question, however, is now settled by 51 L.R.A. (N.S.)

for its employees of the repugnancy to the due process of law and equal protection of the laws clauses of the Federal Constitution of the provisions of N. Y. Laws 1897, chap. 415, § 10, as amended by Laws 1908, chap. 442, requiring the semimonthly payment of the wages of railway employees.

Same — intervals of wage payments.

2. The liberty and property of an interstate railway company are not taken without due process of law by the requirement of N. Y. Laws 1897, chap. 415, § 10, as amended by Laws 1908, chap. 442, passed in the exercise of the reserved power of the state over the charters of its corporations, that railway employees shall be paid their wages semimonthly, the effect of which is to prohibit both carrier and employees from contracting otherwise.

Commerce — state regulation — time of payment of railway employees.

3. Requiring an interstate railway carrier to pay its employees semimonthly does not, until Congress acts upon the subject, amount to an unlawful burden upon interstate commerce, where, as construed by the state courts, such requirement relates to those railway servants who are employed wholly within the state, and those whose duties take them from that state into other states, but not to those employed in other states.

(May 25, 1914.)

ERROR to the Supreme Court of the State of New York for Albany County to review a judgment entered pursuant to the mandate of the Court of Appeals, which affirmed a judgment of the Appellate Division of the Supreme Court, Third Department, which in turn had affirmed a judgment of a Special Term for Albany County, dismissing a complaint filed to enjoin the enforcement of a state law requiring semimonthly payment of wages of railway employees. Affirmed.

the decision of the United States Supreme Court in *ERIE R. Co. v. WILLIAMS*; at least, until Congress has acted in relation to the matter.

In *Cleveland, C. C. & St. L. R. Co. v. Schuler*, — Ind. —, 105 N. E. 567, it was held that the Indiana statute (§ 2983c, Burns's Anno. Stat. 1914) was unconstitutional as arbitrary class legislation, which provided that "any railroad company employing men shall within seventy-two hours after any employee voluntarily quits such service or is discharged, pay to such employee in full the wages due to the time of quitting of such service: Provided, demand is made, therefor and upon failure so to do, such railroad company shall be liable to such employee for each day until such payment is made in a sum equal to the daily wage of the employee." The court said: "It is true . . . that railroads

Statement by Mr. Justice McKenna:

Suit brought by plaintiff in error, the Erie Railroad Company (as it was plaintiff below, we shall so designate it), to restrain the defendant in error (herein called defendant) from instituting actions to recover penalties for noncompliance with the provi-

sions of the labor law of the state of New York, which required plaintiff to pay its employees semimonthly and in cash.

The object of the suit is to test the constitutionality of the law.

The bill is very elaborate and alleges with much detail the following facts: Plain-

may be placed in a class by themselves for some legislative purposes, but only for such purposes as have to do with duties peculiar to them as carriers, or with the dangers peculiar to their operation. . . . There is nothing in the act under consideration which suggests a valid basis for the classification which it makes. It is not designed to regulate the business of common carriers, nor has it any reference to the hazards peculiar to the operation of railroads. In brief, no good reason appears for requiring railroads to pay in accordance with the provisions of this act those who leave their service, while manufacturing corporations and other employers of labor are excepted from its operation." The court further points out that when the act was passed there was no statute relating to the time of payment of wages of railroad employees, but that since the passage of the act a statute was passed requiring all employers of labor to pay their employees semimonthly, and said: "If the act in controversy can be held valid, we would have a present situation where the faithful employee who is working regularly can only demand payment of his wages semimonthly, while one who voluntarily quits the service of the railroad company without cause must be paid in seventy-two hours. There is no just reason for such discrimination. The classification made in the act before us is arbitrary and without any valid reason for its basis."

It would seem that upon the question of class legislation this case is not to be reconciled with the decision in *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419, considered in the said note in 35 L.R.A.(N.S.) 550, and referred to in the opinion in *FRIE R. Co. v. WILLIAMS*, as the statute in the Paul Case was limited to corporations or persons operating or constructing railroads or railroad bridges, but the Indiana court does not refer to such decision.

In *Wynne v. Seaboard Air Line R. Co.* — S. C. —, 79 S. E. 521, the court sustained the statute of South Carolina requiring immediate payment on demand of wages earned by a laborer discharged by "any corporation carrying on any business in this state in which laborers are employed, whose wages, under the business rule or custom of such corporation, are paid monthly or weekly on a fixed day beyond the end of the month or week in which the labor is performed." The court held that the statute did not deprive the corporation of its property without due process of law, nor deny to it the equal protection of the laws, and cited, as sustaining a similar statute, the aforesaid case of *St. Louis*, 51 L.R.A.(N.S.)

I. M. & S. R. Co. v. Paul, supra, and stated that the principal ground taken by the supreme court of Arkansas in the Paul Case of the right to alter or repeal all charters of incorporation was equally applicable under the South Carolina Constitution. The court held also that such legislation might be sustained under the police power. It will be noticed that the statute sustained in the Paul Case applied to a much more restricted class than the foregoing South Carolina statute.

In *State v. Missouri P. R. Co.* 242 Mo. 339, 147 S. W. 118, the court sustained the constitutionality of the Missouri statute of 1911, entitled, "An Act Requiring All Corporations Doing Business in This State to Pay Their Employees as Often as Semimonthly, and Fixing Penalties for Violation Thereof." It was held in terms that such statute did not violate § 1 of art. 14 of the Amendments to the U. S. Constitution, nor did it conflict with § 10 of art. 1 of that Constitution as destroying the right of defendant to make legitimate contracts with its employees in respect to matters which are not a violation of any criminal law, and which do not relate in any manner to the safety, health, or public welfare of such employees, as the law does tend to promote the welfare of defendant's employees and the general public, and is not needlessly injurious or oppressive to corporations. It was also held that the law did not violate the Missouri Constitution as depriving the companies of their natural right and liberty to contract, or of the gains of their own industry, or of their property without due process of law, or of the charter right to employ labor upon any reasonable terms agreed upon: nor did it violate such Constitution as taking the company's private property and appropriating the same to the private use of certain of its employees, nor as granting irrevocable privileges to certain persons, nor as special or class legislation.

In *Regan v. Tremont Lumber Co.* — La. —, 63 So. 874, it was held that the Louisiana statute of 1908, providing that checks, punch-outs, tickets, etc., issued to laborers and employees for their services, shall be redeemed in current money, does not violate any provisions of the Constitution of the United States. This act was in substance similar to the statute of Tennessee sustained in *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1, referred to at length in the aforesaid note in 35 L.R.A.(N.S.) 549, and also in the opinion in *ERIE R. Co. v. WILLIAMS*, and the Louisiana court follows the Harbison decision.

B. B. B.

tiff is a New York corporation, and defendant is commissioner of labor of the state. Plaintiff maintains a railroad in New York which extends into other states, and operates car floats and other floating equipment, navigating the navigable waters of the United States. These and other equipment are used in the business of plaintiff as a common carrier of persons and property under and in compliance with tariffs duly promulgated and filed under the laws of the state and of the United States; and plaintiff is also a carrier of the United States mails. As a rule, the trains of plaintiff run over an operating division without change of employees. Some of the divisions are interstate and some wholly within the state of New York.

Plaintiff, in carrying out its functions, has in its service upon that portion of its road lying east of Meadville, Pennsylvania, upwards of 15,000 men, who are employed either wholly within or partially within the state of New York, and nearly all of them are employed in the movement of interstate commerce. The great majority of these employees render service in more than one state, and many of them who reside in Pennsylvania or New Jersey render a part of their service in New York, any many who reside in the latter state render service in the other two states. The contracts of employment of many of them were made, and in the future must be made, in states other than New York, in which states they must reside.

By the laws of New York plaintiff was vested with its powers as a railroad and to contract and be contracted with for the employment of persons to conduct its operations and enterprises at and for such wages and upon such terms of payment as should or might be mutually agreed on; and thereunder it has been its custom to pay its employees monthly, and thus pay them prior to or on the 20th day of each month the wages earned during the preceding month.

The great majority of plaintiff's employees were in its service prior to January 1, 1908, and all accepted such service with full knowledge of its general and uniform custom so to pay its employees monthly.

Prior to January 1, 1908, there existed and has since existed a contract between plaintiff and its employees that the latter should be paid monthly as stated, and so to pay them, as distinguished from payment twice a month, is not inconsistent with the public interest, or hurtful to the public order, or detrimental to the common good.

Section 4 of the labor law of the state makes it malfeasance in office for any officer, agent, or employee of the state to violate § 1 L.R.A. (N.S.)

or evade his duty under the law, or knowingly permit the violation or evasion of the act, and he is subject to removal from office.

Section 9† provides that every railroad company and certain other companies shall pay their employees in cash, and no such

†"Section 9. Cash payment of wages.—Every manufacturing, mining, quarrying, mercantile, railroad, street railway, canal, steamboat, telegraph and telephone company, every express company, every corporation engaged in harvesting and storing ice, and every water company, not municipal, and every person, firm, or corporation engaged in or upon any public work for the state or any municipal corporation thereof, either as a contractor or a subcontractor therewith, shall pay to each employee engaged in his, their, or its business, the wages earned by such employee in cash. No such company, person, firm, or corporation shall hereafter pay such employees in script, commonly known as store money orders. [Laws 1897, chap. 415, as amended by Laws 1908, chap. 443.]

"Section 10. When wages are to be paid.—Every corporation or joint stock association, or person carrying on the business thereof by lease or otherwise, shall pay weekly to each employee the wages earned by him to a day not more than six days prior to the date of such payment. But every person or corporation operating a steam surface railroad shall, on or before the 1st day of each month, pay the employees thereof the wages earned by them during the first half of the preceding month, ending with the 15th day thereof, and on or before the 15th day of each month pay the employees thereof the wages earned by them during the last half of the preceding calendar month. [Laws 1897, chap. 415, as amended by Laws 1908, chap. 442.]

"Section 11. Penalty for violation of preceding sections.—If a corporation or joint-stock association, its lessee or other person carrying on the business thereof, shall fail to pay the wages of an employee, as provided in this article, it shall forfeit to the people of the state the sum of \$50 for each such failure, to be recovered by the factory inspector in his name of office in a civil action; but an action shall not be maintained therefor unless the factory inspector shall have given to the employer at least ten days' written notice that such an action will be brought if the wages due are not sooner paid as provided in this article.

"On the trial of such action, such corporation or association shall not be allowed to set up any defense, other than a valid assignment of such wages, a valid set-off against the same, or the absence of such employee from his regular place of labor at the time of payment, or an actual tender to such employee at the time of the payment of the wages so earned by him, or a breach of contract by such employee, or a denial of the employment." [Laws 1897, chap. 415.]

company shall pay its employees in scrip, commonly known as store money orders.

Section 10 requires the payment of employees' wages semimonthly.

Section 11 imposes a penalty of \$50 for each failure to so pay, to be recovered by the factory inspector in his name of office in a civil action, and limits the defenses to the action to a valid assignment of such wages, a valid set-off against the same, or the absence of such employee from his regular place of labor at the time of the payment, or an actual tender at the time of the payment, or a breach of contract by such employee, or a denial of the employment.

The commissioner of labor is required to enforce the provisions of the law, and notified plaintiff of his intention to do so, and to sue for the penalties imposed by the act. He expressed his opinion of the act to be that each failure to pay the wages of each employee constituted a separate offense, and that the aggregate of the penalties would be \$250,000. Plaintiff believes, unless that officer is restrained, that he will exercise his authority under the act.

The employees of plaintiff are distributed over more than 1,819 miles, and the making of the payment of their wages in money semimonthly instead of monthly will impose upon and subject plaintiff to an increased cost and expense of several thousand dollars each month.

The difficulty of semimonthly payments is described, and it is alleged that the drastic and enormous penalties are, by reason of their necessarily aggregate character and effect, so excessive as to evidence legislative intention to unduly limit or prevent judicial inquiry, and practically constrain plaintiff to submit to the statute rather than, by contesting its validity, to take the chances of the penalties it imposes.

That the statute by its terms prevents plaintiff from setting up in defense the contracts existing between it and its employees for the payment of their wages once a month, and that the statute violates, when applied to plaintiff, various provisions of the Constitution of the state and of the United States, and thereby is repugnant to article 3 of the Constitution of the United States and article 6 of the Constitution of the state of New York, in that it is an invasion by the legislative of the judicial power; and it is also repugnant to § 1 of article 14 of the Constitution of the United States, and § 6, article 1, of the Constitution of the state of New York, in that it deprives plaintiff of property without due process of law; and violates § 10, article 1, of the Constitution of the United States, in that it impairs the obligation of contracts. The act in its other provisions de-

prives plaintiff of property without due process of law, and of the equal protection of the laws. It also interferes with and impairs plaintiff's performance and discharge of its duties as a common carrier in interstate commerce, is not a valid exercise of the police power, and is illegal and unenforceable and void under articles of the Constitution of the state and of the United States, which are enumerated.

By the enforcement of the act plaintiff will be subjected to enormous penalties, a multiplicity of suits, and to great and irreparable damage, and plaintiff has no adequate remedy at law.

The answer of the defendant admitted the allegations of the complaint as to the statute, and alleged that he intended to give such notice to plaintiff as to enforcing such penalties as he was required by the law to give and enforce. He denied that he had any knowledge or information sufficient to form a belief regarding the truth of the other allegations of the complaint.

A stipulation of facts was entered into by the parties upon which the court entered judgment dismissing the complaint. The judgment was successively affirmed by the appellate division of the supreme court and by the court of appeals.

The facts stipulated practically sustain the allegations of the answer, and detail the manner of the payment by plaintiff of its employees. The plaintiff also introduced in evidence an exhibit which classified its employees and showed the number of days' work, total compensation and average compensation per day as per pay rolls for the year ending June 30, 1908. Its materiality was contested.

Messrs. Frederic D. McKenney and George F. Brownell, for plaintiff in error:

The labor law of New York is repugnant to U. S. Const., 14th Amendment, in that it deprives the company of property, and specifically deprives the company and those of its employees to whom it applies of liberty without due process of law.

Wright v. Hart, 182 N. Y. 344, 2 L.R.A. (N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Republican Iron & Steel Co. v. State, 160 Ind. 379, 62 L.R.A. 136, 66 N. E. 1005; Braceville Coal Co. v. People, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; Johnson v. Goodyear Min. Co. 127 Cal. 4, 47 L.R.A. 338, 78 Am. St. Rep. 17, 59 Pac. 304; Godecharles v. Wigeman, 113 Pa. 431, 6 Atl. 354; San Antonio & A. P. R. Co. v. Wilson, 4 Tex. App. Civ. Cas. (Willson) 565, 19 S. W. 910; Toledo, St.

L. & W. R. Co. v. Long, 169 Ind. 316, 124 Am. St. Rep. 226, 82 N. E. 757.

The conditions under which the legislature, in the exercise of its reserved right to alter and amend corporate charters, may deprive a person (*i. e.*, a corporation) of liberty or property, are substantially the same as those which will justify such a deprivation in the exercise of the police power.

Lord v. Equitable Life Assur. Soc. 194 N. Y. 212, 22 L.R.A.(N.S.) 420, 87 N. E. 443; *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357; *Johnson v. Goodyear Min. Co.* 127 Cal. 4, 47 L.R.A. 338, 78 Am. St. Rep. 17, 59 Pac. 304.

The question whether a statute is or is not a valid exercise either of the police power or the power to alter or amend charters is a judicial one, not foreclosed by legislative action.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Forster v. Scott*, 136 N. Y. 577, 18 L.R.A. 543, 32 N. E. 976; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; *People v. Hawkins*, 157 N. Y. 1, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; *Beardsley v. New York, L. E. & W. R. Co.* 162 N. Y. 230, 56 N. E. 488; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 10 Sup. Ct. Rep. 565; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; *People v. Orange County Road Constr. Co.* 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129; *People v. Williams*, 189 N. Y. 131, 12 L.R.A.(N.S.) 1130, 121 Am. St. Rep. 854, 81 N. E. 778; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133.

In the interest of uniformity of operation, so necessary to the success of every great transportation enterprise whose field of operation is national in scope and character, the power to regulate the relations between such an employer and its employees, if any regulation be necessary, should be reserved to the Congress exclusively.

Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Minnesota Rate Cases (Simpson v. Shepard)* 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 720.

It cannot well be said that the requirement to pay many thousand employees located in several states and on board vessels plying the navigable waters of the

United States is a matter of merely local concern.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 398, 57 L. ed. 1511, 1540, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729.

The excess cost of paying employees twice a month, as distinguished from once a month, and the burden of care, labor, and responsibility imposed by the statute, constitute a direct burden upon interstate commerce, and violate the commerce clause of the Federal Constitution.

Foster v. Master & Wardens, 94 U. S. 246, 24 L. ed. 122; *Moran v. New Orleans*, 112 U. S. 69, 28 L. ed. 653, 5 Sup. Ct. Rep. 38; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 309, 7 Sup. Ct. Rep. 1118; *Illinois C. R. Co. v. Illinois*, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 52 L. ed. 231, 28 Sup. Ct. Rep. 121; *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638.

The statute violates the 14th Amendment of the Constitution of the United States, and is unconstitutional in that it denies to the employees of the Erie Railroad Company the equal protection of the laws.

Kane v. Erie R. Co. 68 L.R.A. 788, 67 C. C. A. 653, 133 Fed. 686; *Bedford Quarries Co. v. Bough*, 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529; *Toledo, St. L. & W. R. Co. v. Long*, 169 Ind. 316, 124 Am. St. Rep. 226, 82 N. E. 757; *Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard)* 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 669, 17 Sup. Ct. Rep. 255.

Messrs. **Joseph A. Kellogg, Thomas Carmody, Attorney General, and Wilber W. Chambers**, for defendant in error:

Legislative acts will be presumed to be constitutional, and if there is any doubt at all, such doubt will be resolved in favor of the validity of such acts.

Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; *Sweet v. Rechel*, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43; *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 281, 53 L. ed. 176, 186, 29 Sup. Ct. Rep. 50.

These statutes are a proper exercise of the reserved power to amend corporate charters, contained in the Constitution of the state of New York.

Berea College v. Kentucky, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33; *Leep v.*

L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; *Adirondack R. Co. v. New York*, 176 U. S. 335, 44 L. ed. 402, 20 Sup. Ct. Rep. 460; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437; *People v. O'Brien*, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961; *Lord v. Equitable Life Assur. Co.* 194 N. Y. 212, 22 L.R.A. (N.S.) 420, 87 N. E. 443.

There is but a single limitation to this general rule of the power to amend charters by the state, enacted under its sovereign power, and that is, the power may not be exercised to destroy property or rights guaranteed by the 14th Amendment of the United States Constitution, and by similar provisions of state Constitutions.

St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 408, 43 L. ed. 746, 747, 19 Sup. Ct. Rep. 419.

Only those persons belonging to the class for whose benefit the particular constitutional provision in question was enacted may legally raise the question that the statute violates such provision.

Red River Valley Bank v. Craig, 181 U. S. 548, 558, 45 L. ed. 994, 1000, 21 Sup. Ct. Rep. 703; *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; *Yazoo & M. Valley R. Co. v. Jackson Vinegar Co.* 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40.

The primary purpose of these laws is to secure to the laboring men the full value or purchasing power of their wages.

State v. Brown & S. Mfg. Co. 18 R. I. 16, 17 L.R.A. 856, 25 Atl. 246; *State v. Peel Splint Coal Co.* 36 W. Va. 802, 17 L.R.A. 385, 15 S. E. 1000; *Arkansas Stave Co. v. State*, 94 Ark. 27, 27 L.R.A.(N.S.) 255, 140 Am. St. Rep. 103, 125 S. W. 1001.

Mr. Justice McKenna delivered the opinion of the court:

The contention of plaintiff is that the labor law is repugnant to the 14th Amendment, "in that it deprives the company of property, and specifically deprives the company, and those of its employees to whom it applies, of liberty, without due process of law." The contention may be limited at the outset to the rights of the company. It cannot complain for its employees; and before considering the contention thus limited, it is well to see what meaning or extent the court of appeals gave to the law.

The court decided that the law operates not only to require the railroads to pay their employees semimonthly, but prohibits them from making contracts with their em-

ployees. If this were not so, the law, the court said, would deprive their employees would have no complaint, "as both master and servant would be left at liberty to contract as they pleased in the market when the servant's wages were payable and the medium of payment would be paid." This liberty of contract, the court stated the contention was to be that the law deprives the employer to make contracts with his employees on advantageous terms, and beyond the power of the plaintiff also contended the equal protection of the law.

The opposing contention was: (1) The legislation of the power reserved of the state to amend its laws; (2) it constitutes a law which gives the police power of the state to the employer.

The court rejected the contention of the plaintiff, and sustained the exercise of the power over the wages, and, adverting to the requirement of semimonthly payment, an unconstitutional in state commerce, the court observed that it [the law] does not conflict with any legislation of the state. And, exhibiting the effect of the law, it was found that it relates to the wages of the employees employed wholly within the state of New York, as well as to those whose duties take them out of the state. The subject of interstate commerce has not under the law of New York, C. & H. R. R. Co. v. New York, C. & H. R. R. Co. 123, 35 L.R.A. 850, 92 N. E. 1001.

How far the reservation of the power over the charters of the companies helped out by its power to amend, gave no indication.

that, in its reference in reviewing the decision, the sole ground of its decision was the session and exercise of the power of the state. The court said:

"There is an irreconcilable conflict of decisions in different states as to the constitutionality of legislation fixing the minimum of the wages of the employees of corporations. After a review of the leading cases sustaining our New York law, the ground which has been consistently maintained is that it does not

burden upon the corporations to which it relates; but that, I think, is within the power of the legislature to the extent to which it has been exercised in this case."

The legislation having been passed in the exercise of the reserved power of the state, is it valid, notwithstanding it prohibits both the plaintiff and its employees from contracting against its provisions? Plaintiff asserts the negative, and attempts to sustain the assertion by a very comprehensive argument in which a number of decisions of this court and of other courts are cited and reviewed. They illustrate by various instances the fundamental and indisputable principle that personal liberty includes the power to make contracts. But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail—principle or condition—cannot be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint, or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance. *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 562, 55 L. ed. 328, 336, 31 Sup. Ct. Rep. 259; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. —, 34 Sup. Ct. Rep. 612.

In considering the competency of the legislative judgment and the power the courts have to review it, we may inquire, what is here complained of? What does the labor law of New York do that seriously affects the liberty of plaintiff? It requires cash payments. That requirement is not now resisted. It requires semimonthly payments. Plaintiff now pays monthly. The extent of its grievance, therefore, is two payments a month instead of one, with the consequence of expense and inconvenience. It is hardly necessary to say that cost and inconvenience (different words, probably, for the same thing) would have to be very great before they could become an element in the consideration of the right of a state to exert its reserved power or its police power. *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 51 L.R.A.(N.S.)

437; *United States v. Union P. R. Co.* 160 U. S. 1, 40 L. ed. 319, 16 Sup. Ct. Rep. 190; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115. See also *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621.

Putting cost and inconvenience to one side, there would remain only an abstract right. Taking them into consideration, they constitute the detriment to which plaintiff is subjected by not being able to make the forbidden contracts. It may be admitted an advantage is taken away from plaintiff, or, to put it another way, a burden is imposed upon it. Is it within the power of the state to impose the burden by virtue of its reserved control over plaintiff? The question must be answered as if the requirement of the law was part of the charter of plaintiff, and in such case it would seem certainly that a liberty of contract could not be asserted against it, for it would be a part of the contract accepted and binding on plaintiff,—a liberty exercised precluding a liberty to be exercised,—and it would seem necessarily to be the very essence of the right of amendment reserved that what could have been put in the charter originally, whatever its consequence, can be added to the charter, whatever the consequence of the addition. Of course, we mean what was and is competent for the state to impose; and we are brought to the narrow question whether a regulation of the time and manner of payment by a railroad of its employees is within the competency of the state to require. A negative answer is contended for, the argument urged to support the contention being that a contract right of dealing with its employees is conferred by plaintiff's charter, which right the labor law takes away, and plaintiff is deprived of property because of the expense to which it is subjected, which, it is contended, is not justified by a corresponding public benefit. It would seem, therefore, to be the contention of plaintiff that it acquired by its charter a vested right to deal with its employees according to its own judgment, and, as alleged in its answer, that it was vested with its powers as a railroad and to contract and be contracted with, for the employment of persons to conduct its operations and enterprises at and for such wages and upon such terms of payment as might or should be agreed on. In other words, it is the contention that the rights asserted are of the very essence of its grant, giving it the rights of a natural person, and investing it with the

same immunity from control, whether exercised under the police power or the reserved power of amendment. We may, in answering the contention, put aside the rights of natural persons and the rights which might exist under a Constitution which did not reserve control in the state. The effect of the control reserved was to make plaintiff, from the moment of creation, subject to the legislative power of alteration, and, if deemed expedient, of absolute extinguishment as a corporate body. *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 352, 28 L. ed. 173, 175, 4 Sup. Ct. Rep. 48. And whether expedient or not is a question for the legislature, not for the courts. *Id.* 357. In other cases the effect of the reserved power of amendment is said to be to make any alteration or amendment of a charter subject to it which will not defeat or substantially impair the object of the grant or any right vested under the grant. *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 697, 698, 43 L. ed. 858, 864, 19 Sup. Ct. Rep. 565; *Looker v. Maynard*, 179 U. S. 46, 52, 45 L. ed. 79, 81, 21 Sup. Ct. Rep. 21. Surely the manner or time of paying employees does not come within such limitation. It is a matter of pure administration, not comparable in its burden to those sustained in the cases which we have already cited.

In *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419, a law of Arkansas was sustained as an exercise of the reserved power of the state which required a railroad company discharging with or without cause, or refusing to employ, any servant or employee, to pay him his unpaid wages, then earned, at the contract rate, without abatement or deduction, to the date of his discharge, and providing that, if the same be not paid on such day, then, as a penalty for nonpayment, his wages shall continue at the same rate until paid.

In *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437, the railroad company was required to remove various grade crossings at its own expense.

In the *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496, legislation requiring the creation of a sinking fund was sustained under the reserved power of amendment, and, after reviewing the cases, the court said "that whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment." Many other cases might be cited, but to cite them would be to accumulate authorities on a proposition which might well be taken at 51 L.R.A. (N.S.)

this late date to be incontestable. Indeed, the contention of defendant that the legislation under review might be supported under the police power of the state has justification in cases.

In *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1, a law of the state of Tennessee which required all persons and corporations to redeem in money evidences of indebtedness given to their laborers or employees, in the hands of their laborers, employees, or a bona fide holder, came up for consideration. The *Knoxville Coal Company* paid its employees in cash and in coal orders. It made money by the practice. There was no proof of an express agreement between the company and its employees that the orders should be paid only in coal, except as implied from accepting the orders, and no proof of an implied agreement except as drawn from the face of the orders and the custom of the company. There was no proof of compulsion except that if the employees did not accept pay in coal orders they had to submit to be in arrears about twenty days, but the company paid in coal orders the whole wages due at the end of each month. *Harbison* purchased a number of the coal orders and demanded their payment in cash, which was refused. He then brought suit against the company, relying on the statute. The Supreme Court gave him judgment, which was affirmed by this court on the ground that the law was a proper exercise of the police power of the state. This court, by Mr. Justice Shiras, commenting on *St. Louis, I. M. & S. R. Co. v. Paul*, *supra*, said that in that case stress was laid upon the reserved power of amendment which the state had, "but it is also true that, inasmuch as the right of contract is not absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the state and its inhabitants, the police power of the state may, within definite limitations, extend over corporations outside of and regardless of the power to amend charters." *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609. The ruling was followed in *Dayton Coal & I. Co. v. Barton*, 183 U. S. 23, 46 L. ed. 61, 22 Sup. Ct. Rep. 5, although the *Dayton Company* was not incorporated under the laws of Tennessee.

In *McLean v. Arkansas*, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206, a law of Arkansas required, where miners were employed at quantity rates, and more than ten were employed, that they should be paid by the weight of coal mined by them as it comes from the mine and before it was passed over a screen of any kind. One of

the grounds of attack on the law was that it was an unwarranted invasion of the right of contract secured by the 14th Amendment, the argument being that the law prevented the miners from contracting for wages upon the basis of screened coal instead of the weight of the coal as originally produced at the mine. The law was sustained as a proper exercise of the police power of the state.

It is, however, contended by plaintiff, that the law under review cannot be sustained either as an exertion of the police power or as an alteration of the charter of plaintiff, unless the court can say from a comparison of the systems of payment—monthly and semimonthly—that the former affects adversely the general welfare or public good, and the latter “remedies that evil or condition, and of itself does not constitute an unjust burden upon the employer.” But whether the law imposes an unjust burden depends upon its validity, and whether the public welfare is subserved by one system or the other is, as we have said, in the first instance, for the legislature to determine, and its judgment will not be reviewed unless “unmistakably and palpably in excess of legislative power.” *McLean v. Arkansas*, *supra*. The labor law of New York cannot be so characterized.

There are certainly advantages of cash payment over deferred payments, and an advantage to those who work for a living of a ready purchasing power for their needs over the use of credit. This is found as a fact by the trial court, and even if there is no affirmative evidence of it, it is the expression of experience.

The next contention of plaintiff is that the cost of paying twice a month is a direct burden on interstate commerce. It is not necessary to review and compare the cases in which this court has pointed out the difference between a direct and indirect burden of state legislation upon interstate commerce, or the power of the states in the absence of regulation by Congress. It is enough to say in the present case that Congress has not acted, and there is not, therefore, that impediment to the law of the state; nor is there prohibition in the character of the burden. The effect of the provision is merely administrative, and so far as it affects interstate commerce, it does so indirectly. The court of appeals, as we have seen, considered that the law relates to the wages of railway servants employed wholly within the state, and to those whose duties take them from the state into other states. In other words, did not make it applicable to those employed in other states, and it therefore does not embrace all of the employees of plaintiff, 51 L.R.A.(N.S.)

and the contention based upon its application to all is without foundation.

The last contention of plaintiff is that the statute violates the 14th Amendment, “in that it denies to the employees of the Erie Railroad Company the equal protection of the laws.” Considerable argument is made to support the contention, in which a comparison is made between the employees—mechanics, workmen, and laborers—to whom the law applies, and the other employees of the company, and it is declared that all, if any, suffer from monthly payments, and all are entitled, therefore, to receive the benefit of semimonthly payments. But, as we have said; employees are not complaining, and whatever rights those excluded may have, plaintiff cannot invoke.

Judgment affirmed.

CALIFORNIA SUPREME COURT. (In Banc.)

DORA R. HOUSEL et al., Appts,
v.

PACIFIC ELECTRIC RAILWAY COMPANY, Resp't.

(— Cal. —, 139 Pac. 73.)

Carrier — collision with vehicle — injury to passenger — presumption of negligence.

The injury of a street car passenger by collision of the car with a vehicle upon the highway raises a presumption of negligence on the part of the carrier which will justify a verdict against it in an action to hold it liable for the injury, unless it explains the cause of the collision.

(February 13, 1914.)

APPPEAL by plaintiffs from a judgment of the Superior Court for Los Angeles County in defendant's favor and from an order denying a new trial in an action brought to recover damages for personal injuries alleged to have been caused by the negligent operation of defendant's car. Reversed.

The facts are stated in the opinion.

Messrs. Thomson & Spencer, for appellants:

Plaintiff was entitled to a presumption that her injury was caused by the defendant carrier's negligence; she thereby made

Note. — Generally as to presumption of negligence from injury to passenger, see notes in 15 L.R.A. 35, 13 L.R.A.(N.S.) 601, 29 L.R.A.(N.S.) 808, and later cases cited in L.R.A. Dig. “Evidence,” II, specifically as to presumption in case of collisions, see page 608 of the note in 13 L.R.A.(N.S.), and page 812 of the note in 29 L.R.A.(N.S.).

out a prima facie case, and in order to rebut this presumption of negligence, it was necessary for the respondent to show that the accident "was the result of inevitable casualty, or of some cause which human care and foresight could not prevent."

Boyce v. California Stage Co. 25 Cal. 400, 9 Am. Neg. Cas. 66; Mitchell v. Southern P. R. Co. 87 Cal. 62, 11 L.R.A. 130, 25 Pac. 245, 9 Am. Neg. Cas. 85; McCurrie v. Southern P. Co. 122 Cal. 558, 55 Pac. 324, 5 Am. Neg. Rep. 117; Bassett v. Los Angeles Traction Co. 6 Cal. Unrep. 700, 65 Pac. 470; Sambuck v. Southern P. Co. 7 Cal. Unrep. 104, 71 Pac. 174; Cody v. Market Street R. Co. 148 Cal. 90, 82 Pac. 666; Boone v. Oakland Transit Co. 139 Cal. 490, 73 Pac. 243; Kline v. Santa Barbara Consol. R. Co. 150 Cal. 741, 90 Pac. 125; Bonneau v. North Shore R. Co. 152 Cal. 406, 125 Am. St. Rep. 68, 93 Pac. 106.

Messrs. J. W. McKinley and R. C. Gortner, for respondent:

The action was not one for the application of the doctrine of *res ipsa loquitur*.

Osgood v. Los Angeles Traction Co. 137 Cal. 282, 92 Am. St. Rep. 171, 70 Pac. 169; Harrison v. Sutter Street R. Co. 134 Cal. 549, 55 L.R.A. 608, 66 Pac. 787; Potts v. Chicago City R. Co. 33 Fed. 610, 10 Am. Neg. Cas. 674; Quinlan v. 6th Ave. R. Co. 4 Daly, 488; North Side Street R. Co. v. Want, 4 Tex. App. Civ. Cas. (Willson) 237, 15 S. W. 40.

Angellotti, J., delivered the opinion of the court:

The following statement is taken from the opinion of the district court of appeals of the second district filed in this case:

"The action is one brought to recover damages for injuries alleged to have been received by plaintiff Lora R. Housel, who was a passenger upon a car of defendant, on account of the negligent operation of such car. The action was tried by a jury and a verdict rendered in favor of defendant. From the judgment entered upon such verdict, and from an order denying a new trial, plaintiffs appeal upon a statement.

"The injuries inflicted upon plaintiff Mrs. Housel were occasioned by reason of a collision between the car upon which she was a passenger and a hay wagon: both being upon the public streets of the city of Los Angeles. There is evidence in the record tending to show that the driver of the wagon, which was drawn by four horses and loaded with hay, going down a hill, lost control of his team, and that when about 150 feet from the point of collision one of the horses fell; that the motorman in charge of the car, having an opportunity

to and seeing the team approaching, made no effort to stop his car, but continued on at a high rate of speed, and the car was actually in motion at the time the collision occurred. In other words, there was evidence tending to show gross negligence on the part of the servants of defendant, and that the injury was occasioned thereby. As is usual in cases of this character, there was a decided conflict in the evidence; that introduced by defendant tending to show that the accident was unavoidable and that its servants exercised the utmost care in the management of the car. Under this proof, the court properly instructed the jury as to the degree of care enjoined by law upon a carrier of passengers; that even the slightest negligence upon the part of defendant's servants rendered defendant liable; and that this was true even though some unavoidable accident or negligence of some other person may have also contributed to cause the accident."

The principal question in this case is whether the doctrine of *res ipsa loquitur* is applicable under the circumstances. This question arises in view of certain instructions to the jury, given by the trial court, and the refusal of the court to give certain other instructions requested by plaintiffs.

The doctrine of *res ipsa loquitur* is thus stated in § 59 of Shearman & Redfield on the Law of negligence, 6th ed., viz.: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." This doctrine has been applied in a long line of cases in this state involving injuries to a passenger while being transported by a common carrier. The effect of the doctrine, when applied to such cases, is that proof of the injury to the passenger while he was being carried as such creates a prima facie case or presumption of negligence on the part of the carrier, which the carrier is called upon to meet or rebut. "The presumption that the injury was caused by the negligence of the carrier, which is raised upon the proof by the plaintiff that he was injured while being carried as a passenger, is itself a fact which the jury must consider in determining its verdict, and which, in the absence of any other evidence in reference to the negligence, necessitates a verdict in favor of the plaintiff." See Bush v. Barnett, 96 Cal. 204, 31 Pac. 2; Sambuck v. Southern P. Co. 7 Cal. Unrep. 104, 71 Pac. 174. If the doctrine was applicable under the circum-

can successfully be disputed that the trial court erred in the matter of instructions to the jury. The learned judge of the trial court clearly believed that the doctrine was not applicable here, and expressly instructed the jury that "the fact that an accident or collision happened is not to be considered by you as tending to prove negligence on the part of the defendant," and also that "the mere fact that the car came in contact with the car is not of itself evidence of negligence on the part of the defendant." He also refused to give a requested instruction in line with what we have already declared to be the situation where the doctrine is applicable, and gave an instruction which, considered in connection with the whole charge, negatived the theory that there was any presumption arising from proof of the accident, which the jury must consider as a fact in arriving at a verdict. The theory of learned counsel for defendant is that the doctrine is not applicable here for the alleged reason that the jury was not caused by an instrumentality under defendant's control; or, at least, that the evidence on the question whether it was caused by such an instrumentality was conflicting.

As against the carrier, it appears to be settled by the decisions in this state that, under such circumstances as appear here, the doctrine of *res ipsa loquitur* is applicable in favor of the passenger. The question was squarely presented in *Osgood v. Los Angeles Traction Co.* 137 Cal. 280, 92 Am. St. Rep. 171, 70 Pac. 169, where the injury was the result of a collision between two cars owned and operated by two different defendants independent of each other. It was held that the rule clearly applied to the proprietor of the vehicle occupied by the passenger. The statement in *McCurrie v. Southern P. Co.* 122 Cal. 558, 55 Pac. 324, 5 Am. Neg. Rep. 117, that "a prima facie case is established when the plaintiff shows that he was injured while being carried as a passenger by the defendant, and the injury was caused by the manner in which defendant used or directed the instrumentality under its control," was quoted approvingly, and the court said: "If the fault or negligence which was the proximate cause of the injury was attributable to some other vehicle under other and independent control, the defendant could so show, and that would be a good defense; but the presumption of defendant's negligence arises regardless of the fact that the injury may have been caused by some other agency." It was further said that the peculiar circumstances of 51 L.R.A. (N.S.)

afford reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. *Harrison v. Sutter Street R. Co.* 134 Cal. 549, 55 L.R.A. 608, 66 Pac. 787, relied on by the defendant here, was there distinguished in such a way as to render it inapplicable here. The reasoning of this case is equally applicable to a collision of a car with a wagon as to that of two street cars belonging to different companies at a place of intersection of their tracks. The doctrine was also held to be applicable in *Houghton v. Market-Street R. Co.* 1 Cal. App. 576, 82 Pac. 972, where the car of defendant railroad company in which the plaintiff was a passenger came into collision with a truck owned and operated by another defendant. It was held that from the happening of the accident a presumption of negligence arose in favor of the passenger as against the railway company. Decisions from other states to the same effect are to be found. See *Shay v. Camden & Suburban R. Co.* 66 N. J. L. 334, 49 Atl. 547; *Olsen v. Citizens' R. Co.* 152 Mo. 426, 54 S. W. 470; *Hill v. Ninth Ave. R. Co.* 109 N. Y. 239, 16 N. E. 61. In § 121 of *White on Personal Injuries* it is declared that proof of collision of a car with a vehicle will ordinarily raise a presumption of negligence sufficient to justify a verdict, if the cause of the collision is not explained. See also 2 *Nellis, Street Railways*, § 496; *Booth, Street Railways*, 2d ed. § 361. In *Shay v. Camden & Suburban R. Co.* supra, it was said: "Proof of the happening of a collision between the car in which she was carried and a vehicle in the public streets, an accident which, in the ordinary course of events, would not have happened if the proper care had been used by the motorman, raised an implication of negligence on the part of the company. It was for the company to establish that the motorman was not, in fact, negligent." The reason for the application of the doctrine in such cases appears to be practically as stated in this quotation, viz., that, in view of the very high degree of care essential under the law on the part of a carrier of persons towards those who are its passengers, such a collision would not happen in the ordinary course of events if the carrier exercised such care, and that ordinarily when such an accident occurs it is due to failure on the part of the person operating the car to use the proper degree of care in so operating it; or, in other words, to "the manner in which defendant used or directed the instrumentality under its control." As said in *Osgood v. Los Angeles Traction Co.* supra, it is always open to

the carrier to show, in reply to the prima facie case thus made, that there was no failure on its part to use due care. As has been suggested in some of the cases, the means of proving the specific facts as to the cause of the accident are peculiarly within the power of the carrier, and the explanation should come from it, rather than from the passenger, who very often is unable to ascertain and prove the real facts.

There is some conflict of authority upon the proposition we have been discussing. This court, however, has heretofore adopted the view we have set forth, and we see no good reason to depart therefrom.

We see nothing in the claim that the theory on which the case was tried was such as to make immaterial the matter we have been discussing.

In view of what we have said, we are of the opinion that the district court of appeal was correct in its conclusion that a reversal must be had.

As was said by the District Court of Appeal, it is unnecessary to pass upon the alleged misconduct of counsel for defendant, as it is not presumable that a repetition of the matters claimed to constitute misconduct will occur on another trial.

The judgment and order denying a new trial are reversed.

We concur: Shaw, J.; Sloss, J.; Lorigan, J.; Melvin, J.; Henshaw, J.

MASSACHUSETTS SUPREME JUDICIAL COURT.

EDWARD GERRISH GARDNER, by Next Friend,

v.

ARTHUR W. DENISON, Admr., etc., of Edward Gerrish, Deceased.

(217 Mass. 492, 105 N. E. 359.)

Contract — consideration — naming of child.

1. The privilege of naming a child is a valid consideration for a promise to pay money.

Note. — Validity and enforceability of contract in consideration of naming child.

"There is a sufficient consideration for a promise if there is any benefit to the promisee, or any loss or detriment to the promisee." 9 Cyc. 311.

Naming—as consideration generally.

That the privilege of naming a child is a valid and legal consideration for a promise is well established by all the authorities. 51 L.R.A.(N.S.)

Same — for benefit of child — right to enforce.

2. A child may enforce an agreement made by a stranger with its parents to place a specified sum in trust for the child for the privilege of naming it.

Waiver — rights under contract — suit in name of another.

3. A father, by bringing an action as next friend in the name of his son, to enforce an agreement by a stranger to place money in trust for the child for the privilege of naming him, relinquishes any rights which he may personally have had under the contract.

(May 21, 1914.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County, made during the trial of an action brought to enforce an agreement to pay a certain amount in consideration of the performance of a promise to name plaintiff for the defendant's testator, which resulted in a verdict for defendant. Sustained.

The facts are stated in the opinion.

Messrs. J. L. P. St. Coeur and G. H. Mellen for plaintiff.

Messrs. S. K. Hamilton and T. Eaton for defendant.

Rugg, Ch. J., delivered the opinion of the court:

The facts upon which the plaintiff seeks to recover are these: His father, who was on friendly terms with the defendant's testator, Edward Gerrish, told the latter, in November, 1900, that the birth of a child was expected in his family. Gerrish, after several interviews, promised that if a boy should be born and named for him, Edward Gerrish Gardner, he would make some provision for the child. When the child was born, on January 1, 1901, he was named for the defendant's testator. On January 23, 1901, the plaintiff's father, at the request of Gerrish, wrote at the latter's dictation the following:

Jan. 23, 1901.

I, Edward Gerrish, promise to place in trust for Joseph A. Gardner's youngest son,

Daily v. Minnick, 117 Iowa, 563, 60 L.R.A. 840, 91 N. W. 913; Wolford v. Powers, 85 Ind. 294, 44 Am. Rep. 16; Diffenderfer v. Scott, 5 Ind. App. 243, 32 N. E. 87; Babcock v. Chase, 92 Hun, 264, 36 N. Y. Supp. 879, 3 N. Y. Anno. Cas. 25; Freeman v. Morris, 131 Wis. 216, 120 Am. St. Rep. 1038, 109 N. W. 983, 11 Ann. Cas. 481; Eaton v. Libbey, 165 Mass. 218, 52 Am. St. Rep. 511, 42 N. E. 1127. This rule is in accord with the holding in GARDNER v. DENISON.

In making such contracts, parents act as

born Jan. 1, 1901, \$10,000, for naming said son after me. Edward Gerrish Garduer.

No specific sum of money had been mentioned before. Gerrish then signed the paper in the presence of the plaintiff's father, who since has had the possession and control of it. Gerrish later lived in the family of the plaintiff's father and showed special attention to the child, bestowing many gifts upon him and constantly referring to him as "my boy." He died in 1908 leaving an estate of more than \$200,000, never having made any provision for the benefit of the plaintiff.

The privilege of naming a child is a valid consideration for a promise to pay money. The child has a direct and immediate interest in his name and is more affected by it than anyone else. He loses

the opportunity of receiving a more advantageous name, and is compelled to bear whatever detriment may flow from the name imposed upon him. The consideration moves in part from the child, although he is not in a position personally to yield an assent to the promise at the time it is made. It is a general rule that one who is not a party to a contract cannot bring an action on it even though it be made for his benefit. But the circumstances of the parties respecting the naming of a child are so peculiar, the nearness of the relation so great, and the obligation resting on the father and mother so important, and the consequences to the child so vital, that the inference may be drawn that the father is acting in the interests of and as agent for the son in making any contract as to giving him a name. *Felton v. Dickinson*, 10 Mass. 287, as in-

the natural guardians of the child, and are presumed to act for its interest. *Daily v. Minnick and Eaton v. Libbey*, supra.

In *Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16, the court said: "The surrender, at the intestate's request, of the right or privilege of naming the appellant's child, was the yielding of a consideration. The right to give his child a name was one which the father possessed, and one which he could not be deprived of against his consent. If the intestate chose to bargain for the exercise of this right, he should be bound, for by his bargain he limited and restrained the father's right to bestow his own or some other name upon the child. We can perceive no solid reason for declaring that the right with which the father parted at the intestate's request was of no value. It is difficult, if not impossible, to invent even a plausible reason for affirming that such a right or privilege is absolutely worthless. The father is the natural guardian of his child, and entitled to its services during infancy, and within this natural right must fall the privilege of bestowing a name upon it. In yielding to the intestate's request, and in consideration of the promise accompanying it, the appellant certainly suffered some deprivation and surrendered some right. The rule is, that 'it is sufficient if there be any damage or detriment to the plaintiff, though no actual benefit accrue to the party undertaking.' . . . Conceding that the intestate derived no benefit, still, as the appellant suffered some detriment and yielded a right, there is a legal consideration. The concession that the intestate secured no benefit is one that cannot be justly made, for he himself determined that the act done by the appellant, at his request, was a benefit to him. It is not necessary that the consideration for a promise should be a property one. It is true that the courts and text writers use the words 'valuable consideration,' but this is done for the purpose of distinguishing the consideration from a good one; that is, one based upon

love and affection, and from one resting on a purely moral obligation."

The benefit of the name to the promisor, and the detriment to the parents of parting with the right to give the child such name as they might choose, is that which the law considers as valuable. *Daily v. Minnick*, 117 Iowa, 563, 60 L.R.A. 840, 91 N. W. 913. And the detriment which the child itself may suffer from the name imposed is also considered. *Eaton v. Libbey*, 105 Mass. 218, 52 Am. St. Rep. 511, 42 N. E. 1127.

The naming of a child after the promisor is sufficient consideration for a promissory note payable to the father. *Wolford v. Powers*, supra. And the same is true of a like note payable to the child. *Eaton v. Libbey*, supra, where the court said: "Gifts to a child because of its name are common, and a change of name is often made the condition of a gift or bequest. In many jurisdictions the change of a name is regulated by statute. If we assume that the right to name a child belongs to its parents, and ultimately to its father, the child cannot be said to have no interest in the name imposed. The consequences affect the child more than anyone else. He is deprived of the advantage of receiving any other name, and is subjected to the possibility of detriment because he bears the name imposed. Assuming that the privilege belongs to the parents, if they waive the right in favor of another, we think the child has an interest in the name which it shall bear analogous to the interest which the child has in its own services, which belong to the father, but which, if the father waives his right, furnish a good consideration for a promissory note given to the child by a person to whom they have been rendered. . . . The right of the parents is one which they have as the natural guardians of the child, and they may be presumed to act in the matter for its interest. If, for exercising the right in a particular manner, they receive a reward which they recognize and treat as belong-

terpreted by *Marston v. Bigelow*, 150 Mass. 45, 53, 5 L.R.A. 43, 22 N. E. 71. It was said in *Eaton v. Libbey*, 165 Mass. 218, at 220, 52 Am. St. Rep. 511, 42 N. E. 1127, respecting the naming of a child: "The right of the parents is one which they have as the natural guardians of the child, and they may be presumed to act in the matter for its interest. If, for exercising the right in a particular manner, they receive a reward which they recognize and treat as belonging to the child, it should be considered as its property, even if the parents could have kept the reward as their own."

This action is brought in the name of the son by his father as next friend. That is a relinquishment of the father's personal rights as far as they ever might have been antagonistic to the son, and is equivalent to an assertion that whatever he did was done as agent for the son. The writing, signed by Gerrish, while inartificially expressed, in substance is a declaration by the de-

fendant's testator that he acknowledges himself indebted in the sum of \$10,000 for the privilege granted him of having the plaintiff bear his name. The words "in trust," in the absence of any definition of the terms of any trust, may be treated as meaning nothing more than the expression of a general purpose that the promise was for the benefit of the plaintiff. No promisee being named in the instrument, all the attendant conditions may be examined for the purpose of determining to whom in fact the promise to pay was made. Such resort to extrinsic circumstances is not for the purpose of changing the writing, but of applying it to its proper object. *Way v. Greer*, 196 Mass. 237, 81 N. E. 1002; *Willet v. Smith*, 214 Mass. 494, 497, 101 N. E. 1058, and cases cited. Under all the circumstances we are of opinion that the plaintiff was entitled to go to the jury.

Exceptions sustained.

ing to the child, it should be considered as its property, even if the parents could have kept the reward as their own. In this case it is fair to say that in the transaction in which the original note was given the parents were acting for the child, and were understood by the defendant's testator to be so acting. The plaintiff has continued to bear the name, and has accepted the present note since he arrived at years of discretion, and he has further ratified the contract by bringing this suit since he became of age. We are of opinion that there was a valid consideration for the note moving from the plaintiff himself."

The naming of a child for promisor in accordance with his previous request is a sufficient consideration for a subsequent promise to convey to the child a particular tract of land because of such act. *Daily v. Minnick*, *supra*.

Changing the name of a child is also a sufficient consideration for a promise to the parents for the benefit of the child. *Babcock v. Chase*, 92 Hun. 264, 36 N. Y. Supp. 879, 3 N. Y. Anno. Cas. 25.

—as adequate consideration.

In the absence of fraud, the question of the adequacy of such a consideration is left to the determination of the parties. *Wolford v. Powers* and *Babcock v. Chase*, *supra*.

In the *Wolford Case* the court said: "Where a party contracts for the performance of an act which will afford him pleasure, gratify his ambition, please his fancy, or express his appreciation of a service another has done him, his estimate of value should be left undisturbed, unless, indeed, there is evidence of fraud. There is, in such a case, absolutely no rule by which the courts can be guided, if once they depart from the value fixed by the promisor. If they attempt to fix some standard, it must 51 L.R.A. (N.S.)

necessarily be an arbitrary one, and ascertained only by mere conjecture. If, in the class of cases under mention, there is any legal consideration for a promise, it must be sufficient for the one made; for, if this be not so, then the result is that the court substitutes its own judgment for that of the promisor, and, in doing this, makes a new contract. Where the purpose of the party is to secure a pecuniary or property benefit, there is much more ground for judicial interference than in a case like this, where the controlling purpose is not gain, but the gratification of a desire or fancy. Even in the former class of cases, courts never do interfere upon the sole ground of inadequacy of consideration, and certainly should not in the class to which the one at bar belongs. No person in the world, other than the promisor, can estimate the value of an act which arouses his gratitude, gratifies his ambition, or pleases his fancy. If there be any consideration at all, it must be allotted the value the parties have placed upon it, or a conjectural estimate, made arbitrarily and without the semblance of a guide, must be substituted by the courts."

Uncertainty.

Of course, the terms of the agreement as shown by the evidence, to be enforceable, must not be ambiguous or indefinite and uncertain. *Daily v. Minnick*, 117 Iowa. 563, 60 L.R.A. 840, 91 N. W. 913, and *Freeman v. Morris*, 131 Wis. 216, 120 Am. St. Rep. 1038, 109 N. W. 983, 11 Ann. Cas. 481.

So, a contract in consideration of the privilege of naming a child, that something would be left the child at the promisor's death, but failing to state what amount of property would be left, or to provide a means by which the amount could be ascertained, is invalid for uncertainty. *Freeman v. Morris*, *supra*.

Such contract is not aided by the testator's declarations to third persons as to how much he would leave the child, or by bequests to the child in revoked wills. *Ibid.*

But the purchase by promisor of a tract of land, and his declaration that it is the land he intends to convey in fulfilment of his promise, are sufficient to render certain his promise to convey an infant a certain quantity of land in case he is named for him. *Daily v. Minnick*, *supra*.

Statute of frauds.

If such a contract is clearly within the statute of frauds, it is unenforceable. *Daily v. Minnick*, *supra*; *Parks v. Francis*, *infra*.

So, an oral promise to deposit a definite sum in a certain bank in four equal annual instalments for the privilege of giving a child the promisor's name was held void in *Parks v. Francis*, 50 Vt. 626, 28 Am. Rep. 517, as a contract not to be performed within a year, within such provision of the statute of frauds.

But naming a child for the grantor is a sufficient performance of the consideration to take an oral agreement to convey land to him in consideration thereof out of the statute of frauds, where payment of the purchase money, or part thereof, is allowed to do so. *Daily v. Minnick*, *supra*.

And naming a child after promisor at his request is such a consideration previously received as to constitute a sufficient performance of an oral promise to convey land to take it out of the statute of frauds. *Ibid.*

Who can enforce contract.

It is well established that there is such privity of contract between the child named and his parents as to entitle him to maintain an action for the enforcement of the contract. *Daily v. Minnick* and *Freeman v. Morris*, *supra*. *GARDNER v. DENISON* is in accord with this rule.

The child is not such a stranger to the consideration that he cannot recover on the promise. *Eaton v. Libbey*, 165 Mass. 218, 52 Am. St. Rep. 511, 42 N. E. 1127.

In *Babcock v. Chase*, 92 Hun. 264, 36 N. Y. Supp. 879, 3 N. Y. Anno. Cas. 25, in deciding whether the child could enforce a promise made in consideration of the change of her name, the court said: "It [the promise] was made expressly for her benefit, and by reason of the relationship between her and the promisees, and also by reason of her connection with the consideration, there was such a privity between her and the promisees that she had a right to enforce the contract."

By continuing to bear the name and bringing the suit, the infant ratifies the contract made by his parents. *Daily v. Minnick*; *Eaton v. Libbey*; and *Freeman v. Morris*,—*supra*.

In *Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16, the father of the child maintained the suit, while in the *Diffenderfer* Case, the child sued by her next friend. And in *Parks v. Francis*, *supra*, the child was plaintiff. W. W. A. 51 L.R.A. (N.S.)

OKLAHOMA SUPREME COURT. (Division No. 1.)

WALRUS MANUFACTURING COMPANY,
Plff. in Err.,
v.
C. A. McMEHEN.

(39 Okla. 667, 136 Pac. 772.)

Assignment — of article purchased — action against vendor.

1. A right of action in original purchaser and debtor against original seller, who is the creditor, does not run with chattels purchased in contracting the debt in the first instance to a second purchaser in succession, who assumes payment of the debt upon release of original debtor, in absence of such intent of the parties to such novation, and of any assignment of such right by original to substituted debtor.

Novation — sale contract — action on warranty.

2. Where, in respect to failure of consideration, it cannot be said, as matter of law, that the parties to a novation (by which plaintiff releases N. from liability upon notes in consideration of defendant's assumption to pay the same, the defendant having acquired by purchase from N. the chattel for which N., as original purchaser, executed such notes to plaintiff, and having assumed to pay said notes in consideration, as between himself and N. only, of his said acquisition) so intended, nor that N. assigned his right to the defendant, it was error for the court to instruct the jury, as matter of law, that defendant was subrogated to all the rights of N. as against plaintiff in respect to the latter's implied warranty, if any, of the quality of the chattel to N.

(November 18, 1913.)

Headnotes by THACKER, C.

Note. — *Right of a purchaser of chattel to avail himself of breach of warranty made to the seller.*

It is not intended to include herein cases involving the liability to the retailer or consumer of a manufacturer of food products and other articles, for defects therein, without reference to whether the liability is based upon the theory of an express or implied warranty, or on the doctrine of negligence. On this subject, see notes to *Tomlinson v. Armour & Co.* 19 L.R.A. (N.S.) 923, and *Mazetti v. Armour & Co.* 48 L.R.A. (N.S.) 213, and other notes there referred to.

A warranty of personal property is personal to the purchaser of the property to whom the warranty is made, and a subsequent sale of the property by such purchaser does not operate to vest in a subsequent purchaser any right of action which the former might have against the original seller for a breach of the warranty, for such a warranty does not pass with the

ERROR to the Superior Court for Pittsburg County to review a judgment in defendant's favor in an action on certain promissory notes given for the balance of the purchase price of a soda fountain outfit. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. Wright & Boyd, for plaintiff in error:

An inspection of the article purchased, or an opportunity to inspect, relieves the plaintiff of any warranty as to the quality and condition of the article sold.

Talbot Paving Co. v. Gorman, 103 Mich. 403, 27 L.R.A. 90, 61 N. W. 655; Campbell Printing Press Co. v. Thorp, 1 L.R.A. 645, 36 Fed. 414; Goulds v. Brophy, 42

Minn. 109, 6 L.R.A. 392, 43 N. W. 834; Davis Calyx Drill Co. v. Mallory, 69 L.R.A. 973, 69 C. C. A. 602, 137 Fed. 332; Oil Creek Gold Min. Co. v. Fairbanks, M. & Co. 19 Colo. App. 142, 74 Pac. 543; Remy, Schmidt & Pleissner v. Healy, 161 Mich. 268, 29 L.R.A.(N.S.) 139, 126 N. W. 202, 21 Ann. Cas. 74; Jones Bros. v. McEwan, 91 Ky. 373, 12 L.R.A. 399, 16 S. W. 81; Stanford v. National Drill & Mfg. Co. 28 Okla. 441, 114 Pac. 734.

Mr. Carl Monk for defendant in error.

Thacker, C., filed the following opinion:

The position of the parties, in respect to their descriptive titles, remains the same here as in the trial court. Plaintiff sold the Nix Pharmacy, and installed in its place

property, and, to maintain an action for breach thereof, there must be privity between the parties:

—Post v. Burnham, 27 C. C. A. 455, 55 U. S. App. 71, 83 Fed. 79, holding the original seller of chattels not liable upon an implied warranty of title to a subsequent purchaser from the original purchaser:

—Nelson v. Armour Packing Co. 76 Ark. 352, 90 S. W. 288, 6 Ann. Cas. 237, stating the doctrine that, unlike covenants of title to land, a warranty of personal property does not run with the property, and there is no privity of contract between the vendor in one sale and the vendees of the same property in subsequent sales, hence each vendee can resort, as a general rule, only to his immediate vendor;

—Boyd v. Whitfield, 19 Ark. 447, holding that an implied warranty of title to personal property is a contract personal to seller and purchaser, and does not pass by a mere transfer of the property to a subsequent purchaser, so as to give him a right of action against the first seller for a breach of warranty, the rule being that the purchaser who loses the chattel by the interposition of a paramount title, for his redress, must look to his immediate seller;

—Welshausen v. Charles Parker Co. 83 Conn. 231, 76 Atl. 271, holding a warranty as to the quality of personal property cannot be taken advantage of by a subsequent purchaser from the original purchaser;

—Kendig v. Giles, 9 Fla. 278, holding that a warranty of a slave does not pass with the slave when subsequently sold;

—Smith v. Williams, 117 Ga. 782, 97 Am. St. Rep. 220, 45 S. E. 394, holding that each sale is a separate transaction, and each seller is liable for his own contract, and to the extent thereof; but that he cannot enlarge his prior vendor's obligation beyond that fixed by law. If his title is not good, the purchaser must look to the person from whom he purchased the article, and to whom he paid the consideration;

—Broughton v. Badgett, 1 Ga. 75, holding that a bill of sale for personal property is not negotiable, and an indorsement of 61 L.R.A.(N.S.)

it does not transfer to the indorsee a right of action upon a warranty contained therein of the property sold, but the original purchaser may maintain an action upon such warranty after having disposed of the property. To the same effect, see Dukes v. Nelson, 27 Ga. 457;

—Zuckermann v. Solomon, 73 Ill. 130, holding a breach of warranty of personal property cannot be asserted by a subsequent purchaser, either by set-off or a suit in his own name;

—Prater v. Campbell, 110 Ky. 23, 60 S. W. 918, holding a warranty as to the size of timber, where the timber is personal property, does not pass to a subsequent purchaser thereof;

—Asher Lumber Co. v. Cornett, 22 Ky. L. Rep. 569, 56 L.R.A. 672, 58 S. W. 438, holding that for a breach of warranty of personal property the buyer may sue only his immediate seller;

—Ranney v. Meisenheimer, 61 Mo. App. 434, stating the rule that a warranty of a chattel is available only between the parties to the contract, and not in favor of a third person, unless claiming as assignee of the warranty;

—Bordwell v. Collie, 45 N. Y. 494, holding a warranty of personal property, upon a subsequent sale thereof, not to pass to the subsequent purchaser.

But in Mazetti v. Armour & Co. 48 L.R.A.(N.S.) 213, it is held that in the absence of an express warranty of quality, the manufacturer of food products under modern conditions impliedly warrants his goods when dispensed in original packages, and such warranty is available to all who may be damaged by reason of their use in the legitimate channels of trade.

Compare with Roberts v. Anheuser Busch Brewing Asso. 211 Mass. 449, 98 N. E. 95, holding that there cannot be a warranty of personal property where there is no privity of contract, and a subsequent purchaser of an article cannot maintain an action for damages on a claim of breach of warranty as to quality; but where the original seller is the manufacturer of the article, and by public advertisements in-

of business at McAlester, Oklahoma, a soda fountain, with articles for use in connection therewith, including a patented carbonator, for \$1,100, of which \$200 was paid at the time; the balance of \$900 being evidenced by the purchaser's notes secured by his chattel mortgage on all the property. And about two and one-half months later defendant purchased with the consent of plaintiff, if not from it, and installed in his place of business in said McAlester, all the said property, upon the representation of the Nix Pharmacy that the carbonator, which he saw before purchasing, was a fine and first-class carbonator, guaranteed by plaintiff to do the work any other carbonator would do (these representations being repeated in the presence of a representative of

plaintiff in this transaction), at the same time, in substitution for the obligations of certain of the Nix Pharmacy notes and mortgage, by indorsement thereon, assuming to pay the said notes in the sum of \$622, and giving his own chattel mortgage on the same property as security therefor; the Nix Pharmacy being thus released on its obligations to plaintiff. But it is not shown how the amount of the original purchase price representing the difference between said \$900 and said \$622 was eliminated as a liability, nor whether the price at which the defendant purchased exceeded said sum of \$622. It appears that defendant paid plaintiff the sum of \$418, leaving an unpaid balance evidenced by said note in the aggregate sum of \$204; but, in the

duces a person to buy his product of a retailer, such manufacturer may be held in tort for damages occasioned the purchaser by such misrepresentations. As shown by comparison of this case with the preceding case, the cases are not in accord on the theory of liability of the manufacturer of the article to be sold at retail, although both hold him liable. As already pointed out, cases of this character are not included herein, but they may be found in the notes heretofore referred to.

In *Conestoga Cigar Co. v. Finke*, 144 Pa. 159, 13 L.R.A. 438, 22 Atl. 868, the liability of an inspector of tobacco to a subsequent purchaser, upon a warranty of quality printed on tags attached to the bales of tobacco, is held to be a question for the jury where there is evidence that, by custom and usage of trade, this tag or label constitutes a warranty of quality for a specified period of time for the benefit of any person in whose possession the tobacco may come within such time, it further appearing that the inspector has in other cases recognized his liability to third persons upon his warranties, and that his agent, when notified of the defect in the tobacco in question, admitted the defect and promised to make it good.

Effect of novation of contract.

Of course, there may be a novation of contract so complete in itself as clearly to render the seller liable to the substituted purchaser for a breach of warranty contained in the original contract. The cases considering the question have not clearly developed the point as to just how complete must be the substitution of a subsequent purchaser for the original purchaser, to entitle the former to avail himself of a warranty to the latter.

It has been held that a subsequent purchaser of an interest in personal property originally sold with a warranty, who executes a note jointly with the original purchasers in renewal of a note given by the latter for the purchase price, may, in a suit upon the renewal note, join with the other makers in asserting a breach of the 51 L.R.A. (N.S.)

warranty as a counterclaim. *York Mfg. Co. v. Bonnell*, 24 Ind. App. 667, 57 N. E. 590. It is stated in the opinion that it was alleged in the counterclaim that at the time of the purchase of the interest, there was assigned to the purchaser an interest in all contracts which the original purchasers had with their vendor.

In *Boyd v. Whitfield*, 19 Ark. 447, a suit in equity, the general rule that a warranty of personal property will not pass upon a subsequent sale thereof is held not to apply where an arrangement is made between buyer and seller and a third person by which the latter assumes payment of the purchase money directly to the original seller, and it is said that such purchaser in equity is subrogated to the implied warranty of title.

This case is very similar to *WALRUS MFG. CO. v. McMEHEN*, except that in the latter case the representations constituting a warranty were repeated by the original purchaser to the subsequent purchaser in the presence of a representative of the original seller. It is to be noted, however, that in the *WALRUS MFG. CO. CASE* a warranty to the original purchaser was held not to inure to the benefit of the subsequent purchaser.

Where the original seller, in order to make it possible for the purchaser to resell the article, gives the second purchaser a warranty similar to that of the original purchaser, the subsequent purchaser, after having paid the purchase price to the original purchaser, as his remedy for a breach of the warranty, cannot tender the article to the original seller and recover the purchase price from him. If he desires to pursue this remedy, he must have recourse to the person to whom the purchase money was paid. *Johnson v. Whitman Agri. Co.* 20 Mo. App. 100.

It has been held that a seller of personal property with a warranty, who takes notes secured by a mortgage on the property in payment thereof, is not liable upon the warranty to a subsequent purchaser of the property, although he took the notes of such purchaser as collateral to the notes

meantime, the carbonator had failed properly and almost entirely to perform the function for which it was intended, although three times sent to plaintiff for repairs and as often returned to defendant with such repairs as plaintiff deemed proper or could make thereon; and defendant, having offered to return the carbonator and demanded a surrender of his unpaid notes, to which plaintiff would not assent, ultimately discontinued payment of these notes, this action by plaintiff following as a sequence.

The evidence tended to show that, although the carbonator would have been worth \$250 if it would properly have performed the function for which it was intended, it was worthless when defendant purchased it and at all times thereafter, it being, in point of mechanism and material, inherently unsuited to perform such function; but there is nothing further to throw light upon how the carbonator was valued, or what portion of the purchase price was apportionable to it in either the original sale to the Nix Pharmacy or the later sale to defendant. Defendant, waiving any right he might have had to damages in excess of the face value of the seven notes sued on, tendered the carbonator to plaintiff in court at the time of the trial, and defeated plaintiff's action upon evidence tending to prove the facts as stated.

The application of the Nix Pharmacy to plaintiff for the purchase of this property, in the first instance, recited that the title should remain in plaintiff pending discharge of deferred payments on the purchase price; but this reservation of title in plaintiff was waived and lost by its acceptance of the Nix Pharmacy notes and chattel mortgage for such deferred payments, the taking of the notes and mortgage being inconsistent with plaintiff's ownership of the property; and it appears inferentially that that portion of defendant's testimony in which he said he purchased the property of plaintiff may have been given upon the erroneous theory that plaintiff held the legal title to the property at the time of his purchase by reason of said order, although the idea that there was a rescission of plaintiff's sale to the Nix Pharmacy and a new sale by it to defendant is not so clearly excluded as to remove all doubt in this regard. However, it appears that the transaction between the plaintiff, the defendant, and the Nix Pharmacy, to which each was privy, was merely a novation of parties in which the plaintiff released the Nix Pharmacy, and, supported by the consideration thereof, the defendant assumed and became legally bound for the payment of the Nix Pharmacy notes to the plaintiff—no other intent appears. See 29 Cyc. 1136, and Michigan

of the original purchaser, and at the same time released his mortgage; and this is true although the original purchaser sold the property upon the same warranty as that given him by the original seller, and so informed the latter. *Thisler v. Keith*, 7 Kan. App. 363, 52 Pac. 619.

And see *WALRUS MFG. CO. v. McMEHEN*, holding that a subsequent purchaser from the original purchaser, without an assignment of the latter's cause of action against the original seller for a breach of warranty, cannot take advantage of such breach in the absence of an express warranty to him by the original seller, although with the consent of the latter, he assumed payment of the notes given by the original purchaser for the purchase price upon the latter's release, and was induced to do so by the repetition to him by the original purchaser, in the presence of a representative of the original seller, of the warranty given by the latter to the original purchaser.

Assignability of cause of action for breach.

Where a purchaser of a chattel has a complete cause of action for a breach of warranty, there can be no doubt that it may be assigned to the same extent as may any other complete cause of action. The few cases which have considered the question make it doubtful whether the warranty itself, at least prior to a breach thereof, may be assigned so as to enable the

assignee thereof to maintain an action at law for its subsequent breach.

Thus, it has been held that on a breach of a warranty of title, the original purchaser may satisfy the claim of the purchaser from him by assigning to the latter his claim and cause of action against the original seller for such breach, and the subsequent purchaser may maintain an action thereon. *Bordwell v. Collie*, 45 N. Y. 494.

And see *Ranney v. Meisenheimer*, 61 Mo. App. 434, wherein it is said that a warranty of a chattel is available only between the parties to the contract, unless the original purchaser's cause of action is assigned to a third person.

In *Kendig v. Giles*, 9 Fla. 278, it is held that a warranty of a chattel does not pass with the chattel, and the original purchaser cannot assign to a subsequent purchaser his right to maintain an action for breach of the warranty, which will be recognized in a court of law.

And in *Zuckermann v. Solomon*, 73 Ill. 130, it is said that a warranty of personal property is not assignable so as to permit a subsequent purchaser of the property to make it the subject of a set-off or of a suit in his own name.

And *Smith v. Williams*, 117 Ga. 782, 97 Am. St. Rep. 220, 45 S. E. 394, is also authority for the doctrine that a warranty of personal property is not negotiable or assignable. A. G. S.

Stove Co. v. A. H. Walker & Co. 150 Iowa, 363, 130 N. W. 130, Ann. Cas. 1912D, 505, and notes thereto at page 508.

The evidence adduced upon the trial does not raise this case above the plane of doubt and uncertainty as to the actual facts and the elemental character of the transaction in which the defendant acquired the property mentioned and assumed the payment of the Nix Pharmacy notes; and several possible theories suggest themselves for consideration in trying to ascertain what the evidence does show or tend to show in this regard. If the Nix Pharmacy, as owner, sold the property to defendant without assignment to him of its right of action, if any it had, upon plaintiff's original warranty, if any there was, to it, and plaintiff did not warrant the property to defendant, it would seem clear that defendant could not successfully defend against these notes, assumed by him, by a promise to pay supported by the consideration of plaintiff's release of the Nix Pharmacy from its obligation thereon. It appears that such a novation of parties could not operate to cause the Nix Pharmacy's right of action for breach of warranty, if any it had, to run with the property to the defendant, nor to subrogate defendant to any right of the Nix Pharmacy in respect to such warranty as against plaintiff. As, in effect, against the new debtor's right of action or defense upon such warranty, see 29 Cyc. 1137, 1138; 21 Am. & Eng. Enc. Law, 2d ed. 671; Keller v. Beaty, 80 Ga. 815, 8 S. E. 598; Adams v. Power, 48 Miss. 450. As to assignment of right of action see, in connection with § 4268, Okla. Stat. 1890 (§ 6740, Rev. Laws 1910) the following: 4 Cyc. 7, 8, and 111, 112; Gustafson v. Stockton & T. C. R. Co. 132 Cal. 619, 64 Pac. 995; Nelson v. Armour Packing Co. 76 Ark. 352, 90 S. W. 288, 6 Ann. Cas. 237.

If plaintiff, as owner, sold the property, in part or in whole, through the agency of the Nix Pharmacy, to the defendant, the representations of the Nix Pharmacy as to the quality of the carbonator, the defects being latent, would be binding upon plaintiff; and it appears that defendant, if he relied upon such representations, would be entitled to set off, against the face value of the notes sued on, damages for breach of warranty, measured by the difference between the value of the carbonator as it actually was at the time to which the warranty relates and its value as it would have been if it had conformed to the requirements of the warranty (Wiggins v. Jackson, 31 Okla. 292, 43 L.R.A.(N.S.) 153, 121 Pac. 602, and Spaulding Mfg. Co. v. Holiday, 32 Okla. 823, 124 Pac. 35); but if there was any evidence whatever justifying the same, which we

deem if unnecessary to determine, the case was not tried upon that theory, and the judgment cannot be affirmed upon the same for obvious reasons.

This case, in respect to ground of defense, was tried upon the theory of a failure, or partial failure, of the consideration supporting defendant's assumption and promise to pay the notes sued on; but if it be conceded that the purchase price is severable, and this defense allowable in that respect, a want or failure of consideration to which plaintiff was not privy, such as a want or failure of beneficial consideration passing from the Nix Pharmacy, as owner of the property constituting the same, to the defendant, is not available as a defense to defendant as against plaintiff's action on these notes; and plaintiff's release of the Nix Pharmacy from liability, if the obligation was valid, on the notes, would appear to be sufficient consideration to support the promise to pay involved in said assumption, which, in view of the Nix Pharmacy's apparent title to the property at the time of the sale to the defendant, is apparently the only consideration to which plaintiff was privy, unless whatever benefit to defendant or detriment to plaintiff may be found in the latter's consent, as mortgagee, to the former's purchase of all the property mentioned from the Nix Pharmacy, may be regarded as a distinct consideration, and not included in the release of the Nix Pharmacy from liability, which it is not material to consider.

It seems clear, in the light of the authorities already cited, that the trial court erred in assuming as a matter of law, and in instructing the jury, that defendant was subrogated to all the rights of the Nix Pharmacy, and so as to permit a verdict for the defendant upon the ground of a failure, or partial failure, of the original consideration upon which the Nix Pharmacy notes were given to the plaintiff in its purchase of the property about two and one-half months before the defendant acquired it.

Uncertainty as to the material facts involved in the transaction, which might change the legal aspect of defendant's position, forbid, in reversing and remanding this case, any extended discussion of the rule that, in the absence of fraud or express warranty, "the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely, and necessarily relied, on the judgment of the seller, and not upon his own" (Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. Rep. 537), in order to ascertain if there is an implied warranty (2 Mechem, Sales, 1311-1318; 2

Benjamin, Sales, 862, 863; Gold Ridge Min. Co. v. Tallmadge, 44 Or. 34, 74 Pac. 323, 102 Am. St. Rep. 602, and notes at page 607; McQuaid v. Ross, 85 Wis. 492, 55 N. W. 705, 39 Am. St. Rep. 864, 22 L.R.A. 187, and notes; and Leavitt v. Fiberloid Co. 196 Mass. 440, 82 N. E. 682, 15 L.R.A. (N.S.) 853, and notes). But, in anticipation of another trial, we suggest that it might be well to observe the distinction in form between a counterclaim or cross action for damages for breach of warranty (which damages are measured by the difference between the actual value of the article as it is and its value as it would have been if it had been as warranted), available as a set-off without regard to whether the purchase price of the article is severable from the whole purchase price, and want of consideration involving a rescission of the contract, and designed to defeat the action to the extent of the purchase price of the article, which is not available unless the purchase price of the article may be ascertained and severed from the whole of the purchase price of all the articles purchased together.

For the reason stated, this case should be reversed and remanded, with instructions to grant plaintiff a new trial.

Per Curiam:

Adopted in whole.

TENNESSEE SUPREME COURT.

WALTER GOODMAN

and

MRS. CORINNE A. RICHARDSON, Plff.
in Certiorari,

v.

CHARLES S. WILSON.

(— Tenn. —, 166 S. W. 752.)

Master and servant — joint employers of chauffeur — liability for negligence.

One of two joint owners of an automobile, who contribute equally to the expense of its up-keep and the wages of the chauffeur, and have equal right to the use of the car except a preference given to the other owner as to its use in going to and from business.

Note. — Liability of joint owners of automobile or carriage for torts of common servant.

As to liability in general of joint employers for torts of employee, see note to Moore v. Southern P. R. Co. ante, 866.

The decision in GOODMAN v. WILSON seems to be in accord with the general rule that joint employers are liable for the torts of an employee, even when such servant, in committing the tort, is at the time performing a duty for one only of his employers. 51 L.R.A. (N.S.)

is liable for injury caused to a traveler on the highway by the chauffeur's negligent operation of the car, in obeying the orders of such other owner to take the car to his office to convey him home, although the former had given no orders in connection with the journey.

(May 7, 1914.)

CERTIORARI to the Court of Civil Appeals to review a judgment affirming a judgment of the Circuit Court for Shelby County in plaintiff's favor in an action brought to recover damages for personal injuries caused by a collision between plaintiff's buggy and an automobile owned jointly by defendants. Affirmed.

The facts are stated in the opinion.

Mr. D. W. DeHaven, for plaintiff in certiorari:

As a matter of law, there is no evidence to support the verdict of the jury as against Mrs. Richardson.

36 Cyc. 1525; McCarthy v. McCabe, 131 App. Div. 396, 115 N. Y. Supp. 829; 26 Cyc. 1519; 20 Am. & Eng. Enc. Law, 178; Hartley v. Miller, 165 Mich. 115, 33 L.R.A. (N.S.) 285, 130 N. W. 336, 7 N. C. C. A. 126; Lotz v. Hanlon, 217 Pa. 339, 10 L.R.A. (N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 Ann. Cas. 731; Jones v. Hoge, 47 Wash. 663, 14 L.R.A. (N.S.) 216, 125 Am. St. Rep. 915, 92 Pac. 433; Patterson v. Kates, 152 Fed. 481; Quigley v. Thompson, 211 Pa. 107, 60 Atl. 506; Daily v. Maxwell, 152 Mo. App. 415, 133 S. W. 351; Howe v. Leighton, 75 N. H. 601, 75 Atl. 102; Shearm. & Redf. Neg. 5th ed. 147; Slater v. Advance Thresher Co. 97 Minn. 305, 5 L.R.A. (N.S.) 598, 107 N. W. 133; Doran v. Thomsen, 74 N. J. L. 445, 66 Atl. 897; Steffen v. McNaughton, 142 Wis. 49, 26 L.R.A. (N.S.) 383, 124 N. W. 1016, 19 Ann. Cas. 1227; Danforth v. Fisher, 75 N. H. 111, 21 L.R.A. (N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 535.

Messrs. George Harsh and Steen & Klower, for defendant in certiorari:

Mrs. Richardson is liable for the injuries complained of by plaintiff

Western U. Teleg. Co. v. Rust, 55 Tex. Civ. App. 359, 120 S. W. 249; 1 Bl. Com. p.

The only case in addition to GOODMAN v. WILSON which involves a similar state of facts is the Ohio case of Bell v. Pistorius, 18 Ohio C. C. 73, 9 Ohio C. D. 869, which is set out and discussed in the GOODMAN CASE, and which, it will be noted, is in direct conflict with the later case.

A somewhat similar case, however, from which GOODMAN v. WILSON derives some support, is Switzer v. Sherwood, — Wash. —, 141 Pac. 181, wherein it was held that both a husband and a wife who owned an automobile as a community were liable for

431; 26 Cyc. 1525; Lynde v. Browning, 2 Tenn. Civ. App. 264.

Lansden, J., delivered the opinion of the court:

This suit was brought by Wilson against Goodman and his sister, Mrs. Corinne A. Richardson, to recover damages resulting from a collision with a buggy in which Wilson was riding and an automobile owned by Goodman and Mrs. Richardson. From the verdict and judgment in the circuit court against both defendants, an appeal was taken to, and the judgment of the circuit court was affirmed by, the court of civil appeals. The case is presented to us upon the petition of Mrs. Richardson alone. The facts which we consider material are that the automobile which collided with defendant in error is owned jointly and equally by Mrs. Richardson and Mr. Goodman, who are brother and sister. They live in the same residence, and jointly employ one chauffeur, and each pays one half of his wages, and he serves them both in the operation of the automobile. They equally bear the expense of operation and repair of the automobile, and each of them, separately or jointly, may use it accordingly as their needs or pleasures may require. They have an agreement by which Mr. Goodman has a right of preference to the use of the automobile in being carried to and from his office in the morning and afternoon, if he sees proper to require the use of the car at this time, to the exclusion of the right of Mrs. Richardson to use it at these hours. When either party desires to use the automobile, orders would be given by the one so desiring to use it to the chauffeur for this purpose. Occasionally they used it jointly, and occasionally Mrs. Richardson would ride into town after her brother, or would ride to town with him in the morning when he would go to his office.

On the occasion of the accident, the automobile was going into town to the office of Mr. Goodman, and was going west on Union avenue. Wilson was driving west on Union avenue in an open buggy with a horse attached. The automobile approached him from behind. It was racing with an-

other automobile moving in the same direction, and was running at a rate of speed estimated by the witness for plaintiff at from 25 to 40 miles an hour. When Wilson saw the two automobiles approaching him, he drew his horse and buggy close to the curb, and, as he did so, the automobile in front of that of plaintiff in error passed Wilson, and plaintiff in error's automobile appeared to be trying to get in between the other automobile and Wilson's buggy. In this attempt, the automobile struck the wheel of the buggy, and knocked Wilson into the air, and he fell onto the asphalt pavement. The automobile ran 90 yards after striking the buggy, before it was stopped.

Upon these facts, it is insisted for Mrs. Richardson that she is not liable, because the evidence does not connect her with the accident, and that the chauffeur, at the time of the accident, was in the service of Mr. Goodman only, and therefore the rule of *respondet superior* does not apply as between the chauffeur and Mrs. Richardson.

The court of civil appeals was of opinion that, although Mrs. Richardson was not in the automobile at the time, and may not have given orders to the chauffeur to proceed on the journey, still the chauffeur and the automobile at the time of the accident were on the business of the joint owners of the automobile.

It is undoubtedly true, as a general proposition of law, that the doctrine of *respondet superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged with the injury resulting from the wrong at the time and in respect of the very transaction out of which the injury arose; and the mere fact that the driver of the automobile was the defendants' servant will not make the defendant liable. It must be further shown that at the time of the accident the driver was on the master's business, and acting within the scope of his employment. This rule was said by Blackstone to be founded on the superintendence and control which the master is supposed to exercise over his servant. 1 Bl. Com. 431.

injuries caused by negligent operation of their car by their daughter while the husband was riding therein, although the wife was not in the car at the time of the accident.

And see the analogous case of Towers v. Errington, 78 Misc. 297, 138 N. Y. Supp. 119, affirmed without opinion in 156 App. Div. 892, 141 N. Y. Supp. 1148, wherein, in holding that a husband, one of the joint owners of an automobile, was not liable for injuries resulting from the negligence of a son, selected by and driving the automobile 51 L.R.A.(N.S.)

for the wife, who was the other owner, the court said that the question in the case was whether the driver was acting as the servant of the husband; and intimated that had he been selected by him, and had he been operating the automobile for the purpose for which he was selected, the husband would have been liable.

As to liability in general where an automobile is being used by a member of the owner's family, see note to McNeal v. McKain, 41 L.R.A.(N.S.) 775. G. J. C.

The rule arises out of the relation of superior and subordinate, and is applicable to that relation wherever it exists, and is co-extensive with the relationship itself. It is founded on the power of control which the superior has a right to exercise, and which, for the safety of other persons, he is bound to exercise, over the acts of his subordinates, and in strict analogy to liability *ex contractu* upon the maxim, *Qui facit per alium facit per se*. Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590. This rule is not modified by the existence of the fact that the negligent servant is jointly employed by two or more persons. For instance, in the case of a flagman at a railroad crossing jointly employed by two or more railroads, the road in whose service he is negligent, or otherwise commits a tort, is liable for his misconduct. Brow v. Boston & A. R. Co. 157 Mass. 309, 32 N. E. 362; Illinois C. R. Co. v. King, 69 Miss. 852, 13 So. 824.

It is said in 28 Cyc. 1525, that "where a servant is jointly employed by several persons who are not partners, each contributing to his wages, one of the masters is not liable for the misconduct of the servant while engaged solely in the service of another master."

For the text a case is cited from a circuit court in Ohio (Bell v. Pistorius, 18 Ohio C. C. 73, 9 Ohio C. D. 869). From a note to the text, it appears that the case cited was where three persons hired a coachman and divided his wages, and the carriage belonged to one, and the horse to another, and a person was injured by the negligence of the coachman while driving one of his employers. It was held that the latter employer alone was liable for the injuries. Upon such a meager report of the case upon which the text is founded, we cannot determine its soundness. Upon principle, it would seem that if two or more persons, as the case under consideration, purchase an automobile in partnership and employ a driver, whose duty it is to drive the vehicle for the joint and separate use of the partnership, that both owners would be liable for injuries resulting from the negligence of the driver, whether they were both using the automobile at the time or not. In fact, neither owner was occupying the car at the time of this accident. It had left the residence of Mrs. Richardson, and was on its way to the office of Mr. Goodman for the purpose of conveying him to the residence of Mrs. Richardson, and it is conceded that this was one of the purposes for which the automobile was owned and operated by them. While it is entirely true that the driver and the automobile were going for Mr. Goodman, it is none the less true that the driver was doing the

thing for which he was jointly employed, and the machine was being used for one of the purposes for which it was jointly owned. The machine is partnership property, and the driver was in the service of the partnership. There is no separateness of time at which the driver may serve, or of interest in the automobile, so that it could be said that the machine belonged exclusively to one, or the driver was exclusively in his service. The case might be different if the understanding between Mrs. Richardson and Mr. Goodman had been that at certain hours of the day one should have the exclusive use of the machine and the driver. But the proof is that each one has an equal right to the use of the machine and the services of the driver, with the slight exception stated heretofore.

Under the partnership arrangement. Mrs. Richardson could have directed the driver, when leaving for Mr. Goodman, to speed the car and return to her within a given time; and this shows that, as joint employer, she had control of the servant at the time of the accident.

We have examined Lotz v. Hanlon, 217 Pa. 339, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 Ann. Cas. 731; Steffen v. McNaughton, 142 Wis. 49, 26 L.R.A.(N.S.) 382, 124 N. W. 1016, 19 Ann. Cas. 1227; Eichman v. Buchheit, 128 Wis. 385, 107 N. W. 325, 8 Ann. Cas. 435. These cases and the annotator's notes indicate that the weight of authority is that an automobile is not a dangerous instrument, so as to be classed with locomotive engines, dangerous animals, explosives, and the like, and also that the liability of the owner of an automobile for acts or omissions of his chauffeur in handling the machine depends upon whether, at the time of the act or omission complained of, the chauffeur was acting within the scope of his employment: that the relationship between owner and chauffeur is not different from that existing between master and servant generally, and is governed by the same general rules of law which govern the relationship of master and servant. The cases referred to do not disclose the existence of any statutory regulation of the subject in the states in which they were decided, and the notes to those cases indicate that the authorities cited are speaking with reference to the general subject of master and servant, and proceeding upon the idea that an automobile is not a dangerous instrument, and falls within the general rule stated. In this case it is not necessary for us to say what effect chapter 173, Acts of 1905, would have upon the general rule, or whether this enactment of the legislature was intended to place the

automobile in the category of dangerous instruments.

We believe the judgment of the Court of Civil Appeals should be affirmed, for the reason stated, and that is, that the driver and the automobile were employed directly in the execution of the purposes of the joint ownership of the automobile and the joint employment of the driver. It was a partnership arrangement, and not a separate interest which each had in the automobile and in the service of the driver.

WYOMING SUPREME COURT.

ROBERT E. BROWN, Plff. in Err.,
v.
ETHEL BROWN.

(— Wyo. —, 140 Pac. 829.)

Divorce — appeal — remedy for failure to pay attorneys' fee.

The remedy for failure of one who, having appealed from a decree of divorce, fails to comply with an order requiring payment

Note. — Remedy pending appeal from decree in divorce suit, for failure to comply with order for payment of temporary alimony, suit money, or counsel fees.

Upon the general question of contempt proceedings to compel payment of alimony, see the extended note to *Staples v. Staples*, 24 L.R.A. 433.

And as to power in general to punish disobedience to orders in case by striking pleadings, including the right of the court to so punish noncompliance with orders for suit money and alimony, see *Trough v. Trough*, 4 L.R.A. (N.S.) 1185, and the note appended thereto.

As to failure to pay alimony or allowance for support granted by decree of divorce as a criminal offense, see note in 42 L.R.A. (N.S.) 1065. And as to imprisonment for failure to pay alimony as violative of the constitutional provision against imprisonment for debt, see note to *Ex parte Davis*, 17 L.R.A. (N.S.) 1140.

It cannot be said that there is a well-settled rule as to what constitutes the proper remedy for failure to comply with an order for payment of temporary alimony, suit money, or counsel fees where an appeal has been taken in the case. The present status of the authority seems to be that where the order for the payment issued from the appellate court, it will dismiss the appeal if the refusal to pay is persisted in; and that there is a conflict when such order issued from the trial court, some of the courts holding that in such case the appeal will be dismissed, and others laying down the rule that the remedy is in the trial court and as for a contempt. No case has been found, however, which expressly

of his wife's attorneys' fee, is not a proceeding to punish for contempt, but a dismissal of the appeal.

(May 15, 1914.)

ORDER to show cause why plaintiff in error should not be punished for contempt for failure to comply with an order requiring him to pay the amount of attorneys' fees allowed for preparation of a brief and representing defendant in error in the Supreme Court. Order authorizing motion to dismiss the proceedings if order for fees is uncomplied with.

The facts are stated in the opinion.

Messrs. Camplin & O'Marr for plaintiff in error.

Messrs. Enterline & La Fleche for defendant in error.

Scott, Ch. J., delivered the opinion of the court:

This case was formerly before this court on an application by the defendant in error for an allowance of attorneys' fees for preparing her brief and representing her in this

refers to any possible distinction between cases where the order which has not been complied with emanated from the trial court and those cases where the order was issued by the appellate court. Of course, where the latter is the case, the trial court would have no possible jurisdiction, and the question would be, as in *Brown v. Brown*, whether dismissal of the appeal or contempt proceedings afforded the proper remedy. Where the order issued from the trial court, the rule seems to be that if the remedy is in that court, it is a proceeding as for contempt, whereas if the remedy is in the appellate court, it is by dismissal of the appeal or suspension of the decree pending compliance with the order. And whether the remedy is in the trial or in the appellate court depends in a great measure upon local statutes and procedure.

Brown v. Brown apparently is the only case which has discussed the question as to the proper remedy in case of failure to comply with an order of the appellate court for the payment of attorneys' fees, but its conclusion that the remedy is by dismissal of the appeal seems consonant with reason and principle.

As before stated, some of the courts lay down the rule that the proper remedy for failure of an appellant to comply with an order of the trial court for the payment of counsel fees, etc., is by dismissal of the appeal or suspension of final judgment. This was the rule adopted in *White v. White*, 148 App. Div. 883, 132 N. Y. Supp. 1043, wherein it was held that where the defendant in a divorce suit, by his insistent refusal to obey the orders of the court as to payment of alimony, counsel fees, and the expenses of the plaintiff in opposing his appeal from a divorce decree, has rendered

court. 135 Pac. 801. Upon consideration we allowed attorneys' fees in the sum of \$250 for that purpose. The case is now here upon a showing by affidavits that plaintiff in error has failed to comply with such order, and an application for an order citing him before this court to show cause, if any there be, why he should not be punished as for contempt in failing to comply with such order. We think it unnecessary to review the affidavits in support and the counter affidavits in opposition submitted upon the hearing of this application, other than to say that it sufficiently appears therefrom that the order has not been complied with, and : o good reason is shown for the failure of plaintiff in that respect. We think the allowance for attorneys' fees was reasonable in amount, and it will be observed that the plaintiff in error is the one who is in default. The defendant in error seeks no affirmative relief in the proceeding in error in this court as to the judgment. Upon the showing when the allowance was made and upon the hearing here, she was and is without means to pay a reasonable attorneys' fee for the services of her attorneys in preparing and filing a brief and appearing in this court on her behalf to properly defend such judgment. No brief has been filed in her behalf in this court,

while plaintiff's brief has been on file for a year.

While the method of enforcing its orders by citation and punishment as for contempt may, in a proper case, be resorted to in this court, yet upon the facts here there is, in our judgment, a more effective remedy. The plaintiff in error is guilty, if at all, of a civil, but not a criminal, contempt. He has failed without excuse to comply with the order of this court, and by his petition in error is seeking affirmative relief at the hands of this court. It is elementary that such conduct is not favored. One cannot refuse to obey the lawful order of a court and expect relief at the hands of the court. This rule is a salutary one, and has been often applied by the courts. *Casteel v. Casteel*, 38 Ark. 477; *Peel v. Peel*, 50 Iowa, 521; *McClung v. McClung*, 40 Mich. 493; *Waters v. Waters*, 49 Mo. 385; *Zimmerman v. Zimmerman*, 7 Mont. 114, 14 Pac. 665; *Walker v. Walker*, 82 N. Y. 260; *Williams v. Williams*, 6 S. D. 284, 61 N. W. 38. The motion for a citation to issue as prayed is refused, but this court is of the opinion that if the order remains uncomplied with on June 1st next, to wit, June 1, 1914, then a showing to that effect with support a motion to dismiss the proceedings in error.

Potter and Beard, JJ., concur.

it impossible for the plaintiff to oppose his appeal, such appeal would be dismissed, the court saying: "Certainly the court cannot allow a party to an action to treat the orders of the court with contumely and contempt, and at the same time allow him to prosecute an appeal, especially where it appears that a compliance with the order is essential to the respondent to sustain the judgment and orders appealed from." So, in *Williams v. Williams*, 6 S. D. 284, 61 N. W. 38, it was held that a husband in an action for divorce who neglects or refuses to pay the wife temporary alimony and counsel fees pursuant to order of the trial court is not in a position to entitle him to a reversal on modification of a decree for permanent alimony, on an appeal therefrom to the supreme court, so long as such order is unappealed from and operative. And in *State ex rel. Dawson v. St. Louis Ct. of Appeals*, 99 Mo. 216, 12 S. W. 661, where the decree in the trial court was for defendant, and an appeal was taken, it was held that the appellate court could render a decree of reversal conditioned on payment by the appellant of arrears of temporary alimony as allowed by the trial court, or, in other words, that the court could suspend entry of a decree in his favor until he had paid the alimony. And see *Wright v. Wright*, 24 Mich. 180, wherein an allowance of alimony was ordered to be paid within a certain length of time, or the appeal would be dismissed. 51 L.R.A. (N.S.)

But other courts have, on the other hand, held that failure of the appellant to comply with the order of the trial court is not sufficient to warrant a dismissal of the appeal, especially where there is a remedy in the trial court. Thus, in *Eastes v. Eastes*, 79 Ind. 363, it was expressly held that failure of the defendant in a suit for divorce to comply with an order of the trial court made after entry of decree in plaintiff's favor, requiring him to pay a sum into court to enable the plaintiff to prosecute her case before the supreme court, should it be appealed thereto by him, afforded no sufficient ground for the dismissal of such an appeal, the court saying: "Conceding, without deciding, that it is sufficiently shown that the appellant is prosecuting this appeal in contempt of the order of the circuit court, we are of the opinion that this action of the appellant would not authorize us to dismiss his appeal. The circuit court has full power by law to enforce its orders, and to punish, if necessary, a wilful disobedience thereof. But we know of no law which would authorize this court to dismiss the appeal in this case, for the reason that the appellant had failed, for some cause not shown, to comply with the order of the court below." And in *Dwelly v. Dwelly*, 46 Me. 377, where a libel for divorce was taken to the supreme judicial court on exceptions, and a motion was filed by the libellant to dismiss the exceptions because the libellee had not com-

tions, to pay the libellant a specified sum to enable her to prosecute her exceptions, it was again held that the appellate court would not entertain the motion. The court said: "We are not satisfied that this court, sitting in banc, has any jurisdiction over the question when presented upon motion, as in the case before us. The proper place of proceeding, in a case like this, seems to be before the judge at nisi prius, where the party complaining of the neglect may proceed against the libellee as for contempt in disregarding the decree of the court, in which proceeding the libellee may appear, upon proper notice, and purge himself of the contempt, by showing his pecuniary inability to comply with the order, or any other facts which may properly produce a like effect; or, perhaps, an execution might issue for the sum allowed. We are of opinion that we cannot, in this summary way, overrule the exceptions of the libellee." The only possible ground upon which this case and the preceding case of *Eastes v. Eastes* can be distinguished from *Brown v. Brown* is that here the order for appeal money was made in the lower court, which, it was said, had power to punish disobedience of the order, whereas in the *Brown* case the order for appeal money was made by the appellate court itself. A case closely analogous to and which supports *Eastes v. Eastes* and *Dwelly v. Dwelly*, supra, is *Vosburg v. Vosburg*, 131 Cal. 628, 63 Pac. 1009, wherein it was held that the fact that the defendant in a suit for divorce, pending his appeal from an adverse decree, kept a child of the marriage out of the state in violation of the decree, and that he also stayed outside the jurisdiction of the court for the purpose of preventing the execution of the decree with respect to the custody of such child, unless the decree on appeal was favorable to him,—did not afford sufficient ground on which to base a motion to dismiss his appeal. The court said: "The case presented does not warrant a dismissal of the appeals. It certainly does not present one of the grounds for dismissing an appeal prescribed either in the Code or the rules of this court, and it seems to be admitted that there is no precedent for a dismissal for the reasons here relied on. It is contended that there should be applied to this motion the principle upon which certain appeals in criminal cases have been dismissed because the appellant had broken jail and disappeared, but this contention cannot be maintained. . . . The status of appellant and of the boy Roydon is exactly the same as it was at the rendition of the judgment and order from which he appeals. Whatever part of the judgment was enforceable at the time it was rendered, and at the time the appeals were taken, would in like manner be enforceable upon its affirmation. In addition to the specific grounds for dismissing appeals prescribed by statute and rules of court, an appeal will also sometimes be dismissed where it clearly appears that

ing between the parties, and no actual controversy pending; but no such condition appears in the case at bar. And, moreover, we cannot see any other general ground upon which this motion to dismiss can be placed."

And in *State ex rel. Bordeaux v. District Ct. 31 Mont. 511, 79 Pac. 13*, it was held that the only remedy for failure to comply with an order of the trial court to pay alimony, pending appeal, is in the trial court by contempt proceedings, it being said that the appellate courts have no authority to enforce the orders of lower courts in such cases.

Other remedies have been sought in the trial court, but without success. Thus, it has been held that where a right of appeal is absolute, the trial court cannot decree that a transcript for purposes of appeal be withheld until the payment of temporary alimony and a sum to enable the successful party to defend any writ of error or appeal. *Martin v. Martin*, 6 Blackf. 321. So, it has been held that the trial court cannot justify a refusal to sign a certificate of evidence for use on appeal upon the ground that one seeking the same is in contempt of court by reason of his failure to pay alimony and counsel fees as decreed. *People ex rel. Crymble v. Horton*, 46 Ill. App. 434. And in such case mandamus will issue to compel the trial judge to issue the certificate of evidence. *Ibid.*

G. J. C.

FLORIDA SUPREME COURT.

JETTON LUMBER COMPANY et al.,
Appts.,
v.

MRS. MINNIE HALL, by Next Friend.

(— Fla. —, 64 So. 440.)

Exemptions — construction.

1. Organic and statutory provisions relating to the homestead and personal prop-

Headnotes by SHACKLEFORD, Ch. J.

Note. — Wife as head of family within homestead or exemption statute.

This note supplements subdivision II. c, of the note appended to *Sheehy v. Scott*, 4 L.R.A.(N.S.) 365, dealing with the general question of what constitutes a "family" under the homestead and exemption law.

The present note does not deal with the rights of married women generally to homestead or other exemptions, but is concerned solely with the question whether she can assert any such rights under statutes in which exemptions are granted in favor of the "head of the family." Cases like *Hill v. Myers*, 46 Ohio St. 183, 19 N. E. 593, which involve merely the application of a

his widow; and as the will avers that he is residing in Massachusetts, consequently he is not deceased.

Betz v. Brenner, 106 Mich. 87, 63 N. W. 970.

Mr. V. H. Nysewander, for appellee:

Exemption laws are to be liberally construed in favor of their beneficent purposes.

McDougall v. Meginniss, 21 Fla. 362; Carter v. Carter, 20 Fla. 562, 51 Am. Rep. 618; Milton v. Milton, 63 Fla. 533, 58 So. 718; Green v. Simon, 17 Ind. App. 360, 46 N. E. 693.

The complainant is the head of a family, residing in this state.

State ex rel. Scoville v. Wilson, 31 Neb. 462, 48 N. W. 147; Hamilton v. Fleming, 26 Neb. 240, 41 N. W. 1002; Nash v. Nor-

ment, 5 Mo. App. 545; Kenley v. Hudelson, 99 Ill. 493, 39 Am. Rep. 31; Linander v. Longstaff, 7 S. D. 157, 63 N. W. 775.

Personal property, exempt upon the Constitution from forced sale for debts, is not susceptible of fraudulent alienation, so far as the creditors are concerned.

Ballard v. Eckman, 20 Fla. 661; Claflin v. Ambrose, 37 Fla. 78, 19 So. 628.

Mr. C. W. Stevens also for appellee.

Shackleford, Ch. J., delivered the opinion of the court:

On the 25th day of September, 1913, the appellee filed her bill in chancery against the appellants, which, omitting the formal parts, reads as follows:

"Mrs. Minnie Hall, by her next friend,

which the premises were occupied by the wife and husband, together with her children by a prior marriage, the court held that the husband was presumptively the head of the family, and that the wife must overcome such presumption before she can assert exemptions.

But the presumption as to the husband's headship of the family was held rebuttable in Temple v. Freed, 21 Ill. App. 238, in which it was held that the wife was the head of the family, where the husband had for a time been confined as an insane person, though he was living with the family when the homestead right was asserted, and where the wife had taken exclusive charge of the farm on which they lived, she and the children doing the manual labor, and she buying the provisions and selling the produce.

Indeed it has been held that a selection of the exemption to heads of families may be made by the wife where the husband is adjudged insane and confined in a state hospital, although most of the property belongs to him. Ecker v. Lindskog, 12 S. D. 428, 48 L.R.A. 155, 81 N. W. 905.

On the other hand, the court, in Union County Invest. Co. v. Messix, 152 Iowa, 412, 132 N. W. 823, remarked in passing that the husband's insanity did not give the wife title to the property, nor confer upon her headship of the family.

Where the husband absconds and the wife remains on the homestead with the family, she as head of the family may claim the exemption. State ex rel. Scoville v. Wilson, 31 Neb. 462, 48 N. W. 147. Note in this connection JETTON LUMBER CO. v. HALL.

So, a business woman who goes to another state and marries a resident thereof, and immediately returns and resumes her business, she and her sister living together, is the head of the family within the exemption laws, her husband never having lived with her or become a resident of the state. Fish v. Street, 27 Kan. 270.

It is recognized in Farmers' & M. Bank v. Hoffman, 5 Neb. (Unof.) 9, 96 N. W. 1044, that where a husband has absconded 51 L.R.A.(N.S.)

from the state, and the support of the family has devolved upon the wife, and neither she nor the husband is owner of real estate subject to the homestead exemption, she as head of the family is entitled in lieu thereof to goods to the value of \$500.

In Bank of Liberal v. Redlinger, 95 Mo. App. 279, 68 S. W. 1073, the court seemed to regard the wife as head of the family, in holding that a woman conducting a business in her own name and with her own funds, her husband having abandoned her and gone to another state, was entitled to exemptions.

Attention is also directed to Re Youngstorm, 82 C. C. A. 232, 153 Fed. 98, holding that the wife of an absconding debtor is entitled to claim the exemption under a statute providing that when the head of the family shall desert, "the family" shall be entitled to exemption. The court said that although the family had consisted only of the husband and wife, she was nevertheless entitled to the same as the remaining portion of the family.

It is held in Illinois that where the homesteader's wife obtains a divorce from him, she being the meritorious cause thereof, and the custody of the children is committed to her, she is to be regarded as a widow and the head of the family, in keeping with the spirit of that provision of the homestead law, which declares that upon the husband's death the homestead continues until the youngest child is twenty-one, and until the widow's death. Vanzant v. Vanzant, 23 Ill. 536, followed in Bonnell v. Smith, 53 Ill. 375.

Thus, it is seen that there is a tendency upon the part of the courts to construe the exemption statute liberally to the end that a wife who has assumed, or has had thrust upon her, the husband's burden, shall be entitled to the immunities thereby granted. But in thus meting out a liberal measure of justice the court should not lose sight of another phase of the situation which is especially well pointed out in Ness v. Jones, 10 N. D. 587, 88 Am. St. Rep. 755, 88 N. W. 706, in which the court stated that since, when the wife is held to be the head of the

John S. Horter, of the county of Hillsborough and state of Florida, brings this, her bill of complaint, against the Jetton Lumber Company, a corporation, with its principal place of business in the city of Tampa, county of Hillsborough and state of Florida, and W. C. Spencer, sheriff of Hillsborough county, state of Florida.

"The complainant would show unto your Honor that on the 23d day of September, A. D. 1913, one of the above defendants, the Jetton Lumber Company, filed suit against the complainant's husband, Harry Hall. That the said suit was instituted in the county court, by attachment of two automobiles, described as follows: One Overland car, city number, No. 1250, and one Buick car. That the said automobiles are still held by W. C. Spencer, one of the above defendants, under the said attachment levies.

"The complainant would further show unto your Honor that the said Harry Hall deserted the complainant on the 24th day of August, A. D. 1913, and that since the said date the complainant has been unaware of the whereabouts of her said husband, though she has since been informed that he is residing within the state of Massachusetts. That the said Harry Hall left against the will of this complainant, and, as your complainant believes, without any intention of returning.

"The complainant would further represent unto your Honor that she is thirty-five years of age, has two children by her said husband, to wit, George, age eleven, and Jack, age eight years. That the said children are dependent solely upon this complainant for their support and maintenance, and that this complainant, together with her said children, reside in the city of Tampa.

family, the husband loses his position as such, the tendency to extend the immunities of the exemption statute to the wife should be cautiously indulged; and that the mere bankruptcy of the husband ought not to deprive him of the headship of the family. For, it is said, if a debtor ever needs the benefits of the exemption laws it is when he is in greatest financial distress; and when he has nothing save his hands with which to support his family, he should at least be permitted to hope that his first acquisitions by such means would not be seized by creditors, as they would be if he had relinquished the headship of the family to his wife. Thus declaring itself, the court in the Ness Case held that therefore the wife was not to be regarded as head of the family and entitled to exemption in produce of her own farm conducted by herself, merely because the husband, who was an able-bodied man, had become bankrupt in an independent business of his own, and, though living with the family, did not aid her in running the farm and supplying the household, save by advice and a slight amount of labor.

The question is not to be determined by whether he or she contributes the greater sum to the support of the family. *Farwell v. Martin*, 65 Ill. App. 55.

Before she can be regarded as head of the family, either the wife must be under a legal or moral obligation to support the family, or else the members of the family must be actually dependent upon, and actually supported by, her. *Briggs v. Bell*, 8 N. J. L. J. 251.

A wife who is an owner of a business cannot be regarded as head of the family where the husband is not incapacitated, and manages her business as her agent. *Blount v. Medbery*, 16 S. D. 562, 94 N. W. 428.

He does not relinquish his character as head of the family by the fact that he is merely assistant in a business purchased with the wife's money, and principally con-

ducted by her, where he is in a normal condition of health, owns the family residence, and other property a part of which he has devoted to the family's support, and devotes all his energy and time to the wife's business, in which he renders valuable services. *Farwell v. Martin*, 65 Ill. App. 55, distinguishing *Temple v. Freed*, 21 Ill. App. 238, *supra*.

Nor can she be regarded as head of the family where the husband is an able-bodied man, twenty-four years old, in possession of all his faculties, and farms her land, receiving one half the crops and sharing the losses; and the fact that he does what he pleases with his share, or that she pays her own expenses when she travels, or that she owns the property and hires him to look after it, or all combined, do not destroy his status as head of the family. *Arnold v. Coleman*, 88 Ill. App. 608.

And a woman whose husband is in fact the head of the family is not a "householder" within the meaning of the Rhode Island exemption statute. *Re Jamieson*, 6 Am. Bankr. Rep. 601.

An abandoned wife who lives upon a farm with her mature sons, one of whom is married and operates the same, cannot be held to be head of the family. *Somers v. Somers*, 27 S. D. 500, 36 L.R.A.(N.S.) 1024, 131 N. W. 1001.

So, a mother living with her daughter and the latter's husband is not the head of the family within the exemption act, where the daughter and husband are not dependent upon the mother, and are not even partially supported by her. *Briggs v. Bell*, *supra*.

Of course, the present question presents no difficulty in jurisdictions like Utah, where the statute expressly states that the head of the family may be either the husband or the wife. That such is the situation in Utah is shown by the case of *Volker-Scowcroft Lumber Co. v. Vance*, 32 Utah, 74, 126 Am. St. Rep. 828, 88 Pac. 896.

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that the automobiles above described are in danger of being disposed of at forced sale, in pursuance of the said attachment suit, as aforesaid, by said defendants.

"That the said automobiles afford the complainant her only means of making a livelihood and a subsistence for herself and her two children (neither the complainant nor her said children having received any support whatsoever from her said husband since his desertion, as aforesaid, nor have they any reason to expect his future aid).

"The complainant further represents that against the said automobiles there are existing, respectively, encumbrances in the sums of \$75 and \$375, leaving an equity in your complainant of not more than \$550. That this equity constitutes the whole of both the complainant's and her said husband's property, and is a true and complete inventory of the whole of their said property.

"That this complainant claims the said automobiles as exempt from said seizure and forced sale in pursuance thereof, under the Constitution of the state of Florida.

"The premises considered, and inasmuch as the complainant is without remedy save in a court of equity, where such matters are properly cognizable, and to the end that the defendants may be required to answer this, the complainant's bill of complaint, but not under oath, answer under oath being hereby expressly waived. And that the complainant's right to exempt the said property be decreed, and that the same be set apart to the complainant as exempt from seizure and sale, under said attachment writs, and the defendants be restrained from selling or disposing of said property.

"And that the complainant may have such other and further relief in the premises as equity may require and to your Honor shall seem meet:

"May it please your Honor to grant unto the complainant the state's most gracious writ of subpœna, issued out of and under the seal of this court, directed to the said Jetton Lumber Company and W. C. Spencer, commanding them to be and appear before this honorable court on a day certain therein to be named, and under a penalty certain therein to be stipulated, and to stand to and abide by such orders and decrees as may be made in this cause.

"The complainant prays the court to grant her a writ of injunction, enjoining and restraining the said Jetton Lumber Company and W. C. Spencer, the defendants, their attorneys, agents, and representatives from selling or disposing of the said automobiles until the further order of this court.
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etc.

To this bill the defendants interposed the following demurrer:

"These defendants, by protestation, not confessing or acknowledging either of the matters or things in the bill of complaint contained to be true, say that said bill is bad in substance and insufficient in law, wherefore the said defendants demur to said bill, and for substantial matters of law to be argued in support of said demurrer, and assign the following, to wit:

"First. The bill does not state a cause of action cognizable in equity.

"Second. The bill shows on its face that it is instituted by a married woman without the joinder of her husband or next friend.

"Third. The bill shows on its face that the property attached is not the property of the complainant, but is the property of complainant's husband, who is a nonresident of the state of Florida.

"Fourth. The bill shows on its face that the complainant's said husband has permanently left the state of Florida without the intention of returning thereto, therefore he would not be entitled to exempt the said property, for which reason the law granting exemptions to the head of a family residing in the state does not give her the right to such exemption.

"Fifth. The bill does not show that the complainant is the widow or heir of the owner of the property in question, so as to cause the right of exemption which might have been claimed by the owner thereof, if the head of the family residing in the state of Florida, to inure to her benefit under the provisions of § 2, article 10, of the Constitution of Florida."

The following order was made at the hearing of the demurrer:

"Demurrer sustained as to second ground, and, complainant asking leave to amend by inserting a next friend in this said bill, and said amendment having been allowed and made *instantly*, it is ordered then after consideration that the demurrer be overruled, and twenty days given defendants to file further pleadings.

"Done, ordered, and decreed this the 13th day of October, A. D. 1913."

From this interlocutory order the defendants have entered their appeal. It will be observed that we have copied the bill as amended.

The appellee's claim to have the attached property set aside to her as exempt is based on § 1 of article 10 of our state Constitution, which reads as follows:

"A homestead to the extent of one hundred and sixty acres of land, or the half of

warranto may at common law be filed by the attorney general in the name of the state, to test the claim to office of an officer of a manufacturing corporation organized for private gain, either under special charter or under general incorporation laws, since the corporation is exercising a public franchise, and the title to its offices is a matter of public concern.

Pleading — quo warranto — plea concluding with *absque hoc* — new matter in replication.

3. In a common-law proceeding by information in the nature of quo warranto, to oust an incumbent from office in a private corporation, in which his usurpation is charged and demand is made for justification of his claim to office, accused cannot, by concluding with an *absque hoc* a plea denying usurpation and setting up title, pre-

clude the state from replying new matter in avoidance of the title set up, and compel it to join issue on the plea.

Corporation — voting power of preferred stock.

4. Statutory and charter authority to deprive holders of preferred stock of the right to vote in the election of officers and directors of a corporation is invalid where the state Constitution provides that "each shareholder shall be entitled to one vote for each share of stock he may hold."

(January 17, 1911.)

ERROR to the Superior Court for New Castle County to review a judgment of ouster in a proceeding in the nature of quo

peler, 11 U. C. Q. B. 222 (director of railroad); *Ex parte Gilbert*, 15 N. B. 29 (president of mining company).

II. American rule.

a. In general.

The Massachusetts courts seem to be the only American courts which follow the English rule. They have held that an information in the nature of a quo warranto is not the proper remedy to try the title to offices in a private corporation. *Goddard v. Smithett*, 3 Gray, 116 (vestrymen in religious society); *Haupt v. Rogers*, 170 Mass. 71, 48 N. E. 1080 (officers of elevated railroad).

All other cases upon the point agree with *BROOKS v. STATE* in holding that an action of quo warranto, or in the nature of quo warranto, is the proper remedy to test the right to an office in a private corporation. *State ex rel. Richards v. Brooks*, — Del. —, 4 Atl. 37 (director); *State ex rel. Dunlap v. Stewart*, 6 Houst. (Del.) 359 (vestrymen of religious society); *Davidson v. State*, 20 Fla. 784 (president of benevolent association); *State ex rel. Hankins v. Newell*, 75 N. J. L. 26, 66 Atl. 929 (trustee of cemetery association); *State ex rel. Schwartz v. Ohio & M. R. Co.* 6 Ohio C. C. 412, 3 Ohio C. D. 516 (directors of railroad company); *Com. ex rel. Clements v. Arrison*, 15 Serg. & R. 127, 16 Am. Dec. 531 (trustees of religious society); *Gunton v. Ingle*, 4 Cranch, C. C. 438, Fed. Cas. No. 5,870 (president and directors of packet company).

This is upon the theory that corporations chartered by the state, or organized under the general statutes of the state, are public franchises, and that the usurpation of a corporate office, therefore, amounts to the usurpation of a privilege granted by the state.

Thus, the court in *Com. ex rel. Clements v. Arrison*, 15 Serg. & R. 127, 16 Am. Dec. 531, supra, says: "I strongly incline to the opinion that in all cases where a charter exists and a question arises concerning the exercise of an office claimed under that charter, the court may, in its discretion, grant

leave to file an information; because, in all such cases, although it cannot be strictly said that any prerogative or franchise of the commonwealth has been usurped, yet, what is much the same thing, the privilege granted by the commonwealth has been abused. The party against whom the information is prayed has no claim but from the grant of the commonwealth, and an unfounded claim is a usurpation, under pretense of a charter, of a right never granted."

And it is similarly stated in *Davidson v. State*, 20 Fla. 784, supra, that "an intrusion into an office of a merely private corporation may, in this country, be corrected by information with the same propriety as in cases of public or municipal corporations, since in both cases there is an unfounded claim to the exercise of a corporate franchise, amounting to a usurpation of the privilege granted by the state."

So, in *State v. Ashley*, 1 Ark. 513, it is held that the office of public director of the Principal Bank of the Real Estate Bank of the State or Arkansas is a public franchise, and not a private right. The following from the opinion, however, shows that this institution was not a strictly private corporation: "The state has a voice in all the transactions of the bank, by the appointment of two members in the board of directors of the Principal Bank and each of the branches, and four directors in the central board. The capital of the bank is raised upon her faith and credit, pledged in the form of bonds."

Attempts have often been made to attack collaterally, or in some action other than quo warranto or in the nature of quo warranto, the right to an office in a private corporation. In such instances courts have frequently felt called upon to state that proceedings of quo warranto or in the nature of quo warranto are the proper remedies. *Hayes v. Burns*, 25 App. D. C. 242, 4 Ann. Cas. 704 (general officers of lodge); *Hussey v. Gallagher*, 61 Ca. 86 (president of religious temperance society); *McCarthy v. McKinney*, 137 Ga. 292, 73 S. E. 394 (secretary of grand lodge); *Lawson v. Kolbenson*, 61 Ill. 405 (trustees of religious corpora-

Pa. Ct. 112; Central Trust Co. v. Milwaukee Street R. Co. 74 Fed. 443; First Nat. Bank v. Ames, 39 Minn. 179, 39 N. W. 308; Jones v. Knauss, 31 N. J. Eq. 211; Skinner & M. Co. v. Waite, 155 Fed. 828; United States v. Edme, 9 Serg. & R. 147.

In all elections for directors or managers of stock corporations, each shareholder shall be entitled to one vote for each share of stock he may hold.

Const. art. 9, § 6.

This provision of the Constitution became a part of every charter thereafter obtained, and no provision of any charter granted, and no by-law or regulation of the corporation, and no agreement of corporators or stockholders, inconsistent with such constitutional provision, would be valid for any purpose or under any circumstances.

Taylor v. Griswold, 14 N. J. L. 251, 27 Am. Dec. 33; United States v. Fisher, 2 Cranch, 358, 2 L. ed. 304; Sedgw. Stat. & Const. Law, 195; Bosley v. Mattingly, 14 B. Mon. 89; Wilmington City R. Co. v. Wilmington & B. S. R. Co. 8 Del. Ch. 468, 40 Atl. 12; Tomlinson v. Jessup, 15 Wall. 456, 21 L. ed. 204; Holyoke Water Power Co. v. Lyman, 15 Wall. 506, 21 L. ed. 135; Miller v. New York, 15 Wall. 494, 21 L. ed. 103; Shields v. Ohio, 95 U. S. 324, 24 L. ed. 359; Maine C. R. Co. v. Maine, 96 U. S. 499, 501, 24 L. ed. 836; Greenwood v. Union Freight R. Co. 105 U. S. 17, 26 L. ed. 963; Atlantic & G. R. Co. v. Georgia, 98 U. S. 361, 365, 25 L. ed. 186, 187; Close v. Glenwood Cemetery, 107 U. S. 476, 27 L. ed. 412, 2 Sup. Ct. Rep. 267; Spring Valley Waterworks v. Schottler, 110 U. S. 353, 28 L. ed. 176, 4 Sup. Ct. Rep. 48; Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 270, 36 L. ed. 968, 13 Sup. Ct. Rep. 90; New York & N. E. R. Co. v. Bristol, 151 U. S. 567, 33 L. ed. 272, 14 Sup. Ct. Rep. 437; Pennsylvania College Cases, 13 Wall. 213, 20 L. ed. 553; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Bixler v. Summerfield, 195 Ill. 147, 62 N. E. 849.

A plea in the form of an *absque hoc* is a proper plea in quo warranto proceedings.

State ex rel. Ward v. Churchman, 3 Penn. (Del.) 167, 49 Atl. 381; State ex rel. White v. Hancock, 2 Penn. (Del.) 252, 45 Atl. 851; Stephen, Pl. pp. 186-190; Thomas v. Black, 8 Houst. (Del.) 507, 18 Atl. 771.

Quo warranto does not lie for usurping office in a private corporation.

Goddard v. Smithett, 3 Gray, 116; High, Extr. Rem. § 802; Darley v. Reg. 12 Clark & F. 541; Haupt v. Rogers, 170 Mass. 71, 48 N. E. 1080.

The proceeding is improperly entitled in the name of the state, on the relation of the attorney general.

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Messrs. Christopher L. Ward and Herbert H. Ward, for defendant in error:

The purpose, intent, and meaning of § 6, art. 9, was merely to abrogate the common-law rule, which was that stockholders in corporations were entitled to one vote each on all questions, irrespective of the number of shares held by them.

2 Cook, Corp. 1137; Taylor v. Griswold, 14 N. J. L. 222, 27 Am. Dec. 33; 2 Harvard L. Rev. 156; Cooley, Const. Lim. 66.

A person may waive any provision either of a contract or of a statute intended for his benefit.

Shutte v. Thompson, 15 Wall. 151, 159, 21 L. ed. 123, 125; Bowen v. Aubrey, 22 Cal. 560; Morrison v. Underwood, 5 Cush. 52; Beecher v. Marquette & P. Rolling Mill Co. 45 Mich. 105, 7 N. W. 695; Phylfe v. Eimer, 45 N. Y. 102; Kimball v. Munger, 2 Hill, 364; Tombs v. Rochester & S. R. Co. 18 Barb. 583.

Quo warranto is usually held to be an appropriate remedy to try an office in a private corporation, either at common law or under special statutory provisions.

23 Am. & Eng. Enc. Law, 2d ed. 640; Com. ex rel. Clements v. Arrison, 15 Serg. & R. 127, 16 Am. Dec. 531; State ex rel. Danforth v. Hunton, 28 Vt. 594; Owen v. Whitaker, 20 N. J. Eq. 122; People ex rel. Israel v. Tibbets, 4 Cow. 357; Hullman v. Honcomp, 5 Ohio St. 237; State ex rel. Kilbourn v. Tudor, 5 Day, 329, 5 Am. Dec. 162; Lawson v. Kolbenson, 61 Ill. 405; Nelson v. Benson, 69 Ill. 27; Place v. People, 192 Ill. 160, 61 N. E. 354; Smith v. Bank of State, 18 Ind. 327; Beckett v. Houston, 32 Ind. 393; 23 Am. & Eng. Enc. Law, 2d ed. 640.

The information was properly signed by the attorney general. This is the practice, whether the application partake of a public or private character.

17 Enc. Pl. & Pr. 429, 430; Atty. Gen. v. Sullivan, 163 Mass. 446, 28 L.R.A. 455, 40 N. E. 843; Haupt v. Rogers, 170 Mass. 71, 48 N. E. 1080; Rice v. National Bank, 126 Mass. 300; Osgood v. Jones, 60 N. H. 548; State ex rel. Wasson v. Taylor, 50 Ohio St. 120, 38 N. E. 24; Goddard v. Smithett, 3 Gray, 116.

Woolley, J., delivered the opinion of the court:

On or about the 28th day of October, A. D. 1901, Henry Brooks, Richard B. Morrell, and William M. Pyle organized a corporation under the general corporation laws of the state of Delaware, for the purpose of conducting and carrying on the textile business in which Brooks and Morrell had been previously engaged in the state of Pennsyl-

warranto directed to the said George H. Brooks and John W. H. Brooks, commanding them and each of them that they appear in the said court on some day to be named by the said court, to show by what warrant or authority they claim to have and enjoy the franchises, offices, privileges, and liberties aforesaid.

Robert H. Richards,
Attorney General of the State of Delaware.

After refusal by the court to allow subsequent motions to quash the information and discharge the rule for reasons that appear in subsequent pleadings, the defendant below filed his plea to the information. By his plea he admits the incorporation of the Geo. Brooks & Son Company, and that prior to the stockholders' meeting of May 11, 1908, Marshall A. Brooks, Morrell and Pyle were its lawfully elected and qualified directors, to remain such until their successors were lawfully elected and qualified. For title to his office as director, he shows that at the election for directors on the date last named, all of the stockholders of the company were present, either in person or by proxy, that the stock vote was equal to the stock issued, that he received 2,000 of the 3,000 votes cast, that 1,000 votes represented the votes cast upon the 1,000 shares of preferred stock and that the other 1,000 votes were cast upon 1,000 shares of the common stock, and that the votes so cast for him upon the shares of preferred stock were legally cast and counted under and by force of the provision of the Constitution of the state of Delaware of 1897, as then existing (art. 9, § 6), which was that "in all elections for directors or managers of stock corporations each stockholder shall be entitled to one vote for each share of stock he may hold."

The plea concludes with a denial of the usurpation of the office charged in the information, by employing the formal language of a special traverse: "Without this, that the said George H. Brooks during all the time since the 11th day of May, A. D. 1908, the said franchises, offices, privileges, and liberties of director of the said corporation has usurped and still does usurp in the manner and form as in the said information is alleged, and this the said George H. Brooks is ready to verify."

To that part of the defendant's plea in which he shows the title by which he claims and holds the office he is charged to have usurped the attorney general replied by special replication, setting up new matter in avoidance of that upon which the defendant based his title. By this new matter he challenges the right of holders of the preferred stock to vote for directors, and quotes

from the charter and by-laws of the corporation the provisions respecting the voting power of stock. The provision of this charter is that "the holders of said preferred stock shall not be entitled, by reason of their holdings thereof, to any voice or vote in the management of the affairs of the corporation. The voting power shall be confined to the holders of the common or general stock." And it is further shown that the by-laws provide that: "The one hundred thousand of preferred stock shall have no vote in the transaction of any business of the company, being a first lien on all of the property, and in case of liquidation shall be redeemed at par, shall draw a regular yearly dividend of 6 per cent, which may be paid quarterly, and which shall be cumulative.

"The two hundred thousand common stock shall have and possess all voting power, shall meet and elect board of directors, once a year, order and amend by-laws, and, in fact, exercise all the power of stockholders, as hereinafter provided."

It is therefore replied that the 1,000 votes received by the defendant below, and cast for him by the holders of that quantity of preferred stock, were illegal, that without the votes on the preferred stock, each person voted for at the election mentioned received the same number of votes, that the vote was therefore a tie, and as a consequence no one was elected, and that the defendant and his brother have usurped the offices to which Morrell and Pyle are entitled as holding-over directors. To this replication the defendant below demurred specially, showing for causes of demurrer matters that appear in his assignment of errors. The demurrer was overruled, and upon election, final judgment was entered.

This cause comes before this court on a writ of error, in support of which the plaintiff in error suggests error in the judgment and proceedings below by an assignment of errors containing ten specifications, which have been grouped and classified so that the questions presented by them may be considered under the following titles:

(1) Exemption of the defendant below from service of process.

(2) Whether the remedy employed extends to the usurpation of an office in a private corporation.

(3) Whether the proceeding is properly entitled in the name of the state of Delaware upon the relation of the attorney general.

(4) Whether a replication may contain new matter in reply to a plea concluding with the *absque hoc*.

(5) Whether the proceeding is futile and nugatory.

an assistance to the court of a nature that would make his presence necessary within the rule. He was present at an argument in which he could have given no testimony. He was there in the capacity of any agent of one of the litigating parties, and in this he was in no different position and is entitled to no further immunity than would have been a director of a corporation, the secretary of an unincorporated association, or the business manager of a partnership, when present under like circumstances. Any other rule would enable a party, and not the court, to extend the privilege and determine the necessity of a person's presence, and would extend the class of privileged persons from those over whom the court has control to all those who might be deemed by a party to be necessary to him or to his counsel in the preparation and presentation of a case. We are therefore of opinion that the service of the rule was valid, and that the court below committed no error in refusing to vacate it.

2. The Geo. Brooks & Son Company, being a private corporation in the sense that its charter powers relate to a manufacturing business for the personal gain of its stockholders, and not to matters in which the public have a beneficial interest, and its officers being private officers in the sense that they have no public services to perform, the question is raised whether the remedy of an information in the nature of a writ of quo warranto will extend to the usurpation of an office in a corporation of such a private nature.

Whatever may have been the origin and history of the writ of quo warranto and of the succeeding remedy, an information in the nature of a writ of quo warranto, it is certain that the latter was a part of that vast mass of remedies for wrongs which was brought over by the early English settlers, and which by statutory and constitutional enactments, beginning in 1736 (Laws of Del. vol. 1, pp. 121, 122) and concluding only with the existing Constitution, was, by the general adoption of the powers of the King's Bench, made a part of our civil judicature, here to remain, ready to be invoked for the first time in the case of *State ex rel. Dunlap v. Stewart* in 1881 (6 *Houst. (Del.)* 359), and to be subjected to judicial construction for the first time by an appellate court of this state in the case now under consideration.

A writ of quo warranto was in the nature of a writ of right for the King, against him who claimed or usurped any office, franchise, or liberty, to inquire by what authority he supported his claim, in order to

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tiquity. Nor is there any historical certainty of the origin of the remedy by information in the nature of a writ of quo warranto, which succeeded and later superseded the original remedy, nor is its history important in the present consideration, in view of the fact that it is known that the remedy by information was in use contemporaneously with the remedy of the writ of quo warranto as a common-law remedy long before the statute of 9 Anne, chap. 20 (1710), and that that statute was not the origin of the proceeding by information, for by its 4th section there is an express recognition of its pre-existence. It is further known that the statute of Anne was limited in its territorial scope, and conferred upon the courts jurisdiction to employ the remedy by information only with respect to those offices and franchises of a public and political character originally derived from the King, that were particularly enumerated in its preamble. This statute was never in force in this or any other American colony (*State ex rel. Dunlap v. Stewart, supra*), therefore the remedy by information, which was adopted in Delaware by reference to that of the common law, was the common-law remedy by information in the nature of a writ of quo warranto, and not the statutory remedy.

While differing in origin, form, and procedure from the writ of quo warranto, the common-law remedy by information, like the ancient writ, was the proceeding by which to try the right to an office or franchise, and it seems to have been long settled in England that the office with respect to which the remedy by information would lie must have been public in its nature. *Darley v. Reg.* 12 Clark & F. 520. Hence the contention of the plaintiff in error, that under the remedy we have adopted by the general terms of our statutes and Constitutions, we are bound to limit it to the same kind of public offices to which it was extended at common law, and that it will not lie "to try the title to an office in a corporation strictly commercial and private."

There is no doubt that the remedy by information may not be invoked for the redress of mere private grievances (*Spelling, Extr. Rem.* §§ 1830, 1831), and can only be invoked when wrong has been done to the public. Hence it follows, if a wrong complained of be the usurpation of an office, it must be the usurpation of an office public in character, otherwise the people cannot be called upon in their sovereignty to petition for its redress.

This brings us to a consideration of what is a public office. At the time the common-

the proceeding by information has never been considered an election contest between contesting candidates for an office, from which the sitting candidate may be ousted and into which the contesting candidate may be inducted, but it is a proceeding by which may be tried and determined the fact of usurpation of an office by an incumbent, the decree in which, if against the defendant, is one of ouster, regardless of the rights or title of the relator.

The proceeding by information being in theory, as at one time it was in fact, a prosecution, the information as a pleading is less of a narr. than a complaint or accusation against the defendant for an offense. 4 Bl. Com. 308. By the information the defendant is accused of usurping a particular office, and is called upon to show by what authority he holds it, and is not called upon to try his title against the title of the relator, as might be required of him in pleadings begun by narr.

The chief characteristics of an information are, first, the accusation of a usurpation; and, second, the demand that the defendant show the authority for his claim. Upon the first, being a statement of fact and presenting an issue, the defendant may take issue by plea; upon the second, being no statement of fact and presenting no issue, he cannot take issue by plea. Therefore when the defendant is called upon to plead to an information, he must admit or traverse the usurpation and disclaim or justify title, right, or authority in or to the thing he is charged to have usurped. If he admits usurpation or disclaims title, the prosecution is entitled to judgment; if he traverses the usurpation and justifies under his title, he may have his rights determined by trial. The plea of not guilty is not a sufficient answer, as it amounts simply to a traverse of the allegation of usurpation, and, like the plea of *non usurpavit*, fails to respond to the demand of the information that the defendant show his title, right, or authority. State ex rel. Atty. Gen. v. Foote, 11 Wis. 14, 78 Am. Dec. 689; State ex rel. Law v. Saxon, 25 Fla. 342, 5 So. 801; Spelling, Extr. Rem. § 1861; Shortt, Extr. Rem. 178. The information can be sufficiently answered only by a plea that traverses the usurpation and justifies the title, right, or authority. Holden v. People, 90 Ill. 434; Catlett v. People, 151 Ill. 16, 37 N. E. 855; State v. Olcott, 6 N. H. 74, 75; Clark v. People, 15 Ill. 213; State v. Ashley, 1 Ark. 513. The plea of justification must show all the facts necessary to establish the lawful right of the defendant in the matter. It is the first pleading that indicates the facts upon which the

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five showing, the burden of maintaining which is upon the defendant, and should be concluded with a verification. People ex rel. Larke v. Crawford, 28 Mich. 88, 89; State ex rel. Harris v. McCann, 88 Mo. 386; State v. Ashley, 1 Ark. 513; Spelling, Extr. Rem. §§ 1857-1859.

To a plea traversing usurpation and justifying, there is no question that the relator may demur (State ex rel. White v. Hancock, 2 Penn. (Del.) 252, 265, 45 Atl. 851; State ex rel. Ward v. Churchman, 3 Penn. (Del.) 167, 174, 49 Atl. 381; People ex rel. Atty. Gen. v. Kankakee River Improv. Co. 103 Ill. 491, 511), or join issue on the facts therein stated (People ex rel. Larke v. Crawford, 28 Mich. 88; State ex rel. Harris v. McCann, 88 Mo. 386; People v. Kankakee River Improv. Co. supra); the question in this case being whether the relator must join issue on the plea, or may reply by way of confession and avoidance.

By the subtlety of a special traverse which the defendant in form has pleaded, he contends that the matter of justification shown by his plea is but inducement to his traverse of usurpation, that instead of joining issue on the traverse, the relator has replied to the inducement by matter in avoidance thereof; or, in other words, the replication traverses a traverse, and therefore is bad.

There is a question, however, whether the plea in this case is a good special traverse, or is a special traverse at all within the rule of pleading, although in form it concludes with the technical words of *absque hoc*, as do the pleas in the cases of State ex rel. White v. Hancock, 2 Penn. (Del.) 252, 263, 265, 45 Atl. 851, and State ex rel. Ward v. Churchman, 3 Penn. (Del.) 167, 49 Atl. 381, and in the English forms given in Wentworth's Pleading, 33, 39, 147, 151, 158. Nevertheless, the plea by the *absque hoc* certainly could have been intended for use only in a case in which the narr. tenders an issue, or in respect to something that calls for a denial. While an information in the nature of a writ of quo warranto is dual in its function, the one issue tendered by it is that of usurpation, and the issue expressly excluded from it is that of the relator's title. If the relator's title were in issue, as the title of the plaintiff in an action to recover real property, as shown by Mr. Stephen's example (Stephen, Pl. 164-189), or as the title of the plaintiff in an action of replevin to recover or retain personal property, as recently shown in the case of Beatty v. Parsons, 2 Boyce (Del.) 134, 78 Atl. 302, we can readily see how the defendant, through the medium of a special

traverse, could avoid the title of the plaintiff, by pleading title or property in himself or in another, "without this, that" the title or property is in the plaintiff as averred in the narr., but when the relator's title is not in issue it cannot be traversed. The title shown by the defendant in his plea is a justification for the act for which usurpation is charged, and is not a defense to a claim of title by the relator. Such a justification, therefore, cannot be the inducement of a special traverse, or otherwise accord with the purpose and theory of a special traverse, as laid down by Mr. Stephen. In the case of Reg. v. Blagdon, Gilb. L. & Eq. 145, cited in *People v. Richardson*, 4 Cow. 97, 100-119, the court refers to the plea in quo warranto as a "general traverse," by saying that "the replication should not take issue on the general traverse, without this, that he usurped, etc., but should be to the special matter, that the defendant may know how to apply his defense." The authorities certainly and abundantly hold that to this special matter, which is the matter of justification, the relator may reply by new matter in confession and avoidance, which is contrary to the rule of a special traverse, and therefore after the pleadings are as in actions. *People v. Richardson*, 4 Cow. 119; Reg. v. Blagdon, supra; *People ex rel. Coon v. Plymouth Pl. Road Co.* 31 Mich. 178; Atty. Gen. v. May, 97 Mich. 568, 56 N. W. 1035; *People v. Bank of Niagara*, 6 Cow. 196; Atty. Gen. ex rel. Woolverine Fish Co. v. A. Booth & Co. 143 Mich. 89, 106 N. W. 868; *People ex rel. Atty. Gen. v. Kankakee River Improv. Co.* 103 Ill. 491, 511; *People ex rel. Larke v. Crawford*, 28 Mich. 89, 89; *State ex rel. Harris v. McCann*, 88 Mo. 386; Spelling, Extr. Rem. § 1846; Shortt, Extr. Rem. 180, 181.

Special consideration has been given to the case of *People v. Bank of Niagara*, 6 Cow. 196 (1826), as that case and one cited by it show conclusively the pleading in quo warranto in force in Delaware. That case was upon an information in the nature of the writ of quo warranto, brought by the attorney general of the people of the state of New York, in which the information charged usurpation generally, and prayed that the president, directors, and company of the respondent bank be made to answer to the people by what warrant they claim to have, use, and enjoy certain liberties, privileges, and franchises. The defendants by their plea admitted incorporation, traversed the charge of usurpation, and justified. The attorney general replied specially, showing causes of forfeiture. The respondents contended that the information was bad because it did not state the causes of

forfeiture, and that the replication was bad because its statement of causes of forfeiture amounted to a departure from the information. The case is interesting in that the form of the information filed in that case is identical, *mutatis mutandis*, with the form in the case under consideration, and is stated by Savage, Ch. J., to have been adopted from the form used in the celebrated case of the King against the City of London, 3 Hargrave, St. Tr. 545, 10 How. St. Tr. 1039, tried in the King's Bench in 1681-83, and which was there adjudged sufficient. The court held that an information in the nature of a quo warranto against a corporation for a forfeiture of its franchises may charge it generally with usurpation, and on the defendant setting forth the act of incorporation and justifying under it, the attorney general may reply the causes of forfeiture specially, and that such a replication is not a departure. The case cited by Chief Justice Savage as the authority for this ruling is that of Car. II., by his attorney general, against the lord mayor, commonalty, and citizens of London, a report of which is to be found in 3 Hargrave's State Trials, 545, 10 How. St. Tr. 1039. This case is probably one of the most celebrated state trials in history, being instituted by that King against the corporation of London, upon the information of his attorney general, in the nature of a writ of quo warranto, charging usurpation without regal grant of the liberties and privileges of the city, and whereby the metropolis of the kingdom was deprived of its charter and magistrates until restored by King James in 1688. In that case, as in the Niagara Bank Case, the averment of usurpation contained in the information was most general, the defendants pleaded incorporation and showed the title by which they exercised the franchises of the city, and traversed the charge of usurpation. The attorney general by his replication did not take issue on the matter of justification, but showed causes of forfeiture, and the pleading thereafter proceeded as in civil causes.

It thus appears that the information in the case at bar is in the exact form of the information in the Niagara Bank Case, that the plea in that case, concluding with the traverse, "without this, that," is like the one filed in this case, that the attorney general in that case, as in this one, replied by new matter in avoidance, and that the rulings of the court below in this case upon question of procedure are supported by the authority of the Niagara Bank Case. But more important is the statement of Savage, Ch. J., that the Niagara Bank Case was decided on the authority of the case against

the city of London, and we find that the form of information and manner of pleading in the case against the city of London are in exact and technical accord with the pleadings in the Niagara Bank Case and in the case at bar. And this should be so, for the case against the city of London was tried in 1681-83, or twenty-eight years before the statute of Anne (1710), and was a case tried by the common-law remedy by information in the nature of a writ of quo warranto. As we have held that was the remedy adopted in this state, it follows that we have adopted the practice and procedure that belong to it. We are therefore of the opinion that the court below committed no error in holding that the information and replication in their form are sufficient in law for the state of Delaware to maintain its action.

5. We hold that this proceeding is not futile and nugatory for reasons that previously appear in the consideration of other questions. Spelling, Extr. Rem. §§ 1786, 1788.

6. The court below, in holding the sufficiency of the form of the pleadings in this case, also held the matters therein contained to be sufficient in law for the state to maintain its action: and finding George H. Brooks guilty of usurping the office of director of the Geo. Brooks & Son Company, rendered against him a judgment of ouster. This raises the question to which all the other questions were preliminary, and embraces the construction of the provisions of our Constitution and statute relating to the voting power of stock.

At the time of the incorporation of Geo. Brooks & Son Company, it was provided, § 13 of the general corporation law (22 Del. Laws, chap. 167), that "every corporation shall have power to create two or more kinds of stock of such classes, with such designations, preferences, and voting powers, or restrictions or qualifications thereof, as shall be stated and expressed in the certificate of incorporation." Supplementary to this provision was another (§ 17) which directed that "unless otherwise provided in the charter, certificate, or by-laws of the corporation, each stockholder . . . shall at every election be entitled to one vote . . . for each share of the capital stock held by him. . . ." Pursuant to these provisions, the incorporators proceeded to incorporate their company otherwise, and by charter and by-laws deprived its preferred stock of any voting power, and vested the whole voting power in its common stock. The sections of the general corporation law above quoted, and under which the incorporators acted, are identical with the sections (18 and 36) of the general corporation law of New Jersey (P. L. 1896, p. 277), from which obviously they were taken. *Wilmington City R. Co. v. Wilmington & B. S. R. Co.* 8 Del. Ch. 468, 46 Atl. 12. The two laws are also similar in providing that "the certificate of incorporation may also contain any provision . . . for the regulation of the business: . . . Provided, such provisions are not contrary to the laws of this state" (22 Del. Laws, chap. 167, § 5, subdiv. 8, and P. L. N. J. 1896, p. 280, § 8). At the time of the enactment of the New Jersey law there was in that state no constitutional provision relating to the voting power of stock, but at the time of the enactment of the Delaware law, March 10, 1899 (21 Del. Laws, chap. 273), and of the incorporation of the Geo. Brooks & Son Company (1901), there was in this state a constitutional provision that directed that "in all elections for directors or managers of stock corporations, each shareholder shall be entitled to one vote for each share of stock he may hold." Const. 1897, art. 9, § 6. We are therefore called upon to construe the meaning of the constitutional provision, and to determine whether the provisions of the statute and of the charter granted under them are provisions "contrary to the law of this state," and thereby determine whether the preferred stock of Geo. Brooks & Son Company has or has not voting power.

It is important to state, and make clear, that the constitutional provision referred to, and with respect to which it is suggested that the subsequent laws and charter are not in harmony, was repealed in 1903 by Acts of the General Assembly (Laws of Del. vol. 22, chap. 1, pp. 3, 4, and chapter 254, p. 543), and is not the law of this state to-day. Therefore the remainder of this opinion, and the decision under it, relate only to the state of the law, constitutional and statutory, as it existed before the date of the repeal of § 6 of article 9 of the Constitution of 1897.

With respect to the constitutional provision in question, it is the contention of the defendant in error that "this section does not mean that the legislature could not provide for certain classes of stock having restricted voting powers or no voting powers at all. It means only that voting in corporations shall be according to the number of shares held by the stockholder having the right to vote, and not one vote for each stockholder, irrespective of his share holdings, as was the rule at common law." In other words, it is contended that the effect of the provision was simply to change the common-law rule of one vote for each shareholder, regardless of the number of shares held by him, to one vote for each share held by the shareholder, and that his right

or limited by the charter of the corporation when created under a statute subsequently enacted, which allowed the incorporators to create several classes of stock, and to define and regulate the voting power of each class.

It is further contended that the constitutional provision at most confers upon stockholders a right to a share vote, which right is waived by them when they incorporate a company that by its charter takes from them, as the holders of one class, the right to vote.

The plaintiff in error contends that, the Constitution having expressly declared who shall be entitled to vote for directors, its provisions were imperative upon the corporation, constituting a part of the law of its being, and a corporation had no authority under statutes subsequently enacted, that provide otherwise, to limit the right as regulated by the Constitution.

A by-law that restricts or alters the voting power of stock of a corporation as established by the law of its charter is, of course, void. *People ex rel. Israel v. Tibbets*, 4 Cow. 358; *People ex rel. Barker v. Kip*, 4 Cow. 382, note.

A provision in a charter of a corporation, giving to its stock a voting power different from that contemplated by the statute under which it was created, is likewise void. *Brewster v. Hartley*, 37 Cal. 15, 24, 99 Am. Dec. 237; *Audenried v. East Coast Mill. Co.* 68 N. J. Eq. 450, 59 Atl. 577, 584; *Com. ex rel. Nickerson v. Conover*, 10 Phila. 55; *Taylor v. Griswold*, 14 N. J. L. 222, 27 Am. Dec. 33; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L.R.A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; *Eastern Pl. Road Co. v. Vaughan*, 14 N. Y. 546, 551; *Com. ex rel. Eilenberger v. Yetter*, 190 Pa. 488, 495, 496, 43 Atl. 226.

A statute that authorizes a corporation to give to its stock a voting power different from that prescribed by the Constitution is equally void. The question, therefore, is narrowed down to whether the Constitution established the voting power of stock, or conferred a personal privilege that might be waived.

Considering the question in the reverse order, we find the statement of the defendant in error, that "a person may waive any provision either of contract or statute, intended for his benefit," is not supported by the authorities cited, when considered in relation to the provision under construction. The cases cited relate to provisions of statutes that are made for the particular and personal protection of one solely interested, and which may be waived without infringing 51 L.R.A. (N.S.)

of one to waive notice of depositions, or notice of a continuance, or notice to himself as tenant, or the right to file a contractor's lien, as well as the protection of the Constitution forbidding the taking of property without process or compensation. *Shutte v. Thompson*, 15 Wall. 151, 159, 21 L. ed. 123, 125; *Morrison v. Underwood*, 5 Cush. 52; *Phyfe v. Eimer*, 45 N. Y. 102; *Bowen v. Aubrey*, 22 Cal. 566, 572; *Endlich*, Interpretation of Statutes, §§ 444, 537; *Cooley*, Const. Lim. 181.

Disregarding the excerpt from the debates of the constitutional convention that adopted the section, the language of the provision alone is sufficiently clear and unambiguous to indicate that the purpose of the convention was to change the control of stock corporations from individual control to stock control, to do which it directly gave to a share of stock the quality of a vote. In doing this it made no discrimination between different classes of stock which subsequent laws might authorize, but provided generally that the holder of a share of stock was the holder of a vote which he was entitled to cast. Being the holder of an interest in property that conferred upon him the right *pro tanto* to control and regulate that property, the holder of a share of stock was then possessed of a personal privilege or benefit which he might use or reject as he chose (*State v. Ashley*, 1 Ark. 513, 549); and it is in this sense that a person may waive the provision of a law intended for his benefit. Being the owner of a share of stock with a voting power given it by the Constitution, he was, by the possession of the share, possessed of a privilege, but he could not by any act of his change the character of the share that gave him the privilege, or rob it of the voting power conferred upon it by the Constitution, so that in his hands or in the hands of any subsequent holder it would not carry the power conferred upon it at its birth by the law that authorized its existence.

The general corporation law that was enacted subsequently to the adoption of the Constitution of 1897, under the terms of which the preferred stock of Geo. Brooks & Son Company was deprived of voting power, must have been enacted in ignorance of the constitutional provision then existing. It was this law, passed two years later, that authorized a corporation created under it to give to its stock such preference and voting power as it might express in its certificate of incorporation. Surely the members of the constitutional convention could not have had this law and its provisions in mind when they adopted the constitutional pro-

People ex rel. Breckon v. Election Comra. 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562; O'Connell v. McClenathan, 248 Ill. 350, 94 N. E. 21.

Mr. John L. Fogle, *amicus curiæ*:

The summary power to punish for contempts is inherent in courts of chancery and other superior courts, as essential to the execution of their power and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the Twelfth Article of the Declaration of Rights.

Storey v. People, 79 Ill. 45, 22 Am. Rep. 158; Ex parte Terry, 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77; Hale v. State, 55 Ohio St. 210, 36 L.R.A. 254, 60 Am. St. Rep. 691, 45 N. E. 199; Cartwright's Case, 114 Mass. 230; Tinsley v. Anderson, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805; Telegram Newspaper Co. v. Com. 172 Mass. 294, 44 L.R.A. 159, 70 Am. St. Rep. 280, 52 N. E. 445; Rex v. Davison, 4 Barn. & Ald. 329.

The judgment of every such court is at common law final and conclusive, and not reviewable.

Rapalje, Contempt, 141.

An order of court (even though improper) must be obeyed provided the court had jurisdiction to issue it; and disobedience of such order, so long as it remains unrevoked or unreversed, is a contempt.

Swedish-American Teleph. Co. v. Fidelity & C. Co. 208 Ill. 562, 70 N. E. 768; Flannery v. People, 225 Ill. 62, 80 N. E. 60; Clark v. Burke, 163 Ill. 334, 45 N. E. 235; Christian Hospital v. People, 223 Ill. 244, 79 N. E. 72; Burdett v. Abbot, 14 East, 150, 5 Dow, 165, 4 Taunt, 410, 12 Revised Rep. 450; People ex rel. Davis v. Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536; Rapalje, Contempt, §§ 16, 33, 117; Hilton v. Patterson, 18 Abb. Pr. 245.

The validity of the order disobeyed cannot

time of the complainant. Although the defendant would be punishable for felony if he married again, yet this clause is necessary in order to prevent him from imposing upon others who might suppose he was capable of contracting matrimony, if the decree was general."

Concerning this, however, Mr. Bishop, in his New Commentaries on Marriage, Divorce, and Separation, vol. 2, p. 580, § 1523, says: "Chancellor Walworth used always to insert the prohibiting clause, as being, to quote his own words, 'necessary in order to prevent him [the guilty party] from imposing upon others who might suppose he was capable of contracting matrimony, if the decree was general.' This care for foolish spinsters, to whom it was presumed the man would be showing the judicial record of his own adulteries as the inducement to marry him, is admirable in philanthropy. 51 L.R.A.(N.S.)

be assailed, if contemner had opportunity to be heard on it.

Wandling v. Thompson, 41 N. J. L. 142; Sickles v. Borden, 4 Blatchf. 14, Fed. Cas. No. 12,833; Koehler v. Farmers' & D. Bank, 14 N. Y. Civ. Proc. Rep. 71; People v. Spalding, 2 Paige, 326; State ex rel. Mason v. Harper's Ferry Bridge Co. 16 W. Va. 864.

The statute prohibiting the marriage of divorced persons within a year from the date of divorce has been held valid by this court.

Wilson v. Cook, 256 Ill. 461, 43 L.R.A.(N.S.) 365, 100 N. E. 222; Olsen v. People, 219 Ill. 40, 76 N. E. 89.

The decree made thereunder is valid and has extraterritorial effect.

Wilson v. Cook, supra; Lanham v. Lanham, 136 Wis. 360, 17 L.R.A.(N.S.) 804, 128 Am. St. Rep. 1035, 117 N. W. 787; Brook v. Brook, 9 H. L. Cas. 193, 7 Jur. N. S. 422, 4 L. T. N. S. 93, 9 Week. Rep. 461; Re Crane, 40 L.R.A.(N.S.) 765, and note, 170 Mich. 651, 136 N. W. 587, Ann. Cas. 1914A, 1173; Pennegar v. State, 87 Tenn. 244, 2 L.R.A. 703, 10 Am. St. Rep. 648, 10 S. W. 305; Carmena v. Blaney, 16 La. Ann. 245; Hills v. State, 61 Neb. 589, 57 L.R.A. 170, 85 N. W. 836.

Cooke, Ch. J., delivered the opinion of the court:

On October 25, 1912, Carrie B. Prouty obtained a decree of divorce against Carlton Prouty, the plaintiff in error, upon a bill filed by her in the circuit court of Cook county charging the plaintiff in error with desertion. This decree contained the following provision: "It is further ordered, adjudged, and decreed that neither party shall marry again within the time prohibited by the statute unless they remarried each other." Thereafter, on October 29, 1912, plaintiff in error and Mary Busscher, both residents of Cook county, in this state, were

But it is quite aside from the function of a legal judgment to notify third persons of what all are presumed to know, the contents of the statute book of the state. There is no pretense that the clause is of any legal validity, or in any way essential to the complete efficacy of the divorce sentence. And it is not believed to be common."

As to marrying out of state contrary to decree as contempt of court, see note to Ex parte Crane, 40 L.R.A.(N.S.) 765.

Upon the conflict of laws as to validity of marriage, including remarriage of divorced persons, see notes to Hills v. State, 57 L.R.A. 155; Gabisso's Succession, 11 L.R.A.(N.S.) 1082; State v. Fenn, 17 L.R.A.(N.S.) 800; Johnson v. Johnson, 26 L.R.A.(N.S.) 179; State v. Hand, 28 L.R.A.(N.S.) 753; and Cunningham v. Cunningham, 43 L.R.A.(N.S.) 355.

A. C. W.

Other holdings to the same effect as those just quoted might be cited, but the proposition is well settled and understood that a court of equity has no jurisdiction in matters which do not involve property or civil rights. No such rights were involved here as to warrant a decree enjoining the parties to the divorce suit from violating a penal statute by marrying within the prohibited time. The punishment for this offense, should it ever occur, must be left to a court of different jurisdiction, and the penalty provided by the statute itself must be presumed to be adequate.

If, then, a court of equity, in the exercise of its general equity powers, has no jurisdiction to enter such an injunctive order, it cannot be contended that the circuit court, in exercising its jurisdiction in cases of divorce, has the power to enter such an order unless that power is expressly given by the statute. It is not expressly given. The mere fact that the legislature saw fit to enact this section as an amendment to the divorce act instead of the Criminal Code or the marriage act does not warrant the circuit court in making such an order. The court being without jurisdiction to enter the order, it was void, and plaintiff in error was not in contempt in disobeying it.

The judgment of the Circuit Court is reversed.

MAINE SUPREME JUDICIAL COURT. COURT.

ALEXANDER T. LAUGHLIN et al.

v.

CITY OF PORTLAND.

(111 Me. 486, 90 Atl. 318.)

Constitutional law — maintenance of fuel yards — taxation.

1. The maintenance by a municipality of a public yard for the sale of fuel to its inhabitants at cost is not prohibited by a

Note. — Right of municipal corporation to engage in enterprise generally regarded as of a private character.

The earlier cases which have considered the question under annotation will be found in the note to *Holton v. Comilla*, 31 L.R.A. (N.S.) 117.

LAUGHLIN v. PORTLAND, in holding constitutional statutes which empower a municipality to establish and maintain permanent wood, coal, and fuel yards for the purpose of selling wood, coal, and fuel to its inhabitants at cost, is in conflict with the coal and fuel cases cited in the earlier note. Those cases are criticized and disapproved in 51 L.R.A. (N.S.)

Same — interference with property rights.

2. No unconstitutional interference with rights of liberty or property of a fuel merchant is caused by the establishment by a municipality of public yards at which fuel is sold to its inhabitants for cost.

(April 4, 1914.)

R EPORT by the Supreme Judicial Court for Cumberland County for the opinion of the Law Court of a question arising upon demurrer to a bill filed to restrain defendant from establishing a municipal fuel yard, from raising by taxation the money necessary for that purpose, and from doing anything in furtherance of votes passed tending to carry it into effect. Bill dismissed.

The facts are stated in the opinion.

Mr. Eben Winthrop Freeman, for complainants:

The conduct of private business is not a public purpose, and is unconstitutional.

1 Cooley, Taxn. 1903, p. 206; Nichols, Taxn. (Mass.) 49; 1 Abbott, Mun. Corp. § 304; State ex rel. Garth v. Switzler, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; Brooks v. Brooklyn, 146 Iowa, 136, 26 L.R.A. (N.S.) 425, 124 N. W. 868; Baker v. Grand Rapids, 142 Mich. 687, 106 N. W. 208; Opinion of Justices, 155 Mass. 601, 15 L.R.A. 809, 30 N. E. 1142; Opinion of Justices (Re Municipal Fuel Plants) 182 Mass. 610, 60 L.R.A. 592, 66 N. E. 25; Holton v. Camilla, 134 Ga. 560, 31 L.R.A. (N.S.) 116, 68 S. E. 472, 20 Ann. Cas. 199; State ex rel. Mueller v. Thompson, 149 Wis. 488, 43 L.R.A. (N.S.) 339, 137 N. W. 20, Ann. Cas. 1913C. 774; State v. Nelson County, 1 N. D. 88, 8 L.R.A. 283, 26 Am. St. Rep. 609, 45 N. W. 33; Genesee v. Genesee Natural Gas, Coal, Oil, Salt & Mineral Co. 55 Kan. 358, 40 Pac. 655; Vail v. Attica, 8 Kan. App. 668, 57 Pac. 137; Keen v. Waycross, 101 Ga. 588, 29 S. E. 42; Hayward v. Red Cliff, 20 Colo. 33, 36 Pac. 795; Mauldin v. Greenville, 33 S.

the opinion. The decision, however, is in harmony with the decision in the *Holton* Case, which is referred to with approval.

But one other reported case has been found which has considered the question under annotation. Thus, in *State ex rel. Toledo v. Lynch*, 88 Ohio St. 71, 48 L.R.A. (N.S.) 720, 102 N. E. 670, it was held that a city has no power to establish and maintain moving picture theaters. The question involved the construction of a constitutional amendment which contained the following provisions: Sec. 2, that general laws shall be passed to provide for the incorporation and government of cities and villages, and that additional laws may also be passed for

February 3, 1913, both branches of the city council passed a resolution in favor of the same proposition, and on February 4, 1913, this resolution was duly approved by the mayor and became effective. At the same time a special committee was appointed, consisting of the mayor, two aldermen, and three councilmen, "to investigate and obtain full information as to the cost of plant, machinery, rolling stock, and things whatsoever necessary to the establishment and maintaining a municipal fuel yard, and carry on the business thereof, including sources from which fuel can be purchased, and prices to be paid therefor, with the duty of furnishing a full report of their findings to the city council; and, for the purpose of defraying the expense of said committee, the sum of \$1,000 is hereby appropriated, the sum to be charged to special appropriation when made."

On February 4, 1913, this bill in equity was brought by fifteen taxable inhabitants

of Portland, asking that the city and its officers and agents be restrained and enjoined from establishing a municipal fuel yard, from raising by taxation the money necessary for that purpose, and from carrying into effect any of the votes before recited.

The defendant demurred to the bill, and, the demurrer being joined, the case is before the law court on report.

The important question is therefore sharply raised whether this court must declare unconstitutional this act of the legislature of 1903. It is not a question whether, under the general statutory powers, a municipality has the right to take this step, a question that has arisen in many cases, but whether such municipality can exercise the right when conferred upon it by the legislature in clear and unambiguous terms. In other words, is this court obliged to declare, as the plaintiffs ask us, that this act is so obviously beyond the realm of constitutional

purposes include only the protection of life, liberty, and property. On the contrary, I am firmly of the opinion that one of the most important duties of the state is to promote the health, convenience, comfort, and welfare of its citizens, and advance the standard of citizenship in every legitimate way. But I do not believe it is within the purview of municipal government to invade the sphere of purely private enterprise wholly disconnected and divorced from public needs or public purposes. It is difficult, perhaps almost impossible, to prescribe a limit where governmental functions end, and private enterprise begins. In the last quarter of a century our views on this subject have so changed that a limit fixed along the line of the prevailing opinion on that subject at that time would seem absurd now, and so it may be a quarter of a century hence."

In a vigorous dissenting opinion Wanamaker, J., expresses the opinion that municipal corporations may operate moving picture theaters, on the ground that all political power is inherent in the people. In the course of his opinion he said: "Since we have in all cities the initiative and referendum, known as the Crosser law, it is up to the people to determine in the first instance whether or not they want to 'embark in these enterprises.' They may permit the council to take the initiative, reserving the right to exercise the referendum upon the council's action; but under their own power of local self-government, it being strictly a municipal purpose, or at least a purpose which affects nobody but those within the municipality, legislated for by the municipality, paid for and operated by the municipality, who else has any right, but those within the municipality, to object? And they have their day in court, before the council, and before the people at the time the vote is being had. . . . 61 L.R.A.(N.S.)

Manifestly, at least in the first instance, a municipality has the right to determine that matter for itself, and should not be interfered with in the exercise of its municipal power or its municipal government, unless the power sought to be exercised be so glaringly and palpably beyond the powers of local self-government that a court should say that the power was unauthorized and unconstitutional. In the light of modern day development of our modern day municipalities, in the light of what municipalities in almost every foreign nation have done, in the light of what American municipalities hope to do, in the light of the genuine home rule which they believe was provided for under the new constitutional amendment, I am entirely free and frank to say the exercise of such power on the part of the city council of Toledo was entirely lawful, fully authorized, and ought not to be denied, in a case of this character, by this court."

In *Radford v. Clark*, 113 Va. 199, 38 L.R.A.(N.S.) 281, 73 S. E. 571, an action for injuries occurring in a quarry operated by a municipality, it was said that it has been repeated in the authorities that it might be convenient or even profitable for a municipal corporation, in order to perform certain duties imposed upon it as such corporation, to hold and operate a rock quarry or other like undertakings, yet it has no power to do so unless in express words conferred in its charter, or necessarily or fairly implied in or incidental to the powers expressly granted. This case is in harmony with the cases involving the right of a municipality to operate a quarry, cited in the earlier note.

As to power of state to engage in enterprises generally conducted by private person or corporation, see note to *Re Opinion of Justices*, 42 L.R.A.(N.S.) 221.

J. H. B.

legislative action that it must be declared void?

Before considering the main issue, it is necessary to restate certain familiar and yet fundamental propositions that lie at the very basis of our inquiry.

First. The legislature has, under the Constitution, "full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this state, not repugnant to this Constitution, nor to that of the United States." Const. (Me.) art. 4, pt. 3, § 1. While, therefore, the executive and the judiciary, the other two co-ordinate departments of government, can exercise only the powers conferred upon them by the Constitution, the powers of the legislature are, broadly speaking, absolute, except as limited or restricted by the Constitution. "As to the executive and judiciary, the Constitution measures the extent of their authority; as to the legislature, it measures the limitations upon its authority." *Sawyer v. Gilmore*, 109 Me. 169, 83 Atl. 673.

Second. The court is bound to assume that, in the passage of any law, the legislature acted with full knowledge of all constitutional restrictions, and intelligently, honestly, and discriminatingly decided that they were acting within their constitutional limits and powers. That determination is not to be lightly set aside. It is not enough that the court be of the opinion that, had the question been originally submitted to it for decision, it might have held the contrary view. The question has been submitted in the first instance to the tribunal designated by the Constitution, the legislature, and its decision is not to be overturned by the court, unless no room is left for rational doubt. All honest and reasonable doubts are to be solved in favor of the constitutionality of the act. This healthy doctrine is recognized as the settled policy of this court. *State v. Doherty*, 60 Me. 504; *State v. Poulin*, 105 Me. 224, 24 L.R.A. (N.S.) 408, 134 Am. St. Rep. 543, 74 Atl. 119. "The power of the judicial department of the government to prevent the enforcement of a legislative enactment, by declaring it unconstitutional and void, is attended with responsibilities so grave that its exercise is properly confined to statutes that are clearly and conclusively shown to be in conflict with the organic law. It is the duty of one department to presume that another has acted within its legitimate province, until the contrary is made to appear by strong and convincing reasons." *State v. Rogers*, 95 Me. 94, 85 Am. St. Rep. 395, 49 Atl. 564.

"In determining . . . the constitutionality of any legislation, all reasonable presumptions are in favor of its validity, and 51 L.R.A. (N.S.)

the courts will not declare an act of the legislature to be invalid, because contrary to the provisions of the organic law, unless it is clearly so. . . . And this is as true respecting legislative enactments by which the power to exercise the right of eminent domain is delegated as in regard to any other species of legislation. The determination by the legislature that the use for which property is authorized to be taken is a public one is undoubtedly subject to review by the court, but all reasonable presumptions are in favor of the validity of such determination by the legislation, and the act must be regarded as valid, unless it can be clearly shown to be in conflict with the Constitution." *Ulmer v. Lime Rock E. Co.* 98 Me. 579, 66 L.R.A. 387, 57 Atl. 1001.

With these principles conceded, the precise question before the court is seen to be whether the act in question, having been passed by the legislature conformably with what it deemed to be an exercise of its constitutional power, can be set aside by this court as invalid on the ground that it palpably and unquestionably transcends that power. We are unable to go that extent.

The main ground of attack is that the maintenance of what, in general terms, may be called a municipal fuel yard, is not a public use, and, as the power of taxation is confined to public purposes, the authority conferred by this act cannot be constitutionally exercised.

The Constitution of Maine, art. 1, § 21, provides that "private property shall not be taken for public uses without just compensation, nor unless the public exigencies require it." The power of taxation is akin to the right of eminent domain, because it rests upon the right of the sovereign power to appropriate the private property of its citizens to public purposes. Therefore the power of taxation must rest upon two elements in order to be permitted by the Constitution, first a public use, and second a public exigency, the first to be determined in the first instance by the legislature and finally by the court, if cases are brought before it raising the question, and with the limitations before referred to; and the second to be determined by the legislature without judicial revision. *Brown v. Gerald*, 100 Me. 351, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 Atl. 785; *Hayford v. Bangor*, 102 Me. 340, 11 L.R.A. (N.S.) 940, 66 Atl. 731.

Did, then, the legislature transcend its constitutional powers when it authorized municipalities to make provision for supplying heat to its citizens? In so doing, was it clearly and unquestionably diverting the power of taxation from a public to a private purpose?

This leads us to consider what is meant by the term "public use," as employed in connection with the power to tax.

The exact line of cleavage between what is, and what is not, a public use, it is somewhat difficult to mark. Some purposes readily align themselves on one side of the line as being clearly public in their nature, while others as readily fall on the other side as being obviously private, and there is a debatable ground between the two. Thus, the support of schools, the relief of paupers, and the maintenance of highways are clearly public uses for which taxation is permissible, and it has also been held that the maintenance of a public clock (*Willard v. Newburyport*, 12 Pick. 227), the purchase of a fire engine (*Allen v. Taunton*, 19 Pick. 485), the erection of a market house (*Spaulding v. Lowell*, 23 Pick. 71), the building of a memorial hall (*Kingman v. Brockton*, 153 Mass. 255, 11 L.R.A. 123, 26 N. E. 998), the aid of a railroad, (*Augusta Bank v. Augusta*, 49 Me. 507; *Dyar v. Farmington*, 70 Me. 515), all come within the scope of the same term.

On the other hand, taxes cannot be imposed to aid a private enterprise, and a municipality cannot assist individuals or corporations to establish or carry on such business, either directly or indirectly, nor can it engage in such business itself. *Opinion of Justices*, 58 Me. 590; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442; *Opinion of Justices*, 204 Mass. 607, 27 L.R.A.(N.S.) 483, 91 N. E. 405. If the direct object is private, the indirect benefits that may result to the public, even in a large measure, are unavailing to remedy the vital defect. *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Opinion of Justices*, 211 Mass. 626, 42 L.R.A.(N.S.) 221, 98 N. E. 611; *Brown v. Gerald*, 100 Me. 351, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 Atl. 785.

The courts have never attempted to lay down with minute detail an inexorable rule distinguishing public from private purposes, because it would be impossible to do so. Times change. The wants and necessities of the people change. The opportunity to satisfy those wants and necessities by individual effort may vary. What was clearly a public use a century ago may, because of changed conditions, have ceased to be such to-day.

Thus, the mill act which came into being in the early days of our parent commonwealth of Massachusetts, and was adopted by our own state, was upheld as constitutional because of the necessities of those

primitive times. The court in later days have strongly intimated that, were it an original question, it might be difficult to sustain it, in view of present industrial conditions. *Murdock v. Stickney*, 8 Cush. 113; *Salisbury Mills v. Forsaith*, 57 N. H. 124; *Jordan v. Woodward*, 40 Me. 317.

On the other hand, what could not be deemed a public use a century ago may, because of changed economic and industrial conditions, be such to-day. Laws which were entirely adequate to secure public welfare then may be inadequate to accomplish the same results now, as was said in *Sun Printing & Pub. Asso. v. New York*, 8 App. Div. 230, 40 N. Y. Supp. 607, affirmed in 152 N. Y. 257, 37 L.R.A. 788, 46 N. E. 499.

"The true test is that which requires that the work shall be essentially public and for the general good of all the inhabitants of the city. It must not be undertaken merely for gain or for private objects. Gain or loss may incidentally follow, but the purpose must be primarily to satisfy the need or contribute to the convenience . . . of the city at large. Within that sphere of action novelty should impose no veto. Should some inventive genius by and by create a system for supplying us with pure air, will the representatives of the people be powerless to utilize it in the great cities of the state, however extreme the want or dangerous the delay? Will it then be said that pure air is not as important as pure water and clear light? We apprehend not."

Thus, a class of public uses has grown up and been recognized within a comparatively recent time, due both to the growing needs of the community and to modern inventions calculated to meet those needs, that furnish, in our judgment, a logical precedent for the case at bar. These public uses or utilities embrace water, light, and heat.

It is common knowledge that in the early days our citizens, even in the more populous towns and cities, obtained their water supply from private wells and cisterns. There was no public supply other than perhaps the town pump in the village square. But in course of time the private sources became both inadequate in quantity and hazardous in quality, and private water companies were chartered to meet the changed demands; one of the earliest to do business on a large scale being the Portland Water Company, chartered in 1866. *Priv. & Spec. Law 1866*, chap. 159. The purpose of these companies is admittedly public. *Portland v. Portland Water Co.* 67 Me. 136; *Riche v. Bar Harbor Water Co.* 75 Me. 91; *Hamor v. Bar Harbor Water Co.* 78 Me. 127, 3 Atl. 40. "The supply of a large number of inhabitants with pure water is a public pur-

pose," says Shaw, Ch. J., in *Lumbard v. Stearns*, 4 Cush. 60.

Later the municipalities in which some of these water companies were established were given the right by the legislature to take over and maintain these plants, or municipal water districts were formed to accomplish the same purpose. The compensation for those plants was raised by taxation or by loan, and again the purpose is obviously public. *Auburn v. Union Water Power Co.* 90 Me. 576, 38 L.R.A. 188, 38 Atl. 561; *Mayo v. Dover & F. V. Fire Co.* 96 Me. 539, 53 Atl. 62; *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 60 L.R.A. 850, 54 Atl. 6; *Brunswick & T. Water Dist. v. Maine Water Co.* 99 Me. 371, 59 Atl. 537; *Augusta v. Augusta Water Dist.* 101 Me. 148, 63 Atl. 663.

Conditions as to lighting met with similar changes. Candles, lamps, gas, and electricity have followed each other in due course of time.

As late as 1890, a doubt seems to have arisen in Massachusetts as to the constitutional power of municipalities in respect to public and private lighting, and the house of representatives of that year submitted to the justices of the supreme judicial court two questions: First, whether the legislature had the power under the Constitution to authorize the cities and towns within the commonwealth to manufacture and distribute gas or electric light for use in their public streets and buildings; and, second, for the purpose of selling the same to its own citizens. These questions were both answered unanimously in the affirmative. The justices, in the course of their opinion, say that "the extent of the right of taxation is not necessarily to be measured by that of the right of eminent domain, but the rights are analogous." [Re Opinion of Justices, 150 Mass. 592, 8 L.R.A. 487, 24 N. E. 1084.] So far as the lighting of the public buildings and streets is concerned, the court held that it was an incident of their maintenance and tended both to common convenience and common necessity; and then these significant words are added: "If the legislature can authorize cities and towns to light their streets and public buildings, it can authorize them to do this by any appropriate means which it may think expedient." In holding the supply to individuals to also be a public purpose, after discussing the question of water companies, the justices say:

"Artificial light is not, perhaps, so absolutely necessary as water, but it is necessary for the comfortable living of every person. Although artificial light can be supplied in other ways than by the use of gas or electricity, yet the use of one or both for lighting cities and thickly settled towns is 51 L.R.A. (N.S.)

common, and has been found to be of great convenience, and it is practically impossible for every individual to manufacture gas or electricity for himself. If gas or electricity is to be generally used in a city or town, it must be furnished by private companies or by the municipality, and it cannot be distributed without the use of the public streets or the exercise of the right of eminent domain. It is not necessarily an objection to a public work maintained by a city or town that it incidentally benefits some individuals more than others, or that from the place of residence or for other reasons every inhabitant of the city or town cannot use it, if every inhabitant who is so situated that he can use it has the same right to use it as the other inhabitants. It must often be a question of kind and degree whether the promotion of the interests of many individuals in the same community constitutes a public service or not. But in general it may be said that matters which concern the welfare and convenience of all the inhabitants of a city or town, and cannot be successfully dealt with without the aid of powers derived from the legislature, may be subjected to municipal control when the benefits received are such that each inhabitant needs them and may participate in them, and it is for the interest of each inhabitant that others, as well as himself, should possess and enjoy them. If the legislature is of the opinion that the common convenience and welfare of the inhabitants of cities or towns will be promoted by conferring upon the municipalities the power of manufacturing and distributing gas or electricity for the purpose of furnishing light to their inhabitants, we think the legislature can confer the power. We therefore answer the second question in the affirmative."

Following the reasoning of the Massachusetts court, if the lighting of private residences and buildings is a public purpose, and one which the municipality can legitimately carry on, the heating of the same buildings is equally public. It is even a greater necessity. Gas and electric lights are in the nature of luxuries, but heat is indispensable. In the regions supplied with natural gas, municipal heating from that source has been adopted, and has been held to be constitutional. *State ex rel. Atty. Gen. v. Toledo*, 48 Ohio St. 112, 11 L.R.A. 729, 26 N. E. 1061.

The reasoning of the court is as follows: "Heat being an agent or principle indispensable to the health, comfort, and convenience of every inhabitant of our cities, we do not see why, through the medium of natural gas, it may not be as much a public service to furnish it to the citizens as to furnish

has the same right to use it as the other habitants. . . . The establishment of natural gas works by municipal corporations, with the imposition of taxes to pay the cost thereof, may be a new object of municipal policy. But, in deciding whether,

a given case, the object for which taxes are assessed is a public or private purpose, we cannot leave out of view the progress of society, the change of manners and customs, and the development and growth of new wants, natural and artificial, which may from time to time call for a new exercise of legislative power. And, in deciding whether such taxes shall be levied for the new purposes that have arisen, we should not, we think, be bound by an inexorable rule that would embrace only those objects for which taxes have been customarily and by long course of legislation levied."

If, then, science had advanced so far that the heating as well as the lighting of houses by electricity was now a practicable method, there would seem to be no doubt that this also would fall within the realm of public purposes. The heat would be conducted from the central power station by means of wires along or under the public streets, the same as light is now. Or suppose it were practicable to install a central heating plant and conduct the heat through pipes in the streets to the various buildings, much the same as water or gas is now conducted, we see no reason why this too should not be called a public use.

Just here, however, the petitioners contend for a distinction between all these illustrations and the case at bar. They say that, in the case of the distribution of water and of light and heat by gas or electricity, the use of the public highways is required for the mains and the poles and wires; that the purpose is public because it is necessary to obtain permission from public authorities, either state or municipal, in order to carry it out. We grant that in those cases this element of public permission exists, but it does not follow that the converse is true, and that no purpose is public where such permission does not exist. How can this criterion be applied to the erection of public buildings, the creation of a park, the building of a memorial hall, or of a market house, or the maintenance of a public clock?

In other words, under this rule, public service of this sort would be limited to one which can only be performed by a so-called public service corporation, and not by an individual or corporation, independent of chartered rights. This is, in our judgment, too narrow. It makes an incident to some

of rendering the service into the essence of the service itself. It makes the exercise of public rights in supplying the necessities of a community a prerequisite to the public use. But this exercise of public rights can itself be authorized only by the legislature, and, if that branch of the government sees fit to bestow the public service in a manner that may obviate the use of the public right, they certainly should have the right and the power so to do. It is a matter within their control.

Let us look at the question from the practical and concrete standpoint. Can it make any real and vital difference, and convert a public into a private use, if instead of burning the fuel at the power station to produce the electricity, or at the central heating plant to produce the heat, and then conducting it in the one case by wires and in the other by pipes to the user's home, the coal itself is hauled over the same highway to the same point of distribution? We fail to see it. It is only a different and a simpler mode of distribution, and, if the legislature has the power to authorize municipalities to furnish heat to its inhabitants, "it can do this by any appropriate means which it may think expedient." The vital and essential element is the character of the service rendered, and not the means by which it is rendered.

It seems illogical to hold that a municipality may relieve its citizens from the rigor of cold if it can reach them by pipes or wires placed under or above the highways, but not if it can reach them by teams traveling along the identically same highway. It will be something of a task to convince the ordinarily intelligent citizen that an act of the legislature authorizing the former is constitutional, but one authorizing the latter is unconstitutional beyond all rational doubt. For we must remember that we are considering the existence of the power in the legislature, which is the only question before the court, and not the wisdom of its exercise, which is for the legislature alone.

Cases directly in point are lacking. We have been unable to find anywhere that the issue has been squarely decided.

The learned counsel for the plaintiffs confidently rely upon the opinion of Justices in 155 Mass. 598, 15 L.R.A. 809, 30 N. E. 1142, and 182 Mass. 605, 60 L.R.A. 592, 66 N. E. 25, rendered in answer to questions propounded by the house of representatives as to the constitutionality of proposed acts for the establishment of municipal fuel yards. While such answers are entitled to great consideration, they do not have the force of decision. Kent, J., 58 Me. 573; Tapley,

J., 58 Me. 615; and Libbey, J., 72 Me. 562, 563. "The giving of advisory opinions is not the exercise of the judicial function at all, and the opinions thus given have not the quality of judicial authority." Prof. James B. Thayer, 7 Harv. L. Rev. p. 153.

In 155 Mass. 598, 15 L.R.A. 809, 30 N. E. 1142, the justices were divided; five advising that the proposed act would be unconstitutional, one, Justice Holmes, that it would be constitutional, and one, Justice Barker, giving a qualified assent to its validity. In 182 Mass. 603, 60 L.R.A. 592, 66 N. E. 25, the opinions of the majority in 155 Mass. were adopted without dissent, and these views have been reaffirmed by way of illustration in Opinion of Justices, 211 Mass. 624, 42 L.R.A. (N.S.) 221, 98 N. E. 611: the subject-matter of that opinion being the power of municipalities to construct houses in the suburbs for wage earners, a power clearly not theirs. A careful study of these opinions shows that the general principles enunciated are in accord with our views, and that in only one particular are we at variance.

The conclusions reached by the majority in the Massachusetts cases seem to be:

(1) That it is beyond the power of a municipal corporation to engage in the sale of commodities which are and can be easily conducted by private business concerns in competition with one another, and which can be sufficiently regulated thereby. In this we most heartily concur.

(2) That the sale of fuel falls within this class of commodities, and there is no necessity why cities and towns should undertake this form of business any more than many others which have always been conducted by private enterprises. Here we differ.

(3) That, in regard to "a condition in which the supply of fuel would be so small and the difficulty of obtaining it so great that persons desiring to purchase it would be unable to supply themselves through private enterprises, it is conceivable that agencies of government might be able to obtain fuel when citizens generally could not. Under such circumstances, we are of opinion that the government might constitute itself an agent for the relief of the community, and that money expended for the purpose would be expended for a public use." Here again we concur.

The principle, therefore, seems to be conceded that, if the difficulty of obtaining an adequate supply exists, the furnishing of such supply by municipalities would be a public use. And this is the construction placed upon the Massachusetts opinion by learned text writers. Dill. Mun. Corp. 5th ed. § 1292; McQuillin, Mun. Corp. (1912) § 1809.

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In the last analysis this differs but little from the definition of a public use laid down by Judge Cooley in his work on Constitutional Limitations, 6th ed. p. 655, viz.: "That only can be considered . . . [a public use] where the government is supplying its own needs or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare which, on account of their peculiar character and the difficulty,—perhaps impossibility,—of making provision for them otherwise, it is alike proper, useful, and needful for the government to provide." This court, in discussing the question of public use with reference to the power of eminent domain, adopted this definition in a very recent case, remarking: "There is perhaps no general definition more satisfactory than this one." *Brown v. Gerald*, 100 Me. 351, 370, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 Atl. 785. And this general definition we adhere to and seek to apply in the case at bar. Its two tests are: First, the subject-matter or commodity must be one "of public necessity, convenience, or welfare." Fuel clearly comes within this category. The second test is the difficulty which individuals have in providing it for themselves. The causes creating the difficulty may vary, but, if the difficulty exists, the test is met. For instance, in the case of a water supply, the difficulty arises from the fact that individual sources are inadequate or unsanitary, and the conditions can be remedied only by the municipality itself providing or allowing some public service corporation to furnish the community at large from a single and common source. This is a matter of common knowledge, and the court, in passing upon the question of public use, cannot ignore it.

In the case of fuel, the practical difficulty is caused by the existence of monopolistic combinations. The mining, transportation, and distribution of coal has, in the process of industrial development, fallen into the hands of these combinations to such an extent that the greater part of the supply is in the absolute control of a few. The difficulty and practical impossibility of obtaining an adequate supply for private needs at times in the past, and the consequent suffering among the people, especially in the more populous cities, are matters of history, and this difficulty may as well be caused by unreasonable prices as by shortage in quantity. All this is a matter of common knowledge, and cannot be overlooked by the court. The supply of water may be inadequate from one cause, that of fuel from another, but out of each arises the condition which renders the furnishing of it by the municipality a public use.

The majority of the Massachusetts justices conceded the right to create municipal fuel yards under certain conditions and exigencies, but say that in their opinion fuel is like all other commodities of ordinary purchase and sale in the open market, and there is no necessity why cities and towns should undertake that form of business any more than many others which have always been conducted by private enterprise. This might seem to be invading the province of the legislature, because the determination of the exigency is for that co-ordinate branch of the government alone, and, by the passage of this act, that branch has necessarily determined that the exigency exists. If, however, independent of their finding, the court has a right to consider all the conditions and circumstances connected with the subject-matter, all the elements which, under the definition of Judge Cooley, make up the public use, then we cannot close our eyes to existing economic conditions, and must admit that, in determining the existence of the difficulty, the finding of the legislature is not wrong beyond all rational doubt, and therefore, under the well-settled rules of constitutional construction, it should not be disturbed.

But it is urged: Why, if a city can establish a municipal fuel yard, can it not enter upon any kind of commercial business, and carry on a grocery store or a meat market or a bakery? The answer has been already indicated. Such kinds of business do not measure up to either of the accepted tests. When we speak of fuel, we are dealing not with ordinary articles of merchandise, for which there may be many substitutes, but with an indispensable necessity of life; and, more than this, the commodities mentioned are admittedly, under present economic conditions, regulated by competition, in the ordinary channels of private business enterprise. The principle that municipalities can neither invade private liberty nor encroach upon the field of private enterprise should be strictly maintained, as it is one of the main foundations of our prosperity and success. If the case at bar clearly violated that principle, it would be our duty to pronounce the act unconstitutional, but, in our opinion, it does not. The element of commercial enterprise is entirely lacking. The purpose of the act is neither to embark in business for the sake of direct profits (the act provides that fuel shall be furnished at cost), nor for the sake of the indirect gains that may result to purchasers through reduction in price by governmental competition. It is simply to enable the citizens to be supplied with something which is a necessity in its absolute sense to the enjoyment of life and health, 51 L.R.A.(N.S.)

which could otherwise be obtained with great difficulty, and at times perhaps not at all, and whose absence would endanger the community as a whole. In our opinion it is a proper and constitutional function of government either to itself provide such a necessity under these circumstances, or to see to it that it is so provided as to bring it within the reach of the citizens.

A similar inquiry, based upon fears for the future, was asked as to the limit of legislative power, in *Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221, and is there answered by the court in these words:

"The question is asked with great pertinence and propriety: What, then, is the limit of the legislative power under the clause which we have been considering, and what is the exact line between public and private uses?

"Our reply is that which has heretofore been quoted. From the nature of the case there can be no precise line. The power requires a degree of elasticity to be capable of meeting new conditions and improvements and the ever-increasing necessities of society. The sole dependence must be on the presumed wisdom of the sovereign authority, supervised and, in cases of gross error or extreme wrong, controlled by the dispassionate judgment of the courts."

This furnishes, we think, a safe and sufficient barrier between the Constitution and those who might attempt to break it down.

Nor is the fact that in operation the act may tend to lessen the profits of a few private dealers, or even force them from business, a matter of consideration for the court.

"It is for the legislature to determine from time to time the occasion and what laws and regulations are necessary or expedient for the defense and benefit of the people; and, however inconvenienced, restricted, or even damaged particular persons and corporations may be, such general laws and regulations are to be held valid, unless there can be pointed out some provision in the state or United States Constitution which clearly prohibits them." Opinion of Justices, 103 Me. 506, 19 L.R.A.(N.S.) 422, 69 Atl. 627, 13 Ann. Cas. 745.

The brief opinion of Mr. Justice Holmes, now of the Supreme Court of the United States, in 155 Mass. 607, 15 L.R.A. 809, 30 N. E. 1142, *supra*, goes even farther than the rule which we have laid down. He says:

"I am of opinion that, when money is taken to enable a public body to offer to the public, without discrimination, an article of general necessity, the purpose is no less public when that article is wood or coal than when it is water or gas or electricity or education, to say nothing of cases like the support of paupers or the taking of land

previous experience or information imparted to it, that a throng of impatient passengers could simultaneously attempt to board the car at that station.

(May 20, 1914.)

EXCEPTIONS by plaintiffs to rulings of the Superior Court for Suffolk County made during the trial of actions brought to recover damages for personal injuries to plaintiff, Helen M. Jackson, while a passenger on defendant's train, and for consequential damages sustained by her husband, which resulted in verdicts for defendant. Overruled.

The facts are stated in the opinion.

Messrs. James P. Magenis and John Wentworth, for plaintiffs:

The mere fact that the previous crowds were less in extent, and had not jostled the plaintiff in the same way, cannot avail the defendant. There had been crowding and jostling there before. This was sufficient to give the defendant warning that just what did happen in this case was likely to occur.

Kelley v. Boston Elev. R. Co. 210 Mass. 454, 96 N. E. 1031; Glennen v. Boston Elev. R. Co. 207 Mass. 497, 32 L.R.A. (N.S.) 470,

454, 96 N. E. 1031, where a passenger was injured by being pushed off the platform on the upper level, the court says: "The congestion of passengers, resulting from their number and eagerness to board cars waiting for them, was not an extraordinary circumstance, but was rather a condition which should have been foreseen from the nature of the business, and provided for by the adoption of reasonable expedients. It follows that the physical harm suffered by the plaintiff arose through the defendant's negligence in permitting a combination of passengers to press violently upon her, and, while not an assault, the wrong finally inflicted was none the less a violation of its duty, for which compensation in damages can be recovered."

In JACKSON v. BOSTON ELEV. R. Co. the crowded condition had not previously occurred at the place where the accident happened, and there was nothing to show that such a condition should have been foreseen.

In Bacon v. Hudson & M. R. Co. 154 App. Div. 742, 139 N. Y. Supp. 740, however, where a passenger was pushed from a subway platform in front of a train, the evidence showed that such was result of sudden jostling and crowding, and not of overcrowding the platform. The court defined the duty of the carrier to prevent jostling in the following terms: "What degree of care the occasion or the exigency requires is for the jury to decide, but it is the care that a good, prudent business man would exercise at the time and place. The plat-

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729, 118 Am. St. Rep. 516, 79 N. E. 815. Mr. Cyrus Brewer for defendant.

Braley, J., delivered the opinion of the court:

The plaintiff in the second action is not entitled to consequential damages unless his wife, the plaintiff in the first action, can recover for personal injuries suffered while she was a passenger on the defendant's railway. The defendant contends that the verdict ordered by the trial court should stand, as there was no evidence of its negligence. If a view of the evidence most favorable to her is taken, the jury would have been warranted in finding that, upon entering the defendant's station carrying an infant child on her left arm, she found herself in the midst of a crowd filling the station, by which at first she was jostled and steadily forced towards the track. As the train came in, the crowd moving to board the car became more boisterous and energetic, and she was caught in the moving mass, pushed through the vestibule into the car, where she was injured by falling over the dress-suit case of a passenger in the car when it arrived. The carrying of traveling bags or bundles by passengers is an ordinary incident of travel,

form may be so sparsely filled as to require slight diligence; it may quickly be so packed by an agitating crowd as to require great diligence. So the degree of care may be constantly changing."

In an action for injury sustained by stepping into the space between the platform and a car at an elevated station, where the plaintiff testified that she could not look down so as to see where she stepped, and that her movements were constrained by the crowd around her, it was held that there was nothing in the size or conduct of the crowd to bring the case within the principles of Kuhlen v. Boston & N. Street R. Co., the principal case in the earlier note upon this subject. Anshen v. Boston Elev. R. Co. 205 Mass. 32, 91 N. E. 157.

Becker v. Interborough Rapid Transit Co. 128 App. Div. 455, 112 N. Y. Supp. 816, reversed the judgment of the court below on the grounds that the charge with respect to injuries resulting from crowding a platform, while correctly setting forth the law, was inapplicable to the case.

Contributory negligence.

Where a passenger seventy-four years of age takes up his position on a subway platform 6 inches from the edge thereof, his contributory negligence is a question for the jury, in an action for injuries received by being pushed from the platform. Bacon v. Hudson & M. R. Co. supra.

E. L. D.

on Street R. Co. 213 Mass. 595, 100 N. E. 1007.

Messrs. Frank W. Knowlton and Arthur J. Santry, for defendant:

The existence of a space between the platform of an elevated train and the station platform in a subway station does not furnish evidence of negligence on the part of the defendant company. However dangerous such a condition may be, and whatever possibilities of injury it may carry, it is an incident of travel and an incident of the use of the station leased by the defendant, and does not furnish a ground of liability.

Willworth v. Boston Elev. R. Co. 188 Mass. 220, 74 N. E. 333, 18 Am. Neg. Rep. 463; Field v. Boston Elev. R. Co. 188 Mass. 222 note, 74 N. E. 334; Hilborn v. Boston & N. Street R. Co. 191 Mass. 14, 77 N. E. 646; Hawes v. Boston Elev. R. Co. 192 Mass. 324, 78 N. E. 480; Anshen v. Boston Elev. R. Co. 205 Mass. 32, 91 N. E. 157.

Rugg, Ch. J., delivered the opinion of the court:

The plaintiff seeks to recover damages for injuries sustained while trying to board an elevated train in the subway station at Boylston street. Her testimony was in substance that she waited there three or four minutes for the train; that there was a very large crowd, which grew larger and larger while she was waiting; that there was not much chance to move up, there was such a crowd, "and just before the train came in the crowd grew all around her; that as the car came in and the door opened, 'I was taken off my feet and was pushed right into this space [by the] pushing crowd, the surging crowd all around me,'" that she struck against the car and went down into the open space, where she was injured. In reply to the question, "What do you mean by surging all around?" she said, "Swaying back and forth." The plaintiff's companion testified: "The crowd was pushing all the time from the time we entered almost, there was a restless crowd there all the time; and she [the plaintiff] was pushed into this hole by the force of the crowd." There was evidence that the plaintiff had been in the habit of taking the train at this station at about the same hour, and that the conditions as to the crowd and its actions on other occasions were identical with those on this night.

The subway and its platform were designed and constructed by public authority, acting through the Boston Transit Commission, and have been leased to the defendant company. Having had no control over the plan or the size of the platform, 51 L.R.A. (N.S.)

the platform. Willworth v. Boston Elev. R. Co. 188 Mass. 220, 74 N. E. 333, 18 Am. Neg. Rep. 463; Hilborn v. Boston & N. Street R. Co. 191 Mass. 14, 77 N. E. 646; Plummer v. Boston Elev. R. Co. 198 Mass. 499, 509, 84 N. E. 849. The case at bar, in respect of the conduct of the crowd and its effect upon the plaintiff, is distinguishable in its facts from Anshen v. Boston Elev. R. Co. 205 Mass. 32, 91 N. E. 157, where the plaintiff put the emphasis of her case upon the open space between the fixed platform and the car, and the failure of the defendant to provide a movable platform, and also from Seale v. Boston Elev. R. Co. 214 Mass. 59, 100 N. E. 1020.

The plaintiff's contention does not rest upon the existence of the open space, but upon the uncontrolled conduct of a restless and surging crowd heedless of the safety of individuals, such as commonly the defendant permitted to be upon its platform at this place. The case is indistinguishable in its salient facts from Kuhlen v. Boston & N. Street R. Co. 193 Mass. 341, 7 L.R.A. (N.S.) 729, 118 Am. St. Rep. 516, 79 N. E. 815, and is governed by the principles there stated at length. To the same effect, see Beverley v. Boston Elev. R. Co. 194 Mass. 450, 80 N. E. 507; Kelley v. Boston Elev. R. Co. 210 Mass. 454, 96 N. E. 1031, and Coy v. Boston Elev. R. Co. 212 Mass. 307, 98 N. E. 1041.

In accordance with the terms of the report let the entry be:

Case to be submitted to arbitrators to determine damages.

TEXAS COURT OF CRIMINAL APPEALS.

EX PARTE LOTTIE BELLE BARNES.

(— Tex. Crim. Rep. —, 166 S. W. 728.)

Habeas corpus — absence of evidence — remand.

1. In the absence of evidence to support the allegations in an application for habeas corpus, petitioner will be remanded.

Contempt — refusal of witness to be sworn.

2. A witness who does not act on religious or other convictions may be committed for contempt in refusing to be sworn or to affirm.

Note. — Refusal to be sworn or to affirm as a contempt of court.

EX PARTE BARNES in holding a refusal to be sworn or to affirm as contempt of court has the unanimous support of the authorities. Thus, it was so held in Good-

firm, although he expects the questions to be propounded to him will require self-incriminating answers.

Witness — incriminating evidence — immunity — compulsion.

3. A woman offered immunity from prosecution may be compelled to testify as to incestuous relations between herself and her father.

(April 22, 1914.)

APPPLICATION by relator for a writ of habeas corpus to secure her release from custody to which she had been committed for refusal to qualify as a witness upon refusal of the District Court for Bexar County to grant the writ. Relator remanded.

The facts are stated in the opinion.

Messrs. John R. Storms and Edwin F. Vanderbilt for appellant.

Messrs. W. C. Linden and C. E. Lane, Assistant Attorney General, for the State.

Harper, J., delivered the opinion of the court:

Relator, having been refused a writ of habeas corpus by the district court in Bexar county, applied to this court and was granted a writ, and the hearing set for April 15th.

On that day relator's attorney and the district attorney appeared and argued the case, but relator introduced no evidence in support of the allegations contained in the

application. In the absence of any proof supporting the allegations, relator should be remanded. The application is merely a pleading, and does not prove itself. *Ex parte Welburn*, — Tex. Crim. Rep. —, 157 S. W. 154, and cases there cited.

The district attorney did offer some evidence, and this evidence would show that when the relator was summoned before the grand jury she refused to be sworn or affirm. When she was carried before the district judge she again refused to be sworn to answer any question, or to affirm in any way, and yet there is no proof offered that such action was on account of any religious or other convictions. This would be such contempt as would authorize her confinement in jail until she should purge herself of contempt and take the oath required by law to be administered to all witnesses.

It would seem from the proof offered by the district attorney that relator presumed that she was going to be questioned by the grand jury about alleged incestuous relations between her and her father. This furnishes no excuse for refusing to be sworn to answer such questions as might be propounded to her by the grand jury. After being sworn, if such questions were propounded, then, and not until then, would she be justified in refusing to answer such questions.

However, it further appears from the testimony offered by the district attorney that

man v. People, 90 Ill. App. 533; *Lockwood v. State*, 1 Ind. 161; *Wilcox v. State*, 46 Neb. 402, 64 N. W. 1072; *People v. Hicks*, 15 Barb. 153; *Com. ex rel. Rathvon v. Roberts*, 2 Clark (Pa.) 340.

But it has been held not contempt of court for a witness merely to decline to be sworn; he must also refuse to affirm, and it must so appear of record. *Wilcox v. State*, 46 Neb. 402, 64 N. W. 1072.

One subpoenaed to appear before a referee in supplementary proceedings is guilty of contempt of court in refusing to be sworn by the referee. *Howe v. Welch*, 11 N. Y. Civ. Proc. Rep. 444.

And a magistrate appointed under a rule of the court of common pleas to take depositions has the power to punish for contempt one who refuses to be sworn as a witness. *Com. ex rel. Rathvon v. Roberts*, 2 Clark (Pa.) 340.

It is contempt of court for a material witness to refuse to be sworn on an examination, on the filing of a complaint that a crime has been committed. *People v. Hicks*, 15 Barb. 153.

And so, also, in *State ex rel. Long v. Keyes*, 75 Wis. 288, 44 N. W. 13, it was held that one subpoenaed to appear before a magistrate on an examination to ascertain whether an offense has been committed, who refuses to be sworn, is guilty of contempt of court.

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In *Stansbury v. Marks*, 2 Dall. 213, 1 L. ed. 353, a Jew who refused to be sworn on Saturday because it was his Sabbath was fined \$10.

And in *United States v. Tom Wah*, 160 Fed. 207, affirmed in 90 C. C. A. 178, 163 Fed. 1008, it was held to be contempt of court for a Chinese person against whom deportation proceedings are pending, to refuse to be sworn as a witness, since the proceedings to deport are civil, and not criminal, in their nature.

But the power to punish must be exercised by the Federal court, as the United States commissioner is not vested with authority. *United States v. Tom Wah*, 160 Fed. 207.

In *People v. Webster*, 14 How. Pr. 242, 3 Park. Crim. Rep. 503, it was held that the act of 1857, an act to suppress intemperance and to regulate the sale of intoxicating liquors, did not authorize a justice of the peace to commit one who refused to be sworn as to the cause of his intoxication.

Nor did the section of the Revised Statutes then in force, relating to punishment for criminal contempt, reach such a case. *Ibid*.

Generally as to what constitutes contempt of court and power to punish therefor, see Index to L.R.A. Notes, "Contempt" §§ 5-12.

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that he then and there offered and tendered her complete and absolute immunity from prosecution as to any matter about which she might be called upon to testify, which tender met with the sanction and approval of the district judge. Under such circumstances, she could be compelled to testify as to her incestuous relations between herself and her father, if any. *Ex parte Muney*, — *Tex. Crim. Rep.* —, 163 S. W. 29, and *Ex parte Higgins*, — *Tex. Crim. Rep.* —, 160 S. W. 696. As said in the *Higgins Case*, it is the better practice that the sanction and approval of the judge of the district court be made a matter of record in his court, and, while the judgment entered in this case impliedly so states, yet it does not expressly do so, and in all such orders it would be proper, and the court should recite that immunity from prosecution had been offered the witness, which offer the court approved, and he then and there informed the witness she could not and would not be prosecuted for any matter about which she might be called on to testify.

The relator is remanded.

Davidson, J., absent at consultation.

Petition for rehearing denied May 13, 1914.

UNITED STATES SUPREME COURT.

ATLANTIC TRANSPORT COMPANY OF
WEST VIRGINIA

v.

FRANK IMBROVEK.

(234 U. S. 52, 58 L. ed. —, 34 Sup. Ct. Rep. 733.)

Admiralty — jurisdiction — torts — injury to stevedore.

The admiralty jurisdiction of a Federal district court extends to a cause of action

Note. — Jurisdiction of admiralty over suit for injury to stevedore.

As to the right to sue in admiralty for damages resulting from an injury to another, see note to *New York & L. B. S. B. Co. v. Johnson*, 42 L.R.A. (N.S.) 640.

For notes on various other phases of the question of admiralty jurisdiction, see Index to L.R.A. Notes, "Admiralty," §§ 2, 3.

The jurisdiction of courts of admiralty over torts generally seems to depend, or, at least, may depend, upon two tests: *vis.*, the locality of the injury and the maritime nature of the tort. "The proposition is elementary in the admiralty law that the test of the jurisdiction of admiralty courts 51 L.R.A. (N.S.)

of an injury to one of its employees, caused by its negligent failure to secure the hatch covers on a vessel lying in navigable waters, whereby such employee was injured while engaged in loading and stowing the ship's cargo, since even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still the wrong which was the subject of the suit was of a maritime nature.

(May 25, 1914.)

CERTIORARI to the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which affirmed a decree of the District Court for the District of Maryland in favor of libellant in a suit to recover damages for personal injuries sustained while loading and stowing a cargo on petitioner's ship. **Affirmed.**

The facts are stated in the opinion.

Messrs. Edward Duffy, Ralph Robinson, and Nicholas P. Bond, for petitioner:

The jurisdiction, as of right, of the admiralty, was limited to causes of a maritime nature.

2 *Browne*, *Adm.* 1 *Am. ed.* pp. 94, 95; *Benedict*, *Adm.* 4th *ed.* pp. 39, 46, 47; *Stevens v. The Sandwich*, 1 *Pet. Adm.* 233, *Fed. Cas. No.* 13,409.

In determining whether a tort is maritime or not three things must be considered, locality, subject-matter of complaint, and person with regard to whom complaint is made.

Reg. v. London Ct. Judge [1892] 1 *Q. B.* 273.

For injury to a mariner in the service of a ship, the ship is liable, whether negligent or otherwise, only for the maintenance and care of the mariner. This is the rule except where the injury happens by reason of the unseaworthiness of the ship or of a failure to supply and keep in order the proper appliances appurtenant to the ship (*The Osceola*, 189 U. S. 158, 47 L. ed. 760,

over torts is the locality of the injury" (*The Mary Garrett*, 63 *Fed.* 1009). Many *obiter* statements may be found to the effect that this is the sole test, and that it is conclusive upon the question of jurisdiction. Such statements, however, have generally been made in cases in which this test was the only one considered,—the respective torts involved in such cases being concededly maritime torts, so that the application of the test of locality in fact solved the question of jurisdiction in those cases. And so, in *ATLANTIC TRANSPORT CO. v. IMBROVEK* it was not necessary to decide whether the locality test was exclusive, since the court was of the opinion that the tort in question was of a maritime nature. As stated

23 Sup. Ct. Rep. 483), in which event the mariner is entitled to damages.

Messrs. W. H. Price, Jr., John E. Semmes, Jr., John E. Semmes, Jesse N. Bowen, and Matthew Gault, for respondent:

In questions of contracts as distinguished from torts, admiralty jurisdiction depends mainly upon the subject-matter,—that is, the nature of the service and engagement,—and is limited to such subjects as are purely maritime.

Ex parte Easton, 95 U. S. 72, 24 L. ed. 374; New England Mut. M. Ins. Co. v. Dunham, 11 Wall. 1, 26, 20 L. ed. 90, 97.

By reason of the jealousy of the English common-law courts against the admiralty, the latter's jurisdiction is narrower and

more restricted in England than in any other country. In the United States the admiralty jurisdiction of the courts is not confined or restricted by restraining statutes or the prejudiced interpretations of these statutes by the judiciary.

Morewood v. Enequist, 23 How. 493, 16 L. ed. 516; New England Mut. M. Ins. Co. v. Dunham, 11 Wall. 1, 20 L. ed. 90; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 385, 12 L. ed. 465, 483; The Blackheath (United States v. Evans) 195 U. S. 361, 49 L. ed. 236, 25 Sup. Ct. Rep. 46; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 574, 22 L. ed. 654, 661.

The sole test of admiralty jurisdiction has been the locality of the person or thing

in the opinion in ATLANTIC TRANSPORT CO. v. IMBROVER, the circuit court of appeals in Campbell v. H. Hackfeld & Co. 62 C. C. A. 274, 125 Fed. 696, holds that locality is not the exclusive test. This general question, however, is beyond the scope of the note. At all events, locality whether or not an exclusive test, is a necessary test. This question of locality, of course, is generally one of fact, and when the fact is shown, the jurisdictional question dependent thereon is answered, leaving no question of law as to whether the tort is within the admiralty jurisdiction, under the locality test, except in cases where the cause of injury arises on navigable waters and the injury is sustained on land, or *vice versa*. But, as stated in Benedict, Adm. 4th ed. p. 176: "It may, however, be doubted whether the civil jurisdiction, in cases of torts, does not depend upon the relation of the parties to a ship or vessel, embracing only those tortious violations of maritime right and duty which occur in vessels, to which the admiralty jurisdiction, in cases of contracts, applies."

Suit against vessel or owner.

In a large majority of the admiralty cases involving injuries to stevedores, the libel has been filed either against the vessel, on or in connection with which the injury was sustained, or against its owners (generally against the vessel itself); and in practically all of these cases, involving negligent or wrongful acts or omissions of those representing the vessel or its owners, it seems to have been assumed that the tort was of a maritime nature, and the only test as to the jurisdiction of the admiralty courts which has been applied in such cases is the locality test. Applying this test, it has been held that where an employee of a corporation owning a vessel, while engaged in the hold of the vessel in receiving lumber which was being loaded from a wharf, was struck and seriously injured by a piece of timber which the shipowner negligently slid down a chute into the hold without warning to those below, admiralty has jurisdiction of the employee's cause of action

against the corporation, notwithstanding the tort originated on land, *i. e.*, on the wharf from which the lumber was being loaded. Hermann v. Port Blakely Mill Co. 69 Fed. 646.

And in The Strabo, 39 C. C. A. 375, 98 Fed. 998, affirming 90 Fed. 110, it was held that a court of admiralty has jurisdiction of a libel against a steamship for personal injuries to a longshoreman at work in loading the ship as she was lying at a dock, which injuries were caused by the negligence of the master of the ship, while he was upon the ship, in regard to the security of a ladder which was furnished by him for the use of the longshoremen, with one end upon the dock and the other end resting upon the rail of the ship, not fastened in any manner thereto, and wholly unsecured, whereby the libellant was thrown off and struck upon the dock, and was seriously injured. The court said: "The important question in the case is that of the jurisdiction of a court of admiralty over a tort caused by the negligence of the master upon navigable water, in regard to the security of the ladder upon the ship, the accident commencing upon the ship, and the known injurious consequences having been suffered by the fall upon the land. . . . In this case it is highly probable that the libellant sustained some damage from nervous shock while precipitated through the air, and before he fell upon the wharf. A person of sensitive nervous organization would, without doubt, receive such an injury. The injury commenced when, by the slipping of the ladder, the libellant was thrown into the air. Whether or not this throw was *damnum absque injuria* cannot be told, but it is true, as the district judge said, 'that the whole wrongful agency was put in motion and took effect on the ship, and thereby the libellant was hurled from his position on the ship, and before he reached the dock was subjected to conditions inevitably resulting in physical injury, wherever he finally struck.' The cause of action originated and the injury had commenced on the ship, the consummation somewhere being inevitable. It is not of

The Plymouth (Hough v. Western Transp. Co.) 3 Wall. 36, 18 L. ed. 128; Thomas v. Lane, 2 Sumn. 9, Fed. Cas. No. 13,902; DeLovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3,776; Leathers v. Blessing, 105 U. S. 626, 26 L. ed. 1192; The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. ed. 1058; The Blackheath (United States v. Evans) 195 U. S. 361, 49 L. ed. 236, 25 Sup. Ct. Rep. 46; Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co. 208 U. S. 316, 52 L. ed. 508, 28 Sup. Ct. Rep. 414, 13 Ann. Cas. 125; The Troy, 208 U. S. 321, 52 L. ed. 512, 28 Sup. Ct. Rep. 416; The Jefferson, 215 U. S. 130, 54 L. ed. 125, 30 Sup. Ct. Rep. 54, 17 Ann. Cas. 907; Martin v. West,

vital importance to the admiralty jurisdiction whether the injury culminated on the stringpiece of the wharf or in the water."

So, in Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft v. Gye, 207 Fed. 247, reversing on the merits a decree for the libellant in a suit in admiralty against the owners of a ship to recover damages for the death of the libellant's husband, a stevedore or longshoreman who had been employed in loading the ship,—one of the errors assigned by the shipowners upon the appeal having been that the admiralty court was without jurisdiction as, notwithstanding the fatal injury was received on navigable waters of the United States, the libellant's decedent died ashore,—the court said: "We deem it unnecessary, in view of the conclusion reached on the merits, to advert to the question of jurisdiction, more than to say that it is well settled by the weight of modern authority that the *locus injuriæ* is the test of jurisdiction."

In The Aurora, 163 Fed. 633,—overruling exceptions to a libel *in rem* against a vessel by the administratrix of a deceased longshoreman who had been in the employ of the vessel and assisting in loading her, and was killed through the negligence of the vessel in not providing a safe and suitable gangway as a means of ingress and egress to and from the vessel,—although the objection seems to have been only to the form of the libel (*i. e.*, that it should have been *in personam* against the owners, instead of *in rem* against the vessel), the court, upholding, under local statutes giving a right of action for wrongful death and a lien upon vessels for injuries by them to persons or property, the jurisdiction of the court to entertain the cause *in rem*, and the right of the libellant to maintain the libel in that form, said: "It does not seem to me that the fact that this is not a case of collision can alter the result. The deceased was injured by a fall upon the deck of the vessel. Hence the injury was sustained upon water, not upon land. The cause is therefore within maritime jurisdiction."

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The tort in this case was essentially maritime in its nature.

The Gilbert Knapp, 37 Fed. 209; The George T. Kemp, 2 Low. Dec. 477, Fed. Cas. No. 5,341; The Seguranca, 58 Fed. 908; The Mattie May, 47 Fed. 69; The Senator, 21 Fed. 191; The Coningsby, 202 Fed. 814.

Mr. Justice Hughes delivered the opinion of the court:

This is a libel to recover for personal injuries sustained by the libellant as a stevedore in the employ of the Atlantic Transport Company (the petitioner), which was engaged in loading the Pretoria, belonging to the Hamburg-American Steam Packet

In his opinion upon the hearing of this case on the merits (178 Fed. 587), the district judge said: "The further question is presented that this court is without jurisdiction of the cause. This, however, has been determined against the contention on exceptions to the libel." And the decree of the district court was affirmed by the circuit court of appeals in 112 C. C. A. 372, 191 Fed. 960.

And in The Anaces, 34 C. C. A. 558, 93 Fed. 240, reversing a decree (87 Fed. 565) which dismissed a libel *in rem* against a steamship to recover damages for injuries received by the libellant while working in the hold of the ship as a stevedore in the employ of a master stevedore who had a contract to load the ship, it was admitted that the libel charged a maritime tort and that the admiralty had jurisdiction,—the appellee contending only (as the district court held) that a libel *in rem* could not be maintained, but that the only remedy in admiralty for a personal injury to one lawfully on the ship, which resulted from the negligent failure of the officers of the ship to perform a duty necessary for his safety, was by libel *in personam* against the owners of the ship.

In the following cases, although the question of jurisdiction was not raised, the United States admiralty courts have entertained libels *in rem* against vessels, and allowed damages to stevedores, longshoremen, or other similar laborers engaged in loading or unloading the respective vessels, for injuries sustained thereon by reason of negligent or wrongful acts or omissions of persons representing the vessels,—the jurisdiction of the courts apparently being unquestionable under the locality test, and at least conceded under the maritime nature test: The Helios, 12 Fed. 732; The Max Morris, 24 Fed. 860, affirmed in 28 Fed. 881, which was affirmed in 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29; The Carolina, 30 Fed. 199; Crawford v. The Wells City, 38 Fed. 47; Keliher v. The Nebo, 40 Fed. 31; The Frank & Willie, 45 Fed. 494; The William Branfoot, 48 Fed. 914, affirmed in 3 C. C. A. 155, 9 U. S. App.

the petitioner, the Atlantic Transport Company, as the stevedore) said: "There would have been no accident had the entire hatch been uncovered. To uncover a hatch takes time and labor. If bad weather comes, it must be covered. Unnecessary uncovering is to be avoided. It is easy to make a partially covered hatch absolutely safe. The cross beams of the hatch have holes in their ends. There are corresponding holes in the hatch combings. Pins can be put through these holes. It takes about five minutes to put

as gave rise to this case cannot happen. The ship's carpenter of the Pretoria keeps the pins when not in use. Accidents often happen because an opened hatch has been left unguarded, or because the hatch coverings fall into the hold. When they do there is usually a dispute as to whether the ship or the stevedore is to blame. In the case at bar the ship and the stevedore were represented by the same proctors and by the same advocates. The stevedore acquits the ship. . . . The stevedore proved that,

ity alone determines the admiralty jurisdiction. Only those torts are maritime which happen on navigable waters. If the injury complained of happened on land, it is not cognizable in the admiralty, even though it may have originated on the water. . . . Now, the injury in the case at bar happened on the land. Wharves and bridges are but improvements or extensions of the shore. They are fixed and immovable, and are a mere continuation and part of the real estate to which they are attached. And this is the case, whether they project over the water or not. Injuries done to or on them, therefore, are not cognizable in the admiralty."

And admiralty has no jurisdiction of personal injuries to a seaman employed on a vessel and engaged at the time in assisting to unload her, where the injuries were sustained by him while on a wharf, although they were due to the negligence of the mate and owner of the vessel in unloading, and the cause of the injuries arose on or proceeded from the vessel. *The Mary Garrett*, 63 Fed. 1009.

And admiralty has no jurisdiction of an injury to one ordered by the mate of a ship to assist in carrying a barrel of oil on shore, where the injury was sustained on the land, although the cause thereof originated on the ship. *Price v. The Belle of the Coast*, 66 Fed. 62.

Suit against stevedore's employer.

In the few suits for injuries to stevedores which had been brought in admiralty against the stevedores' employers, it has been contended by the latter that the locality test of admiralty jurisdiction in tort cases is not exclusive, but that the maritime nature test must also be applied; and that, as their negligent or wrongful acts or omissions resulting in the injuries in question did not constitute maritime torts, the courts of admiralty had no jurisdiction. *ATLANTIC TRANSPORT CO. v. IMBROVEK*, however,—in which the United States Supreme Court affirmed the decree of the circuit court of appeals (113 C. C. A. 398, 193 Fed. 1019), which, in turn, affirmed, on the opinion below, the decree of the district court (190 Fed. 229),—seems to settle in the affirmative the question as to the maritime nature of an employing steve-

dore's negligent or wrongful act or omission resulting in a personal injury to one of his employees while engaged on a vessel in loading or unloading cargo; and this decision renders immaterial the question whether the locality test is exclusive, as, assuming that the requirement as to locality is not necessarily exclusive, the court still has jurisdiction.

This case was followed by, and its decision governed, the case of *Atlantic Transport Co. v. Maryland*, 234 U. S. 63, 58 L. ed. —, 34 Sup. Ct. Rep. 736, affirming 113 C. C. A. 408, 193 Fed. 1019, which affirmed 190 Fed. 240.

Prior to these decisions, it had been held in the circuit court of appeals of the ninth circuit, that the locality of a tort is not the exclusive test, and that admiralty had no jurisdiction over a stevedore's cause of action against the stevedore who employed him, for injuries sustained by reason of the negligence of the head stevedore, or of one of his other employees, as this was not a maritime tort. *Campbell v. H. Hackfeld & Co.* 62 C. C. A. 274, 125 Fed. 696.

Following this case, the district court of the western district of Washington held that, as a court of admiralty, it was without jurisdiction of a cause of action against a stevedoring company, arising out of an injury to one of its employees, caused by its negligence in leaving open, unlighted, and unguarded a hatchway through which the employee fell,—as the alleged tort was not of a maritime character. *The St. David*, 209 Fed. 985. In its opinion, the court noted that the decision of the court of appeals of the ninth circuit, in the *Campbell Case*, had been criticized by the district court of Maryland in the *IMBROVEK CASE*, below (190 Fed. 229), which decision had then been affirmed on the opinion below, by the circuit court of appeals of the fourth circuit (113 C. C. A. 398, 193 Fed. 1019). And the subsequent affirmation of the decision below, in the *IMBROVEK CASE*, by the United States Supreme Court, seems entirely to overthrow the *Campbell* and the *St. David Cases*, and to destroy their value as precedents upon the question as to the maritime nature of an employing stevedore's tort which results in personal injuries to one of his employees while at work on a vessel, loading or unloading it

A. C. W.

Ann. Cas. 1215; Martin v. West, 222 U. S. 191, 56 L. ed. 159, 36 L.R.A. (N.S.) 592, 12 Sup. Ct. Rep. 42; The Neil Cochran, Brown, Adm. 162, Fed. Cas. No. 10,087; The Ottawa, Brown, Adm. 356, Fed. Cas. No. 10,616; Holmes v. Oregon & C. R. Co. 6 Sawy. 262, 5 Fed. 75, 77; The Arkansas, 5 McCrary, 364, 17 Fed. 383, 384; The F. & P. M. 33 Fed. 511, 513; The H. S. Pickands, 42 Fed. 239, 240; Hermann v. Port Blakely Mill Co. 69 Fed. 646, 647; The Strabo, 90 Fed. 110; 2-Story, Const. § 1666. It is also apparent that Congress, in providing for the punishment of crimes committed upon navigable waters, has regarded the locality of the offense as the basis for the exercise of its authority. Act of April 30, 1790, chap. 9, § 8, 1 Stat. at L. 112, 113; act of March 3, 1825, chap. 65, 4 Stat. at L. 115; Rev. Stat. §§ 5339, 5345, 5346, U. S. Comp. Stat. 1901, pp. 3627, 3630, 3631; Criminal Code, § 272, 35 Stat. at L. 1088, 1142, chap. 321, U. S. Comp. Stat. Supp. 1911 pp. 1588, 1671; United States v. Bevans, 3 Wheat. 336, 387, 4 L. ed. 404, 416; United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37; United States v. Rodgers, 150 U. S. 249, 260, 261, 285, 37 L. ed. 1071, 1075, 1076, 1084, 14 Sup. Ct. Rep. 109; Wynne v. United States, 217 U. S. 234, 240, 54 L. ed. 748, 749, 30 Sup. Ct. Rep. 447.

But, the petitioners urge that the general statements which we have cited, with respect to the exclusiveness of the test of locality in cases of tort, are not controlling; and that in every adjudicated case in this country in which the jurisdiction of admiralty with respect to torts has been sustained, the tort, apart from the mere place of its occurrence, has been of a maritime character. It is asked whether admiralty would entertain a suit for libel or slander circulated on board a ship by one passenger against another. See Benedict, Admiralty, 4th ed. § 231. The appropriate basis, it is said, of all admiralty jurisdiction, whether in contract or in tort, is the maritime nature of the transaction or event; it is suggested that the wider authority exercised in very early times in England may be due to its antedating the recognition by the common-law courts of transitory causes of action, and thus arose by virtue of necessity.

We do not find it necessary to enter upon this broad inquiry. As this court has observed, the precise scope of admiralty jurisdiction is not a matter of "obvious principle or of very accurate history." The Blackheath (United States v. Evans) 195 U. S. 361, 365, 367, 49 L. ed. 236-238, 25 Sup. Ct. Rep. 46. And we are not now concerned with the extreme cases which are 51 L.R.A. (N.S.)

assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature, and hence the district court, from any point of view, had jurisdiction. The petitioner contends that a maritime tort is one arising out of an injury to a ship, caused by the negligence of a ship or a person, or out of an injury to a person by the negligence of a ship; that there must either be an injury to a ship or an injury by the negligence of the ship, including therein the negligence of her owners or mariners; and that, as there was no negligence of the ship in the present case, the tort was not maritime. This view we deem to be altogether too narrow.

The libellant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class "as clearly identified with maritime affairs as are the mariners." See The George T. Kemp, 2 Low. Dec. 482, Fed. Cas. No. 5,341; The Circassian, 1 Ben. 209, Fed. Cas. No. 2,722; Roberts v. The Windermere, 2 Fed. 722; The Canada, 7 Sawy. 173, 7 Fed. 119; The Hattie M. Bain, 20 Fed. 389; The Gilbert Knapp, 37 Fed. 209; The Main, 2 C. C. A. 569, 2 U. S. App. 349, 51 Fed. 954; Norwegian S. S. Co. v. Washington, 6 C. C. A. 313, 13 U. S. App. 459, 57 Fed. 224; The Seguranca, 58 Fed. 908; The Allerton, 93 Fed. 219; Hughes, Admiralty, 113; Benedict, Admiralty, 4th ed. § 207. The libellant was injured because the care required by the law was not taken to protect him while he was doing this work. We take it to be clear that the district court, sitting in admiralty, was entitled to declare the applicable law in such a case, as it was within the power of Congress to modify that law. Waring v. Clarke, 5 How. 459, 12 L. ed. 235; The Lottawana (Rodd v. Heartt) 21 Wall. 558, 576, 22 L. ed. 654, 662. The fact that the ship was not found to be liable for the neglect is not controlling. If more is required than the locality of the wrong in order to give the court jurisdic-

mobiles from appellees before this time. Appellees sent an automobile and driver to the place designated by Forbes. Forbes and Mr. and Mrs. E. L. Smith, as his guests, entered the automobile and gave directions to the driver as to the places where they wished to go. The driver had control of the machine, and the management of it, and drove it to the places directed by Forbes. While going along High street, in the city of Little Rock, the automobile ran into an express wagon, and Forbes was killed and Mrs. Smith severely injured. The testimony on the part of appellants tends to show that the collision occurred by reason of the negligence of the driver of the automobile, while the testimony of appellees tends to show that it was caused by the negligence of the driver of the express wagon. Appellees testified that the chauffeur in charge of their car was an experienced driver, and had been in their employment as long as they had been in the business of hiring out automobiles; that he had never had an accident before, and was both careful and skillful; that the car in question cost \$3,500,

and was in perfect condition. The circuit court directed a verdict in favor of appellees on the ground that the only duty appellees owed to the occupants of the car was that of exercising ordinary care in furnishing a safe automobile and a careful and reliable chauffeur. To reverse the judgment rendered, appellants have prosecuted this appeal.

Mr. Hutchinson, in his work on Carriers (3d ed. vol. 1, § 35), says that private carriers for hire are such as make no public profession that they will carry for all who apply, but who occasionally, or upon the particular occasion, undertake for compensation to carry the goods of others upon such terms as may be agreed upon. At § 37, the same author says that, the bailment to the private carrier for hire being for the mutual benefit of the parties, the law exacts of him a higher degree of diligence than of the carrier without hire; that the measure of his duty is what is known as ordinary care or diligence, and for the lack of this he will be held liable. Again, at § 96 of the same volume, he says:

As to liability of automobile owner for negligence of chauffeur furnished by third person, see notes to *Neff v. Brandeis*, 39 L.R.A. (N.S.) 933, and *Dalrymple v. Covey Motor Car Co.* 48 L.R.A. (N.S.) 424.

In *Rodenburg v. Clinton Auto & Garage Co.* 84 N. J. L. 545, 87 Atl. 71, holding that the submission to the jury of the question whether the chauffeur was the servant of the defendant, an automobile livery company, or of one of its regular customers, who had indicated the destination of the car, and as whose guest the plaintiff was riding at the time of the accident, was not prejudicial to the defendant, the evidence not being sufficient to remove the question from their consideration, the court remarked that normally the driver of a hired conveyance, when furnished and paid by the owner thereof, is the latter's servant, and not the servant of the hirer, and that the owner is liable for the driver's negligence, unless it appears that the hirer has exercised such control over the operation of the car as to make the negligence of the driver his own.

In *Neumiller v. Acme Motor Car Co.* 49 Pa. Super. Ct. 183, where the defendant corporation rented an automobile to the plaintiff and selected one of its drivers to operate the car, and there was no attempt on the part of the plaintiff to affect or control the management of the machine, it was held that the defendant was liable for an injury to the plaintiff which resulted from the chauffeur's negligence.

And in *Wallace v. Keystone Automobile Co.* 239 Pa. 110, 86 Atl. 699, the rule of *respondeat superior* was held to apply where an automobile was rented to the plaintiff's husband by the defendant company, and a chauffeur furnished by the company to operate the machine had charge of it when

the plaintiff was injured and her husband killed through such chauffeur's negligence in leaving the mechanism of the machine so that it started while he was away from it, and ran against a tree.

In *Swancutt v. W. M. Trout Auto Livery Co.* 176 Ill. App. 606, the question whether a chauffeur of a taxicab was acting within the scope of his employment was held to be for the jury, it appearing that, after performing the service for which the taxicab had been despatched, he proceeded to a place some distance away in order to "pick up" a load, and by his negligence injured a passenger who had been so "picked up," there being evidence that he had been instructed not to pick up passengers, and to do only livery work, but that defendant's chauffeurs did pick up passengers, and, while it was unusual for them to turn in the money so earned, it was sometimes turned in and accepted by the company, and that, had the chauffeur turned in the fee for carrying the plaintiff, it would have been accepted with a caution.

In *Hannon v. Van Dycke Co.* 154 Wis. 454, 143 N. W. 150, where defendant, a corporation engaged in the real estate business, through its secretary, hired an automobile to take the plaintiff and a friend to see a farm, there being an agreement to divide the commission with the plaintiff in case the sale was made, it was held that the chauffeur was not the agent or servant of the defendant, and the latter was not responsible for his negligence, it appearing that the secretary sat on the front seat with the driver, and the plaintiff on the back seat; and that the machine was driven fast both going and returning, but no protests were made except that the secretary told the driver once to be careful. J. T. W.

tor vehicle hired to a third person, who exercises no control over the driver of the automobile other than telling him where to go, is liable in damages to pedestrians or the occupants of other vehicles who are injured by the negligence of the chauffeur, we can see no difference in principle in such a case and in one where the occupants of the carriage are injured by the negligence of the chauffeur; for the liability of the owner in each case turns upon the question of whether the chauffeur is his servant or not. If the chauffeur is the servant of the owner, as to strangers, it cannot upon principle be said that he is the servant of the person hiring the vehicle, when the latter is injured and sues the owner for damages.

Counsel for appellants have cited numerous cases in their brief; but many of them have only an indirect application to the facts of the present case, and we shall only cite those which we deem squarely in point. In the case of *Johnson v. Coey*, 237 Ill. 88, 21 L.R.A.(N.S.) 81, 86 N. E. 678, the court held: "The owner of a passenger-carrying automobile cannot escape liability for injury to a passenger caused by collision between the automobile and a street car, if the chauffeur negligently ran near the car at high speed without having the machine under control, and, without such negligence, the accident would not have happened, although the immediate cause of the accident was the breaking of a brake rod through a latent defect, for which the owner was not responsible."

In the case of *Gerretson v. Rambler Garage Co.* 149 Wis. 528, 40 L.R.A.(N.S.) 457, 136 N. W. 186, the supreme court of Wisconsin held: "A chauffeur sent by the owner of a garage to operate an automobile leased for a pleasure ride, and who obeys the directions of the lessee merely as to routes, is the servant of the owner of the garage, and the latter will be liable for injury inflicted upon occupants of the car through his negligence."

In the case of *Meyers v. Tri-State Automobile Co.* 121 Minn. 68, 44 L.R.A.(N.S.) 113, 140 N. W. 184, the supreme court of Minnesota held: "Where a dealer in automobiles and owner of a garage lets a car for hire and furnishes a driver, and the hirer exercises no control or supervision over the driver except to direct him where to go and what route to take, and to caution him against improper driving, the owner is responsible for the negligence of the driver, and the hirer may recover from the owner in damages for an injury caused by the driver's negligence." The court said: "Both on principle and authority, we decline to follow the rule that the defendant is liable only for the exercise of care in the 51 L.R.A.(N.S.)

selection of the driver. We apply the ordinary rule of *respondent superior* to this case, and hold that, where a dealer in automobiles and owner of a garage lets a car for hire and furnishes a driver, and the hirer exercises no control or supervision over the driver except to direct him where to go and what route to take, and to caution him against improper driving, the owner is responsible for the negligence of the driver, and the hirer may recover from the owner in damages for an injury caused by the driver's negligence."

In *Routledge v. Rambler Automobile Co.* — Tex. Civ. App. —, 95 S. W. 749, plaintiff was riding as guest of others who had hired an automobile and chauffeur. It was held he was entitled to recover for an injury caused by the negligence of the chauffeur.

As we have already seen, a private carrier is not bound to exercise the highest degree of care for the safety of his passengers, as in the case of a common carrier; but he is bound to exercise ordinary care and diligence to carry his passengers safely. If a private carrier should drive his own vehicle and should cause injury to his passengers by his negligent driving, he could not escape liability by proving that he was ordinarily a safe and careful driver. The reason is that in such case he is a wrongdoer, and, his primary negligence being the proximate cause of the injury, he is liable for the damages sustained. So, too, if he delegates to another the duty to drive his vehicle, and his passengers are injured by reason of the negligence of his driver, the rule of *respondent superior* applies, and the owner is liable. In the case at bar, under the facts shown by appellants, the occupants of the car exercised no authority whatever over the driver, except to direct him where to go. The operation and management of the car were exclusively in charge of the driver. The testimony of appellants also shows that the occupants of the car were injured by the negligence of the driver. It would not be doubted for an instant that in such a case the driver himself would be liable. This is so because, under the circumstances, he would be a wrongdoer, and, his primary negligence being the proximate cause of the injury to the passengers, he would be liable therefor. If, as we have already seen, he was at the time the servant of the owner of the car, such owner would also be liable in damages under the doctrine of *respondent superior*. This rule is especially applicable in the case of one letting out automobiles for hire. Motor vehicles are complicated machines, and are capable of being run at a very high rate of speed. It is necessary for the safety of their occu-

pants, as well as for the protection of pedestrians and other persons in vehicles using the streets, that the drivers of such machines should be competent persons, and that such drivers be required to exercise ordinary care and diligence in running their machines. Under the authority cited above, and upon principle, we do not think that the owner of an automobile, under the facts shown by appellants, can absolve himself from liability by proving that he had employed a careful and competent driver. He also owes the occupants of the automobile the duty to exercise ordinary care to carry them safely to their destination.

It follows that the court erred in directing a verdict for appellees, and for that error the judgment will be reversed and the cause remanded for a new trial.

GEORGIA SUPREME COURT.

MABEL R. JONES, Plff. in Err.,
v.
SAVANNAH HOTEL COMPANY.
(141 Ga. 530, 81 S. E. 874.)

Innkeeper — theft of personal ornaments — liability.

1. Where an innkeeper had an iron safe for the deposit of valuable articles, and posted in the rooms of the guests the notice required by Civil Code, § 3510, and a guest upon retiring for the night took from her person five diamond rings, one watch bracelet, and one topaz chain and watch, which she had been wearing for personal adornment, and which were suitable to her station in life, and placed them upon a bureau in her room, and during the night they were stolen therefrom by some unknown person, the innkeeper was not liable for the value of the articles.

Headnotes by FISH, Ch. J.

Note. — Effect of statute limiting innkeeper's liability for goods not delivered into his custody.

The earlier cases upon this question are treated in the note to *Rockhill v. Congress Hotel Co.* 22 L.R.A. (N.S.) 576, the present annotation being merely supplementary thereto.

The present, like the earlier, note does not go into the question of what constitutes a sufficient compliance with the statute by the innkeeper.

Of course, in order to claim the exemption afforded by the statute, the innkeeper must provide the safe and give the notice required; and if he fails, his liability, in the absence of further controlling statutory provision, is determined according to common-law principles. *Watt v. Kilbury*, 53 Wash. 446, 102 Pac. 403. 51 L.R.A. (N.S.)

Same — negligence — effect.

2. Nor would the innkeeper in such a case be liable if it appeared that such articles were stolen in consequence of his negligence, either in failing to provide a suitable lock on the door of the room of the guest, or in placing a fire escape in such a manner as to afford easy access to the room from the street below.

(April 14, 1914.)

QUESTIONS CERTIFIED by the Court of Appeals arising upon a writ of error to review a judgment of the City Court of Savannah in defendant's favor in an action to recover the value of goods stolen from plaintiff while a guest in defendant's hotel. Answers favoring affirmance returned.

The facts are stated in the opinion.

Messrs. O'Byrne, Hartridge, & Wright, for plaintiff in error:

The liability of an innkeeper in this state is that of an insurer.

Cookery v. Nagle, 83 Ga. 702, 6 L.R.A. 483, 20 Am. St. Rep. 333, 10 S. E. 491; *Murchison v. Sergeant*, 69 Ga. 210, 47 Am. Rep. 754; *Austin v. Berlin Supply Co.* 12 Ga. App. 798, 78 S. E. 723; 22 Cyc. 1081.

All words of a statute are to be given due weight and meaning.

Falligant v. Barrow, 133 Ga. 87, 65 S. E. 149; *Gillis v. Gillis*, 96 Ga. 8, 30 L.R.A. 143, 51 Am. St. Rep. 121, 23 S. E. 107.

Property of a different description, including all that which is useful or necessary to the comfort or convenience of the guest, that which is usually carried and worn as a part of the ordinary apparel and outfit, or is ordinarily used, and is convenient for use, by travelers as well in as out of their rooms, is left, as before the statute, at the risk of the innkeeper.

Ramaley v. Leland, 43 N. Y. 539, 3 Am. Rep. 728.

And when both the innkeeper and the guest comply with the terms of the statute, the former is liable unless his liability is otherwise limited by the statute. See *Blake v. DeJonghe Hotel & Restaurant Co.* 260 Ill. 348, 103 N. E. 225, reversing on other grounds 174 Ill. App. 129, which held that, in order to render an innkeeper liable for the loss of a small leather jewel case and contents deposited with him by a guest for safe-keeping, it was not necessary for the guest to acquaint the innkeeper with the value of the jewels deposited; and *Hyman v. South Coast Hotel Co.* 146 App. Div. 341, 130 N. Y. Supp. 766, holding that an innkeeper with whom jewelry had been deposited, if lost or destroyed while in the hotel safe, would be liable not exceeding the maximum amount set by the statute for loss in such cases.

But few recent cases have passed upon

the notice is effective only as to property which can conveniently be left in the safe, not as to property which the guest needs to keep by him; if applied to such property it would be unreasonable. Clothing and articles of daily use are therefore not covered by the notice.

22 Cyc. 1083; *Johnson v. Richardson*, 17 Ill. 302, 63 Am. Dec. 369; *Fay v. Pacific Improv. Co.* 93 Cal. 253, 16 L.R.A. 188, 27 Am. St. Rep. 198, 26 Pac. 1099, 28 Pac. 943; *Murchison v. Sergeant*, 69 Ga. 206, 47 Am. Rep. 754; *Dibble v. Brown*, 12 Ga. 226, 56 Am. Dec. 460; *Pullman Co. v. Green*, 128 Ga. 145, 119 Am. St. Rep. 368, 57 S. E. 233, 10 Ann. Cas. 893.

It is not necessary for the plaintiff to charge or to prove negligence on the part of the innkeeper.

Watson v. Loughran, 112 Ga. 837, 38 S. E. 82, 9 Am. Neg. Rep. 452; *Bowell v. DeWald*, 2 Ind. App. 303, 50 Am. St. Rep. 240, 28 N. E. 430; *Palace Hotel Co. v. Medart*, 87 Ohio St. 130, 100 N. E. 317, Ann. Cas. 1913E, 860; *Rockhill v. Congress Hotel Co.* 237 Ill. 98, 22 L.R.A.(N.S.) 576, 86 N. E. 740, 21 Am. Neg. Rep. 90; *Louisville & N. R. Co. v. Warfield*, 129 Ga. 473, 59 S. E. 234.

Messrs. Adams & Adams for defendant in error.

Fish, Ch. J., delivered the opinion of the court:

The court of appeals desires instruction from the supreme court upon the following questions, a decision of which is necessary to the determination of the case of *Jones v. Savannah Hotel Company*, to wit:

"1. A female guest at an inn retired for the night, and, before doing so, took from her person the following articles, which she had been wearing for personal adornment, and which were suitable to her station in

the question of what effects or goods are embraced within the statute. Of this character is *JONES v. SAVANNAH HOTEL CO.*, holding that five diamond rings, one watch bracelet, and one topaz chain and watch worn for personal adornment, and in keeping with the station in life of the wearer, were articles for the loss of which the innkeeper was relieved from liability under a statute excusing him from liability for loss of "valuable articles" unless deposited with him for safe-keeping, he having complied with the statute, and the guest having failed to do so. This case was followed in *Jones v. Savannah Hotel Co.* — Ga. App. —, 82 S. E. 155, wherein it was held that a watch and jewelry stolen from a guest's room were embraced within the statute. On the other hand, it has recently been held that a gold watch and chain in habitual use

bracelet, one topaz chain and watch. During the night all of these articles were stolen from the room by some person unknown. The innkeeper had an iron safe for the deposit of valuable articles, and had posted in the room of the guest the notice required by § 3510 of the Civil Code. Is the guest entitled to recover from the innkeeper the value of the property stolen?

"2. If, in answer to the foregoing question, this court should be instructed that the articles above described were such as are in the purview of the foregoing section of the Code, would the guest, notwithstanding any negligence in her failure to deposit the articles in the innkeeper's safe, be entitled to recover, if it appeared that the articles were stolen in consequence of the negligence of the innkeeper, either in failing to provide a suitable lock on the door, or in placing a fire escape in such a manner as to afford easy access to the room of the guest from the street below?"

At common law an innkeeper was an insurer of the goods of his guest. Under the law of this state, however, an innkeeper may relieve himself from responsibility for valuable articles belonging to his guest. The Civil Code, § 3510, declares: "The innkeeper may provide an iron safe, or other place of deposit for valuable articles, and, by posting a notice thereof, may require his guests to place such valuable articles therein, or he will be relieved from responsibility for them." It appears in the first question propounded that the innkeeper in the present case had an iron safe for the deposit of valuable articles, and had posted in the room of the guest the notice required by the above section of the Code, which notice as appears from the record is as follows: "The proprietors of this hotel will not be responsible for money, jewels, or other valuables, unless deposited

by a guest were neither "jewelry" nor "articles of gold and silver manufacture" nor "personal ornaments," within the meaning of a statute limiting the liability of innkeepers who maintain a safe or vault for such effects, unless they are offered by the guest for safe-keeping. *Weadock v. Swart*, 163 Mich. 602, 128 N. W. 734, Ann. Cas. 1912A, 959.

As to duty and liability of boarding house keeper or innkeeper with respect to property of boarder, as distinguished from guest, see note to *Coe v. Ricker*, 45 L.R.A.(N.S.) 31.

As to innkeeper's liability for loss or destruction of commercial traveler's samples, see note to *Williams v. Norvell Shapleigh Hardware Co.* 35 L.R.A.(N.S.) 350.

G. J. C.

in the case at bar from the innkeeper the value of the property stolen, and it follows that the first question must be answered in the negative.

2. As the statute declares that the innkeeper will be relieved from responsibility for valuable articles belonging to his guest if he provides an iron safe or other place of deposit for such articles, and posts a notice in accordance with the statute, requiring his guest to place such articles in the safe or other place of deposit, it must follow, where the innkeeper has complied with the requirements of the statute, thus relieving himself from responsibility for such articles, that a guest who failed to comply with such notice could not recover from the innkeeper if it appeared that the articles were stolen in consequence of the negligence of the latter, either in failing to provide a suitable lock on the door of the room occupied by the guest, or in placing a fire escape in such a manner as to afford easy access to the room from the street below. Had the guest complied with the notice, and thereafter the innkeeper had failed to use the measure of diligence required by the statute, he would have been liable. To hold that, without complying with the requirements of the notice authorized by the statute, the guest could nevertheless recover as to articles covered by the notice, merely by showing want of diligence on the part of the innkeeper in the respect named, would practically make the statute nugatory. A negative answer is therefore given also to the second question.

All the Justices concur.

LOUISIANA SUPREME COURT.

MRS. A. V. HAILE

v.

NEW ORLEANS RAILWAY & LIGHT
COMPANY, Appt.

(— La. —, 65 So. 225.)

Carrier — objectionable remarks of conductor — liability.

Objectionable remarks addressed by a street car conductor to a patron of the

Headnote by SOMMERVILLE, J.

Note. — As to liability of carrier for mental suffering of passenger from mere verbal abuse, unaccompanied by other breach of duty, see notes to St. Louis, I. M. & S. R. Co. v. Taylor, 13 L.R.A. (N.S.) 159, and Bleecker v. Colorado & S. R. Co. 33 L.R.A. (N.S.) 386. See also case of Cincinnati Northern Traction Co. v. Rosnagle, 35 L.R.A. (N.S.) 1030.

iate her, are actionable, and the car company will be held in damages therefor.

(May 11, 1914.)

APPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans in plaintiff's favor in an action brought to recover damages for injuries sustained while a passenger on defendant's car, and for humiliation and mortification caused by the actions of the conductor on the car. Amended and affirmed.

The facts are stated in the opinion.

Messrs. Hall, Monroe, & Lemahn for appellant.

Messrs. Woodville & Woodville for appellee.

Sommerville, J., delivered the opinion of the court:

Plaintiff, a passenger on one of defendant's cars, fell while the car was making a curve at the intersection of two streets in New Orleans, and she was injured to a certain extent. She also alleges that she was humiliated and mortified by the actions of the conductor on the car, for all of which she asks for pecuniary damages.

There was a verdict and judgment for \$500 against defendant, and it has appealed.

The testimony fails to disclose any fault on the part of defendant, for the accident to plaintiff. The tracks and rolling stock of defendant were not shown to be in poor condition, and it does not appear that the speed of the car was at an unusual rate in making the curve around the corner referred to. Defendant used proper precautions in operating the car at the time of the accident; and it cannot be held in damages for an accident in a curve which it was required to make, and which accident occurred without its fault.

The humiliation and mortification of which plaintiff complains were caused by the conductor when she was alighting from the car. He referred to her as "a big fat woman," and he assumed to reprimand her for sitting where she had been seated in the car. Plaintiff testifies that the conductor said to her: "You had no business sitting in front of the car,—a big fat woman like you had no business sitting in front of the car. Why didn't you sit in the back?"

cinnati Northern Traction Co. v. Rosnagle, 35 L.R.A. (N.S.) 1030.

For humiliation as element of damages for exclusion from place of amusement, see note to Aaron v. Ward, 38 L.R.A. (N.S.) 204.

The conductor was absent from New Orleans at the time of the trial, and a statement made by him was admitted in evidence by consent of plaintiff, so as not to delay the trial of the cause. He was not therefore subjected to cross-examination. The conductor states that he told plaintiff "that a stout person like herself ought to seat herself at the rear end of the car."

The statements of plaintiff and the conductor show that the latter used language to plaintiff which was disrespectful and humiliating to her. The personal appearance of a patron of a street car is not a proper subject of comment by the employees of the defendant company. Neither should the conductor undertake to dictate to a passenger as to where she should sit in a car which has no reserved seats.

The language used by defendant's employee was humiliating and mortifying to a sensitive woman, and defendant did not give to plaintiff that care and respectful consideration and attention which it, as a common carrier, owed her while she was using its car, and it is responsible in damages for the annoyance and injured feelings caused to plaintiff through the fault of its employee. *Lamson v. Great Northern R. Co.* 114 Minn. 182, 130 N. W. 945, Ann. Cas. 1914A, 15.

It is ordered, adjudged, and decreed that the judgment appealed from be amended by reducing it to \$250, and, as thus amended, it is affirmed.

MAINE SUPREME JUDICIAL COURT.

INHABITANTS OF MARION

v.

FREDERICK TUELL.

(111 Me. 566, 90 Atl. 484.)

Water — injury to bridge over floatable stream — common nuisance.
One driving logs down a floatable stream

Note. — *Right of one who navigates stream or floats logs therein to abate nuisance arising from bridge.*

Some of the earlier cases on this question may be found in the note to *Hutton v. Webb*, 59 L.R.A. 33, which discusses generally the right to obstruct or destroy rights of navigation.

Generally, as to private right of action for obstruction of navigable stream, see notes to *Viebahn v. Crow Wing County*, 3 L.R.A.(N.S.) 1126, and *Swain v. Chicago, B. & Q. R. Co.* 38 L.R.A.(N.S.) 763.

As to relative rights and duties of those maintaining bridges across streams and those floating logs therein, see note to *Ida*, 51 L.R.A.(N.S.)

is not liable for injury to a bridge erected by a municipality in such manner as to constitute a common nuisance, by the necessary use of explosives to move logs which have jammed in the spaces between the abutments, if he is careful to do as little injury as is consistent with the accomplishment of his purpose.

(May 5, 1914.)

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Washington County made during the trial of an action brought to recover damages for the alleged negligent and wrongful damaging of a bridge by defendant, which resulted in a verdict for plaintiff. Sustained.

The facts are stated in the opinion.

Messrs. C. B. Donworth and E. C. Donworth, for defendant:

When a tangible, physical, public nuisance presents an obstruction to an individual right, particularly as of passage over a highway or navigable waters, the person whose passage is so obstructed has the unquestionable right peaceably to remove so much of the obstruction as will afford him passage.

Hamilton v. Goding, 55 Me. 427; *Mann v. Marston*, 12 Me. 38; *Corthell v. Holmes*, 87 Me. 24, 32 Atl. 715, 88 Me. 376, 34 Atl. 173; *Brown v. Perkins*, 12 Gray, 101.

Messrs. Ashley St. Clair and J. H. Gray for plaintiff.

Spear, J., delivered the opinion of the court:

This is an action on the case in which the plaintiff town seeks to recover damages of the defendant for wilfully, negligently, and wrongfully damaging a bridge by using dynamite or other explosives in such close proximity to the abutment of the bridge as to tear it apart and damage it, thereby rendering the superstructure unsafe and dangerous for public travel, so that they were obliged to close the bridge and repair it at a large expense. At the

ho Northern R. Co. v. Post Falls Lumber & Mfg. Co. 38 L.R.A.(N.S.) 114.

Generally, where there is an obstruction of navigation, it may be abated by any person who is injured thereby in his right, where no breach of the peace is involved, irrespective of how long the obstruction has been in existence. It has been held, however, that the obstruction must be peculiarly injurious to the person abating it, as distinguished from the injury resulting to the public. 29 Cyc. 325. See also 1 *Farnham, Waters*, pp. 406, 441.

Thus, where a logger's whole drive might have been held up on the river for a year, unless he was permitted to interfere with a bridge in his path to the necessary extent

Cathance stream, in Marion. By the exceptions it appears that the stream was "a floatable highway, and has been used by the public from time immemorial for the purpose of floating logs and timber from the forests to the mills; that the defendant at the time of the alleged wrongful act was engaged with his crew in the performance of his contract to drive approximately 1,100,000 feet of logs from Cathance lake in and down said stream to the mill pond of Dennysville Lumber Company, of Dennysville." The exceptions further show that the explosive was never used unless absolutely necessary, and that, in getting the logs by the abutments, the

or they caused any injury to the bridge or abutments by the use of dynamite or otherwise, such injury was wholly unintentional. The defendant also denies that any damage to the structure was caused by the explosion, claiming that, if any injury was occasioned to the bridge by the passage of his logs, it was done by the impacts of the logs against the abutments, and by the logs frequently being driven by the force of the current into the openings, and in the process of disengaging the logs when so interposed.

The declaration does not allege, nor is it anywhere contended, that the defendant, in the use which he made of dynamite, had

of making a passageway, it was held in *MARION V. TUELL* that he had a right to interfere with the bridge to the extent of removing so much of it as became a nuisance in the path of his logs in their course down the stream.

So, where a bridge across a navigable river had, pursuant to an act of Congress, been declared an unreasonable impediment to navigation, and therefore a public nuisance, it was held in *E. A. Chatfield Co. v. New Haven*, 110 Fed. 788, that a manufacturer could maintain a suit to abate such nuisance upon proof that he had been specially injured by the bridge preventing the passage of his merchandise vessel.

It is held in *Barnes v. Racine*, 4 Wis. 454, that a city, under the general powers given it by charter to erect bridges over navigable waters within its limits, had no authority to erect a bridge over a river that would obstruct navigation; and that a bridge erected in the angle of a river so as to make it almost impossible for vessels to pass through the draw without getting aground constitutes a nuisance which a private person specially injured thereby may abate, especially where it appears that a few rods above or below the place where the bridge is erected no such consequence would follow the erection of a suitable bridge, and it does not appear but that the public would be as well accommodated by a bridge at either of those places as by the one in question.

Where the legislature authorized plaintiff to erect a toll bridge across a navigable river, and defendant removed part of it to permit his boat to pass, it was held in *Selman v. Wolfe*, 27 Tex. 68, that the legislature did not authorize the erection of a bridge that would obstruct navigation, and that, so far as the bridge was an obstruction to navigation, it was unlawful and constituted a nuisance which defendant had a right to abate.

So, where defendants were indicted for obstructing a public highway, having removed part of a bridge over the Neuse river to allow their steamboat to pass, it was held in *State v. Dibble*, 49 N. C. (4 Jones, 51 L.R.A. (N.S.))

L.) 107, that, the legislature having declared such river a navigable stream, a bridge built across it under the authority of the county court, obstructing navigation, was necessarily a nuisance which the defendants or any other person had a right to abate. The principle applicable to this case is that any unauthorized obstruction in a navigable stream, by means of a bridge or dam of any kind, is a public nuisance which any person may abate, and if it be put there under the authority of the sovereign, it will be protected only so far and so long as it is confined within the limits of the authority. "The Neuse river," said the court, "having been thus recognized as a navigable water, the defendants had the right in common with all other citizens to navigate it with their boats, and as an incident to such right to remove all obstructions not put there by or under the sovereign power. It is admitted that the sovereign power in the present case is the general assembly of the state."

To the same effect is *State v. Parrott*, 71 N. C. 311, 17 Am. Rep. 5, where the owners of a steamboat were held not guilty of trespass in tearing down a portion of a railroad bridge across the Neuse, which obstructed the navigation thereof. "It is insisted, however," said the court, "that while an individual cannot obstruct a navigable stream, yet the state may do it on the inland streams unless Congress oppose; and here the state did authorize the railroad to build the bridge. It is true the state did authorize the railroad to build a bridge across the Neuse, but it did not authorize the bridge to be so built as to obstruct navigation, but required a draw to be in the bridge so as to permit navigation. This was not done."

So, one was held, in *Arundel v. M'Culloch*, 10 Mass. 70, justified in removing a bridge erected by a town across a navigable stream, in order to facilitate the passage of his vessel, although the bridge had been maintained at the same place for over fifty years. The court observed that "it is an unquestionable principle of the common law that all navigable waters belong to the

theory of the ruling will appear from the following testimony and colloquy: John A. Robinson, called by defendant, was asked on direct examination:

Q. When a log was under water, what did you do?

A. If the log was under water we cut it with dynamite.

Q. Why didn't you shut the gates down above and let the water run out, so it would be on the surface?

A. No river driver does that.

Q. Why didn't you do it?

The court: It don't make any difference

out the right of Mr. Tuell to drive logs there, because he had a right to. He has got a suit against the town for being obstructed in doing it. That don't have anything to do with this case. Whether they did this or didn't do that don't have anything to do with it.

Mr. E. C. Donworth: If the court please, our contention is that if this man Tuell used reasonable care, and used dynamite when it was reasonably necessary, and the bridge was injured thereby, we are not chargeable.

The court: I shall rule that if he blew

traffic contract with a named railroad for the express purpose of operating his said boat through the stream so obstructed, and had used said stream for years, and had built up a good business, which said obstruction to the navigation thereof has almost entirely destroyed, and his said boat has been idle the greater part of the time since such bridge was built, and that, as a citizen and taxpayer of the state and county, he is entitled to the full protection of the law, against the wilful violation and defiance of the laws of navigation by the defendant, where the proofs show that, since the construction of the bridge, there is no navigation under said bridge, and that complainant's boat cannot pass thereunder, and there is no showing of injury or damage to complainant different in kind from that of any other person who might undertake to use the stream for purposes of navigation under similar circumstances.

So, it was held in *Whitehead v. Jessup*, 53 Fed. 707, that a riparian owner could not compel, by an action in his own name, the removal of a bridge spanning a navigable channel, where he failed to show injury different in kind from that sustained by the general public using such waters, access to the channel in front of his land being unobstructed by the bridge, and his land lying half a mile from the bridge, although in passing by the navigable channel to adjacent waters, his boats were obstructed by such bridge. The court observed that the law applicable to such a case is that "an obstruction in front of one's own premises may prevent him from entering upon the highway, and thus interfere with a peculiar right. But when he is once upon the highway he is a traveler, like the rest of the public; and though an obstruction at a distance may as effectually prevent ingress and egress as when it is opposite his door, yet the right to pass along the way is one which he shares in common with the general public."

So, it was held in *Jarvis v. Santa Clara Valley R. Co.* 52 Cal. 438, that a private person could not maintain an action to abate a nuisance arising from a bridge obstructing the navigation of a navigable stream, where he failed to show damage peculiar to himself and differing in kind 51 L.R.A. (N.S.)

and character from that suffered by members of the general public having occasion to use the navigable stream. It the above case it was alleged that the defendants had obstructed the navigation of the creek by driving piles and building a bridge across it, in which they had placed a draw only 36 feet in width; that the bridge and draw deflected from a right angle to the current of the stream so that a vessel in passing through would strike against the side, and that the draw should have been 50 feet in width, and that it was a nuisance and a perpetual obstruction to the navigation of the creek, and delayed the plaintiffs in the navigation of their vessel, and that they had sustained \$50 damage. There was a prayer that the bridge be abated as a nuisance, and that the defendants be enjoined from constructing or maintaining a bridge unless it had a draw 50 feet in width placed at right angles to the stream.

The statute giving the right to "any person injured thereby" to maintain an action to abate a nuisance does not change the ordinary rule that a private individual will not be allowed to maintain an action to restrain or abate a public nuisance unless he can show some peculiar or special damage or injury to himself. Consequently, a person who, after the erection of a bridge over a lake, has purchased boats and is engaged in the business of renting them, has no other or different rights than are enjoyed by other persons in respect to the navigation of the lake, sufficient to enable him to maintain an action to abate the bridge as a nuisance on the ground that it obstructs the navigation of the lake. *Innis v. Cedar Rapids, I. F. & N. W. R. Co.* 76 Iowa, 165, 2 L.R.A. 282, 40 N. W. 701.

In *State v. Leighton*, 83 Me. 419, 22 Atl. 380, defendant was found guilty of obstructing and encumbering a public highway by cutting down and destroying a public bridge leading across a river. Defendant's contention was that he had occasion to navigate the river by his small schooner loaded with lumber, and that the bridge was a nuisance to the public and of special damage to himself, and for that reason he had a right to cut it down and move it. It was held that the bridge was constructed, maintained, and used by legal authority as

this bridge up, or an abutment to it, by the use of dynamite, and thereby destroyed it, he is liable in this action. A man cannot abate a public nuisance by saying that he exercised reasonable care. He may abate a private nuisance and may not be liable in damages, but a public nuisance must be abated by officers chosen by the public to do it. If you leave it for every man to determine whether he may abate a public nuisance, we shall be blowing up all the bridges in the state. The law says Mr. Tuell had no right to blow the bridge up, if he did.

Mr. E. C. Donworth: He is chargeable in damages if he did it accidentally?

The court: Yes, I shall so instruct the jury.

And the court did so instruct them, saying: "(1) If it was a public nuisance, neither the defendant nor his servant or agent had any right to abate it or remove it or destroy it. (2) If you should find it was an obstruction to public navigation, so that it impeded the passage of the defendant's logs, it was a public nuisance, and neither he nor his servants had any right to remove or destroy it." The court proceeded to say: "Now, you will determine, first, gentlemen, whether the defendant or his servant or agent did explode this dynamite there, as it is claimed. If they did, I instruct you that they are liable for it, and the defendant must make the town whole for the damage he caused in blowing up or damaging the abutment there, if he did it either by himself or his servant or agent." These rulings are erroneous. As already noted, they proceed upon the ground that the bridge was a public nuisance, and, because it was a public nuisance, the defendant had no right to do it any injury, although it was necessary in order to enable

him to extricate the logs that had been driven into the openings of the abutment, and remove those that had jammed against it, so that perhaps the whole drive should not be held up.

We do not understand this to be the law. Upon the assumption that the bridge was a nuisance, which the jury might have found if the question had been open to them, it was the undoubted right of the defendant to do whatever was reasonable and necessary to remove so much of the structure as deprived him of the lawful use of the stream for driving his logs. This rule is founded, not only upon authority, but necessity. In the case at bar the defendant was driving down this floatable river, a legal highway for the passage of all lawful traffic, more than a million feet of logs, worth from \$10,000 to \$20,000. It is common knowledge that the driving pitch of water at best is short, and at times very limited. It is equally well known, if a drive of logs is stalled and has to lie over for a season, there is a great depreciation of value. Accordingly, unless the defendant was permitted to interfere with this nuisance in his path to the necessary extent of making a passageway, his whole drive might have been held up on the river for a year. Resort to the courts for the abatement of such a nuisance would be entirely inefficient and futile. And the law does not require it.

The plaintiffs, however, contend that the bridge, having been located by municipal authority, is a legal structure, and, if a common nuisance, cannot be abated by a private individual, and cites *State v. Leighton*, 83 Me. 419, 22 Atl. 380, as authority for this doctrine. The brief interprets the opinion in this language: "A lawful structure, though a public nuisance, cannot be removed, or the public nuisance abated,

a part of the public highway, and that the defendant had no justification in destroying it.

Where one gently removed a bridge crossing a navigable river so as to permit the passage of his rafts and timber, it was held in *Wellington County v. Wilson*, 16 U. C. C. P. 124, that the county could maintain an action for the destruction of the bridge within its limits, and could recover damages therefor.

In *Mississippi & M. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311, plaintiff, being owner of three steamboats and commander of one of them, navigating the Mississippi river between St. Louis and St. Paul, sought to abate as a nuisance obstructing navigation a bridge across the river between Illinois and Iowa. The court dismissed the case on the ground that the whole nuisance was not within the power of the court, since its jurisdiction extended only to the middle of

the river and it was doubtful whether the Iowa side of the bridge, which was in its jurisdiction, was a serious obstruction amounting to a nuisance.

It is held in *Thurlow Twp. v. Bogart*, 15 U. C. C. P. 9, that one cannot excuse the destruction of a bridge by pleading the coming of his timber and logs against it as an unavoidable act which could not have been prevented by due and reasonable care and diligence on his part, by reason of its obstruction and hindrance to the free navigation of the river for the passage of such timber and logs, where he failed to show that the bridge was a nuisance, or that, by the improper construction of the bridge, the acts complained of were really inevitable on his part, or by superior agency acting against him, and that he was acting with due and reasonable care and skill in the navigation of his timber.

J. D. C.

with itself. A lawful structure is not a common nuisance. In other words, a common nuisance is not lawful. Nor does this case hold or intimate that the bridge destroyed by the defendant was a common nuisance. The decision is based solely upon the ground that the bridge was authorized to be built over tide waters, not under the general powers of municipal officers to lay out highways, but by an act of the legislature giving specific authority to build over this specific water. The word "nuisance" is not to be found in the opinion. True, a bridge built by municipal authority is not of itself a common nuisance. In the case at bar the offending thing is not the bridge itself, but the manner of the placing and construction of it. The town had a right to build this bridge under authority of the general statute. But a bridge built by such authority over a navigable or floatable stream, in such a manner as to unreasonably interfere with navigation or the use of a stream for floatable purposes, is *per se* a common nuisance. *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 37 L.R.A. 381, 62 Am. St. Rep. 532, 47 N. E. 2, 18 Mor. Min. Rep. 674. In a broad sense a common nuisance is an unlawful condition. A municipality has no more right to establish such a condition than an individual. *Mootry v. Danbury*, 45 Conn. 550, 29 Am. Rep. 703, is a case which seems to be on all fours with the case at bar. It involved the erection of a bridge that flowed the water back upon the plaintiff. A general demurrer was filed to the declaration, and argued upon the ground that the duty of towns to keep their highways in repair was imperative under the statute. Upon this contention, after alluding to the statute regarding the liability of towns for defects, the court say: "The liability of the defendants, therefore, if liable at all, must rest upon broader grounds than that statute. The statute simply compels them to do by making them liable in damages if they fail to do. A principle of universal application that every man shall transact his lawful business in such a manner as to do no unnecessary injury to another compels them to do what they are required to do in a proper manner. In other words, towns will not be justified in doing an act lawful in itself in such a manner as to create a nuisance any more than individuals, and if a nuisance is thus created, whereby another suffers damage, towns, like individuals, are responsible." To the same effect is *Danbury & N. R. Co. v. Norwalk*, 37 Conn. 109.

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ciple laid down in *Brown v. Perkins*, 12 Gray, 89, must control this class of cases. Shaw, Ch. J., clearly states the rule as follows: "The true theory of abatement of nuisance is that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also, when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing. As in the case of the obstruction across a highway, and an unauthorized bridge over a navigable water course, if he has occasion to use it, he may remove it by way of abatement." This theory of the law was followed in *Mann v. Marston*, 12 Me. 32, and in *Hamilton v. Goding*, 55 Me. 419, in which the language of *Brown v. Perkins* is cited with approval. In *Corthell v. Holmes*, 87 Me. 24, 32 Atl. 715, the court says: "When a public nuisance obstructs an individual's right, he may remove it to enable him to enjoy that right,"—and also cites *Brown v. Perkins*. In a case between the same parties in 88 Me. 376, 34 Atl. 173, the court sustained this doctrine, citing many cases.

Upon authority, as well as reason, the defendant had a right to interfere with the bridge to the extent of removing so much of it as became a nuisance in the path of his logs in their course down the stream.

But in doing this it was incumbent upon the defendant to do as little damage as was consistent with the accomplishment of his purpose. Accordingly, the defense offered, tending to show due care on the part of the defendant in extricating his logs from the abutment, was admissible, and the ruling excluding it erroneous. It was the duty of the defendant, in pursuing the lawful right of passage through this bridge, to do only what was reasonable and necessary to attain his end. He was bound to act within the standard of due care. He could not wantonly and wilfully do damage that was unnecessary. The last paragraph of *Corthell v. Holmes*, 88 Me. supra, confirms this view. It says: "The defendant's plea avers that he removed the encumbrances placed in the way by the plaintiff, with due care and without damage more than necessary to secure the passage for himself and his teams, agents and servants, over the same." All this is admitted by the demurrer, and is a good defense.

Exceptions sustained.

It has been held that under such circumstances a nonresident is free from arrest on mesne process. *Thompson's Case*, 122 Mass. 428, 23 Am. Rep. 370, and cases there cited. But neither this nor any of our cases reaches the point now presented.

The rule has been stated generally that suitors and witnesses from a foreign jurisdiction are exempt from service of civil process while attending court, and for such reasonable time before and after as may enable them to come from and return to their homes. This statement is broad enough to include the parties plaintiff as well as defendants and witnesses. The rule is an ancient one. The reason upon which it rests is that justice requires the attendance of witnesses cognizant of material facts, and hence that no unreasonable obstacles ought to be thrown in the way of their freely coming into court to give oral testimony. Nonresidents cannot be compelled to come within the jurisdiction to testify. As such testimony may be essential in the due administration of justice, they ought to be protected in coming voluntarily into our courts to aid in the ascertainment of truth, and in the accomplishment of right results by the courts. It is not merely a privilege of the person; it is a prerogative exerted by the sovereign power through the courts for the furtherance of the ends of justice. Every party has a right to testify in his own behalf. He cannot do this freely, if hampered by the hazard that he may become entangled in other litigation in foreign courts. The rule is applied almost universally in behalf of witnesses coming from a foreign state. It is extended generally to defendants living outside the state where the litigation is pending. See cases collected in 32 Cyc. 492, 494; *Mullen v. Sanborn*, 79 Md. 364, 25 L.R.A. 721, 47 Am. St. Rep. 421, 29 Atl. 522.

There appears to be no sound distinction for placing a party plaintiff on any different basis in this respect from other parties and witnesses. The reason on which the rule rests is broad and inclusive of plaintiffs as well as defendants. It is as important to the administration of justice that foreign plaintiffs should be protected in making a full presentation of their cases as it is that parties defendant should be given this protection. The weight of authority supports this conclusion, although there are contrary decisions. *Re Healey*, 53 Vt. 694, 38 Am. Rep. 713; *Hale v. Wharton* (C. C.) 73 Fed. 739; *Peet v. Fowler* (C. C.) 170 Fed. 618; *Fisk v. Westover*, 4 S. D. 233, 46 Am. St. Rep. 780, 55 N. W. 961; *Roberts v. Thompson*, 149 App. Div. 51 L.R.A. (N.S.)

man, 122 N. C. 784, 65 Am. St. Rep. 731, 29 S. E. 947; *Letherby v. Shaver*, 73 Mich. 500, 41 N. W. 677; *Richardson v. Smith*, 74 N. J. L. 111, 65 Atl. 162; *Long v. Hawken*, 114 Md. 234, 42 L.R.A. (N.S.) 1101, 79 Atl. 190, and cases there collected. There is nothing inconsistent with this in *Ginn v. Almy*, 212 Mass. 486, 99 N. E. 276, for there the court had acquired jurisdiction of the defendant and the proceedings were in the same cause.

Rulings sustaining defendant's plea in abatement affirmed.

MISSISSIPPI SUPREME COURT.

STATE OF MISSISSIPPI TO USE OF
JOHN A. JOHNSTON et al., Appts.,

v.

W. W. CUNNINGHAM et al.

(— Miss. —, 65 So. 115.)

Sheriff — killing one fleeing from arrest — liability.

1. A sheriff is liable on his official bond for shooting one guilty of a simple misdemeanor to prevent his escaping arrest, although he merely fires his pistol in his direction to cause him to halt.

Pleading — shooting at misdemeanor — proof of aim.

2. The statement in a complaint seeking damages because of a sheriff's negligent performance of his duties in arresting one guilty of a misdemeanor, which results in the death of the latter, that the sheriff fired his pistol at and toward the lawbreaker so that the bullet struck and killed him, does not require proof of deliberate aim toward him.

(May 18, 1914.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Prentiss County in defendants' favor in an action brought to recover damages for the alleged wrongful killing of plaintiffs' intestate by the defendant sheriff. Reversed.

The facts are stated in the opinion.

Note. — Liability of peace officer or his bond for shooting a person while attempting to arrest him.

The general question as to the liability of an officer for making an arrest is covered by notes in 51 L.R.A. 193, and 42 L.R.A. (N.S.) 69.

And the liability of sureties on the bond of an officer, for an illegal arrest, is discussed in a note to *Lee v. Charmley*, 33 L.R.A. (N.S.) 277.

For cases involving the liability of a sheriff, marshal, or constable, for his deputy's torts, generally, in making an ar-

Messrs. Thomas H. Johnston, E. C. Sharp, and A. J. McIntyre, for appellants:

A peace officer and the sureties on his official bond are liable in a civil action for damages for the intentional shooting of a misdemeanor who flees to avoid arrest, or who escapes and flees after arrest.

Brown v. Weaver, 76 Miss. 7, 42 L.R.A. 423, 71 Am. St. Rep. 512, 23 So. 388; *Thomas v. Kinkead*, 55 Ark. 502, 15 L.R.A. 558, 29 Am. St. Rep. 68, 18 S. W. 854; *Head v. Martin*, 85 Ky. 480, 3 S. W. 622.

And it is equally as clear that a sheriff and his bondsmen are liable as well for the negligent, as for an intentional, killing.

Johnson v. Williams, 111 Ky. 289, 54 L.R.A. 220, 98 Am. St. Rep. 416, 63 S. W. 759; *Brown v. Weaver*, 71 Am. St. Rep. 519, note.

When an injury occurs from the discharge of a gun or other firearm, he by whom it was discharged, in order to excuse himself from liability for the injury, must show that the discharge was absolute-

rest, see *Brown v. Wallis*, 12 L.R.A. (N.S.) 1019, and the note thereto.

As to the liability of sureties on the bond of a peace officer for the death of a person due to the act or default of the principal or one of his deputies, see *Growbarger v. United States Fidelity & G. Co.* 11 L.R.A. (N.S.) 768.

And as to the liability of sureties on the bond of a peace officer for the latter's act in killing or injuring one person while attempting to execute criminal process against another, see *Martin v. Smith*, 29 L.R.A. (N.S.) 463, and the note thereto.

The force which an officer may lawfully use to prevent the escape of one arrested for a misdemeanor is no greater than such as might have been rightfully employed to effect his arrest. He cannot in either case take the life of the accused or inflict great bodily harm, except to save his own life or prevent a like harm to himself. *Thomas v. Kinkead*, 55 Ark. 502, 15 L.R.A. 558, 29 Am. St. Rep. 68, 18 S. W. 854; *Head v. Martin*, 85 Ky. 480, 3 S. W. 622.

So, the use of a pistol by an officer in attempting to arrest a person who is charged with a misdemeanor is excessive force which will render him liable. *Sossamon v. Cruse*, 133 N. C. 470, 45 S. E. 757.

And the fact that a constable had warrants for the arrest of a person, charging him with misdemeanors, is no defense to an action for damages for killing him by shooting him when he was fleeing to avoid arrest. *Middleton v. Holmes*, 3 Port. (Ala.) 424.

In *Towle v. Matheus*, 130 Cal. 574, 62 Pac. 1064, a suit against a constable and his bondsmen for the act of a deputy who, in assisting the constable in arresting plaintiff for a breach of the peace, shot plaintiff in the back, a judgment for plaintiff was affirmed, 51 L.R.A. (N.S.)

ly without his fault, and that it happened by inevitable accident.

12 Am. & Eng. Enc. Law, 2d ed. p. 519; *Morgan v. Cox*, 22 Mo. 373, 66 Am. Dec. 623; *Weaver v. Ward*, Hobart, 134; *Underwood v. Hewson*, 1 Strange, 596; *Cole v. Fisher*, 11 Mass. 137; *Tally v. Ayres*, 3 Sneed, 677.

Messrs. J. A. Cunningham and Cox & Cox, for appellees:

A sheriff is confined in the selection and exercise of the means of arrest to only such reasonable means as ordinarily prudent men would likely adopt under similar circumstances.

Cleghorn v. Thompson, 62 Kan. 727, 54 L.R.A. 402, 64 Pac. 605; *Dixon v. State*, — Miss. —, 45 L.R.A. (N.S.) 219, 61 So. 423.

Plaintiffs, if they recover at all, must recover on the case stated in their declaration; the burden is on them to satisfy the jury of the truth of the specific facts stated as the ground of their right to recover; and they must fail if the evidence in the

case, it being held that the act of the deputy, while unnecessary, wrongful, and negligent, was not malicious or extraofficial so as to relieve defendants from liability.

The acts of deputy sheriffs in shooting a person while attempting to arrest him for an offense committed in their presence were "official acts," within a statute making a sheriff responsible for the official acts of his deputies. *King v. Brown*, 100 Tex. 109, 94 S. W. 328, reversing 41 Tex. Civ. App. 588, 93 S. W. 1017.

But in *Brown v. Wallis*, 100 Tex. 546, 12 L.R.A. (N.S.) 1019, 101 S. W. 1070, a companion case to the preceding one, growing out of the same transaction, where the evidence presented failed to show that the offense for which the deputies were attempting to make an arrest was committed in their presence, or that they were acting under a warrant, it was held that a case of "official acts" had not been made out so as to render the sheriff liable.

An officer who shoots one who is fleeing to escape after being arrested for a misdemeanor is liable. *Head v. Martin*, 85 Ky. 480, 3 S. W. 622.

Thus, in *Thomas v. Kinkead*, 55 Ark. 502, 15 L.R.A. 558, 29 Am. St. Rep. 68, 18 S. W. 854, a suit against an officer and his bondsmen for shooting plaintiff's intestate while he was attempting to escape after being arrested on a misdemeanor charge, the court reversed a verdict for defendants, because of a charge of the trial court that defendant had a right to shoot deceased if it was necessary to prevent his escape.

The wrongful shooting by a deputy sheriff of a prisoner attempting to escape from arrest for a misdemeanor is an official act which creates a liability on the sheriff's bond. *Brown v. Weaver*, 76 Miss. 7, 42

14 Enc. Pl. & Pr. 342, 343, and notes; 29 Cyc. 583-585; Chicago & E. I. R. Co. v. Driscoll, 176 Ill. 330, 52 N. E. 923; Chicago City R. Co. v. Bruley, 215 Ill. 464, 74 N. E. 441; New York, C. & St. L. R. Co. v. Kistler, 66 Ohio St. 326, 64 N. E. 132, 12 Am. Neg. Rep. 343; Baltimore & O. R. Co. v. Lockwood, 72 Ohio St. 586, 74 N. E. 1071, 18 Am. Neg. Rep. 590; Buffington v. Atlantic & P. R. Co. 64 Mo. 246; Price v. St. Louis, K. C. & N. R. Co. 72 Mo. 414, 4 Am. Neg. Cas. 508; Gurley v. Missouri P. R. Co. 93 Mo. 445, 6 S. W. 218; Hawker v. Baltimore & O. R. Co. 15 W. Va. 629, 36 Am. Rep. 825; Louisville & N. R. Co. v. Wade, 46 Fla. 197, 35 So. 863; Bowie v. Birmingham R. & Electric Co. 125 Ala. 397, 50 L.R.A. 632, 82 Am. St. Rep. 247, 27 So. 1016.

Reed, J., delivered the opinion of the court:

Appellants, the parents and brothers of Frank Johnston, brought suit against ap-

L.R.A. 423, 71 Am. St. Rep. 512, 23 So. 388.

And the shooting by a city marshal of one who is fleeing after being arrested for a misdemeanor is wrongful, and is an official act for which his sureties are liable. *Rischer v. Meeham*, 11 Ohio C. C. 403, 5 Ohio C. D. 416.

In *Hendrick v. Walton*, 69 Tex. 192, 6 S. W. 749, it was held that under the statute creating liability when the death of any person is caused by the wrongful act, negligence, unskilfulness, or default of another, a sheriff and his sureties were not liable for the act of a deputy in shooting one who was endeavoring to escape after being arrested. It was not decided whether the act of the deputy was an "official act" within a statute making a sheriff responsible for such acts of his deputy.

And in *Stephenson v. Sinclair*, 14 Tex. Civ. App. 133, 36 S. W. 137, which was an action for injury to a horse shot by a constable while being ridden by a misdemeanant in escaping after being arrested, the constable and his sureties were held liable, the court saying that, while the constable had no authority to fire upon the prisoner, that fact did not remove his effort to prevent the escape out of the realm of official duty, so as to relieve his sureties from liability.

In *Goscinski v. Carlson*, — Wis. —, 147 N. W. 1018, a deputy sheriff was held liable to one whom he shot while running to escape after being arrested on a civil warrant, though the court found that the shot was fired merely to frighten plaintiff into submission, without any intent to hit him.

Although an officer is authorized to shoot one charged with a felony if necessary to effect his arrest under a warrant therefor, 51 L.R.A. (N.S.)

official bond, for the full penalty of the bond, claimed as damages for the wrongful death of Frank Johnston, who was shot and killed by the sheriff. Frank Johnston, when killed, was twenty years old. He was a hunchback, carrying his head tilted far back and a little to one side, and was 5 feet high. On Sunday, September 18, 1910, at a church meeting in the country, called an "all day singing," several boys, including Frank Johnston, became engaged in a fight, or disturbance of the peace. The sheriff's attention was called to the matter and with two deputies he proceeded to arrest the boys. The scene of the disturbance was something over 100 yards from the church. When the sheriff and his deputies approached, Frank Johnston ran off through the woods, and was followed by the officers and a number of other persons. After running a distance of 100 to 150 yards, the sheriff drew his pistol and fired. The boy dropped instantly, shot in the head, and died in a short time. While pursuing

a plea of justification in an action for damages against a sheriff for the killing by his deputy of a person under such circumstances is insufficient unless it avers that the officer made known to deceased his authority for arresting him, or sets out circumstances which would make the imparting of such information unavailing or unreasonable, and that the shooting was necessary to prevent the escape, an averment that the shooting reasonably appeared to be necessary being insufficient. *Richards v. Burgin*, 159 Ala. 282, 49 So. 294, 17 Ann. Cas. 898.

A peace officer has no right, upon suspicion merely that a felony has been committed, when in fact it has not, to shoot the person suspected to prevent his escape, and if he makes a mistake as to the commission of a felony he is liable. *Petrie v. Cartwright*, 114 Ky. 103, 59 L.R.A. 720, 102 Am. St. Rep. 274, 70 S. W. 297, 13 Am. Crim. Rep. 72.

Before an officer can resort to extreme measures to prevent an escape from an unauthorized arrest in case of a felony, he should exercise a high degree of care and diligence in ascertaining whether he has the right or wrong man, and failure to exercise such care will render him and his bondsmen liable for injuries inflicted. *Kopplekom v. Huffman*, 12 Neb. 95, 10 N. W. 577.

But when a peace officer shoots a person in attempting to arrest him without a warrant for a felony, without any information which either required or authorized him as an officer to lay hands on him, much less to use a deadly weapon, for the purpose of arresting him, he does not act *colore officii* so as to render his sureties liable. *Chandler v. Rutherford*, 43 C. C. A. 218, 101 Fed. 774.

R. L. S.

Appellant was at the time under fear of being lynched. He told Mr. Fitzgerald that he was afraid, and "wanted to die a decent death." He was told by Mr. Fitzgerald that the people believed that he was guilty, and that the body found was that of the deceased. Mr. Fitzgerald testified that at the time of the conversation with appellant, he did not know whether the body found was that of Elston Brewer, the deceased, and that he had no definite knowledge relative thereto until appellant's confession. We quote from the testimony of Mr. Fitzgerald to show what statements were made by him to induce appellant to confess:

Q. How many trips did you make to see him?

A. Three.

Q. What happened between you and Mr. Johnson at the jail on your first visit there?

A. Well, I tried to get him to confess.

Q. What did you say to him to induce him to confess?

A. Nothing specially; I told him I thought he was guilty. I heard the testimony at the coroner's jury; and he looked listless and nervous, and I didn't think he would have any peace until he unburdened himself of this awful crime I thought he had committed.

Q. You told him also you were a Spiritualist, and could look down in his soul and see the black crime he had committed?

A. I didn't tell him that way. I went up there that evening and said, "You better confess; that boy we dug up there, these printers say, to the best of their knowledge, it is Elston Brewer, and there is no doubt about your guilt, and you have not slept a wink since you killed that boy, and you won't have any peace until you confess;" and I asked him what church he belonged to, and he had better look beyond the grave for comfort; that his only hope was salvation, and asked him what church he belonged to; and he said he didn't have much training at all, and went to the Baptist and Methodist church; and I told him we had some mighty good ministers in town, and if he wanted one I would get one; and he said, "No," he didn't want one then, but he would see about it later; and he said, "What are you, anyhow?" and I said, "I am a Spiritualist, and I can look down in your black heart and see this diabolical crime you committed at midnight the other night." I was hitting in high places when I said that, of course.

Thus far the facts and circumstances connected with the making of the confession by appellant have been stated by us from 51 L.R.A. (N.S.)

Mr. Fitzgerald was attended by another prominent newspaper man of the city of Vicksburg, Mr. F. P. Cashman, city editor of the Evening Post. Mr. Cashman testified that appellant was very sick when he visited him with Mr. Fitzgerald. Continuing his testimony, Mr. Cashman said that appellant "was lying on his cot, and great beads of perspiration breaking out on his forehead and his hands and all portions of his cheek, and he was tossing from one side of the cot to the other, and turning over, and sat up awhile and laid down awhile, and his sentences were disconnected, and looked like he was mentally deranged." He further stated that Mr. Fitzgerald talked to appellant for a length of time which appeared to witness to be about an hour, and was telling appellant that "he was a liar and a murderer, and he better confess and ease his conscience." Mr. Cashman visited appellant next morning about 11 o'clock, shortly after the confession had been given Mr. Fitzgerald, and he testifies that he found appellant still sick, suffering with fever, and in an abnormal condition.

Viewing all the facts and circumstances surrounding the securing of the confession, we do not believe that it was of such free and voluntary character as to render it admissible in this case. It is well-nigh impossible to have a fixed rule by which may be determined the amount or degree of improper influence necessary to make a confession involuntary. It was said by Judge Handy in the opinion of *Simon v. State*, 37 Miss. 288, that "it is a very familiar and well-established rule that a confession is not admissible in evidence, unless it is made freely and voluntarily, without restraint, and without hope of reward or fear of punishment."

A confession cannot be said to be in every respect freely and voluntarily made if it has been obtained by any sort of threat or violence, or any promise, direct or implied, or by the exertion of any influence. *Underhill*, *Crim. Ev.* 2d ed. § 126. Mr. *Underhill*, citing the case of *People v. McMahon*, 15 N. Y. 384, makes the following quotation in his note on this subject: "Voluntary is not always used in contradistinction to compulsory. In many cases 'voluntary' means proceeding from the spontaneous operation of the party's own mind, free from the influence of any extraneous disturbing cause."

It has been held by this court that a confession should not be admitted if there is a reasonable doubt as to whether it was freely and voluntarily made. Concerning this, we quote from *Brame & Alexander's*

and that the body had then been incased in a sack and wrapped in a quilt, to which rocks and stones had been attached with sash or tiller cord. This body was afterwards identified as that of Elston Brewer, a young man twenty-six years of age, who, together with appellant, had gone to Vicksburg from some point in Arkansas, probably Cave City.

Brewer was the owner of two small boats, one of them being a house boat in which he and appellant lived. He was a printer by trade, and, according to the testimony of his father, was at the time going down the river on a pleasure trip. According to the confession of appellant, he and Brewer had started for New Orleans, Brewer promising to give appellant a job, the nature of which does not appear. Before the finding of this body, appellant had mentioned the disappearance of his partner, Brewer, and when he saw the body, which seems to have been drawn ashore near the boats in which he and Brewer lived, his actions were such as to arouse the suspicions of those who saw him.

A day or two before the finding of this body, appellant went to the Merchants' National Bank of Vicksburg, told one of the officers thereof that his name was Brewer, and asked him how he could obtain some money, and was told "to have some bank to wire us to pay him the money and waive identification." This bank afterwards, on July 16th, received a telegram from a bank at Batesville, Arkansas, directing it to pay Brewer the sum of \$50, and to waive his identification.

On the day before the receipt by the bank of this telegram,—that is, on the 15th of July,—appellant went to the office of the Western Union Telegraph Company and delivered to the operator in charge the following telegram, which was accepted and sent by the company:

To G. W. Brewer, Phone Cave City, Ark., Batesville, Ark. Want larger boat. Coming back. Wire \$50 at once to Merchants' National Bank without identification. Letter follows. Elston. (Subject to delay.)

G. W. Brewer was the father of Elston Brewer, and when the telegram was delivered to the operator by appellant he told her that G. W. Brewer was his father. Appellant was identified by the officer of the bank with whom he dealt and by the telegraph operator, as being the man who made the inquiry at the bank, and as the man who sent the telegram above referred to. This telegram addressed to Mr. G. W. Brewer was received by him, and the tele-

bank at Vicksburg was sent at his request.

After being arrested and placed in jail, appellant confessed to several parties on different occasions that he had killed Brewer, his confession being, in the language of the witness Fitzgerald, as follows:

"The boy promised me when we left Arkansas that he would go to New Orleans, and after he got here he made up his mind to make his way back home.' And I think he said he was going to sell the boats and go back and send him adrift, or make his way back to Memphis and go home, and said: 'We quarreled a good deal about it Sunday and Sunday evening; we read a while, and I cooked supper, and we played cards again, and we quarreled again, and we used the quarrel; I knew Elston pretty well, and I didn't think he was treating me right, and the boy went to bed about 10 o'clock and about 1 or 2 o'clock—some time after 12, I don't remember the exact time—I got up and he was asleep, and I went and got the ax and hit him one lick in the head, and he groaned and made a loud noise, and I was afraid the passers-by would hear him, and I went back and hit him until he was perfectly still. And then he said: 'I got out; the boat was by the Y. & M. V. depot, and I came up and sat on the curb for a while, and went up on Washington street, and first thought I would give myself up, and studied about that for a while, and went back on the boat and got a sack and put some stones in it, and tied the sack around Elston's body and turned the boat around and shoved him overboard, and he sank.'"

A few days before he was killed, Brewer had attempted to sell his boats; one of the parties to whom he attempted to sell being Mr. Dillon, the gentleman who afterwards discovered his body floating in the canal. That Brewer was murdered seems not to be open even to the suggestion of a doubt, the only fact to be determined being the identity of the murderer.

The only ground upon which a reversal of the judgment of the court below is asked in which there can be any sort of merit is the one upon which my brethren think the judgment should be reversed, and that is that the court erred in admitting the testimony of Mr. E. A. Fitzgerald, to whom one of the confessions introduced in testimony was made. The ground upon which the reversal is placed is that this confession was not "in every respect freely and voluntarily made," and because "it does not appear that the confession was from the 'spontaneous operation' of appellant's own mind."

Confessions are nothing more than a particular class of admissions against interest,

Fitzgerald said to appellant in this connection was: "Well, you had another restless night; I see you never slept a wink last night. Are you ready to confess this morning?" And he said: "Yes, boys; I am ready to tell you all about it." Record, p. 76. Appellant then proceeded to make confession.

On this visit Fitzgerald was accompanied by Mr. Fox, manager of the Western Union Telegraph Company, who was also introduced as a witness to the confession. He was asked the following question: "Tell the jury whether or not you or Mr. Fitzgerald, either one, at that time, held out any hope of reward or aid, or threatened him to make any statement or confession to you or Mr. Fitzgerald." Record, p. 94. To which he replied: "None whatever; I don't think there were two words before he made the remark and said: 'Well, boys, I am ready to confess this morning.'" Record, p. 94.

The statement made by appellant to Fitzgerald as to his fear of being lynched was made at the second interview, was not caused by anything said to him by Fitzgerald, and there is nothing in the evidence to indicate that the confession was made on account of any fear of being lynched. Record, pp. 71 to 77. All that appellant said with reference to any fear of being lynched was that he didn't want to attend a preliminary hearing for the reason that he was afraid he would be lynched, and Fitzgerald told him he could waive examination, and would not be out of jail more than twenty minutes.

When the court was called upon to rule on the competency of Fitzgerald's testimony, no testimony except that of his own had been introduced, or sought to be introduced, with reference to the circumstances surrounding the making of this confession. From that it did not appear whether, at the time of making the confession, appellant was sick or well. After the confession had been admitted, and on cross-examination by counsel for appellant, Fitzgerald stated that, while he did not know it of his own knowledge, he thought appellant was under treatment of a physician and was taking medicine at the time; that appellant spoke of having contracted malaria on the river; but that his condition appeared to him (Fitzgerald) to be normal.

It will be observed from this statement that appellant was not threatened with any temporal harm in event he declined to confess, or promised any temporal benefit in event he should do so. What was said to him, in effect, was simply this: That Fitzgerald, by reason of being a Spiritualist, 51 L.R.A. (N.S.)

that, by reason of his having committed it, he would have neither peace here nor Salvation hereafter, unless he confessed it; that "the best thing he could do was to confess and try to save his soul."

From this it will be seen that the punishment with which appellant was threatened if he did not confess, and the benefit which he was told he would obtain by confessing, were both predicated upon a belief in a life beyond the grave and upon a future state of punishments and rewards. In numerous decisions it has been held that exhortations invoking the terrors of punishment predicated upon theological beliefs, and the holding out of hopes of a spiritual nature, do not make the confession thereby obtained incompetent, as will appear from an examination of the authorities cited by Wigmore to § 840 of vol. 1 of his Treatise on Evidence, and collated in a note to State v. Williams, Ann. Cas. 1913B, 310.

No case holding the contrary has come under my observation, and, according to Mr. Wigmore, no such case can be found. "It is obvious that, in their ordinary aspect, the influence of religious considerations makes entirely for truth in a confession, and not against it. Mr. Joy's exposition of this point can never be improved upon: "1842, Mr. Joy, Confessions, 51: 'It seems difficult to imagine that a man under spiritual convictions and the influence of religious impressions would therefore confess himself guilty of a crime of which he was not guilty; or that a man under a strong sense of his spiritual relations with God could hope to please God by a falsehood; that a "confidence created" between him and his pastor, or the "being thrown off his guard" by this confidence, should induce him not to confess (that it might naturally do if he were guilty), but induce him to confess falsely. Such spiritual convictions or spiritual exhortations seem, from the nature of religion, the most likely of all motives to produce truth. They are therefore of a class entirely different from those that exclude confessions. A confession is excluded because the motive which induces it is calculated to produce untruth, because it is likely to lead to falsehood. If temporal hopes exist, they may lead to falsehood. Spiritual hopes can lead to nothing but truth.'" 1 Wigmore, Ev. § 840.

This point was expressly decided by our old high court of errors and appeals in Frank v. State, 39 Miss. 711, wherein the court said: "Anything reasonably tending to hold out the hope or promise of reward or benefit for confession, or of punishment or injury for the failure to confess, is in

of the court. The persons and estates of the insane, or those alleged to be insane, are the subjects of protection and care of courts having probate jurisdiction. When the proceeding is instituted, the matter is then under the direction of the court, even to the extent of authorizing it to cause the seizure of the body of the person alleged to be of unsound mind. The statute under consideration makes no provision for a dismissal, nor does it provide for an appeal to this court. The court may or may not authorize or permit the petition to be dismissed. In *Galbreath v. Black*, 89 Ind. 300, it was held that the court ought not to allow the proceeding to be dismissed without the consent of the person alleged to be of unsound mind."

Upon this point, as also upon one phase of the petitioner's attitude in law toward the proceeding, it was said in the case of *Hughes v. Jones*, 116 N. Y. 67, 5 L.R.A. 632, 15 Am. St. Rep. 386, 22 N. E. 446, that "the primary object of the proceeding is not to benefit any particular individual, but to see whether the fact of mental incapacity exists, so that the public, through the courts, can take control. The petitioner can derive no direct benefit from it. The advantage to him, if any, is only such as would result if any other person had first acted in the matter. Attentive study of the history, nature, and object of lunacy proceedings leads to the conclusion that the petitioner therein is not a party to the record so as to be personally estopped by the finding of the jury, except as all the world is estopped."

It was said in the above case that this condition, that is, the peculiar attitude of the law toward an inquest de lunatico, as well as toward the one who as petitioner put the inquest in motion, arose from the fact that anciently the king, as the political *parens patriæ*, assumed custody "as guardian of his subjects." Further it is said that in this country the proceedings are "instituted in behalf of the people of the state, who succeeded to the rights of the King in this regard." *Hughes v. Jones*, supra. The upgrowth of this view, the ancient laws, and the logic of the position are thus set out in the case supra:

"The origin and history of lunacy proceedings throw some light upon the subject. It was provided by an early statute in England that 'the King shall have the custody of the lands of natural fools (idiots), taking the profits of them without waste or destruction, and shall find them in necessities, of whose fee soever the land be holden. And after their death he shall restore them to their rightful heirs, 51 L.R.A. (N.S.)

idiots, nor their heirs be in any wise disinherited. 17 Edw. II. chap. 9.

"The same statute provided for lunatics, or such as might have lucid intervals, by making the King a trustee of their lands and tenements without any beneficial interest, as in the case of idiots, who were the source of considerable revenue to the Crown. Id. chap. 10; *Beverley's Case*, 4 Coke, 127a, 2 Co. Inst. 14, Reg. Brev. 267, Fitzh. Nat. Brev. 532, 16 Eng. Rul. Cas. 702; 1 Bl. Com. chap. 8, § 18, p. 304. This statute continued in force from 1324 until 1863. *Ordronaux, Judicial Aspects of Insanity*, p. 4.

"The method of procedure thereunder is described by an early writer as follows: 'And therefore, when the King is informed that one who hath lands or tenements is an idiot, and is a natural from his birth, the King may award his writ to the escheator or sheriff of the county where such idiot is to inquire thereof. Fitzh. Nat. Brev. 232.

"The object of the writ was to ascertain by judicial investigation whether the person proceeded against was an idiot or not, so that the King could act under the statute, for his right to control idiots or lunatics and their estates did not commence until office found. *Shelford, Lunatics*, p. 14.

"Subsequently authority was given to the lord chancellor to issue the writ or commission to inquire as to the fact of idiocy or lunacy, and the method of procedure was by petition suggesting the lunacy. Ibid.; *Re Brown*, 1 Abb. Pr. 108, 109.

"It was the ordinary writ upon a supposed forfeiture to the Crown, and the proceeding was in behalf of the King as the political father of his people. Ibid.; Fitzh. Nat. Brev. 581.

"As the means devised to give the King his right by solemn matter of record, it was necessary before the Sovereign could divest title. 3 Bl. Com. 259; *Phillips v. Moore*, 100 U. S. 208, 212, 25 L. ed. 603, 604; *Anderson's Dict.* title, Office Found.

"It was used to establish the fact upon which the King's rights depended, as in the case of an alien, who could hold land until his alienage was authoritatively established by a public officer, upon an inquest held at the instance of the government. Whether the basis of action was lunacy or alienage, or otherwise, the proceeding was in behalf of the public represented by the King. Id.

"The inquisition was an inquiry made by a jury before a sheriff, coroner, escheator, or other government officer, or by commissioners specially appointed, concerning any matter that entitled the Sovereign to the possession of lands or tenements, goods

son County was proper, and that the writ of certiorari issued herein should be quashed. It is so ordered.

All concur.

Petition for rehearing denied April 2, 1914.

VIRGINIA SUPREME COURT OF APPEALS.

L. W. TYSOR and Wife, Appts.,
v.

CHARLES E. ADAMS, by Next Friend.

(— Va. —, 81 S. E. 76.)

Deed — failure of consideration — support.

A deed in consideration of a home with grantees in the house conveyed, care in sickness, and burial at death, will be set aside if the grantees immediately upon securing it treat the grantor with such harshness as to terrorize him, and move from the property, leaving the grantor alone in the house, although the grantees invite him to accompany them to the new abode.

(March 12, 1914.)

A PPEAL by defendants from a decree of the Circuit Court for the City of Norfolk in complainant's favor in a suit to cancel a deed, and to enjoin defendants from interfering with complainant's possession of the premises. Affirmed.

The facts are stated in the opinion.

Mr. E. R. F. Wells, for appellants:

Plaintiff having taken the position that the deed was void, and having brought suit to set it aside, defendant was relieved from tendering performance of his agreement until plaintiff thereafter notified him to perform his agreement, and requested him so to do.

Barnes v. Morrison, 97 Va. 378, 34 S. E. 93; United States v. Peck, 102 U. S. 64, 26 L. ed. 46; Wampler v. Harrell, 112 Va. 642, 72 S. E. 135; Lamb v. Clark, 29 Vt. 273; Lewis v. Lewis, 74 Conn. 630, 92 Am. St. Rep. 240, 51 Atl. 854; Risley v. McNiece, 71 Ind. 434; Scott v. Scott, 89 Wis. 93, 61 N. W. 286; Leonard v. Smith, 80 Iowa, 194, 45 N. W. 762; Jenkins v. Stetson, 9 Allen, 128.

Mr. R. Randolph Hicks, for appellee:

Plaintiff is entitled to cancellation of the deed.

Note. — For relief of grantor in conveyance in consideration of agreement to support, which is broken by grantee, see note to Dixon v. Milling, 43 L.R.A.(N.S.) 916, 51 L.R.A.(N.S.)

Rowell v. Jewett, 69 Me. 300; McClelland v. McClelland, 176 Ill. 83, 51 N. E. 559; Lowman v. Crawford, 99 Va. 688, 40 S. E. 17; Dorsey v. Wolcott, 173 Ill. 539, 50 N. E. 1015; Fabrice v. Von der Brelie, 190 Ill. 480, 60 N. E. 835; Lane v. Lane, 106 Ky. 530, 50 S. W. 857; Bevels v. Keen, 23 Ky. L. Rep. 757, 64 S. W. 428; Lockwood v. Lockwood, 124 Mich. 627, 83 N. W. 613; McIntire v. McIntire, 75 Neb. 397, 106 N. W. 29.

Harrison, J., delivered the opinion of the court:

The bill in this case was filed at the November rules, 1911, of the circuit court of the city of Norfolk, alleging that a certain deed executed June 13, 1911, by the appellee, Charles E. Adams, to the appellants, L. W. Tysor and Hattie V. Tysor, his wife, conveying to the latter a certain house and lot, was executed through persuasion and blandishment, the complainant being an old man, and not able to take care of himself, and that the consideration for the deed had wholly failed. The prayer of the bill was that the deed be declared null and void, and the grantees enjoined from interfering with the complainant's possession of the premises.

The record shows that the appellee, Charles E. Adams, was a retired seafaring man, old and infirm, who owned a small house and lot in the city of Norfolk, for which he had paid \$1,330. This property was rented from him by the appellants, L. W. Tysor and Hattie V. Tysor, his wife. These tenants were practically strangers to Adams; the property having been rented to them through an agent. In the latter part of May, 1911, Adams, the appellee, was sick, and boarding with Mrs. Frank. There he was called upon by Mrs. Tysor, his tenant, who, although a stranger, succeeded in persuading the appellee to leave Mrs. Frank's and go to his own house and live with her. In a few days after appellee took up his abode with Mr. and Mrs. Tysor he executed the deed in question, dated June 13, 1911, conveying to them jointly his house and lot, in which they were living. The consideration stated on the face of the deed was "\$5 and other valuable considerations;" but in a few days thereafter a paper was executed by L. W. Tysor showing that the real consideration was that the grantees would allow the grantor to make the house his home as long as he lived, without charge for board, and that they would take good care of him in case of sickness, and in the event of death see that he was buried properly.

While the evidence shows that the grantor in this deed was a feeble, guileless old

Libel — privilege.

2. The common-law defenses of privilege in actions for defamation are available in actions for statutory slander.

Same — communication during altercation.

3. A communication made in the course of an altercation, concerning personal or property rights, and bearing some reasonable relation to the subject-matter of the controversy, is privileged, and it should be left to the jury to say whether the defendant has abused his privilege.

Trial — jury — meaning of words.

4. The sense in which actionable words were used, when the utterance thereof has been attended by facts and circumstances indicating their use in a qualified sense, so as to make them convey, to those who heard them, a meaning different from the one ordinarily accorded them, is a question for jury determination.

Same — instructions — mitigating circumstances.

5. Instructions given in an action for slander, so drawn as to limit the effect of mitigating circumstances to the inquiry as to the existence of actual malice, deprive the defendant of the benefit of the consideration of such facts by the jury in the ascertainment of the amount of the damages, and are erroneous.

The court in *Reed v. Harper*, 25 Iowa, 87, 95 Am. Dec. 774, *infra*, does not discuss the part of the charge of the trial court in which it was stated that drunkenness might be considered in mitigation of damages.

In *Howell v. Howell*, 32 N. C. (10 Ired. L.) 84, it is said: "If one, being drunk, speaks slanderous words and does not repent them when sober, his being drunk is a circumstance to mitigate the damages, because it tends to rebut the presumption of 'malice,' and the words of a drunken man are not usually attended to, and therefore are not much calculated to injure. But when the slanderous words are spoken on many occasions, public and private, when the defendant is sober as well as when he is drunk on some of the occasions when the words are spoken, instead of tending to rebut the idea of 'malice,' this tends to show that the defendant's heart is boiling over with malice, and cannot, in any point of view, be allowed as a reason for abating the damages which the jury would otherwise think proper to give."

But it is held that drunkenness is not to be considered in mitigation of damages in *Mix v. McCoy*, 22 Mo. App. 488.

As defense.

The universal rule seems to be that intoxication constitutes no defense to an action of slander. *McKee v. Ingalls*, 5 Ill. 30; *Reed v. Harper*, 25 Iowa, 87, 95 Am. Dec. 774; *Williams v. McManus*, 38 La. Ann. 61 L.R.A. (N.S.)

6. In such cases, intoxication of the defendant at the time of his use of the slanderous words is a mitigating circumstance, proper for the consideration of the jury in estimating the damages.

Same — provocation.

7. Provocation by the plaintiff, inducing the utterance of the slanderous words, is a mitigating circumstance also.

(*Robinson, J., dissents.*)

(February 13, 1914.)

ERROR to the Circuit Court for Nicholas County to review a judgment in plaintiff's favor in an action brought to recover damages for an alleged slander. Reversed.

The facts are stated in the opinion.

Mr. G. G. Duff, for plaintiff in error:

The alleged slanderous words were not actionable.

Shroyer v. Miller, 3 W. Va. 158; 25 Cyc. 314, 376, 377; *Lawson v. Hicks*, 38 Ala. 279, 81 Am. Dec. 49; *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279; *Hoar v. Wood*, 3 Met. 193; *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. 474; *Moseley v. Moas*, 6 Gratt. 534; *Harman v. Cundiff*, 82 Va. 239; *Womack v. Circle*, 20 Gratt. 192; *Hensbrough v. Stinnett*, 25 Gratt. 495; *Bridge*

161, 58 Am. Rep. 171; *Kendrick v. Hopkins, Cary*, 93.

It would seem, however, that in some circumstances the fact that defendant was intoxicated at the time he spoke the words complained of might be relevant upon the question whether they were actionable, since it is possible that words which if understood literally would be actionable, coming from an intoxicated person, would naturally be regarded by the hearers as mere abuse, and not as imputing to the plaintiff what they literally import. The suggested distinction is somewhat analogous to that found in cases dealing with the effect of intoxication as a defense to homicide, where it is pointed out that, although intoxication is not a defense to homicide, yet the fact of defendant's intoxication may be relevant to show that he was incapable of forming the wilful, deliberate, and premeditated purpose essential to homicide in the first degree. See note in 25 L.R.A. (N.S.) 376. The cases, of course, are not parallel, since actual malice or wilfulness is not essential to liability for slander, but it would seem that if the fact of intoxication may be admissible as tending to negative existence of those elements in a homicide case, it might, for similar reasons, be admissible in some circumstances as tending to negative the actionable character of the words relied on in an action for slander, and thus not merely mitigating damages, but defeating recovery altogether.

E. L. D.

of the defendant in the subject-matter of the interview, and defense of his character or personal feelings, both of which rights are recognized by law. Odgers, Libel & Slander, 289, 291; Newell, Defamation, Libel & Slander, §§ 108-110, pp. 509, 510. Formerly these defenses to statutory slander, insulting words, were not permitted, nor could the defendant justify by plea and proof of the truth of the charges made by him. Brooks v. Calloway, 12 Leigh, 466. Such was the judicially declared effect of the provision saying no plea, exception, or demurrer should be sustained to preclude a jury from passing upon the words charged in the declaration. But in 1849 the statute was amended by the elimination of the words "plea" and "exception," and the insertion of a provision for a plea of justification; and these alterations have restored, or conferred, the common-law defense of privilege. Chaffin v. Lynch, 83 Va. 106, 1 S. E. 803. The right incident to a privilege of this kind does not extend so far, however, as to authorize the set-off of one independent calumny against another. A communication, to be privileged on the ground of defense of self or property or interest, must have been made under an honest belief of its truth, and it must bear some reasonable and fair relation to the right invaded and intended to be protected. If the purpose is to protect a property or other interest, the communication must not extend to something wholly foreign to the subject-matter of the controversy. If it is made in defense of character, the retort must be in the nature of an answer to the attack made. Newell, Defamation, Libel & Slander, § 110, p. 510, § 120, p. 519. "This case must be distinguished from those in which the party pleading the excuse of 'privilege' is guilty of making use of the occasion to utter charges of a character foreign to its legitimate purpose. As, for instance, if this defendant had, in addition to his statements in relation to the supposed theft, gone on to criminate the plaintiff generally, or to accuse her of unchastity, it would then have been the duty of the court, in an action for uttering such charges, to instruct the jury that as to such words, not appropriate to the legitimate objects of the occasion, it furnished the defendant no excuse whatever." Wells, J., in Brow v. Hathaway, 13 Allen, 239. "But even in rebutting an accusation, the defendant must not intrude unnecessarily into the private life of his assailant, or make counter charges against his character, unconnected with his original charge against the defendant." Odgers, Libel & Slander, 5th ed. p. 292.

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in their technical or even ordinary meaning. All the surrounding circumstances go in as evidence, not only to enable the jury to ascertain whether the language used was spoken maliciously, and properly to assess the damages, but also to determine in what sense they were used. "The defendant may plead circumstances showing that the words were not used by him in their ordinary signification. . . . He is allowed thus to give evidence of all the surrounding circumstances, in order to place the jury so far as possible in the position of bystanders, so that they may judge how the words would be understood on the particular occasion." Newell, Defamation, Libel & Slander, § 6, p. 274. "People not unfrequently use words, and are understood to use words, not in their natural sense, or as conveying the imputation which in ordinary circumstances, and apart from their surroundings, they would convey, but extravagantly and in a manner which would be understood by those who hear or read them as not conveying the grave imputation suggested by a mere consideration of the words themselves." Lord Herschell in Australian Newspaper Co. v. Bennett [1894] A. C. 287, 288; Odgers, Libel & Slander, p. 121. Under these principles, it was competent for the jury to find, if they thought the evidence justified them in doing so, that the defendant used the words "robber," "thief," and "cur" merely by way of denunciation of the plaintiff's conduct in and about the defense of the prosecution of the woman, conducted by the defendant, and without actual malice or intent to cast upon the plaintiff any imputation of crime, and for the sole purpose of protecting his interest in the litigation and repelling the charge of drunkenness made against him. In Chaffin v. Lynch, cited, the defendant, in the course of a controversy conducted through a newspaper on a question of veracity, called the plaintiff a "scoundrel," and said he "would be unprincipled enough to deny" the act he had been accused of "when charged with it," and the court held the communication was privileged, and left it to the jury to say whether the defendant had abused his privilege, and had acted with malice, and not honestly and in the protection of his own interest. In the declaration and proof are found circumstances indicating the use of the words in a qualified sense. The plaintiff charges the defendant with having accused him of "trying to help" the woman "to rob" him, then uttering the denunciatory words, "robber," "thief," and "cur." And the defendant and

signed to direct the jury to the subject of mitigation in general terms; and the court, after some modifications thereof, gave them. As requested, the first one would have told the jury the defendant had the right to prove and explain all the facts and circumstances surrounding the speaking of the words, and to show and explain them in mitigation of damages. The court altered it so as to make it say the jury might consider the facts and circumstances for the purpose of disproving malice and as bearing on the quantum of damages. The second one, as offered, would have authorized the jury, in estimating the damages, to consider all the attendant facts in mitigation of the damages, and also the degree of malice on the part of the defendant. This the court altered only to the extent of the insertion of the phrase "if any" after the phrase "mitigation of damages." The modifications were clearly not prejudicial. On the contrary, they wrought a decided improvement as to both form and substance. But neither these two instructions as given, nor any others, have corrected the error in the two given at the instance of the plaintiff, already noted. They abstract or withhold from the operation of the last two discussed, relating to mitigation, the principal mitigating circumstances disclosed by the evidence. If not, then all four of them would be contradictory and misleading.

The principle of mitigation is not denied by the Virginia cases. On the contrary, it is expressly asserted and approved in *Bourland v. Eidson*, 8 Gratt. 27. It is also declared in *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757. There are in these and other decisions enlightening discussions as to the right to prove, under the plea of not guilty, as matter working mitigation, facts tending to establish the truth of the words spoken, and subsequent self-serving declarations, but this case involves no questions of that kind.

For the errors noted, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

Robinson, J., dissents.

ILLINOIS SUPREME COURT.

ILLINOIS MALLEABLE IRON COMPANY, App't.,

v.

COMMISSIONERS OF LINCOLN PARK et al.

(263 Ill. 446, 105 N. E. 336.)

Municipal corporation — ordinance — regulating traffic on park way — construction.

1. An ordinance requiring loaded vehicles 51 L.R.A. (N.S.)

carrying goods to or from premises abutting on a park way to enter on the way at the cross street nearest the premises in the direction in which the load is moving, and forbidding it to proceed thereon further than the nearest cross street thereafter, will not be construed to forbid the loaded vehicles from leaving the premises where the goods were delivered or received.

Highway — forbidding use — interference with constitutional rights.

2. No property right of an abutting owner doing business on a park way is unconstitutionally interfered with by forbidding him to use such park way with loaded wagons further than the nearest intersecting cross street, although he is thereby compelled to take a circuitous route to transact his business, and the bad condition of the cross street prevents the hauling of full loads upon it.

(April 23, 1914.)

APPEAL by complainant from a decree of the Superior Court for Cook County dismissing a bill filed to restrain the enforcement of an ordinance prohibiting loaded vehicles upon a certain park way. Affirmed.

The facts are stated in the opinion.

Messrs. William J. Maher and Samuel B. King, for appellant:

The right of an abutter upon a highway to travel upon the highway its entire length is termed the "easement of access;" it is an appurtenant to the land of the abutter to which the law attaches the presumption of

Note. — Forbidding or restricting teaming on certain public ways.

Generally as to the validity of statutes or ordinances regulating horse-drawn vehicles in city streets including cases respecting the weight of loads and width of tires, see note in 31 L.R.A. (N.S.) 682.

Generally as to the regulation of draymen, see note to *Lawson v. Connolly*, 45 L.R.A. (N.S.) 1152.

As to the regulations of automobiles in city, see note to *Christy v. Elliott*, 1 L.R.A. (N.S.) 215, upon the law governing automobiles, and the supplementary note to *State v. Mayo*, 26 L.R.A. (N.S.) 502, upon the power to prohibit the use of automobiles upon public thoroughfare.

It is a valid exercise of police power for a city to exclude traffic teams from a pleasure driveway. *ILLINOIS MALLEABLE IRON CO. v. LINCOLN PARK COMES.*

And village trustees may inclose a public square so as to exclude teams and wagons. *Guttery v. Glenn*, 201 Ill. 275, 66 N. E. 305.

So it seems that an ordinance reasonably regulating the use of the public streets of a city as to the carriages of unusually large size, or as to those which from the mode of using them would greatly incommode, if not endanger, those having occasion to use

100, 37 N. E. 1036. Traffic teams may be excluded from a pleasure driveway. *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 42 L.R.A. 696, 68 Am. St. Rep. 155, 51 N. E. 758. The ordinance, so far as the public is concerned, was clearly a valid exercise of power by the commissioners, and the appellant does not claim that it was not. It contends, however, that the enforcement of the ordinance interferes with its right of access to its premises, and that this right is its private property, which the commissioners have no right to destroy without making compensation therefor.

Owners of property bordering upon a street have, as an incident of their ownership, a right of access by way of the streets, which cannot be taken away or materially impaired without compensation. *Chicago v. Union Building Asso.* 102 Ill. 379, 40 Am. Rep. 598; *Rigney v. Chicago*, 102 Ill. 64; *Shrader v. Cleveland*, C. C. & St. L. R. Co. 242 Ill. 227, 26 L.R.A. (N.S.) 226, 89 N. E. 997. The inquiry, therefore, is as to the extent of this right of access. The ordinance, under the construction we have given to it, does not interfere with the appellant's use of Diversey park way in the block in which its premises are situated. Its right of access to that extent is not interfered with, but it contends that its right as an abutting owner is to use the street upon which its property abuts as far as such street constitutes the most direct route to the destination, and that the requirement of taking a circuitous route constitutes an impairment of that right. A claim of this character was the subject of consideration in the case of *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795, 10 N. E. 395, in which the city was sued by a lot owner for damages resulting from the vacation of certain streets and alleys. The lot fronted on Third street, but was some distance from that part of Third street vacated by the city ordinance. The court stated the question to be: "Can defendant, as a matter of law, be held liable to the plaintiff for damages resulting from the vacation of streets and alleys between Front and Fourth streets, the vacation being in another block in the city than that in which plaintiff's property is situated?" After citing the cases of *Chicago v. Union Building Asso.* *supra*, and *Littler v. Lincoln*, 106 Ill. 353, the court said (p. 206): "The facts of the case, being considered, bring it precisely within the principle of the cases cited. Here, plaintiff's lot is not adjacent to the streets or alleys vacated. It is in another block. The access to and egress from his lot are not affected by the vacating ordinance passed by the city. The street in front and the alley in the rear of 51 L.R.A. (N.S.)

ing the same access to and egress from it. The inconvenience that would be occasioned to plaintiff in going from the street in front of his house to a particular part of the city, on account of vacating and closing up certain streets and alleys in another block, is the 'same kind' of damage that would be sustained by all other persons in the city that might have occasion to go that way, and, although the inconvenience he may suffer may be greater in degree than to any other person, that fact would not give him a right of action."

In *Guttery v. Glenn*, 201 Ill. 275, 66 N. E. 305, the same question was involved, and it was held that the inclosure and complete obstruction of the street on which the complainant's property fronted, but in the next block, though a public nuisance, did not entitle the complainant to an injunction, because he suffered no special or particular injury from the public nuisance so created. The inconvenience sustained by him in going from the street in front of his premises to a particular part of the city on account of the closing of the street differed in degree only, and not in kind, from that sustained by all other persons having occasion to go that way. So, in the present case, the inconvenience caused the appellant by the exclusion of traffic teams from the boulevard, though greater in degree, is precisely the same in kind as that to all other persons having occasion to do heavy hauling from places in the neighborhood of the appellant's premises to places east, northeast, or southeast of the intersection of the next street east of them. If the boulevard might be entirely closed to all passage by its vacation or complete obstruction, without any liability for damages, certainly its partial closure by the exclusion of traffic teams could not be the basis of a claim for damages or an injunction. The rule is stated in *Elliott on Roads & Streets*, vol. 2, 3d ed. § 1181, as follows: "Owners of land abutting upon neighboring streets, or upon other parts of the same street, at least when beyond the next cross street, are not, however, entitled to damages, notwithstanding the value of their lands may be lessened by its vacation or discontinuance." To the same effect, in substance, are 3 *Dill Mun. Corp.* 5th ed. § 1160, and 1 *Lewis, Em. Dom.* 3d ed. § 123, and numerous authorities are cited in these works in support of the text. The authorities are not entirely uniform, but their great weight sustains the doctrine announced.

The demurrer to the bill was properly sustained, and the decree of the Superior Court is affirmed.

Petition for rehearing denied June 4, 1914.

Nunn, J., delivered the opinion of the court:

The appellee, Ann Marshall, brought this suit on a note against S. A. Anderson. He answered, admitting the note, but set forth that the administrator of Martha Ann Marshall and the children and heirs of Martha Ann Marshall were setting up some claim to it, and asked that they be made parties and assert their claim, and that the court determine to whom the note belonged, and that a judgment be rendered against him

connected with his protection. C. C. Howard, administrator of Martha Ann Marshall, claimed it, and Mattie B. Kirkpatrick, one of the children or grandchildren of Martha Ann Marshall, filed a pleading claiming one-ninth interest. It appears that the plaintiff became the possessor of the note, and claimed to own it under the following circumstances: Martha Ann Marshall was the owner of this note of \$400 on S. A. Anderson, and she went to the Greensburg Deposit Bank, with which it seems she transacted her business, and had B. W. Penick, cashier of the bank, to write an indorsement

& J. 226, 32 Am. Dec. 158; Taylor v. Henry, 48 Md. 550, 30 Am. Rep. 486; Milholland v. Whalen, 89 Md. 212, 44 L.R.A. 205, 43 Atl. 43.

Mass.—Sturtevant v. Jaques, 14 Allen, 523; Childs v. Jordan, 106 Mass. 321; Thacher v. Churchill, 118 Mass. 108; Davis v. Coburn, 128 Mass. 377; Gerrish v. New Bedford Inst. for Sav. 128 Mass. 159, 35 Am. Rep. 365; Chace v. Chapin, 130 Mass. 128; Chase v. Perley, 148 Mass. 289, 19 N. E. 398; Bancroft v. Russell, 157 Mass. 47, 31 N. E. 710; Taft v. Stow, 167 Mass. 363, 45 N. E. 752; Kendrick v. Ray, 173 Mass. 305, 73 Am. St. Rep. 289, 53 N. E. 823; Peck v. Scofield, 186 Mass. 108, 71 N. E. 109; Mee v. Fay, 190 Mass. 40, 76 N. E. 228.

Mich.—Crissman v. Crissman, 23 Mich. 218; Re Elder, 39 Mich. 474; Bostwick v. Mahaffy, 48 Mich. 342, 12 N. W. 192; Calder v. Moran, 49 Mich. 14, 12 N. W. 892; Chadwick v. Chadwick, 59 Mich. 87, 26 N. W. 288; Collar v. Collar, 75 Mich. 414, 4 L.R.A. 401, 42 N. W. 847; O'Neil v. Greenwood, 106 Mich. 572, 64 N. W. 511; Hamilton v. Hall, 111 Mich. 291, 69 N. W. 484; Eipper v. Benner, 113 Mich. 75, 71 N. W. 511; Rapley v. McKinney, 143 Mich. 508, 107 N. W. 101; Mitchell v. Bilderback, 159 Mich. 483, 124 N. W. 557; Frost v. Frost, 165 Mich. 591, 131 N. W. 60.

Miss.—Anding v. Davis, 38 Miss. 593, 77 Am. Dec. 658.

Mo.—Bitts v. Weakley, 155 Mo. 109, 55 S. W. 1055; Harris Bkg. Co. v. Miller, 190 Mo. 640, 1 L.R.A. (N.S.) 790, 89 S. W. 629; Northrip v. Burge, — Mo. —, 164 S. W. 584; Kramer v. McCaughey, 11 Mo. App. 426; Huettelman v. Viesselmann, 48 Mo. App. 582; Deal v. Mississippi County Bank, 79 Mo. App. 262; First Nat. Bank v. Moss, 80 Mo. App. 408; Crowley v. Crowley, 131 Mo. App. 178, 110 S. W. 1100; Carroll v. Woods, 132 Mo. App. 492, 111 S. W. 885; Watson v. Payne, 143 Mo. App. 721, 128 S. W. 238; Ewing v. Parrish, 148 Mo. App. 492, 128 S. W. 538; Murry v. King, 153 Mo. App. 710, 135 S. W. 107; Citizen's Nat. Bank v. McKenna, 168 Mo. App. 254, 153 S. W. 521.

Mont.—Mantle v. White, 47 Mont. 234, 132 Pac. 22.

Neb.—Wolf v. Haslach, 65 Neb. 303, 91 51 L.R.A. (N.S.)

N. W. 283; Devries v. Hawkins, 70 Neb. 656, 97 N. W. 792.

N. J.—Kimball v. Morton, 5 N. J. Eq. 26, 43 Am. Dec. 621; Hooper v. Holmes, 11 N. J. Eq. 122; Sayre v. Fredericks, 10 N. J. Eq. 205; Eaton v. Cook, 25 N. J. Eq. 65; Danser v. Warwick, 33 N. J. Eq. 133; Pitney v. Bolton, 45 N. J. Eq. 639, 18 Atl. 211.

N. Y.—Day v. Roth, 18 N. Y. 448; Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446; Robbins v. Robbins, 89 N. Y. 251; Barry v. Lambert, 98 N. Y. 300, 50 Am. Rep. 677; Gilman v. McArdle, 99 N. Y. 451, 52 Am. Rep. 41, 2 N. E. 464; Re Carpenter, 131 N. Y. 86, 29 N. E. 1005; Bork v. Martin, 132 N. Y. 285, 28 Am. St. Rep. 570, 30 N. E. 584; Hirsch v. Auer, 146 N. Y. 13, 40 N. E. 397; Neresheimer v. Smyth, 167 N. Y. 202, 60 N. E. 449; Bloodgood v. Massachusetts Ben. Life Assn. 19 Misc. 460, 44 N. Y. Supp. 563; Stettheimer v. Stettheimer, 2 N. Y. S. R. 358; Warburton v. Camp, 23 Jones & S. 290, affirmed in 112 N. Y. 683, 20 N. E. 592; Robb v. Washington & J. College. 103 App. Div. 327, 93 N. Y. Supp. 92; Hoffman v. Union Dime Sav. Inst. 109 App. Div. 24, 95 N. Y. Supp. 1045; Morris v. Hughes, 45 Misc. 278, 92 N. Y. Supp. 288; Re Kaupfer, 141 App. Div. 54, 125 N. Y. Supp. 878, affirmed in 201 N. Y. 534, 94 N. E. 1095; Hammerstein v. Equitable Trust Co. 156 App. Div. 644, 141 N. Y. Supp. 1065; Re Falls, 31 Misc. 658, 66 N. Y. Supp. 47.

N. C.—Riggs v. Swann, 59 N. C. (6 Jones, Eq.) 118; Witherington v. Herring, 140 N. C. 495, 53 S. E. 303, 6 Ann. Cas. 188. (In these cases the court said that the 7th section of the statute of frauds has not been re-enacted, in that state, and that there is no distinction as to declarations of trust in personalty and in land.)

N. D.—Berry v. Evendon, 14 N. D. 1, 103 N. W. 748.

Or.—Cooper v. Thomason, 30 Or. 161, 45 Pac. 296; Martin v. Martin, 43 Or. 119, 72 Pac. 639.

Pa.—Tritt v. Crotzer, 13 Pa. 451; Maffitt v. Rynd, 69 Pa. 380; Hess's Appeal 112 Pa. 168, 4 Atl. 340; Washington's Estate, 220 Pa. 204, 69 Atl. 747; Kelley's Estate, 29 Pa. Super. Ct. 106;

property by parol, and be sustained by parol evidence. See *Berry v. Norris*, 1 Duv. 303. In the case of *Barkley v. Lane*, 6 Bush, 587, Lane made an indorsement on a note, but failed to sign it, as follows: "In my own handwrite I give, free of all charges, the within note of \$1,000, interest excepted, to Elizabeth Lane and Ann Barkley, my two daughters, equally, if not paid before my death. I mean by interest excepted, I claim the—especially. If neither principal—is paid before my death, the principal to them and the interest to my estate, for purpose best known to myself. Also a note on G. Spratt of \$1,000, to them equally, if not paid before my death." The court in discussing that matter said: "The memo-

the handwriting of W. N. Lane, was not signed, and could not in any sense be regarded as a testamentary paper; nor was the transaction such as to constitute a gift *causa mortis*, nor even a gift *inter vivos*, according to the rules of law determining the validity of such transfers of property, unless the peculiar facts of the case exempted it from the general rule making a delivery of the thing given essential to the validity of the gift. But it is insisted for the appellants that the facts were sufficient to constitute a parol trust, enforceable in a court of equity. As the subject of the trust sought to be established in this case was personal estate only, no writing was necessary to transfer it, and the

Pac. 417, it was said: "Trusts in personalty may be created, declared, or admitted verbally, and may be proved by parol evidence, although, as the authorities uniformly unite in declaring, such evidence must be clear and unequivocal."

In *Maher v. Aldrich*, 205 Ill. 242, 68 N. E. 810, the court said that trusts in personal property might be established by parol evidence if the evidence to establish the trust was clear and convincing, and that when the trust was established it was well settled that the beneficiaries might follow the fund into all forms of investment which it might assume.

It has been said that it is incumbent on the party asserting the trust to prove it by clear and satisfactory evidence; and that the words or acts relied upon as creating the trust must show clearly and unequivocally the intention of the donor to create a trust. *Trubey v. Pease*, 240 Ill. 513, 88 N. E. 1005, 16 Ann. Cas. 370.

In *Crissman v. Crissman*, 23 Mich. 218, it was said: "Where a party undertakes to establish a trust upon parol evidence, especially after a considerable lapse of time, the evidence ought to be very clear and satisfactory, and it ought to find some support in the subsequent conduct of the parties and in the surrounding circumstances."

And in *Hamilton v. Hall*, 111 Mich. 291, 69 N. W. 484, the court said: "To create a trust, where the donor retains the property, the acts or words relied upon must be unequivocal, . . . and this rule applies with peculiar force where it is claimed that the donor constituted himself trustee.

. . . The mere declaration of an intention or purpose to create a trust, which is not carried out, is of no value, and a mere agreement or statement of an intent to make a gift in the future is not sufficient. It must be such that, from the time it is made, the beneficiary has an enforceable equitable interest in the property, contingent upon nothing except the terms imposed by the declaration of the trust itself."

As to the evidence necessary to establish 51 L.R.A. (N.S.)

a trust in personalty by parol, it was said also in *Watson v. Payne*, 143 Mo. App. 721, 128 S. W. 238: "The evidence must be convincing and the terms of the trust must be clear, definite, certain, and complete. Mere preponderance of evidence adduced by the party affirming the trust will not suffice; but it would be carrying the rule to an unreasonable and unjust length to say, as defendant apparently would have us say, that the evidence of the trust must be uncontradicted. It suffices if the evidence is strong enough to thoroughly convince the chancellor that a trust was declared, and if the terms of the trust are defined with clearness and certainty."

It has been said, however, that although the evidence to establish a trust in personalty by parol must be clear as to the subject-matter and purposes of the trust, and as to the beneficiary, yet that the circumstances may be such as to require but slight independent proof in order to authorize a court of equity to declare the trust. *Huetteman v. Biesselmann*, 48 Mo. App. 582.

Declarations of a purpose to create a trust, not carried out, are of no value as evidence to establish the trust, nor are direct promises to that effect, unaccompanied with a consideration turning them into contracts. *Allen v. Withrow*, 110 U. S. 119, 28 L. ed. 90, 3 Sup. Ct. Rep. 517.

The intention of the party making the trust is the only sure test of its creation; no particular wording is necessary; and the trust may be partly in writing and partly by parol. *Porter v. Bank of Rutland*, 19 Vt. 410.

A valid trust in personalty may be created by parol, though for the benefit of the donor himself and another. *Williams v. Haskins*, 66 Vt. 378, 29 Atl. 371.

It has been said that, "in order to create a valid verbal or parol trust in personal property, three things are indispensable: First, the words of the settlor must express a declaration and grant by him of an estate or interest containing all the essential elements of a trust; second, there

they must be where a verdict for the defendant has been directed, are that, as the plaintiff drove his team along the roadway known as Johnson avenue, he approached a railroad crossing, and when near to it stopped his team, and listened for approaching trains, and, hearing nothing to indicate such approach, he started on, and crossed the first track, and had nearly cleared the second when his wagon was struck by a locomotive engine proceeding from behind some sheds on the north side of the track. This engine was running in a southerly direction, and no bell was rung or whistle sounded until immediately before the engine struck the wagon. There was no flagman at the crossing to warn the plaintiff. There was contradictory testi-

mony as to all of these matters, and at the close of the case counsel for the defendant moved for the direction of a verdict on three grounds: First, that the plaintiff was a mere licensee upon the private property of the defendant, as to whom no actionable negligence had been shown; second, that there was no evidence that the place where the accident happened was a public highway; and, third, contributory negligence. The motion was granted, and the plaintiff took this appeal.

Mr. Warren Dixon, for appellant:

Whenever a railroad company, by the building or maintenance of its railway, creates extra danger to those lawfully using a public thoroughfare, it is bound to

materials and debris indicates that the walk is not open to the public, and thus negatives any implied invitation, a person attempting to use the same is but a licensee at most, and entitled to protection only against wanton injury, and cannot recover for injury sustained by falling into an open roll-way in such walk. *McClain v. Caribou Nat. Bank*, 100 Me. 437, 62 Atl. 144.

And failure to put up a sign notifying travelers that a private way opening into a street is not public does not render the owner liable for injuries caused by a defect therein, to persons traveling thereon without permission; nor does the fact that the way is paved constitute an invitation to the public to use it. *Stevens v. Nichols*, 155 Mass. 472, 15 L.R.A. 459, 29 N. E. 1150, distinguishing *Holmes v. Drew*, supra.

In *Paget v. Girard Trust Co.* 44 Pa. Super. Ct. 596, involving injuries from the breaking of a cellar door whose outer edge was nearly 2 feet from the sidewalk, which was 13 feet wide to the curb, the cellar way being raised from 3 to 7 inches above the surrounding surface, it was held that one who stepped off the sidewalk upon the cellar door in the daytime, for the purpose of getting out of the rain, was a trespasser, and could not recover for injuries occasioned by the breaking of the door. The court said that if the cellar door had been in or so near to the sidewalk that persons using the walk might reasonably believe the door was a part of the walk, or might inadvertently get upon it while attempting to use the sidewalk, there might be more ground for recovery; but that this door was not on the sidewalk, and that its construction and elevation, as well as its location, very plainly indicated that the cellar door was not intended to be walked upon.

Recovery for injuries sustained by stepping into a coal hole about 2 feet back from the street line, in a space paved like the sidewalk, was denied where the injury occurred while a coal wagon was standing by the curb and coal extended therefrom nearly to the house, and two men were preparing

to put in the coal, although the person injured was a foreign woman, ignorant of the custom of delivering coal through such holes, and did not see the coal hole, but stepped upon the coal from the steps of the next house, which came out to the street line. *Lorenzo v. Wirth*, 170 Mass. 596, 40 L.R.A. 347, 49 N. E. 1010.

It has been held in England that the obliteration, by use, of a distinguishing space between a canal tow path and a parallel public footway, does not amount to making the canal adjoin the footway so as to bring the case within the rule holding a landowner liable for dangers suffered to exist in close proximity to a highway. *Binks v. South Yorkshire R. & River Dun Co.* 3 Best & S. 244, 32 L. J. Q. B. N. S. 26, 7 L. T. N. S. 350, 11 Week. Rep. 66. In support of the decision, *Wightman, J.*, said: "There can be no question that here the public have been permitted without objection to pass over the intermediate space between the road and this dangerous canal; but no right in them to pass over it is alleged,—they have at most only a mere permission, and those who take that permission must take it with all chances of meeting with accidents. The defendants were not under any obligation to fence the highway against the canal, which was not shown to be so near as to be dangerous to a person using the road in the regular line." *Blackburn, J.*, said: "It was argued that such alterations had been made in the towing path that they obliterated the distinction between it and the footway, and so rendered it not noticeable, especially at night, and consequently dangerous. But I do not think that that amounts to making the canal adjoin the footway, if it did not do so before. There may possibly be cases where the owner of land adjoining a way may, by his acts, induce the public to go near to an excavation in his land so as to get into danger; in which case it would be the same thing whether the way were a highway or not. But that should be distinctly proved, whereas the only evidence adduced here amounts to nothing of the kind."

street crossings. All of these things, with the exception of the police patrol, were the acts of defendant. If, therefore, the way in question presented the appearance of being a street, the defendant had created such appearance, and was therefore responsible for the consequences, one of which was that persons generally might use the way in the belief that it was what it appeared to be. As to such users the liability of the defendant, arising out of the appearance so created by it, would be the same as if such street actually was what it appeared to be, under the rule that "one who holds out a way as a public street is liable." 29 Cyc. 454.

Such liability is based not upon the landowner's dedication of the street and its ac-

ceptance by the public, but upon the appearances he has created, so that the question for the jury is not whether such acts of the owner were proof of an intention to dedicate a public street, but whether they had created an appearance calculated to induce the public to use the way in the belief that it was what it appeared to be.

Although the fundamental principle that underlies this doctrine is that of estoppel, it is generally treated under the head of implied invitation, thereby distinguishing it from express or inferred invitation, which is limited to those having business with the owner of lands or upon his premises.

The general doctrine of implied invitation is thus stated in one of our own cases (*Furey v. New York C. & H. R. R. Co.*

right of way and the public the free use, and to cross the company's own grounds on a way or street provided for the purpose at a place of which the public has only a qualified privilege and the company the free use, may be a nice one, but it is an obvious one." (Plaintiff struck by train.)

For a better reason, the railroad's duty at strictly public crossings extends to permissive crossings, where, in addition to suffering the public to use the same, it acts affirmatively in constructing and maintaining a crossing, or erecting a signpost, or stationing a flagman.

Thus, it is held that where a railroad company has recognized a road which crosses its line of railway, as a public road, by establishing and keeping up a crossing thereon, it will not be permitted to question the public character of such road. *Markham v. Houston & T. C. R. Co.* 1 Tex. App. Civ. Cas. (White & W.) 35.

A railroad company which maintains a crossing over its tracks, and permits its use by the public as if it were a part of the public highway, is liable for personal injuries resulting from negligently permitting it to become unsafe. *Missouri P. R. Co. v. Bridges*, 74 Tex. 520, 15 Am. St. Rep. 856, 12 S. W. 210.

Such a situation is equivalent to an invitation to the public to use the same; and if a person using the crossing sustains injury from the defects negligently permitted to exist or remain therein, the company will be liable in damages independently of whether a statute governing public crossings in the technical sense is applicable. *Central R. & Bkg. Co. v. Robertson*, 95 Ga. 430, 22 S. E. 551, 11 Am. Neg. Cas. 338.

So, a road openly and notoriously used as a highway by the public, and recognized as such by a railway company by permitting the public to cross its tracks and by assuming to maintain a crossing at that point, must be held to be a highway so far as the duty of the railway company in respect of the condition of the crossing is concerned, whether or not the road has been legally laid out or used. *Kelly v. Southern Minnesota R. Co.* 28 Minn. 98, 9 N. W. 588; *Lillstrom* 51 L.R.A. (N.S.)

v. Northern P. R. Co. 53 Minn. 464, 20 L.R.A. 587, 55 N. W. 624, 12 Am. Neg. Cas. 131.

The building and keeping in repair by a railroad company of a bridge over an approach to a private crossing is such an invitation to the public to use the same as renders the company liable for injuries resulting from defects negligently permitted to exist or remain in the structure. *Southern R. Co. v. Hooper*, 110 Ga. 779, 36 S. E. 232, following *Central R. & Bkg. Co. v. Robertson*, 95 Ga. 430, 22 S. E. 551, 11 Am. Neg. Cas. 338.

And a railroad company which permits the public to use a crossing over its track as a part of the public highway which terminates on either side of the right of way, and which maintains the planking of the crossing, and erects a crossing sign, owes the public the same duty as to the operation of trains over the crossing as if the highway had been legally established over its right of way. *Coulter v. Great Northern R. Co.* 5 N. D. 568, 67 N. W. 1046, followed in *Johnson v. Great Northern R. Co.* 7 N. D. 284, 75 N. W. 250, 4 Am. Neg. Rep. 568.

A statute regulating the speed of trains across highways applies to a point at which a railroad crosses a short cut between two highways, which has become a public way, where the railroad company, in acquiring its right of way, agreed to construct and maintain a train crossing at that point. *Moore v. Maine C. R. Co.* 106 Me. 297, 76 Atl. 871.

So, a railroad company which maintains across its track a planked continuation of a public sidewalk, and permits the public to use the same for years, habitually cutting its trains to permit such use, may be found liable for personal injuries resulting from suddenly closing an opening between cars without warning. *Gurley v. Missouri P. R. Co.* 122 Mo. 141, 26 S. W. 953.

A railroad company which planks a private crossing between two streets, stations a flagman there, and permits the public to use the same as a public crossing for years without objection, is liable to one injured by being struck by a train as a result of

67 N. J. L. 270, 51 Atl. 505, 11 Am. Neg. Rep. 479): "Implied invitation, therefore, is part of the law of negligence by which an obligation to use reasonable care arises from the conduct of the parties; its essence is that the defendant knew or ought to have known that some thing that he was doing or permitting to be done might give rise in an ordinarily discerning mind to a natural belief that he intended that to be done which his conduct had led the plaintiff to believe that he intended." Hence, in the present case, if the defendant ought to have known that by giving to its private way the appearance of a public street it might give rise to the natural belief that it intended the way to be so used by the public, the doctrine stated is applicable to such facts and inferences as a jury might have found from the testimony.

This doctrine is aptly illustrated in a Massachusetts case (Holmes v. Drew, 151 Mass. 578, 25 N. E. 22), which was an action for personal injuries sustained by the plaintiff upon land belonging to the defendant not dedicated as a public sidewalk, but made to resemble one. The facts were these: The defendant owned a lot fronting on a public street of Boston. The building on this lot, in common with those on adjoining lots, had been set back from the street line, and a brick sidewalk laid by such owners in the intervening space. In front of the defendant's building this sidewalk was nowhere less than 8 feet wide, of which but 8 inches were included within the limits of the street; the remainder being entirely upon the defendant's land. This entire sidewalk was so constructed by

the defendant as apparently to constitute a public sidewalk, with nothing to indicate any difference or line of separation between what was public and what was private. The plaintiff was injured by loose bricks that had been permitted to remain in a condition dangerous to pedestrians on the part of the walk that was on the defendant's private property.

Dealing with the question of the defendant's liability upon this state of facts, the court said: "The jury might have inferred from the facts stated that the defendant laid out and paved the sidewalk on her own land in order that it should be used by the public as the sidewalk of the street, and allowed it to remain apparently the part of the street that was intended to be used by foot passengers. This would amount to an invitation to the public to enter upon and use as a public sidewalk the land so prepared."

Referring to this case, Judge Knowlton (afterwards chief justice) said, in *Plummer v. Dill*, 156 Mass. 426, 32 Am. St. Rep. 463, 31 N. E. 128: "There is a class of cases to which *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644, and *Holmes v. Drew*, 151 Mass. 578, 25 N. E. 22, belong, which stand on a ground peculiar to themselves. They are where the defendant by his conduct has induced the public to use a way in the belief that it is a street or public way which all have a right to use, and where they suppose they will be safe. . . . The liability in such a case should be coextensive with the inducement or implied invitation."

This rule of the Massachusetts courts

the flagman's negligence. *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644.

All the rights of a person on a public crossing with respect to protection against injuries from negligently operated trains inure to one upon the continuation of a public street across a railroad, which has long been used as a public thoroughfare, such use having begun before trains were operated across it, and having continued without objection by the railroad company, which has stationed a flagman there; and the establishment of the flag station is to be regarded as a consent to public passage, and not as the assertion of a paramount right. *Webb v. Portland & K. R. Co.* 57 Me. 117.

A landowner who has maintained for over twenty years a connecting link in a roadway between two towns, and has laid railroad switches across the same, planking the crossing and permitting the public to use it, is estopped to deny that the crossing bears the same relation with respect to the duty due to travelers in the operations of trains as if it were in fact a public highway. 51 L.R.A. (N.S.)

way. *Adams v. Iron Cliffs Co.* 78 Mich. 271, 18 Am. St. Rep. 441, 44 N. W. 270.

Where a public street runs up to a railroad right of way over which there is a planked crossing apparently a part of the street, and the crossing is treated as a public one by the railroad company, the public using it continually, it may be found a public crossing, and the railroad's liability for injuries to a user thereof by a train exceeding the speed limit is not affected by the fact that the railroad company kept a signboard at the crossing, declaring that the company would not be liable for injuries. *Chicago, B. & Q. R. Co. v. Reith*, 65 Ill. App. 461.

Where a railroad company, after unsuccessfully attempting to prevent or limit traffic on a traveled roadway over which it constructed its line, has thrown the crossing open to the public and erected a railroad crossing sign, it owes the duty of due care to one attempting to use the same. *Boothby v. Boston & M. R. Co.* 90 Me. 313, 38 Atl. 155 (escaping steam frightening horse). L. A. W.

which accords with the general doctrine laid down by this court, is illustrated by cases in other jurisdictions. 37 Am. Dig. col. 392; Decen. Dig. & Supp. "Negligence," Key-Number 37.

The distinction between this doctrine and dedication is both clear and fundamental; dedication being the permanent devotion of private property to a use that concerns the public in its municipal character, whereas, the doctrine *sub judice* is a rule of negligence applicable to the owner of property only as long as he holds it out as intended for use by the public in their capacity as individuals.

Upon the question whether the acts of the defendant in the present case were evidence of dedication, we express no opinion; but, upon the question whether the defendant by its conduct invited the plaintiff as one of the general public, and within the meaning of the doctrine we are discussing, to use the way in the belief that it was a street, the evidence presented a question for the jury under proper instructions, and it was error, therefore, to direct a verdict.

To the case thus presented the rule of *Dodd v. Central R. Co.* 80 N. J. L. 56, 76 Atl. 544, has no application. Under the doctrine of implied invitation, the negligence of the defendant, as also that of the plaintiff, was clearly for the jury.

The judgment, therefore, is reversed, and a venire de novo awarded.

Gummere, Ch. J., and Swayze and Voorhees, JJ., dissent.

NEW YORK COURT OF APPEALS.

ARTHUR G. MARCEAU, Respt.,
v.

RUTLAND RAILROAD COMPANY, Appt.

(211 N. Y. 203, 105 N. E. 206.)

Master and servant — applicability of *res ipsa loquitur* doctrine.

1. The relation of employer and employee is not *per se* inimical to the application of the maxim *res ipsa loquitur* in case of

injuries received by the employee in the course of his employment.

Same — sufficiency of facts.

2. The applicability of the maxim *res ipsa loquitur* is shown in an action by a locomotive fireman suing under the employers' liability act, by evidence that he was injured by an explosion in the fire box of the engine, that only partly successful attempts had been made to repair leaky valves which had been found to be loose, and could be inspected only by taking out the brick arch when the engine was not in steam, and that after the injury a flue was found to have been blown out of its place, and is not defeated by the facts that the engine was of modern type and a year before the accident had been put in perfect repair.

(April 28, 1914.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of a Trial Term for Franklin County in favor of plaintiff, and from an order denying a motion for new trial, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. E. W. Lawrence, with Messrs. Cantwell & Cantwell, for appellant:

The rule of *res ipsa loquitur* was not applicable, and the motion for nonsuit should have been granted.

Welch v. Cornell, 168 N. Y. 508, 61 N. E. 891; Henson v. Lehigh Valley R. Co. 194 N. Y. 205, 19 L.R.A.(N.S.) 790, 87 N. E. 85; Ferrick v. Eidlitz, 195 N. Y. 248, 24 L.R.A.(N.S.) 837, 88 N. E. 33; Lucid v. E. I. DuPont De Nemours Powder Co. — L.R.A.(N.S.) —, 118 C. C. A. 61, 199 Fed. 377; Shandrew v. Chicago, St. P. M. & O. R. Co. 73 C. C. A. 430, 142 Fed. 320; Omaha Packing Co. v. Sanduski, 19 L.R.A.(N.S.) 355, 84 C. C. A. 89, 155 Fed. 897; Patton v. Illinois C. R. Co. 179 Fed. 530; Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707, 1 Am. Neg. Rep. 745; Midland Valley R. Co. v.

Note. — The general question discussed in the foregoing opinion as to whether the maxim *res ipsa loquitur* ever applies as between master and servant is also treated in notes to *Fitzgerald v. Southern R. Co.* 6 L.R.A.(N.S.) 337, and *Byers v. Carnegie Steel Co.* 16 L.R.A.(N.S.) 214. As the discussion in those notes was confined to the general question whether the maxim ever applies as between master and servant, no attempt was there made to gather the cases that turn merely on the particular circumstances. The application of the maxim to

particular circumstances will form the subject of subsequent notes in this series. Some further light is thrown on the general question whether the maxim ever applies as between master and servant by the following cases in this series: *Jenkins v. St. Paul City R. Co.* 20 L.R.A.(N.S.) 401; *La Bee v. Sultan Logging Co.* 20 L.R.A.(N.S.) 405; *Stewart & Co. v. Harman*, 20 L.R.A.(N.S.) 228; *Ferrick v. Eidlitz*, 24 L.R.A.(N.S.) 837; and *Chiuccariello v. Campbell*, 44 L.R.A.(N.S.) 1050.

G. H. P.

Francey, who was on engine 2055 at the time of the accident, testified that he had used it on various specified dates during the month preceding the day of the accident, and that he had orally reported it as leaking, although he had been turning in written reports which made no mention of the fact. While such a circumstance might ordinarily affect the credibility of a witness, all doubt upon this subject is dissipated by the testimony of the defendant's witnesses, showing that the engine was inspected by the foreman of boiler makers on or about March 21, 1911, and found to be in a leaky condition. Several of defendant's witnesses testified that the engine had been in the shop at various times during the month on account of leaking flues, and that the last repairs in this regard were made two or three days before the accident.

After the accident an examination of the engine was made which revealed the probable cause of the trouble. One of the flues, which extend longitudinally through the boiler from the rear flue sheet to another flue sheet next the smoke stack, had been pushed or blown out of its socket in the rear flue sheet so that the forward end of the flue projected several feet beyond the forward flue sheet, thus leaving an opening in the rear flue sheet through which the boiling water and steam were admitted into the fire pot, where the explosion was generated. There were 342 of these flues, which were each $1\frac{1}{2}$ inches in diameter and about 16 feet in length. These flues are "safe ended" into the flue sheets, so that when they are in perfect condition there can be no leakage through them from the boiler. The particular flue that was blown or driven out of its place was in the bottom row of flues, where there could be no inspection without taking out the "brick arch," and that could be done only when the boiler was not in steam. There can be no doubt that the explosion by which the plaintiff was injured was due immediately to the displacement of the flue; but the cause of the dislodgment of the flue is not so clear. It is a matter of common knowledge that steam, like electricity, is a capricious and fickle agency which sometimes causes unexpected and unexplainable accidents. If the plaintiff's case were wholly dependent upon evidence merely showing the happening of this explosion, it might be necessary to hold that he had not proved enough to give him the benefit of the maxim which he invokes. The ultimate question, therefore, is whether he has the support of surrounding circumstances which show that the accident was of "such a character as does not ordinarily occur where the party charged with

responsibility has exercised the degree of care and caution required by law to avoid such a mishap." *Henson v. Lehigh Valley R. Co.* 194 N. Y. 205, 211, 19 L.R.A.(N.S.) 790, 87 N. E. 85. We think he has. The defendant's foreman testified that if a flue is loose at both ends it would be liable to move from the pressure, and that if a flue is loose at one end it is more liable to move than one that is not loose. It is undisputed that defendant's chief boiler man inspected this engine on the 21st or 22d of March and found that a number of flues, about twenty-five, were leaking. These were repaired, but the boiler still leaked on the 24th, and the explosion occurred on the 25th. Since the defendant's experts had found loose and leaking flues which they repaired, it is reasonable to infer that the displacement of another flue within two or three days was attributable to the same cause. This was not a part of the locomotive over which the plaintiff had any control, or in respect of which he had, so far as the record discloses, any duty or knowledge. The work of inspection and repair was the work of the defendant, and any failure in this regard was its failure. The almost immediate recurrence of a condition that had led to inspection and repair was circumstantial evidence which tended to show that the work had not been thoroughly done. We think, therefore, that the plaintiff was entitled to rest upon the rule of *res ipsa loquitur*, and that, in the absence of a satisfactory and convincing explanation by the defendant, the plaintiff was entitled to recover.

Counsel for the defendant contends that such an explanation has been made. In that regard it appears that the locomotive was of a modern and standard type; that for several months from January, 1910, it was in the main shops of the defendant at Rutland, where it was given a thorough overhauling and sent out in perfect condition; that the complaints of leakage made in the early part of 1911 were followed by prompt inspection and complete repair. This was an explanation well calculated indeed to create a serious issue of fact, but we think it would be going too far to hold that it was conclusive as matter of law. The limitations of the rule of *res ipsa loquitur*, and the legal effect of defendant's explanation, were well stated in the charge to the jury, and we think the judgment entered on the verdict must stand.

The judgment should be affirmed, with costs.

Willard Bartlett, Ch. J., and Collin, Cuddeback, Hogan, and Cardozo, JJ., concur. Hornblower, J., not sitting.

GENERAL INDEX

NOTES ARE INDEXED BY THE WORD "ANNOTATED" AFTER THE PARAGRAPHS TO WHICH THEY APPLY.

(Separate Index to Notes Precedes this.)

ABATEMENT.

Of nuisance, see Nuisances.

A cause of action arising under § 4313, Stat. 1893 (§ 5281, Rev. Laws 1910), has the quality of survivability, is not extinguished by the death of the beneficiary therein, may be revived and prosecuted in the name of his administratrix. *Shawnee v. Cheek*, 51: 672, 137 Pac. 724, — Okla.

ABORTION.

Forbidding mailing of letter containing information as to where abortion will be performed, see Post-office.

ABSENCE.

From state, effect of, on running of limitations, see Limitation of Actions, 4.

ABUTTING OWNERS.

Rights of, as to trees in highway, see Highways, 3-6.

Liability of, for injury by defect in street or sidewalk, see Highways, 17.

ACCEPTANCE.

Of insurance risks, see Insurance, 3, 4.

Of insurance policy, see Insurance, 5-7.

ACCIDENT INSURANCE.

See Insurance.

ACCORD AND SATISFACTION.

Cashing a check sent in payment of the portion of an account which is admitted to be due does not prevent enforcement of the balance, although the tender is on condition that it shall be received in full payment. *Whittaker Chain Tread Co. v. Standard Auto Supply Co.* 51: 315, 103 N. E. 695, 216 Mass. 204.
51 L.R.A. (N.S.)

ACCOUNT BOOKS.

Condition in insurance policy as to place of keeping, see Insurance, 11.

ACCOUNTING.

Conditions precedent to actions for accounting, see Action or Suit, 1.

Pleading in action by stockholders for, see Pleading, 4.

ACTION OR SUIT.

Abatement of action, see Abatement and Revival.

Raising objection of prematurity of action for first time on appeal, see Appeal and Error, 17.

Nature of contempt proceedings, see Contempt, 1.

By stockholders of corporation, see Corporations, 3-6.

Dismissal or discontinuance, see Dismissal or Discontinuance.

Parties to action, see Parties.

Conditions precedent to action for replevin, see Replevin, 1, 2.

1. Stockholders of a corporation are not, in order to maintain an action for an accounting against the corporation and strangers to whom corporate stock is alleged to have been fraudulently issued in exchange for securities belonging to such persons, bound to offer to return the securities so received. *Continental Securities Co. v. Belmont*, 51: 112, 99 N. E. 138, 206 N. Y. 7.

2. An insurer of an automobile who had, in accordance with a provision of the policy, become subrogated to the claim of the owner for damages thereto against a street railway company before the institution by such owner of a suit for personal injuries growing out of the same accident, in which a judgment has been recovered, is not precluded thereby from maintaining an action. *Underwriters at Lloyd's Ins. Co. v. Vicksburg Traction Co.* 51: 319, 63 So. 455, — Miss. — (Annotated)

ADMINISTRATION.

Of decedents' estates, see Executors and Administrators.

which authorizes such amendment in furtherance of justice, especially where a section of the act to comply with which the amendment is sought provides for the amendment. *Wilson v. Kryger*, 51: 760, 143 N. W. 764, 26 N. D. 77.

3. Under a statute making it a sufficient pleading of the ordinances of a village to refer to the section and number or chapter thereof, giving them the effect of general laws, and providing that they need not be given in evidence upon the trial of a civil or criminal action, the supreme court may consider an appeal from a conviction of violation of a village ordinance where the only record before it is the complaint, finding, and judgment, there being no settled case and no evidence in that court. *Minnesota v. Martin*, 51: 40, 145 N. W. 383, 124 Minn. 498.

4. The supreme court will not pass upon assignments of error based upon the action of the court below in sustaining a demurrer to a pleading, where the party complaining fails to comply with that part of court rule No. 25 which requires him to set forth the material parts of the pleading upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court. *Eberle v. Drennan*, 51: 68, 136 Pac. 162, — Okla. —.

5. The granting of a motion for new trial will not be upheld upon a ground other than that specified by the court, if counsel points out no other prejudicial error in the record but leaves the court to find one if it exists. *Harrington v. Butte Miner Co.* 51: 369, 139 Pac. 461, 48 Mont. 550.

Objections and exceptions; raising questions in lower court.

6. That no objection was made to the admission of evidence tending to establish a cause of action by a subagent employed by a broker to assist in securing a purchaser of real estate, against the property owner for compensation for his services, does not prevent the court from determining that the contract sued on was within the statute of frauds, and incapable of ratification except by writing executed for that purpose, and that there could be no recovery because of absence of ratification. *Sorenson v. Smith*, 51: 612, 129 Pac. 757, 65 Or. 78.

7. Rulings of a master admitting evidence alleged to be incompetent cannot be reviewed if no exception was taken to them. *Burnham v. Dowd*, 51: 778, 104 N. E. 841, — Mass. —.

8. Ruling out a question after the witness has answered it does not, without more, eliminate the answer from evidence, the proper practice being to move to strike out the answer, unless the court, in sustaining the objection, also directs the jury not to consider the reply given. *Sorenson v. Smith*, 51: 612, 129 Pac. 757, 65 Or. 78. 51 L.R.A.(N.S.)

Dismissal of appeal as punishment for contempt, see Contempt, 4.

9. Mere delay in settling a statement of the case or in taking an appeal, where such appeal was taken within the statutory period allowed therefor, constitutes no ground for a dismissal of the appeal. *Wilson v. Kryger*, 51: 760, 143 N. W. 764, 26 N. D. 77.

Hearing and determination generally.

Questions open to review on certiorari, see Certiorari.

10. Upon an appeal to the district court from a judgment of a justice court rendered upon the refusal of the defendant to plead further after his plea to the jurisdiction of the justice was overruled, appellee is not entitled to the judgment of the district court affirming the judgment of the justice, upon appellant conceding the jurisdiction of the justice, where under the statute the case is triable in the district court *de novo* upon the merits. *Rogers v. Kemp Lumber Co.* 51: 594, 137 Pac. 586, — N. M. —.

Discretionary matters.

11. The question of recommitting a master's report to have rulings by which evidence is alleged to have been erroneously admitted inserted for review is within the discretion of the trial judge, where there was no objection to the admission of such evidence when it was offered, although objection to the report was made upon that ground and exceptions filed in pursuance thereof. *Burnham v. Dowd*, 51: 778, 104 N. E. 841, — Mass. —.

12. Before reversing a judgment for error in overruling a motion to continue, it should appear that the trial court abused its discretion, and that the mover of the motion has been prejudiced thereby. *State v. Angelina*, 51: 877, 80 S. E. 141, — W. Va. —.

13. The question whether sufficient foundation has been laid to enable a witness to testify as to a custom is a matter which the trial judge must, in the exercise of a sound discretion, pass upon as a question of fact, and his decision will not be reversed except in a very clear and strong case. *Krahn v. J. L. Owens Co.* 51: 650, 145 N. W. 626, 125 Minn. 33.

14. The credibility of an expert witness is ordinarily to be tested by his cross-examination, and, though it may be proper to do so by the testimony of another expert specially qualified in respect to the subject-matter, the extent to which the examination of such other expert may be carried rests, as in the case of cross-examination, in the sound discretion of the court. *State v. Minneapolis Milk Co.* 51: 244, 144 N. W. 417, 124 Minn. 34.

15. The discretion of the trial court in granting a new trial for excess of damages for a sprained ankle, the effect of which has extended over a period of two years, will not be interfered with on appeal, where the evidence is conflicting as to the painful and disabling quality of the injury. *De-*

4. No recovery can be had for time lost and expenses incurred in an attempt to take possession of a leasehold under a contract void under the statute of frauds, which the property owner refused to carry out. *Boone v. Coe*, 51: 907, 154 S. W. 900, 153 Ky. 233.

5. The resignation of his former position by one who had entered into an oral contract with a corporation whereby it was to sell him some of its stock, and to employ him as its bookkeeper, does not constitute giving "something in earnest to bind the bargain, or in part payment," so as to take the contract out of the statute of frauds. *Hewson v. Peterman Mfg. Co.* 51: 398, 136 Pac. 1158, — Wash. —.

6. The fact that, by direction of the purchaser, the deed was made to a stranger, does not change the rule that a parol contract to purchase real estate may be enforced if the deed has been executed and delivered. *Malzer v. Schisler*, 51: 77, 136 Pac. 14, — Or. —. (Annotated) Entirety.

Of insurance contract, see Insurance, 12.

Sufficiency of plea of issue of entirety, see Pleading, 9.

7. A proposition to real estate brokers for the sale of land, contained in a letter stating that the writer has large tracts of land for sale, and that if they have any clients looking for tracts of land of the size of these, either one will surely suit them, and fixing the price at so much net per acre to the writer, together with another letter referring to "putting the 6,000-acre tract . . . up" for sale, which has been accepted by the real estate brokers, constitutes an entire contract, and does not authorize the brokers to sell or find a purchaser for any part of the tract less than the whole. *Bentley v. Edwards*, 51: 254, 146 N. W. 347, 125 Minn. 179.

Validity; public policy.

Illegal consideration as defense in action on note, see Bills and Notes, 1, 2.

Contracts of unauthorized foreign corporation, see Corporations, 9.

Contracts by infants, see Infants.

Combinations between several persons or corporations in restraint of trade or commerce, see Monopoly and Combinations, 2.

8. A contract employing an agent to institute and carry out a movement for a recall election against certain officers, without disclosing the true motives and real parties behind the movement, and undertaking to pay necessary expenses therefor, is contrary to public policy and void. *Stirtan v. Blethen*, 51: 623, 139 Pac. 618, — Wash. —.

9. An agent who expends money to institute and carry out a recall election, under promise of his principal to defray the 51 L.R.A.(N.S.)

reimburse him for his outlay on the theory that when an agreement has been fully executed, the one profiting by it will not be permitted to defeat an action by the other party for money had and received upon the ground of illegality. *Stirtan v. Blethen*, 51: 623, 139 Pac. 618, — Wash. —.

10. Requiring the establishment of the accidental nature of an injury by a gunshot wound before liability attaches therefor under an accident policy is not against public policy as an attempt to modify or control the procedure of courts of justice. *Roeh v. Business Men's Protective Asso.* 51: 221, 145 N. W. 479, — Iowa, —.

(Annotated)
11. An agreement of a retailer to buy a particular line of goods exclusively from a certain manufacturer thereof, for a limited period of time, and confined to a particular locality, in consideration of other covenants therein of mutual advantage to the parties, when otherwise unobjectionable under the law, is not invalid as a restraint of trade. *J. W. Rippy & Son v. Art Wall Paper Mills*, 51: 33, 136 Pac. 1080, — Okla. —.

12. A plaintiff who, to make out a case, must rely on an illegal contract, cannot recover, although the other party has received a benefit from his act. *Stirtan v. Blethen*, 51: 623, 139 Pac. 618, — Wash. —. Breach and its effects.

Measure of compensation for breach, see Damages, 1, 7.

Interest on damages for breach of, see Interest.

13. No recovery can be had for breach of contract to employ one as secretary and treasurer of a corporation, since, being a position of responsibility and trust, the incumbent was removable at will. *Hewson v. Peterman Mfg. Co.* 51: 398, 136 Pac. 1158, — Wash. —.

Public contract.

Review by courts of ordinance fixing minimum wage in public contracts, see Courts, 6.

Who may maintain action on, see Parties, 4.

As to municipal contracts generally, see Municipal Corporations, 6.

14. A city is not, in contracting for the construction of a sewer to be paid for by special assessment upon property benefited, thereby the agent of the property owner within the rule that it must do the work for the lowest price possible, and cannot stipulate for a minimum wage for common labor in excess of the prevailing wage for similar labor on private contracts, at least, where it is not required to let the contract to the lowest bidder. *Malette v. Spokane*, 51: 686, 137 Pac. 496, 77 Wash. 205.

(Annotated)

CONTRIBUTION AND INDEMNITY.

Between sureties, see Principal and Surety, 3.

CONTRIBUTORY NEGLIGENCE.

In general, see Negligence, 5-7.

CONVERSION.

Action for, see Trover.

CORPORATIONS.

Contract for sale of stock as within statute of frauds, see Contracts, 2, 5.

Specific performance of contract of sale of stock, see Specific Performance, 2.

Breach of contract to employ one as secretary and treasurer of corporation, see Contracts, 13.

Extent of punishment of corporation for violation of statute as to monopoly, see Criminal Law.

Who bound by act of stockholders attempting to ratify fraud of directors, see Estoppel, 7.

Quo warranto to test claim to office of officer in private corporation, see Quo Warranto, 1.

Exemption from service of process of officer who attends argument of proceeding against corporation to render assistance to its solicitor, see Writ and Process, 4.

Contracts; ultra vires.

Right to exercise power of eminent domain, see Eminent Domain, 1.

1. The trustees elected to manage the affairs of a corporation organized for charitable and religious purposes, to furnish a home for the aged and infirm, and also for indigent orphans, cannot enter into a valid contract by which its property may become subject to mechanics' liens, without first having obtained an order of the district court for that purpose. *Horton v. Tabitha Home*, 51: 161, 145 N. W. 1023, — Neb. —

2. All persons dealing with the trustees of a corporation organized for charitable and religious purposes, to furnish a home for the aged and infirm, and also for indigent orphans, must at their peril take notice of the powers granted by its articles of incorporation. *Horton v. Tabitha Home*, 51: 161, 145 N. W. 1023, — Neb. —

Action by stockholders.

Restoration of benefits received as condition precedent to action by stockholders, see Action or Suit, 1.

Jurisdiction of action, see Courts, 3.

Estoppel to bring action, see Estoppel, 7.

Effect of insanity to suspend running of limitations against stockholder's right of action, see Limitation of Actions, 5.

Corporation as necessary party to suit by stockholder, see Parties, 6.

Pleading in action by stockholder, see Pleading, 2, 4, 8.

3. It is fraudulent for the management of a corporation to permit its real estate of great value to be sold under execution for a nominal sum, when there are funds in their possession sufficient to pay the judgment, and the corporation dissolved for 51 L.R.A. (N.S.)

the purpose of destroying the value of the stock of a minority stockholder, which will give him a right of action therefor. *Fleming v. Warrior Copper Co.* 51: 99, 136 Pac. 273, — Ariz. —

4. A stockholder of a corporation cannot, without demand on the corporation and its directors, maintain an action against directors who are alleged to have fraudulently failed to enforce contracts in favor of the corporation and to protect its property, if defendants are minority directors, and no collusion with the majority is shown. *Kelly v. Thomas*, 51: 122, 83 Atl. 307, 234 Pa. 419.

5. Absence of response within the time specified by the directors of a corporation to a notification by stockholders that, if they do not institute a proceeding to recover stock alleged to have been fraudulently issued by the corporation, the stockholders will do so, is sufficient to justify the stockholders' suit, and it is not necessary to show notice to the body of stockholders collectively, and refusal by them to act. *Continental Securities Co. v. Belmont*, 51: 112, 99 N. E. 138, 206 N. Y. 7. (Annotated)

6. Demand on a corporation and its management to bring suit to recover corporation property, which had been transferred to another corporation is not necessary to sustain a suit by minority stockholders, where the managers, who had complete control of the affairs of the corporation, are shown to have been hostile to plaintiffs, and to have acted upon a preconcerted plan to accomplish the result complained of. *Fleming v. Warrior Copper Co.* 51: 99, 136 Pac. 273, — Ariz. —

(Annotated)

Liability of stockholders.

Conflict of laws as to, see Conflict of Laws, 1.

State court following decision of Federal court as to, see Courts, 12.

7. A subscriber to stock of a corporation whose contract provides that, upon payment of a portion of the par value of the stock, it shall be issued as fully paid and nonassessable, cannot, under the trust fund theory, be compelled to pay in for the benefit of creditors the difference between the contract price and the par value. *Southworth v. Morgan*, 51: 56, 98 N. E. 490, 205 N. Y. 293.

(Annotated)

Stockholders' meetings; voting.

Specific performance of pooling agreement, see Specific Performance, 1.

8. Statutory and charter authority to deprive holders of preferred stock of the right to vote in the election of officers and directors of a corporation is invalid where the state Constitution provides that "each shareholder shall be entitled to one vote for each share of stock he may hold." *Brooks v. State ex rel. Richards*, 51: 1126, 79 Atl. 790, — Del. —

Foreign corporations.

Impairment of obligations by change of decision as to validity of contracts of unauthorized company, see Constitutional Law, 14.

contracts of unauthorized company, see Courts, 9, 11.

Jurisdiction of action by, or against, see Courts, 1-3.

9. It is a good defense to an action brought by a foreign corporation upon a contract made in the prosecution of its business within the state, that it has not complied with a statute which expressly provides that it shall not be lawful for any corporation to carry on any business in the state until it shall have filed a statement giving the location of its place of business within the state, and the name of an agent thereat upon whom process may be served, and which further subjects to a penalty any corporation undertaking to transact any business in the state without complying with such requirements, although such statute does not in terms declare that any contract made by a corporation before complying with the statute shall be void or not enforceable. *Oliver Co. v. Louisville Realty Asso.* 51: 293, 161 S. W. 570, 156 Ky. 628.

COTENANCY.

Extent of recovery in ejectment by tenant in common against stranger, see Ejectment.

Necessity that tenants in common join in suit in ejectment, see Parties, 5.

Tenancy by entireties, see Husband and Wife, 1.

COTTON.

Constitutionality of statute making weight determined by public warehouse conclusive between buyer and seller of cotton, see Constitutional Law, 13.

COUNTIES.

Liability of county auditor for negligence in failing to give notice of tax sale, see Taxes, 2.

COURTS.

Of admiralty, see Admiralty.

Contempt of, see Contempt.

Prohibition to restrain, see Prohibition.

Power in quo warranto, see Quo Warranto.

Process of, see Writ and Process.

Jurisdiction; territorial limitations.

1. A foreign corporation cannot complain if the court exercises a jurisdiction to which it has submitted itself. *Fleming v. Warrior Copper Co.* 51: 99, 136 Pac. 273, — Ariz. —.

2. The courts of the state within which is situated property alleged to have been fraudulently transferred by a domestic to a foreign corporation have jurisdiction of a suit to set aside the transfer. *Fleming v. Warrior Copper Co.* 51: 99, 136 Pac. 273, — Ariz. —.

3. Courts of one state have no jurisdiction of a suit by a stockholder of a foreign corporation which does not transact 51 L.R.A.(N.S.)

force contracts in its favor and to protect its property since those are matters of internal management. *Kelly v. Thomas*, 51: 122, 83 Atl. 307, 234 Pa. 419.

Relation to other departments of government.

4. Whenever the action of the governor of a state in any matter is authorized by law, and comes before the court for review, it is its duty to sustain the governor. *Ex parte Williams*, 51: 668, 136 Pac. 597, — Okla. Crim. Rep. —.

5. In the absence of a statutory right of supervision or control, a court cannot, at the instance of citizens and taxpayers, in any manner restrain or control the governing body of a municipal corporation, in the exercise of powers and functions vested in it by law, whether the discretion and power so vested is legislative, executive, or administrative. *Charleston v. Littlepage*, 51: 353, 80 S. E. 131, — W. Va. —.

6. The court will not pronounce an ordinance fixing a minimum wage of \$2.75 per day for common labor on public contracts unreasonable in the absence of evidence showing it to be so, although such wage is 25 per cent higher than the prevailing price for such labor. *Malette v. Spokane*, 51: 686, 137 Pac. 496, 77 Wash. 205.

7. The court will not ordinarily supervise the action of municipal authorities in establishing fire limits. *State v. Lawing*, 51: 62, 80 S. E. 69, 164 N. C. 492.

Rules of decision.

Change of decision as affecting contract, see Constitutional Law, 14.

8. The rule of *stare decisis*, stated in simple form and considered in relation to its effect upon private affairs, is really nothing more than the application of the doctrine of estoppel to court decisions. It finds its support in the sound principle that when courts have announced, for the guidance and government of individuals and the public, certain controlling principles of law, or have given a construction to statutes upon which individuals and the public have relied in making contracts, they ought not, after these principles have been promulgated and after these constructions have been published, to withdraw or overrule them, thereby disturbing contract rights that had been entered into, and property rights that had been acquired, upon the faith and credit that the principle announced or the construction adopted in the opinion was the law of the land. *Oliver Co. v. Louisville Realty Asso.* 51: 293, 161 S. W. 570, 156 Ky. 628.

9. A court of last resort will not feel bound to adhere to an earlier decision that a party entering into a contract with a corporation is estopped, in an action thereon, from setting up as a defense the failure of the corporation to comply with a statute, enacted pursuant to the Constitution, for the purpose of carrying out a wise public policy, which provides that it shall not be

Personal injuries; death.

2. A verdict for \$15,000 in favor of a farmer forty-eight years of age, against the manufacturer of a threshing machine which suffered through a defective condition of the machine, is excessive above \$12,000. *Krahn v. J. L. Owens Co.* 51: 650, 145 N. W. 626, 125 Minn. 33.

Injury to real property; nuisance.

3. The owner of the fee from which mineral oil is taken by the owner of a right of way across property may recover what the latter receives from a sale of the oil, in the absence of any evidence showing the cost of bringing it to the surface. *Right of Way Oil Co. v. Gladys City Oil, Gas, & Mfg. Co.* 51: 268, 157 S. W. 737, — Tex. —.

Eminent domain cases.

4. The damages to be awarded for the appropriation of a right of way for a logging railroad through a canyon cannot include the value of the property for the purpose of such road, based upon the assumption that all the timber from the watershed of the stream which flows through it will eventually pass down the canyon, if the timber belongs to strangers to the proceeding, so that the route to be taken by it depends upon their will alone. *Meskill & C. R. Co. v. Luedinghaus*, 51: 1090, 139 Pac. 52, 78 Wash. 366.

Mental anguish.

5. Mental suffering by a man because a physician whom he has employed to attend his sick wife delays upon the way, and thereby fails to minister to her suffering, is not an element of damages to be recovered for breach of the contract. *Adams v. Brosius*, 51: 36, 139 Pac. 729, — Or. —.

(Annotated)

6. A telegraph company which causes a delay of a couple of days in the starting of a sick child for another climate through loss of a message is not answerable in damages for the mental anguish suffered by the father pending the delay, because of the child's condition; at least, if there was nothing to prevent the starting of the child without fixing definitely its accommodations at destination, which the message was intended to effect. *Mackay Telegraph-Cable Co. v. Vaughan*, 51: 404, 163 S. W. 158, — Ark. —.

Loss of profits.

7. Loss of profits is not a proper element of damages for breach of contract to establish a business in a distant and sparsely settled country. *Webster v. Beau*, 51: 81, 137 Pac. 1013, — Wash. —.

Mitigation; reduction.

8. Intoxication of the defendant at the time of his use of slanderous words is a mitigating circumstance, proper for the consideration of the jury in estimating the damages. *Alderson v. Kahle*, 51: 1198, 80 S. E. 1109, — W. Va. —.

(Annotated)

9. Provocation by the plaintiff, inducing

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DANCE HALLS.

Requiring license to conduct, see License, 3-5.

Validity of ordinance for regulation of, see Municipal Corporations, 5.

DATE.

Alteration of date in note, see Alteration of Instruments; Evidence 12.

DEATH.

Abatement of action for death, see Abatement and Revival.

Liability on sheriff's bond for shooting misdemeanor to prevent his escaping arrest, see Bonds.

Conflict of laws as to action for, see Conflict of Laws, 2.

Conflict of laws as to time for action for, see Conflict of Laws, 5.

Presumption of due care on part of person drowned, see Evidence, 10.

Bar of statute of limitations, see Limitation of Actions, 7.

Effect of death of candidate for election before election day but too late to substitute other candidate, see Officers.

Effect on competency of witness, see Witnesses, 2.

1. Section 4313, Stat. 1893 (§ 5281, Rev. Laws 1910), does not operate as a continuance of any right of action which the injured person would have had but for his death, but confers upon the beneficiary thereof a property right in the pecuniary value to him of the life of his decedent, and gives him a new or independent cause of action for the pecuniary loss he has sustained by reason of such death. *Shawnee v. Cheek*, 51: 672, 137 Pac. 724, — Okla. —.

2. A child begotten after the divorce of its parents is not kin to children of its father and his second wife within the meaning of the Federal employers' liability act, and therefore such children cannot recover under that statute for the wrongful death of such child, although he contributed toward their support. *Cincinnati, N. O. & T. P. R. Co. v. Stephens*, 51: 308, 163 S. W. 493, 157 Ky. 460.

(Annotated)

3. An action for the benefit of a parent for the instantaneous death of his minor son through another's negligence is not precluded under a statute providing that if the negligence is such as would, if death had not ensued, have entitled the person injured to maintain an action to recover damages in respect thereof, an action may be maintained for the benefit of his next of kin, by the fact that recovery is limited to the loss of the child's earnings during minority and that the child could not have recovered for loss of such earnings. *Lincoln v. Detroit & M. R. Co.* 51: 710, 146 N. W. 405, — Mich. —.

(Annotated)

DISOBEDIENCE.

As a contempt, see Contempt, 1, 3, 4.

DIVORCE AND SEPARATION.

Provision in decree that application for appeal should render provision for alimony ineffectual, see Appeal and Error, 32.

Contempt in violating injunction issued in divorce proceeding, see Contempt, 1.

Including in decree injunction against remarriage within specified time, see Injunction, 4.

Status of child begotten after the divorce of its parents, see Death, 2.

Sufficiency of circumstantial evidence to prove adultery, see Evidence, 34.

Relief from decree secured by collusion, see Judgment, 5, 8.

1. A divorce will not be granted for nonsupport or extreme cruelty, because an out-door laborer earning \$35 a month consumes a portion of it for liquor and cigars, paying only the grocery, meat, and coal bills, and when he reaches home after his work prefers to read or go to bed rather than to talk to his wife, or take her out to entertainments or to visit friends. *Bowen v. Bowen*, 51: 460, 146 N. W. 271, — Mich. — (Annotated)

2. Actual violence, to constitute ground for divorce, must be attended with danger to life, limb, or health, or be such as to cause reasonable apprehension of such danger. *Huff v. Huff*, 51: 282, 80 S. E. 846, — W. Va. —

3. Vulgar, indecent, and unnatural conduct on the part of a wife, and her solicitation of the husband to engage in such conduct with her, showing viciousness and degeneracy on her part, are not sufficient grounds for divorce, nor do they justify the husband in breaking off cohabitation with her and treating her as having abandoned or deserted him. *Huff v. Huff*, 51: 282, 80 S. E. 846, — W. Va. — (Annotated)

4. A wife who has been abandoned and denied support by her husband may have a decree for alimony without a divorce, and such relief may be granted her in a suit for divorce brought by a husband, on a prayer in her answer therefor as affirmative relief. *Huff v. Huff*, 51: 282, 80 S. E. 846, — W. Va. —

DOCUMENTARY EVIDENCE.

See Evidence, 16.

DOGS.

See Animals.

DRAINS AND SEWERS.

Stipulation for minimum wage in contract for construction of sewer, see Contracts, 14.

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covenant against encumbrances in deed of property, see Covenants and Conditions.

DRIVER.

Imputing negligence of, to passenger, see Negligence, 6.

DROWNING.

Municipal liability for, see Municipal Corporations, 8.

DRUNKENNESS.

Of person provoking assault, see Assault and Battery, 2.

As mitigating damages for slander, see Damages, 8.

DUE PROCESS OF LAW.

See Constitutional Law, 3-13.

DUPPLICITY.

In indictment, see Indictment, etc., 1.

DURESS.

As ground for relief from judgment, see Judgment, 5.

EJECTION.

Of passenger or trespasser, see Carriers, 5, 6.

EJECTMENT.

Joinder of parties plaintiff, see Parties, 5.

A tenant in common suing separately in ejectment may, if the defendant shows no title, recover possession of the entire estate, in subordination, however, to the right of his cotenents. *De Bergere v. Chaves*, 51: 50, 93 Pac. 762, 14 N. M. 352. (Annotated)

ELECTIONS.

Sale of vote as consideration for note, see Bills and Notes, 2.

At stockholders' meeting, see Corporations, 8.

Recall election, see Initiative, Referendum and Recall.

ELECTRICITY.

Injury to trees in highway by stringing of electric wires, see Highways, 5, 6.

ELECTRIC LIGHTS.

Of public service corporations; injury by, to trees in highway, see Highways, 4-6.

ELEVATED RAILWAYS.

See Carriers.

ELEVATORS.

A hospital may be found to be negligent in maintaining an entrance to an elevator from outside the building, which resembles an ordinary doorway and is protected only by unfastened screen doors, so as to render it liable to one who, mistaking

toxication, his hearing voices and communication with spirits of the dead, his mutterings and outcries when asleep, delusions causing him to arm himself, insults to her and attempts to take her life, although similar acts and declarations occur in the presence of others. *Whitehead v. Kirk*, 51: 187, 61 So. 737, — Miss. —.

30. A wife cannot testify as to confession of adultery made to her by her husband when they are alone, nor as to his charging her with infidelity under the same circumstances. *Whitehead v. Kirk*, 51: 187, 61 So. 737, — Miss. —.

31. Upon the question of negligence of the owner of a garage in driving a car against another on the highway, repair tickets issued by the garage showing the nature of repairs made upon his car are not admissible in evidence, nor is a private letter from him relating to repairs made just prior to the accident admissible, since they are mere self-serving declarations. *Granger v. Farrant*, 51: 453, 146 N. W. 218, — Mich. —.

Relevancy and materiality.

32. Upon the question of the existence *vel non* of a common-law marriage between a decedent and a woman claiming his property, evidence is admissible of the character of the community in which she lived and her own character for virtue, to interpret the association of decedent with her. *Berger v. Kirby*, 51: 182, 153 S. W. 1130, 105 Tex. 611.

33. Upon the question whether or not a letter deposited in the mail gives information prohibited by statute, evidence is admissible of an interview with the sender by one supposed by him to have appeared in response to it. *Kemp v. United States*, 51: 825, 41 App. D. C. 539.

Weight, effect, and sufficiency.

Constitutionality of statute as to, see Constitutional Law, 13.

Requiring accidental character of discharge to be established by at least one person other than insured, in case of injury to insured by discharge of firearms, see Insurance, 17.

Insufficiency of evidence as ground for vacating divorce decree, see Judgment, 7.

Instructions as to, see Trial, 19.

34. Though circumstantial evidence is admissible and sufficient to prove adultery in a suit for divorce, it must be so clear and strong as to carry conviction of the truth of the charge, and, if it does no more than raise a suspicion of chastity, it is insufficient. *Huff v. Huff*, 51: 282, 80 S. E. 846, — W. Va. —.

35. Where, owing to the failure of the memory of the subscribing witnesses, after the lapse of a long time, it is impossible to obtain direct testimony that the testator's signature was attached to his will at the time of its attestation, resort may be had to circumstances to supply the deficiency; and the uncontradicted testimony of one of 51 L.R.A. (N.S.)

the room where the witnesses were with pen, ink, and the paper in his hand, sat down for a moment at the table, arose, and, handing the pen to the first witness, said it was his will and asked them to sign it, is sufficient to this end. *Re Strachan*, 51: 927, 136 Pac. 1175, — Colo. —.

(Annotated)

Variance.

36. The statement in a complaint seeking damages because of a sheriff's negligent performance of his duties in arresting one guilty of a misdemeanor, which results in the death of the latter, that the sheriff fired his pistol at and toward the lawbreaker so that the bullet struck and killed him, does not require proof of deliberate aim toward him. *State use of Johnston v. Cunningham*, 51: 1179, 65 So. 115, — Miss. —.

37. The variance between purported language of a letter alleged to have been unlawfully deposited in the mail, set out in the indictment as "and have to say here one week," and the letter itself as offered in evidence, "& would have to stay here one week," is immaterial. *Kemp v. United States*, 51: 825, 41 App. D. C. 539.

EXECUTION.

Levy of, see Levy and Seizure.

EXECUTIVE DEPARTMENTS.

Relation to courts, see Courts, 4.

EXECUTORS AND ADMINISTRATORS.

Bar of statute of limitations, see Limitation of Actions, 5, 7.

Liability of administrator for failure to collect inheritance tax, see Taxes, 6.

P. nds.

Contribution between sureties, see Principal and Surety, 3.

Effect on liability of surety of substitution of new bond, see Principal and Surety, 3.

The bond of a personal representative, taken by an officer without authority, and voluntarily given, is valid as a common-law obligation, and enforceable as such, in the absence of a statutory prohibition of such construction. *Central Bkg. & S. Co. v. United States Fidelity & G. Co.* 51: 797, 80 S. E. 121, — W. Va. —.

EXECUTORY CONTRACTS.

To give deed, see Deeds.

EXEMPTIONS.

Homestead exemptions, see Homestead. From process or arrest, see Writ and Process, 2-4.

EXPERT TESTIMONY.

In general, see Evidence, 23-26.

EXPULSION.

Of passenger or trespasser, see Carriers, 5, 6.

FUEL.

Right of municipality to engage in sale of fuel to inhabitants for cost, see Constitutional Law, 3; Taxes, 1.

FUGITIVES.

Extradition of, see Extradition.

GARNISHMENT.

Motion by garnishees to vacate judgment against principal defendant and themselves, see Judgment, 6.

1. The fact that under § 6982, Rev. Codes 1905, no judgment can be had against a garnishee until judgment is obtained by the plaintiff against the principal defendant, does not preclude valid garnishment proceedings where service against the principal defendant is had by publication as authorized by § 6972, under which service personal judgment cannot be had against the principal defendant, since a judgment *in rem* in the action against him is authorized by the further provision of § 6982, that the court may adjudge the recovery of an indebtedness or personal property disclosed or found to be applicable to the plaintiff's demand, this provision relating to § 6977, prescribing the form of judgment to be rendered against the garnishee. Atwood v. Roan, 51: 597, 145 N. W. 587, 26 N. D. 622.

2. No valid judgment can be rendered against the garnishee defendant upon a default judgment against the principal debtor, based upon attempted service by publication under a void affidavit, where, as under § 6982, Rev. Codes 1905, the garnishee proceedings are ancillary to the suit against the principal defendant, and judgment against him is a prerequisite to judgment against the garnishee defendant. Atwood v. Roan, 51: 597, 145 N. W. 587, 26 N. D. 622.

GAS.

Rates; regulation.

Question for jury as to which rate is applicable in certain case, see Trial, 7.

1. A person who owns and conducts an automobile garage in which he uses a gas engine for the purpose of generating an electric current to supply light for a large building in which he carries on his business, to charge electric automobiles and storage batteries, and to use the same generally in his business, is a manufacturer within the meaning of a city ordinance dividing the inhabitants of the city into three classes, viz., "domestic consumption," "public institutions," and "manufacturers," for the purpose of fixing the rate that may be charged by a gas company. Henderson v. Shreveport Gas, E. L. & P. Co. 51: 448, 63 So. 616, — La. —.
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capital actually expended for the purpose of fixing rates, the cost of replacing pavement now in the streets, but not there at the time the mains were laid, is not to be taken into consideration. People ex rel. Kings County Lighting Co. v. Willcox, 51: 1, 104 N. E. 911, 210 N. Y. 479. (Annotated)

3. In ascertaining the gross receipts of a gas company for the purpose of fixing its rates, the annual appreciation of the value of its land should not be considered. People ex rel. Kings County Lighting Co. v. Willcox, 51: 1, 104 N. E. 911, 210 N. Y. 479.

4. "Going value" is to be considered as a distinct item in fixing the rates to be charged by a gas company. People ex rel. Kings County Lighting Co. v. Willcox, 51: 1, 104 N. E. 911, 210 N. Y. 479.

5. "Going value," for the purpose of fixing the rates of a gas company, is an amount equal to the deficiency of net earnings below a fair return on the actual investment, due solely to the time and expenditures reasonably necessary and proper to the development of the business and property to its present stage, and not comprised in the valuation of the physical property. People ex rel. Kings County Lighting Co. v. Willcox, 51: 1, 104 N. E. 911, 210 N. Y. 479.

6. The item of going value is eliminated in fixing rates for a gas company if it has already received a fair return on its investment, either by charging rates, which give it a fair return from the start, or which give it more than a fair return after the business has been developed. People ex rel. Kings County Lighting Co. v. Willcox, 51: 1, 104 N. E. 911, 210 N. Y. 479.

7. Where a gas company paid no dividends for a number of years after it began to do business, going value is to be allowed in fixing its rates where it was not due to bad management, the accumulation of surplus, or to betterments which have been allowed for in the structural valuation. People ex rel. Kings County Lighting Co. v. Willcox, 51: 1, 104 N. E. 911, 210 N. Y. 479.

GOING VALUE.

As item in fixing gas rates, see Gas, 4-7.

GOVERNOR.

Interference of court with, see Courts, 4.

GRADE.

Of highway, negligence as to, see Highways, 8, 9.

Injuries from fixing and changing street grade, see Highways, 7.

GUARANTY INSURANCE.

See Insurance, 19.

HABEAS CORPUS.

Remanding petitioner because of absence of evidence to support allegations in application, see Appeal and Error, 34.

Scope of writ; questions considered.

1. The writ of habeas corpus is not a

Liability of, for injury by joint employee, see Master and Servant, 1-3.

JOLT.

Injury to passenger by, see Carriers, 4.

JUDGMENT.

On appeal, see Appeal and Error, 34, 55.

In replevin, see Replevin, 5, 6.

Effect and conclusiveness.

Judgment for part of claim as bar to further suit, see Action or Suit, 2.

1. A decree in a suit by the distributees of an estate for the benefit of which certain bonds were given at different times, against the principal and sureties in all of them, dismissing the bill as to the sureties in the subsequent bonds on their separate demurrers thereto, does not conclude the surety in the original bond in a subsequent suit against the sureties in the other for contribution, under the principle of *res judicata*, after payment or satisfaction of liability to the estate by the surety in such first bond, where no question as to contribution was raised in the first action. *Central Bkg. & S. Co. v. United States Fidelity & G. Co.* 51: 797, 80 S. E. 121, — W. Va. — (Annotated)

2. A judgment in favor of one who claims adversely property attached by a mortgagee as that of the mortgagor is not *res judicata* in a subsequent proceeding in detinue by the mortgagee against the mortgagor under his mortgage. *Ex parte Logan*, 51: 1068, 64 So. 570, — Ala. —.

The lien.

Effect of absence from state to preserve lien of judgment, see Limitation of Actions, 4.

3. The lien of a judgment continues so long as the right to have execution issued or to bring an action or *scire facias* on it is not barred. *Lamon v. Gold*, 51: 883, 79 S. E. 728, — W. Va. —.

4. When a judgment becomes barred by the statute of limitations it ceases to be a lien on the debtor's land and a court of equity will not enforce it. *Lamon v. Gold*, 51: 883, 79 S. E. 728, — W. Va. —.

Relief against.

Right under pleadings to inquire into excessiveness of judgment, see Pleading, 8.

5. Representations by a man that his wife's refusal to secure a divorce from him greatly embarrasses him in his business, and that her continued refusal will compel him to leave the state, are not such duress as to entitle her to a vacation of a collusive decree secured in consequence thereof. *Robinson v. Robinson*, 51: 534, 138 Pac. 288, — Wash. —.

6. Garnishee defendants by defaulting in answer are not concluded from raising the question of jurisdiction over the principal defendant, by motion to vacate the judgment against the principal defendant 51 L.R.A. (N.S.)

Atwood v. Roan, 51: 597, 140 N. W. 387, 20 N. D. 622. (Annotated)

7. Insufficiency of evidence is no ground for vacating a divorce decree. *Robinson v. Robinson*, 51: 534, 138 Pac. 288, — Wash. —.

8. A decree of divorce secured by collusion will not be vacated at the instance of petitioner, in the absence of duress. *Robinson v. Robinson*, 51: 534, 138 Pac. 288, — Wash. —. (Annotated)

9. The fact that a divorce decree is founded on perjury affords no ground for vacating it. *Robinson v. Robinson*, 51: 534, 138 Pac. 288, — Wash. —.

JUDICIAL NOTICE.

See Evidence, 1.

JUDICIAL SALE.

Fraud of corporate officers in permitting property to be sold under execution and corporation dissolved, see Corporations, 3.

Sale under execution of property of charitable or religious corporation, see Mechanics' Liens, 4.

JURISDICTION.

Of admiralty, see Admiralty.

Of appellate court, see Appeal and Error.

Of courts, generally, see Courts.

Presumption as to, see Habeas Corpus, 3.

Release of prisoner held under judgment in excess of jurisdiction, see Habeas Corpus, 4

JURY.

New trial for matters pertaining to, See New Trial, 2.

The constitutional right to trial by jury is not infringed by the granting by the court of a new trial for the award of excessive damages by the jury. *Devine v. St. Louis*, 51: 860, 165 S. W. 1014, — Mo. —. (Annotated)

JUSTICE OF THE PEACE.

Trial *de novo* on appeal from judgment of justice's court, see Appeal and Error, 10.

Authority of constable in justice's court to levy *fi. fa.* issued by superior court, see Levy and Seizure.

KIN.

Who is kin entitled to bring action for death, see Death, 2.

LABORERS.

In general, see Master and Servant.

Lien of, see Mechanics' Liens.

LABOR ORGANIZATIONS.

Conspiracy by, see Conspiracy.

Injunction against, see Injunction, 3.

LACHES.

See Limitation of Actions.

LADDER.

Injury to servant by defective ladder, see Master and Servant, 9-11.

LANDLORD AND TENANT.

Parol agreement for lease, see Contracts, 4.

Conversion by purchaser of property of tenant on premises, see Trover.

LARCENY.

Liability of innkeeper for, see Innkeepers.

LAST CLEAR CHANCE.

See Negligence, 7.

LAUNDRY.

Regulating hours of labor in, see Constitutional Law, 8.

LAW OF PLACE.

See Conflict of Laws.

LEGISLATURE.

Authority to provide for commission form of government for municipality, see Municipal Corporations, 1.

Legislative intent as guide to interpretation of statute, see Statutes, 4.

LEVY AND SEIZURE.

Estoppel by giving forthcoming bond to question legality of levy, see Estoppel, 5.

Sale on execution of property of religious or charitable corporations, see Mechanics' Liens, 4.

A fl. fi. issued upon the foreclosure of a chattel mortgage in the superior court, and directed to "all and singular the sheriffs, or their lawful deputies, and coroners of this state," cannot be levied by a constable of a justice's court, and such a levy should be dismissed upon a motion made at the trial. *Peoples v. T. W. Garrison & Son*, 51: 635, 81 S. E. 116, — Ga. —.

LIBEL AND SLANDER.

Prejudicial error in instructions, see Appeal and Error, 27.

Mitigation of damages for, see Damages, 8, 9.

New trial in libel suit, see New Trial, 2.

Complaint in action for, see Pleading, 3, 6, 7.

Demurrer to complaint, see Pleading, 12.

Negation of defense in pleading, see Pleading, 3.

What actionable generally.

Question for jury as to, see Trial, 3.

1. That the house is not designated in a statement that a shooting occurred on a named street between two other streets, in a house which bore a bad reputation with the police, does not prevent it from being a libel on the occupants if those familiar with the facts know which house was referred to. 51 L.R.A. (N.S.)

ferred to. *Fitzpatrick v. Age-Herald Pub. Co.* 51: 401, 63 So. 980, — Ala. —.

2. To write that one has a bad reputation with the police is libelous *per se*. *Fitzpatrick v. Age-Herald Pub. Co.* 51: 401, 63 So. 980, — Ala. —.

3. A written statement that a particular house has a bad reputation with the police is a libel on its occupants. *Fitzpatrick v. Age-Herald Pub. Co.* 51: 401, 63 So. 980, — Ala. —.

4. It is libelous *per se* for a mercantile agency falsely to report in writing to its customers that a business corporation has been sued for "money advanced" in an amount in excess of its capital. *Pacific Packing Co. v. Bradstreet Co.* 51: 893, 139 Pac. 1007, 25 Idaho, 696. (Annotated) Privileged communications.

5. The common-law defenses of privilege in actions for defamation are available in actions for statutory slander. *Alderson v. Kahle*, 51: 1198, 80 S. E. 1109, — W. Va. —.

6. A communication made in the course of an altercation concerning personal property rights, and bearing some reasonable relation to the subject-matter of the controversy, is privileged, and it should be left to the jury to say whether the defendant has abused his privilege. *Alderson v. Kahle*, 51: 1198, 80 S. E. 1109, — W. Va. —.

7. Reports by a mercantile agency to its customers, as to the financial standing of a business corporation, are not privileged communications. *Pacific Packing Co. v. Bradstreet Co.* 51: 893, 139 Pac. 1007, 25 Idaho, 696.

LIBERTY.

Guaranty of right to, see Constitutional Law, 3-13

LICENSE.

Certiorari to review revocation of, see Certiorari.

Equal protection and privileges as to, see Constitutional Law, 1.

Due process as to, see Constitutional Law, 6, 7, 10.

Mandamus to compel issue of, see Mandamus.

To use railroad tracks, see Railroads, 4.

Indefiniteness of statute providing for revocation of license, see Statutes, 2.

1. Where a person operating a place of business under a license authorizing the sale by retail of drinks in imitation of or intended as a substitute for beer, ale, wine, whisky, or other alcoholic, spirituous, or malt liquors, under Georgia Civ. Code 1910, § 1765, was convicted of unlawfully keeping on hand at his place of business alcoholic, spirituous, malt, and intoxicating liquors, under Penal Code 1910, § 428, and it was conceded that the place of business so referred to was that where he conducted business under the license above mentioned, *ipso facto*, under Civil Code 1910, § 1769,

2. Charter authority to regulate any trade of a tendency dangerous to morals, health, or safety, and to prevent nuisances and declare what are such, includes power to require persons engaged in the sale of cider to procure a license. *Texarkana v. Hudgins Produce Co.* 51: 1035, 164 S. W. 736, — Ark. —

3. Power to require a license to conduct a public dance hall is conferred upon a municipal corporation by charter authority to pass ordinances for government and good order of the city and the suppression of vice and prevention of crime. *Mehlos v. Milwaukee*, 51: 1009, 146 N. W. 882, 156 Wis. 591. (Annotated)

4. Arbitrary power sufficient to render the ordinance invalid is not conferred upon the mayor with respect to the granting or refusing of a license for a public dance hall, where the ordinance fixes the standard of fitness for the place where it is to be conducted, and requires the mayor to act upon the report of four city officials as to whether or not the standard has been met. *Mehlos v. Milwaukee*, 51: 1009, 146 N. W. 882, 156 Wis. 591.

Reasonableness; amount.

5. Conditioning the granting of a license for a public dance hall upon satisfactory proof of the place being fit for such gatherings as regards health, convenience, and safety, and making it subject to cancellation for violation on the premises of good order or good morals, and to the duty of keeping it in fit condition, of closing not later than 3 o'clock A. M., and not allowing anyone under eighteen years of age to attend and participate in the dancing after 10 o'clock P. M., unless accompanied by a parent or guardian, is not unreasonable. *Mehlos v. Milwaukee*, 51: 1009, 146 N. W. 882, 156 Wis. 591.

6. A fee of \$15 per month for wholesalers, and \$10 per month for retailers, for the privilege of selling cider free from intoxicating qualities, making frequent analyses necessary to determine whether or not the licensee is acting within his authority, is not so excessive that the court can say that it is for revenue, rather than for regulation, and is therefore void. *Texarkana v. Hudgins Produce Co.* 51: 1035, 164 S. W. 736, — Ark. —

7. In the absence of any evidence showing its unreasonableness, a village ordinance fixing the license fee for auctioneers at \$25 a day, enacted in pursuance of legislative authority that that amount shall be considered reasonable, cannot be considered oppressive, prohibitive, or unreasonable, so as to make it beyond the scope of legislative discretion. *Minnesota v. Martin*, 51: 40, 145 N. W. 383, 124 Minn. 498. (Annotated)

LICENSEES.

Ejection of, from train, see Carriers, 5.

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LIMITATION OF ACTIONS.

Adverse possession, see Adverse Possession.

Conflict of laws as to, see Conflict of Laws, 5, 6.

Effect of bar of judgment by limitations on lien thereof, see Judgment, 4.

Right of junior mortgagee to redeem property when debt secured by his mortgage is barred by limitations, see Mortgage, 2.

Raising defense of, by demurrer, see Pleading, 11.

Laches.

Laches in seeking relief from judgment, see Judgment, 6.

1. Laches will not bar an action to set aside a transfer for fraud prior to the lapse of the limitation period, if complainant is free from fault. *Fleming v. Warrior Copper Co.* 51: 99, 136 Pac. 273, — Wash. —

When statute runs.

2. A provision in a bond that if any instalment of interest shall remain unpaid for ninety days after demand, the principal shall at once become due and payable, has the effect to set the statute of limitations running against the right to enforce the security from the time when a demand for the payment of interest due was refused, notwithstanding no request has been made by the bondholders for the foreclosure of the deed of trust, which contains a provision that, should a default continue for three months, the trustee, upon being requested to do so by a majority of the bondholders, shall proceed to sell. *Central Trust Co. v. Meridian Light & R. Co.* 51: 151, 63 So. 575, — Miss. —

(Annotated)

3. A cause of action against an attorney for wrongful dismissal of an action which he is retained to prosecute is not, although he conceals his act from his client, within a limitation statute relating to actions for relief upon the ground of fraud, which provides that the action shall not be deemed to have accrued until discovery of the facts constituting the fraud, but the time begins to run from the commission of the act. *Cornell v. Edsen*, 51: 279, 139 Pac. 602, — Wash. —

(Annotated)

4. Notwithstanding a debtor's departure from and residence out of the state, after a judgment has been recovered against him, may not obstruct the creditor in the enforcement of his lien, it will suspend the running of the statute of limitations and preserve the lien of the judgment. *Lamon v. Gold*, 51: 883, 79 S. E. 728, — W. Va. —

(Annotated)

5. An action by an executor to set aside a transfer of the property of a corporation of which his testator was a stockholder, on the ground of fraud, is not

after baggage for another company using the depot, from rendering the former company liable, under a statute making railroad companies liable for injuries negligently inflicted by servants on fellow servants, if he was in fact the agent of both companies for the performance of such duties at that station. *Moore v. Southern Co.* 51: 866, 81 S. E. 603, 165 N. C. 439.

2. That the joint agent of two railroad companies at a particular station was performing a service for one of them when he inflicted an injury upon a bystander does not relieve the other from liability for his acts. *Moore v. Southern Co.* 51: 866, 81 S. E. 603, 165 N. C. 439. (Annotated)

3. One of two joint owners of an automobile, who contribute equally to the expense of its up-keep and the wages of the chauffeur, and have equal right to the use of the car except a preference given to the other owner as to its use in going to and from business, is liable for injury caused to a traveler on the highway by the chauffeur's negligent operation of the car, in obeying the orders of such other owner to take the car to his office to convey him home, although the former had given no orders in connection with the journey. *Goodman v. Wilson*, 51: 1118, 166 S. W. 752, — Tenn. —. (Annotated)

4. One who lets an automobile for hire in charge of a chauffeur in his employ, to persons who control the movements of the machine only so far as to direct the chauffeur where to go, is liable to them for injury due to the chauffeur's negligence, although he had exercised due care to employ a careful and competent chauffeur. *Forbes v. Reinman*, 51: 1164, 166 S. W. 563, — Ark. —. (Annotated)

Wages.

Requiring railway to pay employees semimonthly as interference with interstate commerce, see Commerce, 2.

Due process of law as to, see Constitutional Law, 9.

Stipulation for minimum wage in contract for public work, see Contracts, 14.

Review by courts of ordinance fixing wage for public work, see Courts, 6.

Validity of ordinance prescribing minimum wage for public work, see Municipal Corporations, 4.

Who may question constitutionality of statute requiring monthly payment of railway employees, see Statutes, 1.

5. No constitutional rights of the taxpayer are infringed by requiring a payment of a minimum wage for work done on public improvements the cost of which is to be paid by special assessment, in excess of the prevailing wage for similar labor at the time and place when and where the improvement is made, although it results in 51 L.R.A. (N.S.)

Termination of relation.

Presumption and burden of proof as to period of employment, see Evidence, 4, 11.

6. Unless the understanding between an employer and employee is mutual that the services are to extend for a certain fixed and definite period, it is an indefinite hiring, and is determinable at the will of either party. *Reasnor v. Watts, Ritter, & Co.* 51: 629, 80 S. E. 839, — W. Va. —.

Duty as to place and appliances.

7. The mere use on the cab of an engine of a stirrup of the kind used on box cars, instead of the standard step generally used on such engines, does not of itself show negligence as a matter of law. *Duncan v. Atchison, T. & S. F. R. Co.* 51: 565, 119 Pac. 356, 86 Kan. 112.

Liability to volunteers.

8. A lumber company is not, in the absence of emergency, liable to a volunteer who complies with a request of its foreman to assist in turning the lever of a railroad switch leading to the corporation's plant, to release a car stuck in the switch, for injury caused by the springing of the lever when released, if the foreman was not required to exercise any supervision or control over the railroad track or the cars thereon. *Kentucky Lumber Co. v. Nicholson*, 51: 1213, 164 S. W. 84, 157 Ky. 812.

Assumption of risk.

9. Spikes in the bottom of a ladder to prevent its slipping do not change its character as a simple tool, risk from defects in which is assumed by the employee. *Sivley v. Nixon Min. Drill Co.* 51: 337, 164 S. W. 772, — Tenn. —. (Annotated)

10. A request by a servant about to use a ladder, that someone hold it, is not a notice of defect, where the employee was ignorant that one existed, so as to render the master liable for injury due to fall of the ladder because of a defect, when the foreman directs the employee to go ahead and use the ladder, saying that it had been in use for three years and had never fallen with anyone. *Sivley v. Nixon Min. Drill Co.* 51: 337, 164 S. W. 772, — Tenn. —.

11. A master cannot avoid liability to an employee through a defect in a ladder, on the theory that it was a simple tool, if his superintendent, upon being notified of the defect, insisted that the ladder was safe, and required it to be used, and the injured employee was in fact ignorant of the defect, which was not readily discoverable. *Philip Carey Roofing & Mfg. Co. v. Black*, 51: 340, 164 S. W. 1183, — Tenn. —.

Fellow servants and their negligence.

12. A statute rendering a railroad company liable for injury to a servant by the negligence, carelessness, or incompetence of a fellow servant covers an injury to one by a pistol shot from a weapon which had been placed in a drawer by another servant in such a manner that it must be

der a contract with the owner of the land. Eberle v. Drennan, 51: 68, 136 Pac. 162, — Okla. —.

For what work or materials.

3. A lien may be claimed for lumber furnished and used in the erection of a building for shoring, that is, support for the concrete while it is setting, so far as the lumber is destroyed or depreciated in value by such use, under a statute giving a lien for materials furnished "for or in or about" the erection of a structure. Moritz v. Lewis Constr. Co. 51: 1040, 146 N. W. 1120, — Wis. —. (Annotated)

To what property attaches.

Agreement of trustees of charitable corporation that property may be subjected to mechanics' lien, see Corporations, 1.

4. A trust for the benefit of the public attaches to property secured by a corporation organized for charitable and religious purposes, to furnish a home for the aged and infirm, and a home for indigent orphans to be given a common school education to fit them to become nurses and attendants on orphan homes and similar institutions, and property so secured and used is not subject to mechanics' liens without an order of the district court of the proper county authorizing the same; nor can the property of such a corporation be sold on execution, where such sale would defeat the trust and destroy the public purpose for which the property was donated or secured. Horton v. Tabitha Home, 51: 161, 145 N. W. 1023, — Neb. —. (Annotated)

5. The failure of the trustees of a corporation organized for charitable and religious purposes, to furnish a home for the aged and infirm, and also for indigent orphans, to object to the use of the material furnished, at the order of other persons, in remodeling a building situated upon the property of such corporations, will not have the effect of creating a mechanics' lien thereon. Horton v. Tabitha Home, 51: 161, 145 N. W. 1023, — Neb. —.

How waived or defeated.

6. The mere fact of bankruptcy of the original contractor does not defeat the right of the materialmen and subcontractor to a lien on the building constructed by the contractor. Eberle v. Drennan, 51: 68, 136 Pac. 162, — Okla. —. (Annotated)

7. The fact that the right of a bankrupt contractor to a lien arose out of services rendered by the contractor's receiver or trustee in bankruptcy is not sufficient to defeat the lien, especially where the owner requested or consented to an order of the bankruptcy court directing the receiver or trustee to complete the bankrupt's contract. Eberle v. Drennan, 51: 68, 136 Pac. 162, — Okla. —.

Enforcement.

8. Under the provisions of § 6156, Okla. Comp. Laws 1909, the original contractor is an indispensable party to an 51 L.R.A.(N.S.)

erty of the owner, but where the original contractor, during the construction of the building, is adjudged a bankrupt, the bankruptcy trustee should be made a party defendant in such actions, and the unenforceable judgment taken against him made the basis upon which the liens claimed against the property are predicated. Eberle v. Drennan, 51: 68, 136 Pac. 162, — Okla. —.

9. The lien of a subcontractor who has furnished materials to a firm of building contractors for the erection of a building will not be declared invalid because, in his statement for a lien, such subcontractor names one member of the firm as the person with whom he dealt as the contractor, where there is nothing to indicate that the owner of the land whereon the building was erected was misled or injured by the failure of the subcontractor to correctly state the name of the contractor. Eberle v. Drennan, 51: 68, 136 Pac. 162, — Okla. —.

MENTAL ANGUISH.

Damages for, see Damages, 5, 6.

MERCANTILE AGENCY.

Libel by, see Libel and Slander, 4, 7.

MERGER.

Of prior and contemporaneous oral negotiations into written contract, see Evidence, 18.

MILK.

See Food.

MINES.

Measure of damages for taking of mineral oil from land, see Damages, 3.

Parol evidence on bill for rescission of deed for coal lands, see Evidence, 18.

Right of railroad company to take oil from land conveyed for right of way, see Railroads, 1.

1. A sale executed by a deed of coal lands in which the consideration named is an exact multiple of the number of acres conveyed, made in pursuance of an option which provided for payment at a stipulated price per acre for each and every acre of coal, is a sale of coal by the acre. Light v. Grant, 51: 792, 79 S. E. 1011, — W. Va. —.

2. One who has purchased coal in place, the same being conveyed to him by a deed conveying "all the coal in, on, and underlying" the land, and specifying a stated number of acres of coal, is entitled to an abatement from the purchase price for any shortage in the coal acreage. Light v. Grant, 51: 792, 79 S. E. 1011, — W. Va. —.

3. The grantee of coal in place in a deed conveying all the coal in a tract of land cannot rescind the sale merely because the coal area in the land is not as large as he had hoped or expected to obtain, provided there is a substantial quantity of coal in

the land. *Light v. Grant*, 51: 792, 79 S. E. 1011, — W. Va. — (Annotated)

4. Rescission of a sale executed by a deed conveying all the coal in a tract of land cannot be had because of nonexistence of a particular coal vein or measure in the land. *Light v. Grant*, 51: 792, 79 S. E. 1011, — W. Va. —

MINIMUM WAGE.

Review by courts of ordinance as to, see Courts, 6.

Requiring payment of minimum wage for public work, see Contracts, 14; Master and Servant, 5; Municipal Corporations, 4.

MISTAKE.

In telegram, see Telegraphs.

As to value of property as defense in action for conversion, see Trover.

MITIGATION.

Of damages, see Damages, 8, 9.

MONOPOLY AND COMBINATIONS.

Misconduct of prosecuting attorney in prosecution for, see Appeal and Error, 30.

Contracts between two persons in restraint of trade, see Contracts, 11. Extent of punishment for, see Criminal Law.

Indictment for, see Indictment, etc., 2.

1. A contract by the manufacturer of a particular brand of flour sold in a certain market, with retailers, as ancillary to his wholesaling the product to them, that they will maintain a minimum price, is valid, if it is necessary to the continued production of his product, involves less than a controlling part of that commodity in the market and the price fixed is fairly necessary to his protection, and affords only a fair profit to the contracting parties. *Fisher Flouring Mills Co. v. Swanson*, 51: 522, 137 Pac. 144, — Wash. — (Annotated)

2. A violation of a statute prohibiting the entering into a combination with others to raise the price of commodities offered for sale by those forming the combination cannot be excused by facts tending to justify the act, and which would have been proper and legal had the members thereof acted independently of the combination. *State v. Minneapolis Milk Co.* 51: 244, 144 N. W. 417, 124 Minn. 34. (Annotated)

3. A combination of several persons and corporations, all independent dealers in milk and cream, to raise and increase the price thereof, is a violation of §§ 51C8 and 51B9, Minn. Rev. Laws 1905, prohibiting the entering into a combination with others to raise the price of commodities offered for sale by those forming the combination, although the increased price was necessary to afford a profit. *State v. Minneapolis Milk Co.* 51: 244, 144 N. W. 417, 124 Minn. 34. 51 L.R.A. (N.S.)

MORTGAGE.

As to chattel mortgage, see Chattel Mortgage.

When limitations begin to run, see Limitation of Actions, 2.

Right of insured to maintain action on policy containing mortgage clause, see Parties, 1.

Payment of mortgage registry tax in addition to legal interest as usury, see Usury.

1. There is no conflict between a provision in a bond that if default is made in payment of interest, the bond shall at once become due and payable, and in the mortgage securing that and other bonds that should default occur in payment of interest, taxes, or the amount due the sinking fund, and continue ninety days, the principal of the bonds shall, at the option of the trustee, to be expressed by written notice, become due and payable. *Central T. Co. v. Meridian Light & R. Co.* 51: 151, 64 So. 216, — Miss. —

2. A junior mortgagee has no right to redeem the property from a sale under a prior mortgage, when the debt secured by his mortgage is barred by the statute of limitations. *Central Trust Co. v. Meridian Light & R. Co.* 51: 151, 63 So. 675, — Miss. —

MOTIONS AND ORDERS.

Raising question for consideration on appeal by, see Appeal and Error, 8.

MULTIFARIOUSNESS.

See Pleading, 2.

MUNICIPAL CORPORATIONS.

Establishment by municipality of fuel yard as interference with liberty or property of fuel merchants, see Constitutional Law, 3.

Sale of fuel by municipality at cost as violation of constitutional provision limiting power of taxation to public use, see Taxes, 1.

Judicial questions as to acts of, see Courts, 5-7.

Rights as to trees in highway, see Highways, 2.

Power as to license, see License, 2-4.

Liability of committee appointed at public meeting of citizens of municipality for supplies ordered by it, see Principal and Agent, 2.

Supply of water by municipality to its inhabitants, see Waters.

Charter; form of government.

Uncertainty of statute providing for commission government, see Statutes, 3.

1. A statutory enactment which in effect is that, upon stated affirmative favorable action taken by a municipal council and the electors of a municipality, and the due election of commissioners, a commission form of government for the municipality "shall become operative," is not unconstitutional under a Constitution which expressly

confers upon the legislature authority to prescribe the powers of a municipal corporation to alter or amend the same at an Munn v. Fingar, 51: 631, 64 So. 271, (Ann

Ordinances.

Judicial notice as to ordinance, Appeal and Error, 3.

Prejudicial error in exclusion of evidence from evidence, see Appeal and Error, 25.

Due process of law in, see Constitutional Law, 4-6.

Court's power to review ordinance, Courts, 6, 7.

Release on habeas corpus of person convicted for violation of ordinance, see Habeas Corpus, 3, 5.

Who may maintain action to set aside city ordinance, see Parties, 4.

Construction of, as question of law, see Trial, 7.

2. Charter and statutory authority to pass ordinances for the general welfare of the city, and such regulations for the government of the town as the council may deem necessary, does not include power to forbid members of the white or colored race to live in a neighborhood where a majority of the residents are of the other race. *State v. Darnell*, 51 S. E. 338, — N. C. —.

3. The police power of a city extends to the prohibition of smoking and carrying lighted tobacco in its streets and parks, which are spacious enough for the use of tobacco in such places without being harmful to others, or tend to cause damage to property from fire. *Zion v. Bel*, 562, 104 N. E. 836, 262 Ill. 510.

(A) 4. An ordinance prescribing a maximum wage for all public work, which is within the general powers conferred upon a municipality, cannot be held invalid as contrary to public policy for increasing the cost of public work, where the municipality itself has passed a law limiting the rate of labor on such work. *Malette v. State*, 51: 686, 137 Pac. 496, 77 Wash. 20.

5. An ordinance for the regulation of public dance halls is not invalid if it confers power upon a police officer to stop a dance if any provision of the ordinance is violated, an indecent act is committed, or any disorder of a gross or vulgar character exists. *Mehring v. Waukegan*, 51: 1009, 146 N. W. 882, 591.

Contracts.

Who may maintain action on contract, see Parties, 4.

6. The employment of an agent to represent a municipal corporation in litigation need not, in the absence of a statute requiring it, be evidenced by a formal ordinance, by-law, or resolution. It is essential that it be in writing, and in the absence of proof to overcome the presumption in favor of his employment, an attorney cannot be denied the right of representing the municipal corporation. 51 L.R.A. (N.S.)

Conflict of laws as to liability for negligent injury, see Conflict of Laws, 2.

Measure of damages for negligence causing personal injury, see Damages, 2.

Matters peculiar to actions for death, see Death.

As to elevators, see Elevators.

Presumption and burden of proof as to, see Evidence, 6-9.

Of innkeeper, see Innkeepers.

Of master, see Master and Servant.

Of municipal corporations, see Municipal Corporations, 7-9.

Parent's liability for child's negligence, see Parent and Child, 2.

Proximate cause of injury by, see Proximate Cause.

Of railroad company, see Railroads.

As to transmission of telegraph message, see Telegraphs.

Question for jury as to, see Trial, 4-6.

Liability of seller or manufacturer.

Measure of damages for injury resulting from, see Damages, 2.

Refusal of instruction in action for injury, see Trial, 16, 17.

1. The manufacturer of a bean and pea thresher is liable for injuries resulting to a farmer for whom the vendees of the machine were threshing, from the breaking of a defective removable board over the cylinder while he was standing thereon feeding the cleaner at the close of the job, where it is shown that the board was so defective as to be dangerous to life and limb, that the manufacturer knew of the defect when he sold the machine, and the vendees did not know thereof prior to the accident, that the defect was the proximate cause of the injury, and was concealed to such an extent that ordinary observation on the part of the plaintiff would not have discovered it, that the board was intended for the purpose for which it was being used, and that the farmer was one of the class of persons by whom it was contemplated the article would be thus used. *Krahn v. J. L. Owens Co.* 51: 650, 145 N. W. 626, 125 Minn. 33.

Dangerous premises.

Liability of charitable institution, see Charities, 1.

Demurrer to complaint in action for negligence toward trespasser, see Pleading, 13.

2. A telephone company which installs in a store operated by another a slot telephone apparatus for the use of the public is bound to provide a safe passageway to and from such apparatus, and is liable in damages for injury to one who, without fault on his part, falls through a trapdoor negligently left open in the passageway by the storekeeper. *Hill v. Chesapeake & Potomac Teleph. Co.* 51: 1072, 42 App. D. C. 170.

3. A landowner owes a trespasser a duty, in respect to safety from dangerous artificial condition of premises, not to in-

jure him intentionally or wantonly. *Shawnee v. Cheek*, 51: 672, 137 Pac. 724, — Okla. —.

4. A mere omission, although superficially characterized by mere thoughtlessness or heedlessness, but, in its deeper explanation, involving a reckless disregard for the safety of merely technical and reasonably anticipated trespassers, such as children of tender years, especially if unconscious trespassers, in respect to obviously and seriously dangerous artificial condition of premises, may amount to wantonness, in a landowner; but the attractiveness and accessibility of the place or thing involving such danger to, and the probability of, such trespassers, the gravity of the danger in such condition, the length of time such condition has existed, the smallness of cost and of deprivation of beneficial use involved in eliminating same, and the reasonableness of the inference that the landowner, as a person of ordinary sensibilities and prudence, knew or should have known of, and under all the facts and circumstances in the case, should have eliminated, such danger, are proper considerations in determining whether there was such reckless disregard for the safety of such trespassers. *Shawnee v. Cheek*, 51: 672, 137 Pac. 724, — Okla. —.

Contributory negligence.

Of person bitten by dog, see Animals, 2.

Of person injured by automobile, see Automobiles, 4.

Of passenger, see Carriers, 9, 10.

As to injuries from defects in highways, see Highways, 18.

Presumption and burden of proof as to, see Evidence, 10.

Question for jury as to, see Trial, 5.

5. A child under seven years of age, or, in the absence of evidence of capacity, between seven and fourteen years of age, is presumed to be incapable of guilt of more than technical trespass, as affecting question of duty of owner in respect to dangerous condition of premises, and the character of the trespass may be a circumstance to be considered by the jury in ascertaining whether there is contributory negligence. *Shawnee v. Cheek*, 51: 672, 137 Pac. 724, — Okla. —.

6. The negligence of the owner of an automobile in not properly controlling it when another machine is brought into collision with it, by reason of which it leaves the road and injures a guest riding in the machine, is imputable to the guest. *Granger v. Farrant*, 51: 453, 146 N. W. 218, — Mich. —.

7. The mere negligent act of a pedestrian about to cross the street will not excuse negligent injury to him by the operator of an automobile if the operator of the automobile could, by the exercise of reasonable care have avoided such injury. *Deputy v. Kimmell*, 51: 989, 80 S. E. 919, — W. Va. —.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes,

NEGROES.

Ordinance providing for segregation of white and colored races, see Municipal Corporations, 2.

NEW TRIAL.

Sufficiency of assignment of error as to, see Appeal and Error, 5.

Review of discretion in granting new trial for excessive damages, see Appeal and Error, 15.

Grant of new trial because of excessive damages as infringement of right to jury trial, see Jury.

1. In a criminal action, where it is shown, on a motion for a new trial, that false and perjured testimony, which the defendant had no fair opportunity to rebut at the trial, probably influenced the jury to find him guilty, it is the duty of the court to set the conviction aside and grant a new trial. *State v. Mounkes*, 51: 286, 138 Pac. 410, 91 Kan. 653. (Annotated)

2. Where, under the Constitution, the jury, under the direction of the court, are to determine the law and the facts in actions for libel, a new trial cannot be granted because of the refusal of the jury to follow an instruction that the matter complained of is libelous *per se*. *Harrington v. Butte Miner Co.* 51: 369, 139 Pac. 451, 48 Mont. 550. (Annotated)

NOISE.

As nuisance, see Trial, 8.

NONRESIDENTS.

Jurisdiction over, see Courts, 1-3.

School privileges of, see Schools, 1.

Transfer tax on property of, see Taxes, 3, 4.

NONSUIT.

See Trial, 9.

NONSUPPORT.

As ground for divorce, see Divorce and Separation, 1.

NOTICE.

Of appeal, see Appeal and Error, 1.

To carrier of danger of crowding at station, see Carriers, 8.

Of defect in street, see Highways, 19-21.

To insurance company, estoppel by, see Insurance, 14.

Of trust to beneficiary, see Trusts.

NUISANCES.

Right to compensation for nuisance resulting from location of switch yard, see Eminent Domain, 4.

Question for jury as to, see Trial, 8.

One driving logs down a floatable stream is not liable for injury to a bridge erected by a municipality in such manner as to constitute a common nuisance, by the necessary use of explosives to move logs which have jammed in the spaces between the abutments, if he is careful to do as 51 L.R.A. (N.S.)

little injury as is consistent with the accomplishment of his purpose. *Marion v. Tuell*, 51: 1172, 90 Atl. 484, 111 Me. 566 (Annotated)

OBJECTIONS.

To raise questions on appeal, see Appeal and Error, 6-8.

OBSTRUCTION.

Of highway, see Highways.

OCCUPANCY.

Of insured premises, see Insurance, 10.

OFFICERS.

In corporation, see Corporations.

Estoppel to deny that one acted as officer, see Estoppel, 3.

Recall of, see Initiative, Referendum and Recall.

Right of, to reward, see Reward, 1.

Tax officers, see Taxes, 2.

Where a candidate for election dies before election day, too late to have a candidate substituted as provided by statute, or to notify the voters of his death, so that a majority vote for him in ignorance of his death, the person receiving the next highest number of votes cannot be declared elected, but a vacancy will exist in the office, where the statute provides that the person having the greatest number of votes shall be declared elected. *Patten v. Haselton*, 51: 226, 146 N. W. 477, — Iowa, — (Annotated)

OIL.

In mines, see Mines.

OPENINGS.

In party wall, see Party Wall, 2, 3.

OPINIONS.

As evidence, see Evidence, 23-26.

OPTION.

Of insured, see Insurance, 9.

ORAL CONTRACTS.

In general, see Contracts, 2-6.

ORAL EVIDENCE.

As to writing, see Evidence, 18-22.

ORDINANCES.

See Municipal Corporations, 2-5.

PAID-UP INSURANCE.

See Insurance, 9.

PARENT AND CHILD.

Recovery for mental anguish of father because of default in sending telegram which results in delay of starting of sick child to another climate, see Damages, 6.

Right of action for death of parent, see Death, 2, 3.

Right of action for death of child, see Death, 3.

Right of infant to sue on promise to parent, see Parties, 3.

Question for jury as to whether daughter acted as servant of father in driving automobile, see Trial, 1.

1. A father, by bringing an action as next friend in the name of his son, to enforce an agreement by a stranger to place money in trust for the child for the privilege of naming him, relinquishes any rights which he may personally have had under the contract. *Gardner v. Denison*, 51: 1108, 105 N. E. 359, 217 Mass. 492.

2. The fact that a daughter driving her father's car while occupying the relation of servant to her father permits a stranger riding with her to drive the car temporarily does not absolve her father from responsibility for negligence in the operation of the car. *Kayser v. Van Nest*, 51: 970, 148 N. W. 1091, 125 Minn. 277.

PARKS.

Prohibition of smoking in parks of city, see Municipal Corporations, 3.

Maintenance of park by city as governmental function, see Municipal Corporations, 7.

Liability of municipality for death of boy drowned in pond in city park, see Municipal Corporations, 8.

PARKWAY.

Regulating use of, see Constitutional Law, 11; Highways, 1.

PAROL CONTRACTS.

In general, see Contracts, 2-6.

PAROL EVIDENCE.

As to writing, see Evidence, 18-22.

PAROL TRUSTS.

See Trusts.

PARTIES.

Who are affected by judgment, see Judgment, 1, 2.

Exemption of, from service of process, see Writ and Process, 2, 3.

Plaintiff.

Action for death, see Death.

Action by husband, see Husband and Wife, 2.

Who may have remedy against nuisance, see Nuisances.

1. An action may be maintained upon an insurance policy by the insured although it contains a mortgage clause that the loss or damage, if any, is payable to a named mortgagee as its interest may appear, where the petition alleges that the mortgagee gave its consent to the action being brought in the name of the insured and the mortgagee testifies to the same effect. *Schmidt v. Williamsburgh City F. Ins. Co.* 51: 261, 144 N. W. 1044, — Neb. —.

2. A right of action in an original purchaser of a chattel against the original seller, for breach of warranty, does not

run with the chattel to a second purchaser, who assumes payment of the notes given for the purchase price by the first purchaser, upon release of the latter from liability thereon, in the absence of such intent of the parties to the novation and of any assignment of the right of action by the original purchaser to his vendee. *Walrus Mfg. Co. v. McMehen*, 51: 1111, 136 Pac. 772, 39 Okla. 667.

3. A child may enforce an agreement made by a stranger with its parents to place a specified sum in trust for the child for the privilege of naming it. *Gardner v. Denison*, 51: 1108, 105 N. E. 359, 217 Mass. 492.

4. A city ordinance, which is a contract between the city and a quasi public corporation, and which fixes terms upon which the said corporation shall supply gas and electricity to inhabitants of the city, will be enforced in favor of the inhabitants of that city. *Henderson v. Shreveport Gas, El. & P. Co.* 51: 448, 63 So. 616, — La. —.

5. Tenants in common need not join in a suit in ejectment to recover possession of lands, although they may do so if they so desire. *De Bergere v. Chaves*, 51: 50, 93 Pac. 762, 14 N. M. 352.

Parties defendant.

Remanding case for lack of parties defendant, see Appeal and Error, 35.

In proceeding to enforce mechanics' lien, see Mechanics' Liens, 8.

6. The corporation is a necessary party to a suit by a stockholder to hold directors liable for refusal to enforce contracts in its favor and to protect its property. *Kelly v. Thomas*, 51: 122, 83 Atl. 307, 234 Pa. 419. (Annotated)

PARTNERSHIP.

Measure of damages for breach of contract to form partnership, see Damages, 1.

An express agent who, after delivering to one member of a firm C. O. D. packages without payment of the charges, contrary to the directions of the other partner, takes the duebill or note of the partner to whom delivery was made in satisfaction of the debt of the firm, thereby discharges the obligation of the other partner. *Grubbe v. Lahay*, 51: 358, 145 N. W. 207, 156 Wis. 29. (Annotated)

PART PERFORMANCE.

Under statute of frauds, see Contracts, 5.

PARTY WALL.

1. An agreement for a party wall to be erected between two adjoining lots, to extend throughout the whole distance of the dividing lines, requires a solid wall throughout the entire length and height. *Kuh v. O'Reilly*, 51: 420, 104 N. E. 5, 261 Ill. 437.

2. That one of the parties to a party-wall agreement constructs the wall at his own expense, to be reimbursed when the other party makes use of it, does not en-

O'Reilly, 51: 420, 104 N. E. 5, 261 Ill. 437.

3. Successors in title to one of the parties to a party-wall agreement may compel a restoration of the wall to a solid condition by the other party to the agreement who has made openings therein for windows and steam-pipe exhaust, although the cost of the wall was borne by the latter and the former is not ready to use the portions of the wall where the openings exist. *Kuh v. O'Reilly*, 51: 420, 104 N. E. 5, 261 Ill. 437.

PENAL STATUTES.

Enforcement of, in other state, see Conflict of Laws, 2.

PERJURY.

As ground for relief against judgment, see Judgment, 9.

As ground for new trial, see New Trial, 1.

PERSONAL INJURIES.

Admiralty jurisdiction of action for, see Admiralty.

Conflict of laws as to, see Conflict of Laws, 2.

Measure of damages for, see Damages, 2.

To married woman, husband's right of action for, see Husband and Wife, 2.

Proximate cause of injury, see Proximate Cause.

Sale of, see Sale.

PETITION.

Of plaintiff, see Pleading, 3-8.

PHOTOGRAPH.

As evidence, see Evidence, 17.

PHYSICIANS AND SURGEONS.

Certiorari to review action of medical board in revoking physician's license, see Certiorari.

Constitutionality of statute as to revocation of physician's license, see Constitutional Law, 2.

Due process in revocation of license, see Constitutional Law, 7.

Indefiniteness of statute providing for revocation of license, see Statutes, 2.

Damages for breach of contract by physician to attend sick person, see Damages, 5.

PLAINTIFFS.

Parties plaintiff, see Parties, 1-5.

PLEA.

See Pleading, 9.

PLEADING.

Sufficiency of assignment of error as to ruling on, see Appeal and Error, 4.

Estoppel by pleading, see Estoppel, 6.

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In criminal prosecution, see Indictment, etc.

In quo warranto, see Quo Warranto, 2.

1. In an action for conversion of personal property, an allegation in the alternative that one or the other of the two defendants converted the goods, but which one plaintiff is unable to determine, states no cause of action against either defendant, where no close relation or community of action between the defendants is alleged, except that they were tenants of the same building. *Casey Pure Milk Co. v. Booth Fisheries Co.* 51: 640, 144 N. W. 450, 124 Minn. 117. (Annotated)

Misjoinder; multifariousness.

2. A bill by a stockholder of a corporation is multifarious which seeks to recover on behalf of the corporation against its directors for fraudulent management of its affairs, against another corporation to recover profits made by it on business which should have come to the former, and by such stockholder individually against the directors of the two corporations to recover for depreciation in the value of the stock of the former. *Kelly v. Thomas*, 51: 122, 83 Atl. 307, 234 Pa. 419.

Declaration or complaint.

3. Under a statute denying punitive damages against a newspaper for publication of a libel unless a demand for retraction has been made, the failure to make such demand is matter of defense. *Fitzpatrick v. Age-Herald Pub. Co.* 51: 401, 63 So. 980, — Ala. —.

4. Stockholders of a corporation suing the corporation and strangers to whom stock is alleged to have been fraudulently issued for an accounting are not bound to negative in the pleadings acquiescence by their predecessors in title in the fraud. *Continental Securities Co. v. Belmont*, 51: 112, 99 N. E. 138, 206 N. Y. 7.

5. There can be no recovery on a *quantum meruit* where the complaint declares upon an express contract, and there is no pleading or proof of the reasonable value of plaintiff's services. *Bentley v. Edwards*, 51: 254, 146 N. W. 347, 125 Minn. 179.

6. It suffices in a common-law count for defamation, to charge, in appropriate terms and connection, the use of such words as "thief" and "robber," and it is not necessary to charge accusation of the commission of a specific offense. *Alderson v. Kahle*, 51: 1198, 80 S. E. 1109, — W. Va. —.

7. An innuendo cannot add to, enlarge, or change in any degree words alleged to be libelous. *Fitzpatrick v. Age-Herald Pub. Co.* 51: 401, 63 So. 980, — Ala. —.

8. The question of the proper service of process on a corporation and the excessiveness of a judgment against it in a foreign court cannot be inquired into upon averments that the suit was kept secret from complainant, a stockholder in the corporation, by service upon an officer of the cor-

poration, who was in the employ of plaintiff, and that the claim adjudicated was wrongfully and fraudulently excessive. *Kelly v. Thomas*, 51: 122, 83 Atl. 307, 234 Pa. 419.

Pleas and answers.

9. The issue of the entirety of a contract is properly raised by an answer which sets out in full the writings constituting the contract sued on. *Bentley v. Edwards*, 51: 254, 146 N. W. 347, 125 Minn. 179.

Demurrer.

Sufficiency of assignment of error as to rulings on demurrer, see Appeal and Error, 4.

Demurrer to evidence, see Trial, 12.

10. A joint demurrer of two defendants to a complaint which states a cause of action against one of them is properly overruled. *Howley v. Scott*, 51: 137, 143 N. W. 257, 123 Minn. 159.

11. To raise the defense of the statute of limitations by demurrer, it must be specifically set up. *Central Trust Co. v. Meridian Light & R. Co.* 51: 151, 64 So. 216, — Miss. —.

12. Demurrer is not the proper remedy for an excessive demand for damages in a libel suit. *Fitzpatrick v. Age-Herald Pub. Co.* 51: 401, 63 So. 980, — Ala. —.

13. A petition which does not allege facts from which a reckless disregard for the safety of reasonably anticipated technical, if not unconscious, trespassers, amounting to wantonness, appears as a legal conclusion, nor the ultimate fact of reckless disregard for the safety of such trespassers amounting to wantonness, is not sufficient, as against a demurrer, to warrant a recovery of damages for death resulting to such trespasser from dangerous artificial condition of defendant's premises. *Shawnee v. Cheek*, 51: 672, 137 Pac. 724, — Okla. —.

POLICE.

Liability of city for tort of police officer, see Municipal Corporations, 9.

POND.

Municipal liability for drowning in, see Municipal Corporations, 8.

POOL.

Of corporate stock, specific performance of agreement as to, see Specific Performance, 1.

POSTOFFICE.

Evidence in prosecution for illegal use of mails, see Evidence, 33.

Prejudicial error in admission of evidence in prosecution for offense against mailing laws, see Appeal and Error, 24.

Variance between allegations and proof, see Evidence, 37.

1. To determine whether or not a letter deposited in the mail violates the statute forbidding the mailing of any letter giving information as to where or by whom an

abortion would be performed, it may be interpreted in the light of the one to which it is an answer. *Kemp v. United States*, 51: 825, 41 App. D. C. 539.

2. In a prosecution for depositing in the mail a letter containing information as to where an abortion would be performed, in violation of statute, in answer to a decoy letter sent by a detective, the information upon which the detective acted is immaterial, as well as his motive in sending the decoy, if it was not to induce the commission of a crime. *Kemp v. United States*, 51: 825, 41 App. D. C. 539.

3. It is no defense to a prosecution for mailing a letter containing information as to where an abortion would be performed, contrary to statute, that it was sent in response to a decoy letter of a detective who wrote under an assumed name. *Kemp v. United States*, 51: 825, 41 App. D. C. 539. (Annotated)

PREFERRED STOCK.

Depriving preferred stockholders of right to vote at election of officers, see Corporations, 8.

PREJUDICIAL ERROR.

See Appeal and Error, 23-33.

PREMIUMS.

For insurance, see Insurance, 13.

PRESCRIPTION.

Title by, see Adverse Possession.

PRESUMPTIONS.

In general, see Evidence, 2-15.

PRICES.

Validity of contract provision seeking to control price at which article shall be resold, see Monopoly and Combinations, 1.

PRINCIPAL AND AGENT.

Authority of real estate broker, see Brokers, 1, 3.

Ratification of employment of sub-agent by broker where contract of employment is within statute of frauds, see Contracts, 3.

Compensation of real estate broker, see Brokers, 2-4.

Burden of proving period of employment of agent, see Evidence, 4.

Presumption and burden of proof as to period of employment, see Evidence, 11.

Liability of agent for illegal sale of liquor, see Intoxicating Liquors.

Agent of insurance company, see Insurance, 1.

Ratification by insured of attempted change of insurers by agent, see Insurance, 8.

Imputing agent's knowledge to insurance company, see Insurance, 14.

Liability for assault by agent sent to collect debt, see Master and Servant, 13.

1. An agent to settle the accounts of

another agent of the common employer has no implied authority to institute criminal proceedings against him for embezzlement, so as to render the employer liable for malicious prosecution because of his act in so doing. *Russell v. Palatine Ins. Co.* 51: 471, 63 So. 644, — Miss. —. (Annotated)

2. An executive committee appointed by the citizens of a municipality to have control of the arrangements for the entertainment of an organization which has been invited to meet in the municipality is not personally liable for supplies ordered by it if it sees that the funds contributed for the enterprise are honestly accounted for and equitably disbursed. *Little Rock Furniture Mfg. Co. v. Kavanaugh*, 51:406, 164 S. W. 289, — Ark. —. (Annotated)

PRINCIPAL AND SURETY.

Liability on executor's or administrator's bond, see Executors and Administrators.

Judgment in favor of one or more sureties and against others in action by distributees of an estate as *res judicata* between sureties, see Judgment, 1.

1. The sureties upon a redelivery undertaking executed by two defendants in an action of claim and delivery are not discharged from liability by the dismissal of the action as to one of the defendants, either with the consent or without objection by the plaintiff. *Larson v. Hanson*, 51: 655, 144 N. W. 681, 26 N. D. 406. (Annotated)

2. The recital in a subsequent bond of an administrator, of the tender thereof in lieu of the preceding one, in compliance with a desire on the part of the principal therein to release the surety in it from further liability, is not a stipulation or covenant for indemnity of the surety in the preceding bond. *Central Bkg. & S. Co. v. United States Fidelity & G. Co.* 51: 797, 80 S. E. 121, — W. Va. —.

3. Bonds given by a personal representative before the clerk of a county court in the vacation of the court, as new bonds, after he had qualified and given bond, are not substitutes for the original bond, but are valid and enforceable as additional ones and as further security; and in case of necessity for contribution among the sureties, the proportion of contribution is determinable by the penalties of the several bonds. *Central Bkg. & S. Co. v. United States Fidelity & G. Co.* 51: 797, 80 S. E. 121, — W. Va. —.

PRIVATE SCHOOLS.

See Schools, 2.

PRIVILEGE.

Of witness, see Witnesses, 4.

Of exemption from service of process, see Writ and Process, 2-4.

PRIVILEGED COMMUNICATIONS.

In general, see Evidence, 29, 30.

In libel case, see Libel and Slander, 5-7.

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PROBATE.

Of wills generally, see Wills.

PROCESS.

See Writ and Process.

PROFITS.

Loss of, as element of damages, see Damages, 7.

PROHIBITION.

1. Where the jurisdiction of a court depends upon the existence of certain facts and it has granted an injunction upon a pleading which does not set forth such facts, its claim of right to time for consideration of the objection to the sufficiency of the pleading does not justify its action in refusing to vacate the void order, and the enforcement of the order may be restrained by prohibition. *Charleston v. Littlepage*, 51: 353, 80 S. E. 131, — W. Va. —.

2. The rule under which a supervising court sometimes requires an applicant for a writ of prohibition first to make application to the lower court for discontinuance or vacation of the proceeding or action complained of on the ground of lack of jurisdiction is a discretionary one of courtesy and deference to the court below, and does not apply if it appears in any manner that such court has acted deliberately or has considered the question of its jurisdiction and intends to proceed. *Charleston v. Littlepage*, 51: 353, 80 S. E. 131, — W. Va. —.

PROMISSORY NOTE.

See Bills and Notes.

PROPERTY.

Guaranty of right to, see Constitutional Law, 3-13.

Destruction of, as a nuisance, see Nuisances.

PROSPECTIVE LEGISLATION.

In general, see Statutes, 6.

PROSTITUTION.

Right of state to forbid importation of woman into state for immoral purposes, see Commerce, 1.

PROVOCATION.

To assault, see Assault and Battery, 2.

Effect of, to mitigate damages for slander, see Damages, 9.

PROXIMATE CAUSE.

1. While the negligent act of one person may, as a natural consequence, cause injury to another, yet if before the injury results the negligent act of a third person intervenes and produces the injury, the latter alone is responsible therefor, though but for the first negligent act the injury could not have occurred. *Anderson v. Baltimore & O. R. Co.* 51: 888, 81 S. E. 579, — W. Va. —.

2. Although a nonresident landowner is negligent in failing to pay a half-yearly in-

stalment of taxes for which his lands are subsequently sold, the failure of the auditor to place the words "sold for taxes" on the list furnished the treasurer, as is required of him by statute, is the proximate cause of the nonresident owner's loss, where, through the consequent failure of the treasurer to stamp these words upon his receipt for taxes subsequently paid, such owner had no notice of the tax sale, and therefore no opportunity to redeem from it, as he would have done. *Howley v. Scott*, 51: 137, 143 N. W. 257, 123 Minn. 159.

3. A railroad company which has furnished a car inadequately equipped with brakes, to a coal mining company which had knowledge of the defect, and placed it near the tippie of the coal mining company at the highest point of a grade on which the track is located, is not liable for injuries done to the horses and wagons of one who is loading another car on the same track farther down the incline when the employees of the coal mining company in an effort to adjust the car to the tippie to receive its complement of coal negligently permitted it to escape, although the injury may not have occurred had the car so furnished been equipped with brakes adequate to control its movements. *Anderson v. Baltimore & O. R. Co.* 51: 888, 81 S. E. 579, — W. Va. —. (Annotated)

PUBLICATION.

Service by, see Writ and Process, 1.

PUBLIC CONTRACT.

See Contracts, 14.

PUBLIC IMPROVEMENTS.

Provision for a minimum wage for work on public improvements, see Master and Servant, 5.

PUBLIC MEETING.

Liability of executive committee appointed at public meeting for supplies ordered by it, see Principal and Agent, 2.

PUBLIC POLICY.

As affecting contracts, see Contracts, 8-10.

PUBLIC PROPERTY.

Lien on, see Mechanics' Liens, 4.

PUBLIC SCHOOLS.

See Schools.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Gas; Railroads; Waters.

PUBLIC WATER SUPPLY.

See Waters.

PUBLIC WORK.

Minimum wage for public work, see Contracts, 14; Courts, 6; Municipal Corporations, 4.

QUALIFIED FEE.

See Wills, 4.

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QUANTUM MERUIT.

Recovery on, under pleading, see Pleading, 5.

QUIETING TITLE.

See Cloud on Title.

QUITCLAIM DEED.

By woman on land held by entireties, see Cloud on Title; Husband and Wife, 1.

Estoppel by, see Estoppel, 2.

QUO WARRANTO.

1. An information in the nature of a quo warranto may at common law be filed by the attorney general in the name of the state, to test the claim to office of an officer of a manufacturing corporation organized for private gain, either under special charter or under general incorporation laws, since the corporation is exercising a public franchise, and the title to its offices is a matter of public concern. *Brooks v. State ex rel. Richards*, 51: 1126, 79 Atl. 790, — Del. —. (Annotated)

2. In a common-law proceeding by information in the nature of quo warranto, to oust an incumbent from office in a private corporation, in which his usurpation is charged and demand is made for justification of his claim to office, accused cannot, by concluding with an *absque hoc* a plea denying usurpation and setting up title, preclude the state from replying new matter in avoidance of the title set up, and compel it to join issue on the plea. *Brooks v. State ex rel. Richards*, 51: 1126, 79 Atl. 790, — Del. —.

RAILROADS.

As carriers, see Carriers.

Regulation of interstate business of, see Commerce, 2.

Requiring railroad to pay employees semi-monthly, see Commerce, 2; Constitutional Law, 9; Statutes, 1.

Consequential injury from construction and operation of, see Eminent Domain, 4.

Crossing railroad as a taking of property, see Eminent Domain, 2, 3.

Requiring railroad company to construct bridge over public waterway laid across its right of way, see Eminent Domain, 2.

Exemption of insurer from loss by fire caused by locomotive engine, see Insurance, 16.

Injury to employees, see Master and Servant.

Change of fellow servant rule by statute, see Master and Servant, 12.

Liability of railroad company for injury resulting from act of shipper in setting in motion car equipped with defective brakes, see Proximate Cause, 3.

Switch yard as nuisance, see Trial, 8.

1. Where an easement only is conveyed

by a grant of right of way, the insertion in a right of way deed of a provision permitting the grantee to take and use all timber, earth, stone, and mineral that may be found within the right of way, does not include the right to take oil found there. *Right of Way Oil Co. v. Gladys City Oil, Gas, & Mfg. Co.* 51: 268, 157 S. W. 737, — Tex. —.

2. A waterway with walks on each side, duly established by public authority for public use, connecting navigable lakes and public grounds in a city park system, is not distinguishable either by the fact that it is artificial, or by the fact that it is in part a waterway, from a natural waterway or from a landway, in so far as concerns the duty of a railway company whose right of way is crossed thereby to construct an overhead bridge for the purpose of carrying its tracks over the way. *Chicago, M. & St. P. R. Co. v. Minneapolis*, 51: 236, 133 N. W. 169, 115 Minn. 460.

3. The rule that a railway company may be required to erect and maintain a bridge to carry its tracks over a street crossing extends to all cases where the public safety, convenience, or welfare requires such bridge. *Chicago, M. & St. P. R. Co. v. Minneapolis*, 51: 236, 133 N. W. 169, 115 Minn. 460.

4. A railroad company whose conduct with reference to a crossing of its tracks is such as to induce members of the public to use the crossing under the belief that it is a public street, owes to them the same duty as if such way were in fact a public street. *Black v. Central R. Co.* (N. J. Err. & App.) 51: 1215, 89 Atl. 24, — N. J. —. (Annotated)

5. The statutes governing the duty of railroad companies to keep lookouts ahead and to give signals and stop trains upon the appearance of a person on the track do not apply in case of the backing of a train into a station which it has run past a short distance before coming to a stop. *King v. Tennessee Central R. Co.* 51: 618, 164 S. W. 1181, — Tenn. —. (Annotated)

RAPE.

Effect of allegations in complaint to prevent reliance on statute barring defense of consent, see *Estoppel*, 6.

Consent by a child under the age of consent is no bar to civil liability for rape where the statute defines criminal knowledge of a child under such age as rape the same as forcible knowledge of one over such age. *Hough v. Iderhoff*, 51: 982, 139 Pac. 931, — Or. —. (Annotated)

RATES.

For gas, see *Gas*.

Rate of taxation, see *Taxes*, 5.

RATIFICATION.

Estoppel by, see *Estoppel*, 7.

By insured of attempted change of insurers, see *Insurance*, 8.

REAL ESTATE BROKER.

See *Brokers*.

REAL PROPERTY.

Oral contract as to, see *Contracts*, 3, 4, 6.

Covenants and conditions as to, see *Covenants and Conditions*.

Measure of damages for injury to, see *Damages*, 3.

Deeds of, see *Deeds*.

Lien of judgment upon, see *Judgment*, 4.

Mortgage on, see *Mortgage*.

Sale of, see *Vendor and Purchaser*.

REASONABLENESS.

Of rule by college, see *Colleges*, 1.

Of license fee, see *License*, 5-7.

RECORDS AND RECORDING LAW.

On appeal, see *Appeal and Error*, 3-5.

Payment of mortgage registry tax in addition to legal interest as usury, see *Usury*.

The records of a public insane asylum containing information concerning the mental and physical condition of a patient, which has been obtained by physicians in their professional character for the purpose of determining the proper treatment, are privileged, and are not open to inspection as public records. *Massachusetts Mut. L. Ins. Co. v. Board of Trustees*, 51: 22, 144 N. W. 538, — Mich. —. (Annotated)

REDELIVERY BOND.

See *Principal and Surety*, 1; *Replevin*, 3, 4.

REDEMPTION.

From foreclosure sale, see *Mortgage*, 2.

REFERENCE.

Review of findings on appeal, see *Appeal and Error*, 22.

Discretion as to recommitting master's report for amendment, see *Appeal and Error*, 11.

Necessity for exceptions to rulings of master, see *Appeal and Error*, 7.

RELEASE.

Of surety, see *Principal and Surety*, 1.

RELEVANCY.

Of evidence, see *Evidence*, 32, 33.

RELIGIOUS SOCIETIES.

Duty of persons dealing with trustees to take notice of their powers, see *Corporations*, 2.

Sale of property of, under execution, see *Mechanics' Liens*, 4.

Mechanics' liens on property of, see *Mechanics' Liens*, 4, 5.

Agreement of trustees of charitable corporation that property may be subjected to mechanics' lien, see *Corporations*, 1.

REMANDING.

See Appeal and Error, 34, 35.

REMEDIES.

Conflict of laws as to, see Conflict of Laws, 3-6.

In case of illegal contract, see Contracts, 9, 12.

REMITTITUR.

By trial court, see Trial, 20.

REMOVAL OF CAUSES.

Estoppel to assert that jurisdiction of state court has not been restored, see Estoppel, 4.

REPETITION.

Of instructions, see Trial, 14-17.

REPLEVIN.

Conditions precedent; demand.

1. It is not a condition precedent to the maintenance by the seller of an action in replevin to recover property sold under a conditional-sale contract that he return or tender to the buyer partial payments made, or note given for unpaid instalments. *C. W. Raymond Co. v. Kahn*, 51: 251, 145 N. W. 164, 124 Minn. 426. (Annotated)

2. An action of replevin cannot be dismissed because no demand was made by the plaintiff for the delivery of the property, where the answer of the defendant demands the return of the property to him. *C. W. Raymond Co. v. Kahn*, 51: 251, 145 N. W. 164, 124 Minn. 426.

Bond.

Discharge of surety on redelivery bond, see Principal and Surety, 1.

3. The redelivery undertaking in an action of claim and delivery must be construed with reference to the intent of the legislature in providing for it, and the purpose for which it is given. *Larson v. Hanson*, 51: 655, 144 N. W. 681, 26 N. D. 406.

4. The redelivery undertaking in an action of claim and delivery is not only a substitute for the possession of the property by the plaintiff, but also security for any money judgment recovered. *Larson v. Hanson*, 51: 655, 144 N. W. 681, 26 N. D. 406. Judgment.

5. While the customary practice in an action on claim and delivery is to take judgment in the alternative for the return of the property or for its value if a return cannot be had, judgment need not be entered for its return or possession where, on the record of the trial, it appears that the property cannot be returned. *Larson v. Hanson*, 51: 655, 144 N. W. 681, 26 N. D. 406.

6. A judgment for money only is properly rendered against the sureties on a redelivery undertaking in claim and delivery, where the record in the action of claim and delivery shows that the defendants sold the property, which consisted of about forty head of live stock, at auction to ten or twelve different purchasers; that some of

them resold it to others, and that it was scattered over a wide territory a year before the trial of that action, although the principals on the undertaking testify in general terms that they could have returned the property at such time, especially where it appears that the sureties executed the undertaking on the day of the advertised sale, and knew that it was to be sold, were present at the sale, saw it sold, and made no objection. *Larson v. Hanson*, 51: 655, 144 N. W. 681, 26 N. D. 406.

REPRESENTATIONS.

By insured, see Insurance, 10-12.

RESCISSION.

Of deed of coal lands, see Evidence, 18.
Of sale of coal lands, see Mines, 3, 4.

RES JUDICATA.

See Judgment, 1, 2.

RESTAURANTS.

Right of proprietor to complain of rule of college forbidding students to patronize his restaurant, see Colleges, 2.

RESTRAINT OF TRADE.

See Contracts, 11.

RETROSPECTIVE LAWS.

As to when laws are retrospective, see Statutes, 6.

REVERSIBLE ERROR.

See Appeal and Error, 23-33.

REVISION.

Of statute, see Statutes, 5.

REWARD.

1. A "special and nonpay" deputy sheriff whose duties are limited to serving such papers as may be delivered to him, or performing such other acts as may be specially directed, being under no obligation to devote time to the investigation of criminal offenses, is not precluded by his office from claiming a reward offered for the arrest and conviction of an offender, where by his own efforts he has discovered by whom the crime was committed and the evidence by which it can be proved. *Elkins v. Board of County Comrs.* 51: 638, 138 Pac. 578, 91 Kan. 518.

2. A person who discovers the perpetrator of a crime and the evidence by which he can be convicted may be entitled to a reward offered for the "arrest and conviction of the offender, even although, having the power to make the arrest himself, he omits to exercise it, and permits someone else to take the defendant into custody. *Elkins v. Board of County Comrs.* 51: 638, 138 Pac. 578, 91 Kan. 518.

ROPE.

Injury resulting from rope barrier in street, see Highways, 11.

SALE.

Constitutionality of statute making weight determined by public warehouse conclusive between buyer and seller of cotton, see Constitutional Law, 13.

Contract in restraint of trade, see Contracts, 11.

Burden of proving defense in action for purchase price, see Evidence, 5.

Sale in bulk, see Fraudulent Conveyances.

Place of sale of intoxicating liquors, see Intoxicating Liquors.

Seller's liability for injury by defects in things sold, see Negligence, 1.

Replevin to recover property sold under conditional sale contract, see Replevin, 1.

Right of one purchasing chattel from original purchaser to bring action for breach of warranty against original seller, see Parties, 2.

Question for jury as to subrogation of second purchaser to original purchaser's right of action against original vendor for breach of warranty, see Trial, 2.

1. To enable the seller to recover the purchase price when a contract for personalty is repudiated before time for delivery arrives, he must so far perform his part of the contract as to vest title in the purchaser. *Pate v. Ralston*, 51: 735, 139 N. W. 906, — Iowa, —. (Annotated)

2. That a purchaser of personal property notifies the seller that he will not receive it, and that shipment will be at seller's risk, does not obviate the necessity of delivery or tender to entitle the seller to recover the purchase price of the property. *Pate v. Ralston*, 51: 735, 139 N. W. 906, — Iowa, —.

3. In a so-called conditional-sale contract by which the seller retains title to the property and the right to recover it on default of the buyer, when the seller exercises this right and retakes the property, he cannot thereafter maintain an action to recover unpaid instalments of the purchase price. *C. W. Raymond Co. v. Kahn*, 51: 251, 145 N. W. 164, 124 Minn. 426.

4. One who buys a chattel from the original purchaser and assumes payment of the notes given by the latter, who is released from liability thereon, for the purchase price, cannot set up, in defense of an action on the notes, breach of warranty made by the original seller to his vendee, in the absence of an assignment to the second purchaser of the first purchaser's rights under the warranty. *Walrus Mfg. Co. v. McMehen*, 51: 1111, 136 Pac. 772, 39 Okla. 667. (Annotated)

SALESMAN.

Burden of proving period of employment of, see Evidence, 4.
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SATISFACTION.

See Accord and Satisfaction.

SCHOOLS.

As to colleges, see Colleges.

Injunction against discharge of teacher, see Injunction.

1. Children of nonresident parents who are committed to a charitable institution within the limits of a school district, which has undertaken to furnish them with support and education, are not entitled to the benefits of a statute providing that all persons of certain age, residents of any school district, shall have equal right to attend any school therein. *Lake Farm v. School Dist. No. 2*, 51: 234, 146 N. W. 115, — Mich. —. (Annotated)

2. A private school the catalogue of which makes the tuition payable in advance, and provides that pupils may be expelled for breach of discipline, may, upon expelling a pupil for breach of reasonable regulations, not only retain the tuition actually paid, but compel payment of the portion due and not paid when the expulsion occurred. *Teeter v. Horner Military School*, 51: 975, 81 S. E. 767, 165 N. C. 564. (Annotated)

SCIENTER.

See Animals, 1.

SEDUCTION.

Securing sexual intercourse with a sixteen-year-old girl by promising, at her solicitation, to marry her if anything happened, is not within a statute making it a misdemeanor to seduce and carnally know any female of previous chaste character between the ages sixteen and twenty-one. *Hamilton v. United States*, 51: 809, 41 App. D. C. 359. (Annotated)

SEGREGATION.

Ordinance providing for segregation of white and colored races, see Municipal Corporations, 2.

SEIZURE.

See Levy and Seizure.

SELF-DEFENSE.

In committing assault, see Assault and Battery, 2.

SEPARATION.

See Divorce and Separation.

SERVICE.

Of process, see Writ and Process.

SET-OFF AND COUNTERCLAIM.

Of mechanics' lien, see Mechanics' Liens, 9.

SEVERABILITY.

Of insurance contract, see Insurance, 12.

such cases as still had a right of appeal under the old law. *Wilson v. Kryger*, 51: 760, 143 N. W. 764, 26 N. D. 77.

(Annotated)

STEVEDORE.

Admiralty jurisdiction for injury to, see Admiralty.

STOCKHOLDERS.

See Corporations.

SUBCONTRACTOR.

Lien of, see Mechanics' Liens.

SUBROGATION.

Of insurer, see Insurance, 18.

Question for jury as to, see Trial, 2.

SUBSCRIPTION.

To will, see Wills, 1.

SUCCESSION TAX.

See Taxes, 3-6.

SUCCESSIVE SUITS.

See Action or Suit, 2.

SUPPORT.

Cancellation of deed given in consideration for, see Cancellation of Instruments.

SURETYSHIP.

See Principal and Surety.

SWITCH YARD.

Consequential injury from location of, see Eminent Domain, 4.

As nuisance, see Trial, 8.

TAKING.

What constitutes, see Eminent Domain, 2.

TAXES.

For what purpose or use.

1. The maintenance by a municipality of a public yard for the sale of fuel to its inhabitants at cost is not prohibited by a constitutional provision limiting the power of taxation to a public use. *Laughlin v. Portland*, 51: 1143, 111 Me. 486, 90 Atl. 318. **Tax officers.**

Negligence of officer as proximate cause of loss to nonresident whose lands are sold for taxes without notice to him, see Proximate Cause, 2.

2. A county auditor upon whom a statute imposes the duty, in making out tax lists, or placing opposite each description of land that has been sold for taxes the words "sold for taxes," who fails to comply with this statutory duty, is liable to a nonresident landowner who forgot to pay a half-yearly instalment of his taxes for which his land was afterwards sold, and who, through this failure of the auditor and the consequent failure of the treasurer 51 L.R.A. (N.S.)

did not have notice, and therefore had no opportunity to redeem from the tax sale, as he would have done. *Howley v. Scott*, 51: 137, 143 N. W. 257, 123 Minn. 159.

(Annotated)

Succession or transfer tax.

3. An exception of property conveyed for some educational, charitable, or religious purpose exclusively, in a statute imposing an inheritance tax upon property in the state which shall pass by will or the intestate laws, does not extend to property conveyed to charitable institutions located in other states. Re Assessment of Colateral Inheritance Tax, 51: 817, 165 S. W. 1062, — Mo. — (Annotated)

4. Personal property which has been conveyed to a trust company under a contract by which it undertook to manage and control it during the owner's lifetime, paying her the net income therefrom, and at her death to distribute it among her heirs at law under the statute of descent and distribution then in force in the state, comes to the heirs of such owner by the inheritance laws, and is therefore subject to the inheritance tax, although the owner was a nonresident. *Security Trust Co. v. Com.* 51: 232, 161 S. W. 510, 156 Ky. 455.

5. The amount of an estate passing by will which is exempt from succession tax is to be deducted from the entire amount so passing in order to determine the rate of tax, where the tax provides for a certain rate when the amount passing exceeds a certain sum, and a less rate when it is less than that sum, provided that the tax is to be levied only upon the excess of a specified minimum. Re Ullmann, 51: 1075, 105 N. E. 292, 263 Ill. 528. (Annotated)

6. Where, under the inheritance tax law, the duty of collecting such tax is imposed upon all administrators, executors, and trustees, and the sheriff of each county, a trustee or administrator cannot relieve himself from liability for the tax by stating a case in general terms, and calling upon the sheriff to show affirmatively why the commonwealth is entitled to the tax. *Security Trust Co. v. Com.* 51: 232, 161 S. W. 510, 156 Ky. 455.

TAXPAYER.

Injunction by, see Injunction, 1.

TEAMING.

Regulating teaming on parkway, see Constitutional Law, 11; Highways, 1.

TELEGRAPHS.

Recovery for mental anguish for delay in telegram, see Damages, 6.

One whose telegram directing purchase of commodities by a broker is changed by the telegraph company so as to require the purchase of a much larger amount than ordered is not bound to protect the broker in obeying the changed order, and if he does so with full knowledge of the facts,

6. The court cannot declare an employee negligent as matter of law in descending a ladder face foremost, so as to relieve the master from liability for injury by a fall through the breaking of a round of the ladder. *Philip Carey Roofing & Mfg. Co. v. Black*, 51: 340, 164 S. W. 1183, — Tenn. —.

7. Where a city ordinance which fixes terms upon which a gas company shall supply gas to the inhabitants of the city undertakes to divide the inhabitants into three different classes for the purpose of determining rates, and the business of a certain inhabitant does not technically fall within any one of the three classes, it is a question for the court, when appealed to, to construe the ordinance and determine within which class said inhabitant and his business shall be placed. *Henderson v. Shreveport Gas, E. L. & P. Co.* 51: 448, 63 So. 616, — La. —.

8. Where it is in evidence that the noises from the operation of a railroad switchyard are so loud, incessant, and distracting as to rob an adjoining landowner and his family of sleep and rest, and that large volumes of smoke, cinders, and dust are thrown upon his property and thereby its use and value almost destroyed, it is a question for the jury whether the adjoining landowners' enjoyment of the premises and the value thereof are seriously interfered with so as to constitute a private nuisance. *Matthias v. Minneapolis, St. P. & S. Ste. M. R. Co.* 51: 1017, 146 N. W. 353, 125 Minn. 224.

Taking case from jury.

9. The same rule for determining the sufficiency of the testimony to support a judgment in favor of plaintiff is applicable to a motion for nonsuit and one for directed verdict in defendant's favor. *Sorenson v. Smith*, 51: 612, 129 Pac. 757, 65 Or. 78.

10. A court is not, upon the motion of only one party to a suit for a directed verdict, authorized to determine disputed questions of fact, where there is testimony on behalf of the other party sufficient to support his cause of action or defense. *Schmidt v. Williamsburgh City F. Ins. Co.* 51: 261, 144 N. W. 1044, — Neb. —.

11. Where all that the evidence discloses as to the alleged undue influence exerted by the chief beneficiary of a will was that he was a warm personal friend of the testator, and transacted considerable business for him, and that they visited one another frequently, the court is warranted in directing the jury to find against the contestant. *Re Strachan*, 51: 927, 136 Pac. 1175, — Colo. —.

12. As against a demurrer to the evidence, an allegation of legal incapacity is sufficiently sustained by testimony that the plaintiff was a morphinomaniac; that she was incompetent of exercising any judgment and discretion in the ordinary business affairs of life; that she was not responsible; that she was a maniac; that her will power was gone; that she could not

fix her attention on anything. *Gillmore v. Gillmore*, 51: 834, 139 Pac. 386, 91 Kan. 707.

Instructions.

Prejudicial error as to instructions, see Appeal and Error, 27-29.

New trial because of refusal of jury to follow instruction, see New Trial, 2.

13. It is not error to refuse an instruction in an action against the operator of an automobile for injuries resulting to a pedestrian from being struck by his machine, that the plaintiff cannot recover unless the jury believes from a preponderance of the evidence "that the defendant was negligent in the very manner set out in the declaration." *Deputy v. Kimmell*, 51: 989, 80 S. E. 919, — W. Va. —.

14. The refusal of an instruction requested by one of the parties to a cause is not error if the matter contained in the instruction has been already given by the court, although it may have been given in different language and in different form. *Chicago, R. I. & P. R. Co. v. Evans*, 51: 608, 138 Pac. 804, — Okla. —.

15. A request for a charge to the jury of that which has already been charged in substance is properly denied. *Exchange Nat. Bank v. Henderson*, 51: 549, 77 S. E. 36, 139 Ga. 260.

16. In an action against the manufacturer of a threshing machine for injuries to a farmer from a defective condition of the machine, it is not error to refuse an instruction that if the farmer was not one of the class of persons who were contemplated as likely to go upon the threshing machine when in operation, he could not recover, where the court has fully covered this subject by instructions in fact given. *Krahn v. J. L. Owens Co.* 51: 650, 145 N. W. 626, 125 Minn. 33.

17. In an action against the manufacturer of a threshing machine, for injury to a farmer for whom the vendee of the machine were threshing, which resulted from a defective condition thereof, an instruction to the jury that, in determining the weight to be given to the testimony of the vendee, it is proper to take into consideration their interest in the outcome, and more specifically the fact that an admission by them of their knowledge of the defective condition of the machine might render themselves liable to plaintiff for his injury, is properly refused, where the court has charged fully and correctly as to the credibility of witnesses generally, and as to the consideration to be given to their interest in the outcome of the case. *Krahn v. J. L. Owens Co.* 51: 650, 145 N. W. 626, 125 Minn. 33.

18. The trial judge in a criminal case may review the evidence in his instructions to the jury, and state to them that it tends to prove certain facts, the only restriction upon this right being that the review shall be fair and impartial, and not in a manner naturally to confuse the jury or lead them to a particular result. *State v. Minneapolis Milk Co.* 51: 244, 144 N. W. 417, 124 Minn. 34.

By insurer, see Insurance, 14, 15.
By father of his rights under contract made for benefit of child, see Parent and Child, 1.

WALL.

Party wall, see Party Wall.

WARRANTIES.

In insurance contract, see Insurance, 10-12.

WARRANTY.

On sale of personalty, see Sale, 4.

WATERS.

Due process in denying damages to property owner for loss of use of fixtures installed to utilize water supply which proves inadequate, see Constitutional Law, 12.

Easement for public sewer as within covenant against encumbrances in deed of property, see Covenants and Conditions.

Obstruction of water as nuisance, see Nuisances.

A municipal corporation is not liable for the inconvenience suffered by residents of a newly opened tract by the fact that mains laid to supply water to them prove to be inadequate, since it results from a mere error of judgment, if the defect is remedied when the municipality receives notice of it. *Stansbury v. Richmond*, 51: 984, 81 S. E. 26, — Va. —.

WEEDS.

Requiring landowner to cut or pay for cutting weeds in abutting highway, see Constitutional Law, 4.

WEIGHTS AND MEASURES.

Constitutionality of statute making weight determined by public warehouse conclusive between buyer and seller of cotton, see Constitutional Law, 13.

WHITE SLAVE ACT.

Effect of Federal statute, on right of state to forbid importation of woman into state for immoral purposes, see Commerce, 1.

WILLS.

Competency of witness as to incapacity of testator, see Witnesses, 3.

Competency of wife to show incapacity of husband, see Evidence, 29.

Signature of testator.

Sufficiency of proof as to, where attesting witnesses have forgotten circumstances, see Evidence, 35.

1. A will which, after it had been sub-
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and then published, and the signature acknowledged in the presence of the witnesses, who thereupon subscribed their names as witnesses in the presence of the testator, is signed by the testator, since the testator may adopt as his sign his own sign manual made at the foot of his will before its completion, and his acknowledgment thereof makes it his signature to it, will as it stands. *Re Bullivant*, 51: 169, (N. J. Err. & App.) 88 Atl. 1093, — N. J. —.

(Annotated)

Probate; contest.

Presumption and burden of proof, see Evidence, 3.

Admissibility of parol evidence, see Evidence, 20.

Sufficiency of proof, see Evidence, 35.

Effect of rule excluding testimony of interested person in controversy over decedent's estate, see Witnesses, 3.

Direction of verdict in will contest, see Trial, 11.

2. A will cannot be said to be unnatural and capricious because the bulk of testator's estate is left to an intimate friend instead of to a brother in a distant country, with whom testator had no communication for forty years, and who he said had done him a great wrong. *Re Strachan*, 51: 927, 136 Pac. 1175, — Colo. —.

3. The failure of attesting witnesses to remember whether a will bore testator's signature or not at the time of its attestation will not preclude its probate, where the statute makes the will, and not the signature of the testator, the subject of attestation and acknowledgment. *Re Strachan*, 51: 927, 136 Pac. 1175, — Colo. —.

Nature of estate or interest created.

4. Where in a will there is a devise to a son, and, if he dies without lineal descendants living at the time of his decease, then over, these words are not, by themselves, without assistance from other parts of the will, sufficient to create an estate by implication in the lineal descendants, but the son takes a fee defeasible upon his death without lineal descendants living at the time of his decease; and, in the event of lineal descendants living at the time of the son's decease, his fee becomes absolute, and such descendants have no interest under the will as against his grantee. *Anderson v. United Realty Co.* 51: 477, 86 N. E. 644, 79 Ohio St. 100. (Annotated)

5. A condition in a bequest to a woman who, at the time of making the will, was living apart from her husband, that she should have the money in case she was compelled to live apart from him, and support herself, to be paid as soon as the executor shall be convinced that it is impossible for her to live with her husband, is reasonable, and not void on the ground of public policy as an inducement to destroy the marriage relation. *Dusibier v. Melville*, 51: 367, 148 N. W. 208, — Mich. —.